



Appeal number: FTC/52/2013

VAT – whether building intended for use solely for a relevant charitable purpose – charity with objects of educating young people in water borne activities – construction of training centre – whether construction services zero-rated – whether charity carrying on a business/economic activity – Section 30 and items 2 and 4 of Group 5 of Schedule 8 to VATA 1994 – Note (6) to Group 5

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE AND CUSTOMS

Appellants

- and -

LONGRIDGE ON THE THAMES

Respondent

TRIBUNAL: MRS JUSTICE ROSE

Sitting in public at The Rolls Building, London EC4A 1NL on 14 and 15 October 2014

Michael Jones instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Appellants

Roger Thomas QC instructed for the Respondent

DECISION

1. This is an appeal by HMRC against the decision of the First-tier Tribunal (Tax Chamber) dated 28 February 2013 ([2013] UKFTT 158 (TC)) ('the Decision'). The issue raised by the appeal is whether construction services supplied to the Respondent ('Longridge') should be zero-rated for VAT purposes because those construction services related to supplies for a building that was intended for use solely for relevant charitable purposes. The Commissioners decided in November 2011 that the supplies were not zero-rated. The First-tier Tribunal (Judge Edward Sadler and Mr Nigel Collard) allowed an appeal against that decision. The VAT in issue is about £135,000.

2. The facts are set out in detail in the Decision at paragraphs 24 onwards. Longridge is a company limited by guarantee and not having a share capital. It is a registered charity. The objects of Longridge include:

(1) To safeguard and promote Longridge as a centre of excellence for the advancement of education in water, outdoor and indoor activities for young people generally, and for purposes related thereto such as coaching, leadership and training in water and other activities; and

(2) To promote the development of young people in achieving their full physical, intellectual, social and spiritual potential as individuals, as responsible citizens and as members of their local, national and international communities.

3. The FTT heard evidence from two witnesses on behalf of Longridge, Miss Foister who is the chief executive officer of the charity and Mr Julian Fulbrook who is a trustee of Longridge and has acted as a volunteer canoe and aquatic first aid instructor there for many years. The Tribunal accepted their evidence.

4. The Longridge site is on the banks of the River Thames near Marlow in Buckinghamshire. It used to operate as a boating centre for The Scout Association. In 2004 the three Scout counties involved at Longridge decided they could no longer provide oversight for the premises. The site was transferred to a new charitable trust in September 2005. On the site there are areas for campsites; a games field; a ropes course, climbing wall and "Jacob's ladder"; an area for go-karting; a "giant swing"; waterfront landing stages; and buildings for storing craft and equipment for the various water-based activities provided. There is a building which provides overnight accommodation for young people's groups visiting the site and taking courses provided by the Longridge. There is also a youth club, a reception area and a cafe.

5. When Longridge took over the site in 2005, it was apparent that the facilities there were in need of an extensive upgrade. The VAT at the centre of this dispute was incurred on the construction of a training centre at the site. The training centre includes toilets, shower rooms and changing rooms on the ground floor and meeting room facilities on the upper floor. The cost of building the training centre was, the

Tribunal found, entirely met by donations and grants rather than out of charges to customers. A principal donor was Sport England.

6. The Tribunal described the activities carried on at Longridge:

5 “36. The Appellant provides a wide range of day and residential courses and activities principally (but not exclusively) based on water-borne activities, for schools and colleges, scout, guide, cadet and youth groups, individual young people, families and birthday party groups, and adults (individually, in groups, or by corporate use). Corporate use takes place when the facilities are not being used by young people or families. In addition, on occasion during the summer
10 the Appellant organises special day events. The principal water activities are dinghy sailing, kayaking, canoeing, rowing and sculling, bell-boating and dragon boating, and rafting. For all courses and most activities the Appellant provides an appropriately qualified instructor (either a paid employee or contractor, or a volunteer). Courses for adults include coaching courses. Courses
15 are accredited by a range of organisations.

20 37. Accommodation is provided in the form of space for camping, bunk-house accommodation, some single rooms and a building which can be used as a dormitory. Meals are provided at the cafe on the site.”

7. The FTT concluded that both the upper and lower floors of the training centre were intended for use for Longridge’s activities.

