**[2021] UKUT 0224 (TCC)**

**Appeal number: UT/2019/0173**

***VALUE ADDED TAX – disallowance of input tax – whether necessary for HMRC to deregister taxpayer before disallowing input tax – whether taxpayer carrying on a business – appeal dismissed***

**UPPER TRIBUNAL**
**(TAX AND CHANCERY CHAMBER)**

**BABYLON FARM LIMITED** **Appellant**

**- and -**

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

**TRIBUNAL: MR JUSTICE SNOWDEN**
**JUDGE THOMAS SCOTT**

**Sitting in public by way of video hearing treated as taking place in London on 29 June 2021**

**Hammad Baig, counsel, instructed by VATangles Consultancy, for the Appellant**

**Barbara Belgrano, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

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DECISION

1. Babylon Farm Limited ("Babylon") appeals against the decision of the First-tier Tribunal (the "FTT") reported at [2019] UKFTT 562 (TC) (the "Decision").

2. The FTT dismissed Babylon's appeal against HMRC's decision to deny credit for certain input tax. The FTT decided that (1) HMRC were not required to deregister Babylon for VAT before claiming that it did not carry on a business for VAT purposes and (2) the VAT had been properly disallowed because Babylon was not in fact carrying on a business for VAT purposes.

3. With the permission of the FTT as regards certain grounds and this Tribunal as regards the remainder, Babylon appeals against both decisions reached by the FTT.

**Background**

4. Babylon appealed to the FTT against two decisions of HMRC dated 11 May 2018 which denied a claim by Babylon to recover input tax of £19,760.50 ("the Input Tax Claim") and reduced its claim for input tax to nil for the period from May 2014 to February 2018. HMRC denied the input tax credit on the basis that Babylon was not carrying on a business for VAT purposes in the relevant period (defined at [3] of the FTT decision as 05/14 to 05/17). Babylon claimed that it was carrying on a business, comprising the activity of selling hay to Mr McLaughlin, the co-owner and director of Babylon, and the provision of services in relation to certain other business activities carried on or to be carried on by Mr McLaughlin.

5. The claims for input tax in the relevant period arose mainly from costs incurred by Babylon in building a new barn to replace outbuildings which it had sold and which was to be used to store equipment use by Babylon in carrying out its haymaking activities.

6. Babylon had also challenged HMRC's decision to deregister Babylon for VAT purposes on the basis that it was not carrying on a business. HMRC agreed to continue the registration pending the conclusion of the appeal. Babylon argued that it was not open to HMRC to argue that a person registered for VAT was not carrying on a business, as HMRC needed to deregister that person before such a claim could be made.

**Findings of fact**

7. References below to paragraphs in the format [x] are, unless indicated otherwise, to paragraphs of the Decision.

8. At [8] the FTT stated as follows:

> 8. The Tribunal understood the following facts to be agreed between the parties at the time of the hearing and found them to be supported by the evidence:
>
> (1) The Appellant's only income during the relevant period arose from the sale of hay and amounted to £440 p.a.
>
> (2) The only customer for the hay was Mr McLaughlin, who required it for his livery business.
>
> (3) The Appellant had been registered for VAT since 1991 and had previously carried out more extensive farming activities whilst under the ownership of Mr McLaughlin and his wife.
>
> (4) The Appellant had previously received management fees from successful businesses that Mr McLaughlin had owned and run.
>
> (5) During the relevant period Mr McLaughlin was seeking to develop new businesses.
>
> (6) The Appellant's claims for input tax during the relevant period arose mainly from the cost of building a new barn in order to replace the outbuildings sold by the Appellant. This new barn was used to store the equipment and machinery required to carry out the haymaking activities of the Appellant.
>
> (7) The land on which the hay was grown belonged to Mr McLaughlin or to Mr and Mrs McLaughlin and not the Appellant.
>
> (8) The Appellant owned and had control over some outbuildings on the farm occupied by Mr and Mrs McLaughlin. Mr and Mrs McLaughlin owned land and other buildings on the farm.

9. In relation to Babylon's activities, the FTT found as follows, at [15]-[17]:

> 15. It is agreed that the activities being carried out by the Appellant include the making of hay for re-sale to Mr McLaughlin and the sale of outbuildings. The Appellant argued that it was also undertaking preparatory acts for the new business activities that Mr McLaughlin was developing and that it would be able to levy management charges on these businesses once they were generating revenue. One new business activity was the creation of an investment and insurance product that would help to fund the care needs of older people. The other new business described by Mr McLaughlin was the provision of management and financing advice to small businesses. During the relevant period Mr McLaughlin was working on these two new business opportunities. It became clear from the evidence of Mr McLaughlin in the hearing and the submissions on behalf of the Appellant, that neither of these activities had yet resulted in any chargeable services being provided and that both were to be carried on through companies that had been formed for these purposes. In relation to the care funding activities Mr McLaughlin corresponded in the name of Investment in Care Ltd and contracted in that name. Mr McLaughlin's evidence at the hearing was that he had formed a new company, Babylon Farm Consulting Ltd, in order to pursue the consultancy activities. Both businesses remained at a formative stage and neither company has generated any revenue.

