FISHER DIES ON THE THAMES: THE COURT OF APPEAL'S JUDGMENT IN LONGRIDGE ON THE THAMES v. HMRC [2016] EWCA Civ 930

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On 1 September, the Court of Appeal (Arden and Tomlinson LJJ and Morgan J) handed down its judgment in *Longridge on the Thames*. The judgment overturns a series of cases on the meaning of "economic activity" and "taxable person" dating back to *CEC v. Lord Fisher* [1981] STC 238, and significantly narrows the ability of charities and other third-sector bodies to claim that their supplies fall outside the scope of VAT as not representing economic activity.

The facts

Longridge on the Thames ("Longridge") is a charity providing water-based and outdoor activities for educational and recreational purposes, predominantly to young people. It charges for its courses and the use of its facilities. However, many of its staff are volunteers, its tries to keep its charges to affordable and to the lowest level consistent with financial prudence, and it tries to waive or reduce charges where there is especial need.

The question in dispute between Longridge and HMRC was whether Longridge was entitled to have supplies to it of a new centre zero-rated under items 2 and 4 of Group 5 of Schedule 8 to VATA. The answer to that question depended on whether Longbridge was engaging in any "economic activity" on the site.

The decisions below

The FTT concluded that it was not, and the Upper Tribunal (Rose J) [2015] STC 672 upheld its decision. In reaching that view, Rose J relied on a stream of High Court decisions dating back to *Lord Fisher*, which had suggested that the question of whether someone was a "taxable person" carrying on "economic activity" for the purposes of what are now Articles 2 and 4 of the PVD, implemented by what is now section 2 of VATA, was to be decided by a range of criteria, including whether the activity "*is predominantly concerned with the making of taxable supplies to consumers for a consideration*". The FTT had relied heavily on that criterion, holding that Longridge's supplies were incidental to a predominant concern of furthering its charitable objectives, referring to the extensive use of volunteers and other matters. It also held that the use of volunteers and reliance on donations as a key part of its financing meant that it did not meet another of the *Lord Fisher* criteria, namely the need for the activity to be "*consistent with sound business principles*". Rose J agreed that that was an approach open to the FTT.

The Court of Appeal's analysis

The Court of Appeal based itself on the judgment of the CJEU in Case C-246/08 *Commission v Finland* [2009] ECR I-10605, which concerned supplies of legal services under the Finnish legal aid scheme, in which recipients paid capped fees calculated by reference to their income with the State making up the difference. Arden LJ (with whom Tomlinson LJ agreed) noted that in that case (at [37]) the CJEU had held that as a general rule activity which is "*permanent and is carried out for remuneration which is received by the person carrying on the activity*" will be an economic activity. However, it went on to apply what Arden LJ called a "direct link test": if there was no direct link between the remuneration and the supplies at issue (in *Finland* because the remuneration was fixed by reference to the income of the recipient) then there was no economic activity.

In Arden LJ's view, *Fisher* (and by extension the approach of the tribunals below in the present case) was inconsistent with the *Finland* approach for two reasons. First, by omission, it left out the direct link test. Secondly, by commission, it added the "*predominant concern*" test. That approach had led the tribunals below to place weight on factors, such as the use of volunteers, that were irrelevant to the direct link test. Applying the direct link test, there was no dispute on the facts that charges were more than nominal and were directly related to what was supplied: the concessionary charges sometimes made did not displace that conclusion.

In his concurring judgment, Morgan J took a more nuanced approach. He listed a number of propositions that could be derived from the CJEU case-law ([109]). In that list, he included (item (ii)) the existence of a direct link between the supply and the consideration, though he went on to note (item (iii)) that where there is no such link, there is no consideration and the question of "economic activity" does not arise. Other items in his list included: the irrelevance of the purpose of the activity, as well as subjective intention; the "general rule" that a permanent activity of making supplies for a consideration is economic activity; the need to judge the character of the activity objectively; that neither charitable status nor being non-profit making were determinative. He identified the error of the tribunals below, following Fisher, as being to place weight on the "predominant concern" test, which, in his view was "*unhelpful and may be misleading*". Rather, applying his list of factors, the answer was that the charitable status and non-profit making nature of Longridge were not of any significance and it was irrelevant that the consideration was below market value and sometimes involved a concession.