8. The FTT set out its findings about the charges set by Longridge and the contribution those charges made to meeting the costs of providing the services
25 offered. The Tribunal found:

(1) Longridge publishes an extensive price list each year. The prices are set by the trustees having regard to the need to make sure that the activities are affordable for young people and their families, balanced against the need to cover operational costs after taking account of donated income and volunteers.

30 (2) All capital projects are paid for out of donated income and not out of charges made for activities and courses.

(3) There is typically a three-tier pricing structure with the lowest price for youth groups, a mid price for families and a higher price for adult groups including corporate events.

35 (4) In the case of youth groups, Longridge may offer discounts or waive the fee entirely, particularly in the case of groups of young people with disabilities or other special needs.

40 (5) In the period 1 January 2012 to 25 November 2012, 94.5 per cent of those using the Longridge facilities were young people. Of the 1438 adults comprising the remaining 5.5 per cent the vast majority were adults whose use was subsidised. 327 adults paid a charge without discount.

5 (6) The cost of providing the activity was higher than the charge to young people but may be lower than the charge to adults for particular activities. Overall an analysis of Longridge's financial statements for the years 2010/11 shows that total income from all its subsidised activities (that is, all young people's activities, family activities, and those adults for whom a discount on the published price is given) was £580,883, and that the cost of providing those activities (disregarding the value of volunteer time) was £655,498. That analysis also shows that the total income from activities provided to all other adults (including those participating as a "corporate team") was £61,998 and that the cost of providing those activities was £53,476 (this figure also disregards the value of volunteer time – the evidence was that in the case of activities provided for adults, a higher proportion of instructor/training input would be by way of paid instructors, but that where volunteers were used, they would be the more experienced volunteers – and hence have a higher "value").

10 9. The FTT also found that a substantial number of volunteers contribute their time and skills without charge. The volunteers act mainly as instructors (in addition to the full-time, paid instructors engaged by Longridge) but there are also volunteers who help with maintaining the premises and the equipment and with other office duties.

The relevant law

20 10. Section 30 of the VAT Act 1994 ('VATA') provides for certain supplies by a taxable person to be taxable at the zero rate. Schedule 8 to the VATA specifies the relevant supplies and Group 5 of Schedule 8, headed 'Construction of Buildings' is the relevant supply here. Items 2 and 4 of Group 5 are:

- 25 "2 The supply in the course of the construction of –
- (a) a building ... intended for use solely for ... a relevant charitable purpose; or
- (b) ... ,
- 30 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.
- 35 "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."

11. Note (6) to Group 5 is relevant to the present appeal:

- 40 "(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) ..."

12. Thus the construction supplies in this case will be zero rated if the training centre at Longridge is a building used solely for a charitable purpose otherwise than in the course or furtherance of a business.

13. It is common ground between the parties that when determining whether the use of a building is ‘in the course or furtherance of a business’ for the purpose of Note (6), the test to be applied is the same test as applies to determine whether an activity is an economic activity for the purpose of deciding whether a person is a taxable person for VAT purposes. That test is currently set out in Article 9 of the Principal VAT Directive¹ which provides in paragraph 9(1):

“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”

14. Article 9 is implemented within the United Kingdom by section 4 of VATA:

“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.”

The Tribunal’s Decision

15. Having set out the facts and the parties’ submissions, the Tribunal addressed the question whether in carrying out its activities, Longridge was carrying on a business. The Tribunal found that by far the greater part of Longridge’s activities are ‘directly by way of carrying out its charitable objectives’ and a limited part was ‘seemingly for the purpose of raising funds’ to subsidise the charitable activities. As regards the test to be applied, the Tribunal stated:

“87. ... in deciding whether a person is engaged in an economic activity, that judgment is to be made objectively, without reference to “the purpose and results of that activity”, as Article 9(1) specifies, and as the Court of Justice confirmed in the case of *Kingdom of the Netherlands*. Mr Jones [counsel for HMRC] gave us the example of two institutions providing private education, one established as a charity and the other not. The fact that one of them is

¹ EC Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, *Official Journal* 11.12.2006 L 347 p. 1.

carrying out its charitable purposes cannot be the determining factor in deciding the question of whether it is engaged in an economic activity. What is required is to have regard to the nature of the activity, not the motive for it. For the same reason, the question is not determined by whether the purpose, or a purpose, of the activity is to make a profit – if by its nature the activity is an economic activity, the absence of a profit motive does not of itself result in it becoming something other than an economic activity: This objective approach ensures that there is tax neutrality as between activities which are inherently the same in character, even if they are differently motivated.”