> 16. The Appellant's activities during the relevant period in relation to these new business opportunities need to be assessed. The Tribunal was not made aware of any evidence that any service was provided at this time to either of the new companies or that preparatory acts were undertaken by the Appellant during the relevant period in order that it could provide such services in the future. The Tribunal understood from the evidence that the Appellant's involvement in these new businesses was to be limited to providing accommodation and unspecified support services for these new companies from the Appellant's buildings in return for payment of a management charge.
>
> 17. Mr McLaughlin did not seek to argue that he or the companies that he controlled were the recipient of services or goods from the Appellant during the relevant period and none were identified and invoiced. The new businesses through which Mr McLaughlin was intending to provide services remained at a preparatory stage during the relevant period. The Tribunal concludes that the Appellant did not itself carry out any activities during the relevant period in connection with the new businesses that Mr McLaughlin was pursuing.

10. We deal below with the FTT's findings of fact and law in relation to the question of whether Babylon was carrying on a business.

## The legislation

11. The FTT did not refer at all to EU legislation in the Decision, even though it is the appropriate starting point in considering the issues in this case.

12. There are three provisions of the Principal VAT Directive (EU Directive 2006/112/EC) (the "PVD") which are relevant.

13. Article 2(1) provides that:

> The following transactions shall be subject to VAT:
>
> (a) the supply of goods for consideration within the territory of a Member State by a taxable person acting as such…

14. Article 9(1) defines "taxable person" as follows:

> '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.

15. The deduction of input tax is dealt with by Article 168, which provides, so far as relevant, as follows:

> In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:
>
> (a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person…

16. The provisions of the PVD have been transposed into UK law by the Value Added Tax Act 1994 ("VATA"). References below to sections are to sections of VATA.

17. Section 3 provides as follows:

> **3. Taxable persons and registration.**
>
> (1) A person is a taxable person for the purposes of this Act while he is, or is required to be, registered under this Act.
>
> (2) Schedules 1 to 3A 1 shall have effect with respect to registration.
>
> (3) Persons registered under any of those Schedules shall be registered in a single register kept by the Commissioners for the purposes of this Act; and, accordingly, references in this Act to being registered under this Act are references to being registered under any of those Schedules.
>
> (4) The Commissioners may by regulations make provision as to the inclusion and correction of information in that register with respect to the Schedule under which any person is registered.

18. The scope of VAT on taxable supplies is set out in section 4(1):

> (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.

19. Section 5(2) provides the basic definition of a "supply" for VAT:

> (2) Subject to any provision made by that Schedule and to Treasury orders under subsections (3) to (6) below—
>
> (a) "*supply*" in this Act includes all forms of supply, but not anything done otherwise than for a consideration;
>
> (b) anything which is not a supply of goods but is done for a consideration (including, if so done, the granting, assignment or surrender of any right) is a supply of services.

20. "Input tax" and "output tax" are defined by section 24 as follows:

> (1) Subject to the following provisions of this section, "input tax" , in relation to a taxable person, means the following tax, that is to say—
>
> (a) VAT on the supply to him of any goods or services;

(b) VAT on the acquisition by him from another member State of any goods; and

(c) VAT paid or payable by him on the importation of any goods from a place outside the member States,

being (in each case) goods or services used or to be used for the purpose of any business carried on or to be carried on by him.

(2) Subject to the following provisions of this section, “output tax” , in relation to a taxable person, means VAT on supplies which he makes or on the acquisition by him from another member State of goods (including VAT which is also to be counted as input tax by virtue of subsection (1)(b) above).

21. Credit for input tax against output tax and the extent to which input tax is allowable is dealt with in sections 25 and 26 as follows:

**25. Payment by reference to accounting periods and credit for input tax against output tax**

(1) A taxable person shall—

(a) in respect of supplies made by him, and

(b) in respect of the acquisition by him from other member States of any goods,

account for and pay VAT by reference to such periods (in this Act referred to as “prescribed accounting periods”) at such time and in such manner as may be determined by or under regulations and regulations may make different provision for different circumstances.

(2) Subject to the provisions of this section, he is entitled at the end of each prescribed accounting period to credit for so much of his input tax as is allowable under section 26, and then to deduct that amount from any output tax that is due from him.

(3) If either no output tax is due at the end of the period, or the amount of the credit exceeds that of the output tax then, subject to subsections (4) and (5) below, the amount of the credit or, as the case may be, the amount of the excess shall be paid to the taxable person by the Commissioners; and an amount which is due under this subsection is referred to in this Act as a “VAT credit” .

**26. Input tax allowable under section 25.**

(1) The amount of input tax for which a taxable person is entitled to credit at the end of any period shall be so much of the input tax for the period (that is input tax on supplies, acquisitions and importations in the period) as is allowable by or under regulations as being attributable to supplies within subsection (2) below.

(2) The supplies within this subsection are the following supplies made or to be made by the taxable person in the course or furtherance of his business—

(a) taxable supplies;

(b) supplies outside the United Kingdom which would be taxable supplies if made in the United Kingdom;

(c) such other supplies outside the United Kingdom and such exempt supplies as the Treasury may by order specify for the purposes of this subsection.