Discussion

Commentators have, for some years, been drawing attention to the increasing

disparity between the *Fisher* criteria and the development of CJEU case-law. Indeed, since *Fisher* was decided 35 years ago, in an era when VAT judgments did not grapple with European case-law to the extent that they do now, it is surprising that it has survived as long as it has. Its survival may well be due to an apparently favourable reference by Lord Slynn in his speech in *Institute of Chartered Accountants of England and Wales v CEC* [1999] 1 WLR 701 ("*ICAEW*"), presumably on the basis that endorsement by a former Judge of the Court of Justice was to be taken as authoritative. However, Morgan J argues that, when read closely, Lord Slynn's speech was not so much endorsing as merely referring to *Fisher*. In any event, the Court of Appeal has now given *Fisher* the coup de grace, and it is no longer good law.

What, though, has replaced it? The judgment of Arden LJ (the majority judgment) points firmly in favour of a "direct link" test. But that approach is problematic. First, as Morgan J points out in the course of his list of propositions, the absence of a direct link between remuneration and supply will usually lead to the conclusion that the remuneration is not consideration for the supply, which in most cases will make the question of "economic activity" otiose. Second, there are clearly a number of CJEU cases where there was no economic activity but clearly supplies directly linked to remuneration. The strongest example of such a case is Case C-369/04 *Hutchison 3G v HMRC* [2008] STC 218, where the CJEU held that the activity of awarding spectrum licences (for which consideration of over £23 billion was given pursuant to contracts entered into by the licensees) was not economic activity: that case followed the same approach as had *ICAEW* in the House of Lords, where the ICAEW was held not to be carrying out economic activity when issuing authorisations to practise in return for a fee. In both those cases there was clearly a "direct link" between the remuneration and the supply. The reason why, nonetheless, there was no economic activity was that they both concerned essentially regulatory activity (controlling spectrum use and regulating accountants, respectively). Another recent "no economic activity" case is Case C-267/08 *SPÖ v Finanzamt Klagenfurt* [2010] STC 287 (charges made by the Austrian Socialist Party to its branch for, *inter alia*, the essential service in Austria, even for socialists, of organising the annual party ball): that was not economic activity because it was not supplied in a market and was carried on as part of the activities of a political party with a non-economic character).

Those cases show that the "direct link" test cannot, as a naïve reading of Arden LJ's might suggest, be the only relevant factor. In that respect, Morgan J's more nuanced approach is, it is respectfully submitted, more reliable as a guide over the large range of bodies where the question of economic activity arises. In particular, where a body's statutory functions and responsibilities can be characterised as either regulatory or as discharging some essentially public law responsibility of a kind that could not be exercised by any private body, it may well not be regarded as carrying out economic activity even where it

charges for various supplies and where (as is often the case) the charges are designed to cover costs. In consequence, in the present writer's submission, the remarks of the Upper Tribunal in *Capernwray Missionary Fellowship of Torchbearers v HMRC* [2016] STC 172 at [39] are still good law: "*The mere receipt of remuneration is not enough. It is necessary to have regard to the nature or status of the activity … That enquiry may result in it being found that remuneration is not consideration … or that the activity [is not] such as to constitute an economic activity for another reason.*"

Implications

There are considerable implications of this case for public, charitable and third-sector bodies and their advisers. Advisers will need to consider whether VAT has been properly charged and accounted for by a range of bodies who may well have regarded themselves as outside the scope of VAT on the basis of *Fisher*. Moreover, there are many cases (such as *Longridge* itself) where the tax treatment of a supply to the body depends on its characterisation as carrying on economic or non-economic activity, and advisers will need to ensure that those supplies have been properly accounted for. In examining those supplies, advisers will need to bear in mind the "direct link" test, which is not always easy to apply (see, for example, the difficulties faced by the Upper Tribunal in *Wakefield College v HMRC* [2016] STC 1219, where the Tribunal had to decide whether there was a sufficiently "direct link" in the case of courses supplied at published fees at levels well below cost, and which were sometimes rebated by reference to personal circumstances). However, advisers should not, particularly when looking at bodies with a wide statutory function, put out of their minds the wider cases mentioned above, and in such cases it is respectfully submitted that Morgan J's approach may be more reliable than that of Arden LJ.

The Comment made in this case note are wholly personal and do not reflect the views of any other members of Monckton Chambers, its tenants or clients.

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