16. The Tribunal then referred to the decisions of Patten J in *Customs & Excise Commissioners v Yarburgh Children’s Trust* [2001] EWHC 2201 (Ch), [2002] STC 207 and of Evans-Lombe J in *Customs and Excise Commissioners v St Paul’s Community Project Ltd.* [2004] EWHC 2490 (Ch) [2005] STC 95, which I will consider later. The Tribunal drew the following conclusion from those decisions:

“93. ... it seems clear to us that they do not hold that a charitable activity cannot be an economic activity where a supply is made for a price. They do hold that an activity whereby a supply is made for a price is not necessarily an economic activity; that it is necessary to identify in objective terms what the activity is in order to determine whether it is an economic activity; and that to identify what in truth that activity is it is necessary to look, not at purpose or results, but at the entirety of what it is and the context in which it is carried out. Those propositions, we respectfully consider, are entirely consistent with the relevant case law.”

17. The Tribunal also referred to the six criteria or indicia formulated by the United Kingdom courts for determining whether an enterprise amounts to the carrying on of a business. These indicia were first advanced by Ralph Gibson J in *Customs and Excise Commissioners v Lord Fisher* [1981] STC 238 and expressed by Lord Slynn of Hadley in *Institute of Chartered Accountants in England and Wales v Customs and Excise Commissioners* [1999] 1 WLR 701 as:

“...was [the activity] (a) a ‘serious undertaking earnestly pursued’; (b) pursued with reasonable continuity; (c) substantial in amount; (d) conducted regularly on sound and recognised business principles; (e) predominantly concerned with the making of taxable supplies to consumers for a consideration; and (f) such as consisted of taxable supplies of a kind commonly made by those who seek to make profit from them.”

18. Having described the test it had to apply in those terms, the Tribunal set out the factors that it took into account in concluding that Longridge did not carry on a business. The Tribunal acknowledged that since Longridge was providing services for a consideration, ‘it therefore must be presumed, unless and until other factors establish otherwise’ that Longridge is engaged in an economic activity. The Tribunal also recognised that there are commercial enterprises who offer similar services for a profit and that Longridge runs its activities and manages its financial affairs in a professional and business like manner. However the Tribunal then said:

5 “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.”

19. The Tribunal concluded that ‘these are not factors which are indicative of a business’. The other factor considered significant by the Tribunal was that time and services were donated to Longridge by volunteers who were essential to the way in which Longridge carries out its activities. The Tribunal emphasised the financial significance of the corps of volunteers noting that it amounts to a significant subsidy to the cost of Longridge’s operations. The Tribunal concluded:

30 “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.”

20. The Tribunal considered that some of the indicia referred to in the *Lord Fisher* case were met but that the activity was 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’. The Tribunal went on:

5 “103. ... 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.”

10 21. The Tribunal considered the small proportion of the adults whose participation was not subsidised by Longridge, comprising 1.25 per cent of the total number of participants and just under 10 per cent of the income. The Tribunal held that this did not change the essence of Longridge’s activities and the way in which it carries them out.

Discussion

15 22. Mr Thomas QC, appearing for Longridge, reminded me that the right to appeal from the First-tier Tribunal to the Upper Tribunal under section 11 of the Tribunals, Courts and Enforcement Act 2007 is on a point of law only. The proper approach of the Upper Tribunal to an appeal on a point of law in respect of the question whether a particular activity is in the nature of trade or business has been established for many years by *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14. Whether a given transaction or series of transactions is in the nature of trade is a question of fact for the First-tier Tribunal and an appeal from their decision can only succeed if they have misdirected themselves in law or if the only true and reasonable conclusion from the facts found by them is contrary to their determination.