22. So far as relevant, section 94 defines "business" as follows:

(1) In this Act "business" includes any trade, profession or vocation.

23. Provision for registration in respect of taxable supplies is made by Schedule 1 VATA. Paragraph 9 provides:

Where a person who is not liable to be registered under this Act and is not already so registered satisfies the Commissioners that he—

(a) makes taxable supplies; or

(b) is carrying on a business and intends to make such supplies in the course or furtherance of that business,

they shall, if he so requests, register him with effect from the day on which the request is made or from such earlier date as may be agreed between them and him.

24. Paragraph 13 of Schedule 1 concerns the cancellation of a VAT registration by HMRC and provides as follows:

(1) Subject to sub-paragraph (4) below, where a registered person satisfies the Commissioners that he is not liable to be registered under this Schedule, they shall, if he so requests, cancel his registration with effect from the day on which the request is made or from such later date as may be agreed between them and him.

(2) Subject to sub-paragraph (5) below, where the Commissioners are satisfied that a registered person has ceased to be registrable, they may cancel his registration with effect from the day on which he so ceased or from such later date as may be agreed between them and him.

(3) Where the Commissioners are satisfied that on the day on which a registered person was registered he was not registrable, they may cancel his registration with effect from that day.

(4) The Commissioners shall not under sub-paragraph (1) above cancel a person's registration with effect from any time unless they are satisfied that it is not a time when that person would be subject to a requirement to be registered under this Act.

(5) The Commissioners shall not under sub-paragraph (2) above cancel a person's registration with effect from any time unless they are satisfied that it is not a time when that person would be subject to a requirement, or entitled, to be registered under this Act.

(6) In determining for the purposes of sub-paragraph (4) or (5) above whether a person would be subject to a requirement, or entitled, to be registered at any time, so much of any provision of this Act as prevents a person from becoming liable or entitled to be registered when he is

> already registered or when he is so liable under any other provision shall be disregarded.
>
> (7) In this paragraph, any reference to a registered person is a reference to a person who is registered under this Schedule.

## The deregistration issue

25. Babylon's first ground of appeal is that the FTT erred in law in rejecting its argument that HMRC could not deny credit for input tax (on the basis that Babylon was not carrying on a business in the relevant period) without first cancelling Babylon's registration for VAT.

26. The FTT set out its decision on this issue as follows, at [12]-[13]:

> 12. The Tribunal considered the Appellant's submission that the Respondents needed to de-register a person from VAT before concluding that they were not carrying on a business. The Appellant argued that under paragraph 9 of Schedule 1 of the VAT Act 1994 a person making taxable supplies is entitled to be registered for VAT. The Appellant stated that it would be ultra vires for the Respondent to find that a person was not carrying out business activities whilst they were still registered for VAT. The Tribunal understood that the Appellant was asserting that the Respondents continued registration of the Appellant was clear evidence that they accepted that the Appellant was making taxable supplies.
>
> 13. The Tribunal considered the Appellant's submission and noted that paragraph 9 of Schedule 1 of the Act requires the Respondents to be satisfied that a person is either making taxable supplies or is carrying on a business and intends to make such supplies in the course or furtherance of a business before they are registered for VAT. The Tribunal accepts that the registration of the Appellant demonstrates that the Respondents were satisfied that it met these requirements. The Tribunal has not, however, been referred to any legal argument that supports the contention that the Respondents must de-register a person before they could conclude that they were not operating as a business. Paragraph 9 of Schedule 1 of the Act deals with the criteria for registration but it does not place restrictions on when deregistration may be permitted. The Respondents must be allowed some time to become aware of relevant information about the activities of a person who is VAT registered and, having done so, they would have to satisfy themselves that a registered person continues to meet the criteria for registration. If they do not the Respondents must follow the requirement of the Act with regard to the timing of a decision to de-register any person. The Tribunal did not accept the Appellant's submission that the Respondent needed to de-register a person from VAT before concluding that they were not carrying on a business. The Tribunal concluded that the question of whether or not the Appellant was carrying on business and making taxable supplies for the purposes of VAT needed to be determined on the facts and that the mere fact that the Appellant was registered for VAT did not constitute an

> acceptance by the Respondent that a person was, at all times whilst registered, operating as a business.

27. Mr Baig's argument relied on section 3 and paragraph 13 of Schedule 1 VATA. He pointed out that under section 3(1), a person is a taxable person "while he is, or is required to be, registered". This meant, he said, that so long as a person is and remains registered for VAT, he is a taxable person and is therefore entitled to deduct any input tax by virtue of sections 24 to 26. He submitted that this of itself meant that Babylon's appeal must be allowed. He also submitted that the effect of paragraphs 13(2) and (5) of Schedule 1 is that HMRC may cancel a registration if but only if they are satisfied that a person is no longer required or entitled to be registered. In oral argument, Mr Baig modified this submission to argue that by virtue of paragraph 13(2), if HMRC are satisfied that a person has ceased to be registrable, they *must* deregister him, and, having failed to do so, HMRC cannot now argue that Babylon is not entitled to credit for input tax.

28. We have no hesitation in rejecting Mr Baig's submissions.

29. In relation to paragraph 13, paragraph 13(2) clearly confers a discretion on HMRC to cancel a registration, and not an obligation to do so. The use of the words "may cancel" is permissive, and stands in clear contrast to the wording of paragraph 13(1), which states that where it applies HMRC "shall…cancel" the registration.

30. As regards section 3, Mr Baig argues that because HMRC have not cancelled Babylon's registration, it remains a taxable person and is therefore entitled to reclaim the disputed input tax, regardless of whether it was carrying on a business during the relevant period. This argument is misconceived. It assumes that status as a taxable person carries with it an automatic entitlement to deduct input tax. However, that ignores the fact that if there is no business carried on or to be carried on by a person, the relevant VAT is not input tax at all. That is the result of section 24(1), which defines input tax as VAT paid by a taxable person on certain goods and services "being…goods or services used or to be used for the purpose of any business carried on or to be carried on by him".

31. Section 26 also restricts creditable input tax to input tax attributable to supplies made or to be made by a taxable person in the course or furtherance of his business. However, HMRC were refused permission to argue the attribution position in this appeal, so we do not consider that issue further.

32. We note that Article 9 of the PVD, unlike section 4, defines a taxable person not by reference to the formalities of registration but by reference to the substantive question of whether a person carries out an economic activity. In any event, section 3 does not operate to remove from Babylon, simply because it remains registered, the burden of establishing that it was carrying on a business in order to claim an input tax credit.

33. For these reasons, the appeal on this ground is dismissed.

**Was Babylon carrying on a business?**

*The FTT's decision*

34. The FTT set out its approach to determining whether Babylon was carrying on a business at [14]:

> The Tribunal concluded that in order to determine whether or not the Appellant was carrying on an economic activity through a business during the relevant period, it needs to consider s.94 of the Act and to assess and understand (i) what activities were being carried out by the Appellant in the relevant period and (ii) whether those activities were such as to constitute, as a matter of fact, a business.

35. Babylon had argued that in addition to its haymaking activities, it carried on preparatory work in relation to other business activities being developed by Mr McLaughlin. The FTT determined that it had no evidence of any such services being provided by Babylon during the relevant period, and concluded that Babylon did not carry out any activities during the relevant period in connection with the new businesses that Mr McLaughlin was pursuing: [17].

36. The FTT recorded (at [10]) that HMRC's conclusions were based on the principles set out by the High Court in *Customs and Excise Commissioners v Lord Fisher* [1981] STC 238 ("*Lord Fisher*"), which HMRC "regarded as setting out the six indicators that are to be used in assessing whether an activity is being carried on as a business".

37. The FTT adopted HMRC's approach, and set out its analysis and conclusion at [18]-[21] as follows:

> 18. The Tribunal went on to consider the evidence and submissions in relation to the activity of haymaking and the sale of outbuildings for development. S.24 of the Act provides that input tax can be recovered on the supply of goods or services used or to be used for the purpose of any business carried on or to be carried on by a taxable person. S.94 of the Act offers some guidance on what constitutes a "business" but does not seek to offer a comprehensive definition. In the case of *Customs and Excise Commissioners v Lord Fisher [1981] STC 238*, the High Court identified six factors that could be used to determine whether an activity constitutes a business. These factors require an examination of whether the activity;
>
> - is a serious undertaking earnestly pursued;
>
> - has a certain measure of substance;
>
> - is an occupation or function actively pursued with reasonable or recognisable continuity;
>
> - is conducted in a regular manner and on sound and recognised business principles;
>
> - is predominantly concerned with the making of taxable supplies for consideration; and

- the supplies were of a kind that, subject to differences of detail, are commonly made by those who seek to profit from them.

19. The Tribunal reviewed all of the evidence and the submissions in this appeal against these six criteria and concluded that:

(1) The hay making activity was being seriously and earnestly pursued by the Appellant. Mr McLaughlin organised this activity using the equipment and machinery that had been in use for many years when the Appellant had a larger active farming business. Mr McLaughlin explained that he and his wife had wanted a farm and had carried on farming for many years and remained committed to it. Hay making was the last part of that activity. The customers of Mr McLaughlin's livery business were the end-users for the hay and there was a clear purpose in producing the hay.

(2) For the same reasons the hay making activity had some substance. The supply of hay is zero rated but is not VAT exempt. However it was a very modest activity carried out on a casual basis.

(3) The hay making activity has been continuous even though it was seasonal. The Appellant undertook this activity regularly and had done so for many years.

(4) The Tribunal accepted that the supply of hay for consideration was a common activity that was frequently carried on for profit in agricultural businesses.

(5) The activity of haymaking was not being conducted in a regular manner and on sound and recognised principles. The hay was grown on land belonging to Mr and Mrs McLaughlin. There was no evidence of the commercial basis on which the Appellant was able to carry out the cutting of hay or any other activity on Mr and Mrs McLaughlin's land. The hay was cut and baled by the Appellant on the machinery it owned and operated. The bales were then sold to Mr McLaughlin for his livery business. He fixed the price that he paid for the hay and decided what costs were borne by the Appellant and which he or another of his businesses bore. The business activities of the Appellant do not appear to give rise to any staff or other costs. Mr McLaughlin appeared to carry out some or all of the activity himself without charge. It is only the Appellants' ownership of the baling equipment and machinery that was used in the hay making activity that justifies a conclusion that it had any involvement at all in this activity. The profitability of the Appellant's hay making activities was entirely dependent on Mr McLaughlin's subjective judgement as to where costs and revenue should be allocated between his various activities.