25 23. The limited role of the appellate court in reviewing the conclusions of the First-tier Tribunal was recently confirmed by Sales J in *Eclipse Film Partners (No 35) LLP v The Commissioners for Her Majesty’s Revenue and Customs* [2013] UKUT 0639 (TCC). The taxpayer in that case invited the learned judge to adopt a more intrusive standard of review on this issue, having regard to the fact that in a range of film partnership cases at first instance some partnerships had been found to have engaged in activities which qualified as carrying on a trade and others not. Sales J rejected that invitation:

35 “43. I reject Mr Maugham’s submission that *R (Jones) v First tier Tribunal* justifies any departure from the ordinary and well understood *Edwards v Bairstow* approach in this class of case. It may be that some issues of evaluative judgment in tax cases may be found to lend themselves to a more intrusive policy-based classification as questions of law (amenable to appeal) rather than as questions of fact, in circumstances where the Upper Tribunal can be confident that it really will be making a contribution to the coherent development and consistent application of the law applicable in its specialist field by doing so. However, I think that in the tax field such cases are likely to be unusual. The Tax Chamber of the FTT is staffed by very experienced and expert judges. A particularly clear policy-based reason would need to be shown to justify the Upper Tribunal departing on any particular issue from well established principles of classification of questions of fact and questions

of law in the tax field, which are well understood by taxpayers and the Revenue alike.

5 44. The clarity of the existing position in tax cases promotes cost-effective dispute resolution and settlements between taxpayer and Revenue. Further, the fact that a right of appeal has been created which is limited to points of law (section 11(1) of the Act of 2007) also ensures that the Upper Tribunal is not excessively burdened with appeals and so can deal with all business coming to it with reasonable expedition. Broadening the ambit of the classes of case
10 which are regarded as involving appeal on a point of law would extend the business which the Upper Tribunal would have to conduct, which would be detrimental to its overall ability to cope with the business coming to it without delay. It is in the public interest that there should be cost-effective dispute resolution in the tax field and that there should not be substantial delays in the
15 administration of justice. These factors indicate that the Upper Tribunal should not be overly ready to change the conventional approach in the tax field by reference to *R (Jones) v First-tier Tribunal*, and should only do so where strong reasons to justify such a change are made out.”

24. Sales J did not consider that the fact that there have been film partnership cases
20 before the FTT in which it had been found that the partnership carried on a trade and others in which it was found that it did not justified adoption of a new, more intrusive approach to identifying whether a question of law arises.

“47. ... In fact, it is to be expected that different outcomes in terms of application of the legal classification of carrying on a trade will arise without
25 there being any error of law. The facts of the cases will no doubt have been different, and that will in turn have informed in critical ways the evaluative judgments made by the tribunals hearing those cases. There is nothing untoward in this.”

30 25. In the present case, Mr Jones for HMRC submits that the Tribunal erred in law by focusing on the prices that Longridge charges and the fact that the prices charged in most cases do not cover the costs of providing the service. He submits that this was an error because it amounts to treating the activity as not being an economic activity because it is not profit-making and not designed to be profit-making. HMRC rely on
35 Case C-246/08 *Commission of the European Communities v Finland* [2009] ECR I-10605 (*Finland*) as a recent reiteration of the principle that an activity may be a business even though it is not intended to generate a profit. That case concerned Finland’s decision to extend legal aid in legal proceedings to people whose income was above the threshold for free provision but who would find it difficult to pay the
40 full cost of the service. Finnish law provided that the recipient should pay a contribution, dependent on his financial means, for part of the work of the legal adviser, who may be a public employee or a private practitioner. The fees paid by the client were a percentage of the fees and expense of the adviser consulted, that percentage varying from 0 to 75 according to the client’s disposable monthly income:
45 see paragraph 12 of the judgment.

26. The Finnish legislation exempted legal aid from VAT if it was provided by one of the public offices set up for the purpose even if the client made a part payment. The legislation provided that VAT was chargeable on the supply of legal services by a private practitioner even if the recipient received those services for free.

5 27. The European Commission alleged that that legislation infringed the VAT provisions. It argued that it was correct for assistance supplied by private lawyers always to be subject to VAT. So far as provision by public employees was concerned the Commission argued that it should only remain outside the scope of the tax when
10 that assistance was completely free. Where the activity was carried out by a public office and the person concerned made a payment, then it should be taxed.