(6) The Tribunal were not persuaded that the hay making activity was predominantly concerned with making taxable supplies for consideration. The activity raises little revenue, under £500 per year and consists of Mr McLaughlin cutting and baling the hay on his and his wife's land in order to sell it back to the livery business that he owns for onward sale to the clients of the livery business. No invoices had been raised by the Appellant for payment by its only customer and

> no payment had been made for the bales of hay for a number of years until payment was identified as being relevant to the Respondents' view of the input tax claimed by the Appellant. The Appellant's activity was not predominantly concerned with making a profit.
>
> 20. The Tribunal considered the sale during the relevant period of the outbuildings owned by the Appellant for re-development and sought to assess whether this was relevant to its judgement on whether goods or services were being acquired or supplied for the purpose of any business carried on or to be carried on by the Appellant based on the criteria set out above. This activity was clearly a one-off capital transaction. It was a VAT exempt transaction. The Tribunal was not provided with any evidence that this activity formed a part of any continuous or regular business or was concerned with the making of taxable supplies or other trading activity.
>
> **Conclusion**
>
> 21. The Tribunal concluded in all of the circumstances of this case that the evidence and submissions established that the Appellant's activities during the relevant period had been confined to haymaking and the sale of buildings and that these activities had not been conducted on a basis that followed sound and recognised business principles or on a basis that was predominantly concerned with the making of taxable supplies for consideration. As a consequence the Appellant was not operating as a business during the relevant period.

*The submissions of the parties*

38. For Babylon, Mr Baig argued that the FTT made a number of errors of law in concluding that Babylon was not carrying on a business or economic activity. Babylon's grounds of appeal were that:

(1) The FTT had failed to take into account Article 9(1) of the PVD.

(2) The correct approach to the interpretation of "business" is that set out in *Wakefield College v HMRC* [2018] EWCA Civ 952 ("*Wakefield*").

(3) Even on a proper analysis of the *Lord Fisher* indicia, Babylon was carrying on a business.

(4) The FTT erred in taking into account the number and scale of transactions in determining whether Babylon was carrying on an activity.

39. For HMRC, Ms Belgrano accepted that *Wakefield* set out the correct approach to the determination of whether a person was carrying on a business for VAT purposes. She submitted, however, that although the FTT did not refer to *Wakefield*, the application of the approach in that case would have led to the conclusion reached by the FTT. Therefore, she contended, the FTT did not err, or, if it did, the error was

immaterial. Ms Belgrano submitted that, according to *Wakefield*, the determination of whether Article 9 is satisfied requires an examination of "all the objective circumstances", and, in particular, the activity must be carried out on a continuing basis for the purposes of obtaining income therefrom in order for it to be a business. The relevant CJEU authorities lend additional support to the conclusion that, on the facts found, Babylon did not satisfy this test.

*Discussion*

40. In determining whether a person is carrying on an economic activity (as Article 9 expresses it) or a business (as the VATA expresses it), the most useful guidance remains that given by the Court of Appeal in *Wakefield*[1]. The Court's analysis of certain of the leading CJEU authorities is particularly instructive given that, read in isolation, those authorities can be somewhat opaque.

41. As the Court explained in *Wakefield*, the main issue of law in that case was the effect of the decision of the CJEU in *Geemente Borsele v Staatssecretaris van Financiën, Staatssecretaris van Financiën v Geemente Borsele* (Case C-520/14) EU:C:2016:334, [2016] STC 1570 ("*Borsele*") on earlier decisions, particularly the decision of the CJEU in *European Commission v Finland* (Case C-246/08) EU:C:2009:671, [2009] ECR I-10605 ("*Finland*") and the decision of the Court of Appeal in *HMRC v Longridge on the Thames* [2016] EWCA Civ 930, [2016] STC 2362, [2017] 1 WLR 1497 ("*Longridge*").

42. In *Borsele,* which concerned a supply of services, the Advocate General set out a two-stage process for determining the existence of a business, namely (a) the presence of a supply for consideration, and (b) the fact that the activity was carried on for the purpose of obtaining income on a continuing basis. The CJEU accepted this approach, stating that in considering the second limb of this approach, all the circumstances of the supply must be considered:

> 30. Comparing the circumstances in which the person concerned supplies the services in question with the circumstances in which that type of service is usually provided may therefore be one way of ascertaining whether the activity concerned is an economic activity (see, by analogy, *Enkler v Finanzamt Homburg* (Case C-230/94) EU:C:1996:352, [1996] STC 1316, [1996] ECR I-4517], para 28).
>
> 31. Other factors, such as, inter alia, the number of customers and the amount of earnings, may be taken into account along with others when that question is under consideration (see, by analogy, *Enkler*, para 29).

43. The Court of Appeal in *Wakefield* explained that in its earlier decision in *Finland*, the CJEU "approached the issue by way of the two-stage process made clear in

[1] The two terms have the same meaning, since the VATA implements the PVD: *Wakefield* at [9].

*Borsele*, although that is not entirely clear from a reading of the English version of the judgment alone"[2].

44. In *Wakefield*, the position was summarised by David Richards LJ as follows:

> THE PRESENT STATE OF THE LAW
>
> [51] There was a good deal of agreement between the parties on the correct legal approach, following these cases, particularly *Borsele*. What follows is my analysis of the current legal position, but I will indicate any disagreements between the parties.
>
> [52] Whether there is a supply of goods or services for consideration for the purposes of art 2 and whether that supply constitutes economic activity within art 9 are separate questions. A supply for consideration is a necessary but not sufficient condition for an economic activity. It is therefore logically the first question to address. It requires a legal relationship between the supplier and the recipient, pursuant to which there is reciprocal performance whereby the goods or services are supplied in return for the consideration provided by the recipient: see, for example, the judgment in *Borsele* at para 24. That is what is meant by 'a direct link' between the supply of the goods or services and the consideration provided by the recipient: see *Borsele* at para 26 and contrast *Apple and Pear Development Council v Customs and Excise Comrs*. There is no need for the consideration to be equal in value to the goods or services. It is simply the price at which the goods or services are supplied. This requirement was satisfied in both *Finland* and *Borsele*.
>
> [53] Satisfaction of the test for a supply for consideration under art 2 does not give rise to a presumption or general rule that the supply constitutes an economic activity. However, as Mr Puzey for HMRC pointed out, the Advocate General remarked in her opinion in *Borsele* at para 49, 'the same outcomes may often be expected'.
>
> [54] Having concluded that the supply is made for consideration within the meaning of art 2, the court must address whether the supply constitutes an economic activity for the purposes of the definition of 'taxable person' in art 9. The issue is whether the supply is made for the purposes of obtaining income therefrom on a continuing basis. For convenience, the CJEU has used the shorthand of asking whether the supply is made 'for remuneration'. The important point is that 'remuneration' here is not the same as 'consideration' in the art 2 sense, and in my view it is helpful to keep the two terms separate, using 'consideration' in the context of art 2 and 'remuneration' in the context of art 9.
>
> [55] Whether art 9 is satisfied requires a wide-ranging, not a narrow, enquiry. All the objective circumstances in which the goods or services are supplied must be examined: see the judgment in *Borsele* at para 29. Nonetheless, it is clear from the CJEU authorities that this does not include subjective factors such as whether the supplier is aiming to

[2] *Wakefield* at [33].

> make a profit. Although a supply 'for the purpose of obtaining income' might in other contexts, by the use of the word 'purpose', suggest a subjective test, that is clearly not the case in the context of art 9. It is an entirely objective enquiry.
>
> [56] In describing the relationship between the supply and the charges made to the recipients in the context of art 9, the CJEU has used the word 'link'. In Finland at para 51, the court concluded that 'it does not appear that the link between the legal aid services provided by public offices and the payment to be made by the recipients is sufficiently direct … for those services to be regarded as economic activities'. Likewise, in *Borsele* at para 34, the court adopted precisely those words in concluding that the provision of the school transport was not an economic activity.
>
> [57] Mr Prosser QC for the College submitted that whether there was 'a sufficiently direct link' between the services and the charge made was an important circumstance, while Mr Puzey submitted that 'direct link' does not feature in the analysis.
>
> [58] I regard this as a largely semantic point. The word 'link', whether 'sufficient' or 'direct', is used as no more than shorthand to encompass the broad enquiry as to whether the supply is made for the purpose of obtaining income. It is not a separate test, or one of the factors to be considered when addressing the central question. For my part, I think it is apt to cause some confusion to use the same word for both art 2 and art 9 and I have not myself found it particularly helpful or illuminating in considering whether there exists an economic activity.
>
> [59] Each case requires a fact-sensitive enquiry. While cases concerning the supply of legal aid services or school transport will provide helpful pointers to at least some of the factors relevant to the supply of subsidised educational courses, there is not a checklist of factors to work through. Even where the same factors are present, they may assume different relative importance in different cases. The CJEU made clear in *Borsele* at para 32 that it was for the national court to assess all the facts of a case.

45. The decision of the Court of Appeal in *Longridge* was apparently given without the benefit of either the Advocate General's opinion or the CJEU's judgment in *Borsele*[3]. The leading judgment was given by Arden LJ, who concluded that the domestic authorities and the relevant CJEU authorities had come to diverge on the correct approach. Importantly for this appeal, Arden LJ made the following observations in relation to the use of the criteria in *Lord Fisher* in determining whether a business or economic activity exists:

> [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

[3] *Wakefield* at [41].

> on whether there was a sufficiently direct link between the payment and the service. The *Fisher* criteria…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 of 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.
>
> …
>
> [89] The differences between the test of direct link and the *Fisher* criteria are material…

46. In *Longridge*, Morgan J commented as follows in relation to criterion (e) in *Lord Fisher* (the predominant concern of the activity):

> [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*[4], 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.