28. The first issue considered by Advocate General Colomer was whether the supply of services was an economic activity for the purposes of the Sixth VAT Directive. He noted first that the case law of the European Courts shows that it is
15 “immaterial that the task being discussed here is carried out in the public interest and by imposition of law or with the aim of providing assistance (helping citizens in order to facilitate and improve their access to justice) and not with a purely business spirit or with the aim of achieving certain targets”: see paragraph 37 of his Opinion. He referred to the Court’s case law on when a payment amounts to ‘consideration’ for the purposes of VAT. He held that the payment made by the recipient of legal aid did not
20 have a sufficiently direct link – or the link was not of the ‘intensity’ required – because it was ‘contaminated’ by taking into account the client’s income and assets. The more modest the person’s income, the less direct the link between the payment and the services provided would be.

29. The Court of Justice also emphasised the wide scope of the term ‘economic
25 activity’:

“37 ... An activity is thus, as a general rule, categorised as economic where it is permanent and is carried out in return for remuneration [contre une rémunération *in the French version*] which is received by the person carrying out the activity”

30. The Court stated that the fact that the services were provided in the public interest and without any business or commercial objective was irrelevant. However the Court held that the payments made by the clients were not consideration. The Court noted what the Advocate General had said about the disparity between the money received from clients and the costs of providing the legal services, being one
35 third of the overall office cost of €24.5 million. The Court held that it did not appear that the link between the legal aid services and the payment made by the recipient was sufficiently direct for that payment to be regarded as a consideration for those services and accordingly for those services to be regarded as economic activities.

31. Although the Court referred to its earlier case law on ‘consideration’, in
40 particular Case 102/86 *Apple & Pear Development Council* [1988] ECR 1443, the *Finland* judgment appears to me to be an extension of the principle established in that earlier case. In *Apple & Pear* there was no direct link at all between the mandatory subscription paid by the fruit growers and the promotional services provided by the

Council. The promotion services were provided for the benefit of the industry as a whole not for the benefit of any particular growers. The position in *Finland* was different because the recipient of the legal aid only had to pay any contribution if he actually received legal services from the public office. Moreover, the contribution
5 was calculated as a percentage of the fees incurred. There was therefore a much closer relationship between the service conferred and the individual payer and between the value of the services and the amount paid. Nevertheless, whilst stressing that the absence of a business or commercial objective was irrelevant, the Court followed the Opinion of the Advocate General in holding that the disparity between
10 the amount paid and the costs of providing the service and the factors taken into account when computing the fee were sufficient to take the activity outside the scope of the VAT regime.

32. I do not therefore regard *Finland* as authority for the proposition that any analysis of the prices charged, their method of calculation and their relationship to
15 costs is impermissible because it offends against the principle that activities can be economic even if they are not pursued for profit. On the contrary, the *Finland* case indicates that the test to be applied is a more nuanced one than HMRC urged upon me here. This is also reflected by the decision of the Court of Justice in the earlier decision, Case 50/87 *Commission v France* [1988] ECR 4798. In that case, the Court
20 considered French legislation which limited the entitlement of the lessor of immoveable property to a total and immediate deduction of input tax where the aggregate amount of the proceeds from letting the property were less than one-fifteenth of the property's value. The Court held that the legislation was inconsistent with the VAT provisions but commented that the amount of rent might, in some
25 circumstances be regarded as 'involving a concession and not as constituting an economic activity within the meaning of the directive'.

33. Mr Jones sought to contrast the facts as found by the Tribunal in the instant case with the facts described in *Finland* to show that the fees in the latter were a much smaller proportion of total costs than in the former. He also relied on the decision of
30 the Inner House of the Court of Session in *Customs and Excise Commissioners v Morrison's Academy Boarding Houses Association* [1978] STC 1. In that case the Court held that the Association which provided boarding services to pupils at Morrison's Academy was making a taxable supply even though it did not seek to make profits from the business. Lord Emslie (Lord President) held that VAT is not a
35 tax on income or profits and there was no obvious justification for looking at the motivation of a taxable person to discover whether or not he is carrying on a business:

"In this case the provision of board and lodging by the association on the scale on which they conduct their operations has all the essential features of activities which are commonly carried out commercially, for profit, and the activities of
40 the association in pursuit of its objects are only distinguishable in respect that the commercial boarding house keeper's normal motivation is absent, and the association regulates the lives of the boarders in term time."