47. Turning to Babylon's grounds of appeal on this issue, Mr Baig's point in relation to Article 9 was that it is widely expressed, and refers specifically to "agricultural activities" as being included within economic activity. We agree that it would have been helpful if the FTT had referred to Article 9, but we do not consider that its failure to do so led it into any error of law. There was nothing in the FTT's reasoning to suggest that it did not consider that in principle agricultural activities could not amount to an economic activity. As *Wakefield* makes clear, whether a person is carrying on economic activity in any particular case depends on the application of the approach developed by case law to the facts.

48. However, we consider that the FTT did err in its approach to the applicable principles in determining whether Babylon was carrying on a business or economic activity. The FTT applied the indicia set out in 1981 in *Lord Fisher* as if they were an exhaustive checklist, and failed to acknowledge or consider the significant developments in European and domestic case law discussed in *Wakefield*. Its application of (and only of) the *Lord Fisher* criteria led directly to its conclusion (at [21]) that Babylon's activities "had not been conducted on a basis that followed sound and recognised business principles or on a basis that was predominantly concerned

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[4] *Wellcome Trust Ltd v Customs and Excise Comrs* (Case C-155/94) [1996] STC 945, [1996] ECR I-3013, [1996].

with the making of taxable supplies for consideration. As a consequence the Appellant was not operating as a business during the relevant period."

49. The FTT's approach is understandable given that notwithstanding that HMRC must have been aware of the decisions in *Borsele*, *Finland*, *Wakefield* and *Longridge*, HMRC based its own analysis of whether Babylon was carrying on a business simply on the basis of the *Lord Fisher* criteria, and indeed submitted to the FTT that this was the correct approach.

50. In his oral submissions, Mr Baig made an attempt to distinguish those later decisions on the basis that they largely concerned "not for profit" activities, whereas in the case of a private company (such as Babylon) there was a strong presumption that it was carrying on an economic activity. We reject that argument; those authorities are clearly enunciating general principles, and the question of whether any entity is carrying on an economic activity turns on all the facts.

51. Having found that the FTT's decision "involved the making of an error on a point of law", we may (but need not) set it aside. If we set it aside we may either remake it or remit it to the FTT: section 12 Tribunals, Courts and Enforcement Act 2007.

52. Ms Belgrano submitted that any error of law in this respect was immaterial to the FTT's decision, so we should refuse to set the decision aside. This, she argued, would be consistent with the approach set out by the Court of Appeal in *Patrick Degorce v HMRC* [2017] EWCA Civ 1427, where it stated at [94]-[95]:

> 94. The appeal from the FTT to the Upper Tribunal was likewise confined to an appeal on any point of law arising from the FTT Decision: see section 11(1) of TCEA 2007. Section 12 then sets out the powers of the Upper Tribunal, in deciding an appeal under section 11, if it finds that the decision of the FTT "involved the making of an error on a point of law". The Upper Tribunal "may (but need not) set aside the decision" of the FTT, and if it does so, it must either remit the case to the FTT with directions for its reconsideration, or itself re-make the decision. If the Upper Tribunal decides to re-make the decision, it has the further powers set out in subsection (4), including power to "make such findings of fact as it consider appropriate".
>
> 95. I would accept the submission of Mr Gibbon that, if the Upper Tribunal finds an error of law to have been made, it then has a broad discretion whether or not to set aside the decision of the FTT. That is the clear import of the words "may (but need not) set aside", and in my view it would be wrong in principle to interpret the scope of this discretion by reference to the previous law on tax appeals under TMA 1970. TCEA 2007 set up a new tribunal structure, and the provisions of section 12 apply to all chambers of the Upper Tribunal, not merely to the Tax & Chancery Chamber. That said, however, I consider that a test of materiality will still have a crucial, and usually decisive, role to play in the decision of the Upper Tribunal whether or not to set aside the decision of the FTT, and likewise in the decision of this court if an error of law by the Upper Tribunal is established. At least in cases of the present type, I find it difficult to envisage circumstances in which

> the Upper Tribunal could properly leave the decision of the FTT to stand, once it is satisfied that the error of law might (not would) have made a difference to that decision. As a taxpayer, Mr Degorce is entitled to be taxed according to the law, and if an error of law is detected in the FTT's decision, which is material in the sense I have mentioned, justice will normally require nothing less than that the decision be set aside. Conversely, if an error of law is made, but the Upper Tribunal is satisfied that it was immaterial, there will be no injustice to Mr Degorce in allowing the decision of the FTT to stand. Similarly, if we were to take the view that the Upper Tribunal erred in law in the task which it had to perform, but that the errors could have made no difference to its decision to dismiss Mr Degorce's appeal, there would again be no injustice if his appeal to this court were in turn dismissed.

*Decision*

53. We have concluded that, taking into account the formulation of materiality expressed in *Degorce*, the FTT's decision *might* have been different had it applied the correct legal test. The Court of Appeal in *Longridge* explained that, while the criteria in *Lord Fisher* had a role to play in addressing the existence of an economic activity, they could not displace the "direct link" test set out in the CJEU jurisprudence, which is materially different. Moreover, in its decision the FTT relied on its conclusion that Babylon failed two of the six *Lord Fisher* criteria, one of which was the "predominant concern" test, which Morgan J in *Longridge* described as having become unhelpful and potentially misleading. The error of law was therefore material.