34. These cases show that there is a dividing line to be drawn between a situation akin to that in *Morrison's Academy* where the activities do amount to the furtherance

of a business even though the activities are not aimed at making a profit and a situation akin to that in *Finland* where the activity is not conducted as a business even though payment is made by the recipient for the services provided. In my judgment, it is also clear it is for the First-tier Tribunal to decide, on the basis of all the facts before it, on which side of the line the instant case falls. The Tribunal here considered the scale of the payments made, the way they were calculated and the way the finances of Longridge were dealt with in terms of donations and the use of volunteers. There is nothing in their discussion of the test to be applied or in their application of that test to the facts found that shows any error of law. I accept Mr Jones' point that there are many businesses that depend on donations as well as income from charges for goods or services and also that many small businesses rely on the free provision of labour by family members of the owner to keep going. But the Tribunal did not hold that in every case where volunteers are used or where activities are funded from a mix of sources, then there is no economic activity. What they held was that, looking at the totality of the 'observable terms and features' of the activities carried out by Longridge at the site, the activities were not economic. That is precisely the kind of evaluation of the facts that the First-tier Tribunal is well-placed to make and with which the appellate court should not interfere.

35. That term 'observable terms and features' was taken by the Tribunal from the judgment of Patten J in *Customs & Excise Commissioners v Yarmouth Children's Trust* [2001] EWHC 2201 (Ch), [2002] STC 207 ('Yarmouth'). In that case the respondent was a charity providing daycare facilities for children. It occupied a building under a lease at an annual rent of £2,800. The lease provided that the user was for the education and occupation of children under five. That building had been constructed for the playgroup at a cost of about £100,000 paid for in part by the trust's own funds, in part from National Lottery money and in part from the proceeds of an appeal. The question arose whether the construction services should be zero-rated under Item 2 of Group 5.

36. Patten J noted that the trust had accepted that for them to succeed it was not enough for them to show that the lease to the playgroup was not in itself an economic or business activity. It was also necessary to decide whether the playgroup's own use of the premises satisfies one or both limbs of Note 6. This was because the lease expressly provided that it was for the playgroup's use and also because item 2 applies if the intended use is *solely* for a relevant charitable purpose. Patten J dealt first with the characterisation of the lease. Patten J's conclusion that the grant of the lease to the playgroup was not an economic activity does not appear to me to assist in resolving the present case. It was based on the case law concerning the exploitation of property and the elements he considered particularly relevant are very far from the facts of this case. However, he also considered the test for whether activity is economic more generally and applied that to the daycare provision by the playgroup. He said:

"I accept [counsel for HMRC's] submission that the motive of the person who makes a supply of goods or services is not relevant to and more particularly cannot dictate the correct tax treatment of that transaction. But the exclusion of motive or purpose in that sense does not require or in my judgment allow the

5 Tribunal to disregard the observable terms and features of the transaction in
question and the wider context in which it came to be carried out. This is
because the transaction if looked at in isolation will not usually enable the Court
to decide whether it was carried out in the course or furtherance of a business
10 which is the test under VATA 1994 Section 4(1) or to use the language of the
Sixth Directive whether it was a supply of services effected for consideration by
a taxable person acting as such: i.e. by a person who is carrying out some form
of economic activity: see Articles 2 and 4(1). This test necessitates an enquiry
by the Tribunal into the wider picture. It will need to ascertain the nature of the
15 activities carried on by the person alleged to be in business, the terms upon
which and manner in which these activities (including the transaction in
question) were carried out and the nature of the relationship between the parties
to the transaction. This is not intended to be an exhaustive or particularised list.
But it is clear that the questions posed by Gibson J in [*Customs and Excise
Commissioners v Lord Fisher* [1981] STC 238] or by the Court of Session in
CCE v Morrison's Academy Boarding House Association [1978] STC 1 simply
could not be answered by reference only to the fact that a service was provided
at a price. That is the beginning not the end of the enquiry.”

37. Turning to the question whether the playgroup was a business, Patten J said:

20 “29. ... the fact that an essentially business operation is intended to further the
charitable objects of the body which carries it out does not of itself alter the
nature of the operation for VAT purposes. A charity shop run to make a profit
for the charity is a business even though its object is to benefit that charity. But
25 in that case the shop itself is not as such a charitable activity. It is merely a form
of fund raising run on a commercial basis. The operation of the Playgroup by
contrast is itself charitable. This may not prevent it being treated as a business
but its charitable nature does have to be taken into account in deciding whether
in the words of Lord Slynn in the *Institute of Chartered Accountants* case the
Playgroup operation has an economic content.”

30 38. The judge concluded that the ‘overwhelming impression’ gathered from the
evidence was that the playgroup was not predominantly concerned with the making of
taxable supplies for a consideration. The factors he considered relevant included that
the fees were fixed to maintain a balance between remaining affordable and meeting
its operating costs. I respectfully share Patten J’s conclusion that it is possible and
35 indeed necessary to take into account the charitable nature of the activity as part of its
‘observable terms and features’ whilst avoiding the twin heresies of taking account of
the purpose for which the activity is conducted or regarding an activity as not
‘economic’ because it is non-profit making.

40 39. A similar conclusion was reached by Evans-Lombe J in *Customs and Excise
Commissioners v St Paul’s Community Project Ltd.* [2004] EWHC 2490 (Ch) [2005]
STC 95 (*‘St Paul’s’*). That case also concerned a day nursery school which was
funded by a mixture of donations, Government grants and fees charged to parents.
The question arose whether construction services supplied to refurbish the building
used for the nursery should be zero-rated under Item 2. The tribunal found that the

fees charged of between £85 and £95 per week per child represented only part of the cost of providing a place. That cost was calculated at £130 per week per child. By comparison, the cost of a place at a local commercial nursery was, on average, £118 per week (the highest fee put forward in evidence being £145). The accounts of the playschool showed a figure of £52,540 in respect of fees received out of a total turnover of £1,248,806 reflecting the total turnover for all the activities conducted by St Paul's during the period. The learned judge recorded HMRC's concession in that case that the payment of fees by the parents using the nursery was not a deciding factor but only one of the factors which the tribunal had to put in the balance in reaching a conclusion as to whether the nursery was a business. He held that there was ample evidence to support the tribunal's conclusion that it was not carrying on a business.

40. Mr Jones submitted that *Yarburgh* and *St Paul's* must now be read in the light of the judgment of the Court of Justice in *Finland*. That establishes, he argued, that where there is consideration paid for services then there is a presumption that there is an economic activity absent some unusual feature that overturns that presumption. Mr Jones also pointed to Advocate General Colomer's reference to the earlier case Case C-142/99 *Floridienne and Berginvest* [2000] ECR I-9567 in paragraph 39 of his Opinion. The *Floridienne* case concerned a holding company making available capital by way of loans to its subsidiary companies. The Court in *Floridienne* held that such activity may be an economic activity provided, amongst other things, that it is carried out with a business or commercial purpose characterised by a concern to maximise returns on capital investment. Advocate General Colomer rejected any suggestion that this wording was of general application importing a requirement of a commercial or business purpose into the test of whether any activity is economic. He considered that the Court's statement in *Floridienne* was dealing with an activity which constituted the exploitation of tangible or intangible property. The wording of what is now Article 9 of the Principal Directive itself indicates that such exploitation is an economic activity if carried out "for the purposes of obtaining income therefrom on a continuing basis". There was no need to import that requirement into the more general wording of Article 9 in so far as it refers to "activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions".

41. Mr Thomas did not accept that Advocate General Colomer was right to limit the relevance of the income generated by an activity to cases where the activity in question was the exploitation of tangible or intangible property. He points to Case C-8/03 *Banque Bruxelles Lambert SA (BBL) v Belgian State* [2004] ECR I-10157 where Advocate General Maduro referred to an economic activity being one 'generally performed in the interest of making a profit'. Advocate General Maduro did not seem there to be limiting that criterion to cases of exploitation of property but rather was making a general comment about the test for VAT purposes. Further, the Court of Justice itself in Case C-408/06 *Götz* [2007] ECR I-11295 said at paragraph 18 that that the requirement that the activity give rise to income on a continuing basis is one that applies to all the activities referred to in what is now Article 9, not just to the exploitation of property.

42. On this point, I do not consider that Advocate General Colomer or the Court in *Finland* narrowed the test that had previously prevailed in a way which leads to the conclusion that the *Yarburgh* or *St Paul's* cases are no longer good law. The Court of Justice in *Götz* was saying no more than that there must be remuneration received by the person carrying out the activity in order for the activity to be regarded as economic. Neither the Court in *Götz* nor the Court in *Finland* regarded the existence of a payment in return for services as determinative of the issue. In *Götz* the Court emphasised that it was for the national court (in the context of a reference for a preliminary ruling) to assess, in the light of the detailed rules according to which the activity was organised in Germany whether the activity was permanent and carried out in return for remuneration. In *Finland* the Court (in the context of an infringement action) went on to make that assessment itself in the manner I described earlier. Both judgments support Longridge's contention that the assessment should be based on a wider investigation of the intrinsic nature of the activity. I can see nothing in what the Tribunal did in this case that is inconsistent with that approach.

43. Mr Jones criticised the decision of the Tribunal because it refers to the "predominant concern" of Longridge being to pursue its charitable objectives by carrying on the activities at the site. At paragraph 103 of the decision, the Tribunal applied the six indicia from the *Lord Fisher* case including the fifth criterion, that the activity is predominantly concerned with the making of taxable supplies to consumers for a consideration. Instead of considering the predominant concern of the activity, Mr Jones submits that the Tribunal considered the predominant concern of Longridge. This, he argued, tipped over impermissibly into considering the purpose for which the activities were carried on. The fact that the activities are carried on for the purpose of fulfilling Longridge's charitable objectives is not relevant because Article 9 makes clear that the 'purpose or results' of the activity are to be disregarded. Although some of the wording of the Decision may have been imprecise, I do not consider that the Tribunal in fact fell into error here. I bear in mind the comment of Etherton LJ in *Commissioners for Her Majesty's Revenue and Customs v London Clubs Management Ltd* [2011] EWCA Civ 1323 where he said:

"74. ... in order to ascertain the reasoning of the FTT, the Decision must be read as a whole. It is not to be interpreted like a statute drafted by Parliamentary Counsel. Its reasoning and sense are to be gathered by a fair reading of its entirety. This is true of every judgment, but particularly so an expert tribunal which, like the FTT, includes non-lawyers."

44. Looking at the Decision as a whole, it is clear that the Tribunal understood that the charitable purpose of Longridge was not relevant to its consideration. The test that the Tribunal applied, as set out in paragraph 93 of the Decision cited earlier was the correct one even after the *Finland* judgment.

45. Finally Mr Jones relied on the existence of exemptions from VAT in Articles 132 and 133 of the Principal Directive. Article 132 requires Member States to exempt transactions including:

“ (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.”

46. Article 133 then permits a Member State to make such exemption subject to certain specified conditions including a condition that the body must not systematically aim to make a profit or as to the level of prices that it must charge, or that the exemption must not distort competition.

47. HMRC rely on the existence of these exemptions as showing that charitable activities which are not pursued for profit and which charge lower prices than commercial enterprises are still to be regarded as economic activity – otherwise they would not need to be exempted. On this point I agree with the conclusion of the Tribunal that the question whether Longridge’s activities are economic activity is necessarily anterior to the question whether it can benefit from any exemption implemented in the United Kingdom. The existence of the exemption shows that some non-profit supplies of educational or sports services to young people are economic activities and may therefore seek to rely on the exemption. But it does not mean that every organisation meeting that description is carrying on an economic activity.

Disposal

48. In my judgment the First-tier Tribunal applied the correct test in evaluating the facts as it found them. There are no grounds for disturbing its conclusion that Longridge does not carry on an economic activity at the site.

TRIBUNAL JUDGE



RELEASE DATE: 11 November 2014