54. As a result, we conclude that the FTT's decision on this issue should be set aside.

55. We consider that it is appropriate to remake the decision rather than to remit it to the FTT. There is no dispute as to the primary facts found by the FTT, and we have sufficient evidence to determine the issue. Both counsel agreed with this approach, should we determine to set the decision aside, and, to his credit, Mr Baig pointed out that this would also be a proportionate course to adopt.

56. Applying the two-stage approach set out in *Borsele* and endorsed in *Wakefield*, the first stage is to ask whether, in relation to the relevant period, Babylon made a supply of goods or services for consideration within the meaning of Article 2 of the PVD. HMRC accept that this condition was satisfied.

57. Turning to whether or not Babylon was carrying on an economic activity during the relevant period, while the *Lord Fisher* criteria "have a role to play"[5], the more appropriate starting point is to consider whether Babylon's supplies were made for the purposes of obtaining income therefrom on a continuing basis. This is an entirely objective enquiry. Another way of expressing the question is to ask whether there was a direct link between the services supplied by Babylon and the payment it received for them.

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[5] *Longridge* at [86].

58. At [19(3)], the FTT found that Babylon's haymaking activity was continuous even though it was seasonal, and had been conducted regularly for many years. In light of this finding, HMRC accept that the activity was carried on a continuing basis.

59. Therefore, the only question is whether there was a direct link between Babylon's supplies and the price it received for them, such that the activity was "carried out for the purposes of obtaining income therefrom".

60. As the Court in *Wakefield* emphasised, this is a wide-ranging enquiry, in which all the objective circumstances must be examined[6]. Mr Baig argued that the FTT had erred in law by taking into account in its evaluation the number and scale of transactions entered into by Babylon. He relied on a passage[7] from the CJEU's decision in *Slaby and Others v Dyrektor Izby Skarbowej w Warszawie* (C-181/10), but all that the Court says there is that "the number and scale of the sales carried out…are not in themselves decisive". That statement is plainly correct, but it does not mean that the number and scale of transactions is not a relevant factor to be taken into account.

61. On the facts found by the FTT, we have concluded that Babylon was not carrying on an economic activity during the relevant period. We have reached this clear conclusion for several reasons.

62. First, the FTT was undoubtedly correct to conclude (at [19(5)]) that Babylon's activity was not being conducted in a regular manner and on sound and recognised principles. Indeed, it was not clear on what basis Babylon even had title to the hay it sold to Mr McLaughlin, given that the land on which the hay was grown belonged to Mr McLaughlin or to Mr and Mrs McLaughlin, and not Babylon: [8(7)]. As the FTT observed, there was "no evidence of the commercial basis on which the Appellant was able to carry out the cutting of the hay or any other activity on Mr and Mrs McLaughlin's land". We would add that nor was there any evidence of the legal basis on which they could do so. Babylon did own the machinery used to cut and bale the hay, and the FTT stated that it was only this fact which justified a conclusion that it had any involvement at all in the activity. The FTT found that Babylon's activities "do not appear to give rise to any staff or other costs".

63. Second, we consider that there was no direct link between Babylon's activities and the income which it received. Mr McLaughlin was Babylon's only customer. There was no evidence that it made any efforts to obtain other customers. Critically, Babylon's income was not determined, in whole or even in part, by the value of Babylon's supplies, or by reference to Babylon's business costs. Mr McLaughlin "fixed the price that he paid for the hay and decided what costs were borne by the

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[6] *Wakefield* at [55].

[7] At [37].

Appellant and which he or another of his businesses bore"[8]: [19(5)]. As the FTT found:

> The profitability of the Appellant's hay making activities was entirely dependent on Mr McLaughlin's subjective judgement as to where costs and revenue should be allocated between his various activities.

64. The CJEU in *Borsele* referred to a lack of symmetry between operating costs and income from supplies as indicative of the absence of a "genuine link" between the services or goods supplied and the price received.

65. Third, a number of other factors are consistent with the conclusion that Babylon's activities were not carried out for the purposes of obtaining income therefrom, including the following:

> (1) Babylon raised no invoices for payment and no payment for the hay was made for a number of years "until payment was identified as being relevant to [HMRC's] view of the input tax claimed by [Babylon]": [19(6)].
>
> (2) There was no evidence that Babylon maintained any insurance in respect of its activities.
>
> (3) Babylon had only one customer, and its income during the relevant period was only £440 per annum.

66. Finally, it is relevant in assessing economic activity to consider whether the relevant person is a market participant: see *Wakefield* at [27] and *HMRC v Pertemps Limited* [2019] UKUT 234 at [57]. Here, Babylon did not carry on its activities on the general market and in any event did not carry on activities on general market terms.

67. In relation to the *Lord Fisher* criteria, HMRC did not seek to appeal against the FTT's findings that Babylon satisfied four of the six criteria. We consider that, in light of our reasoning above, the FTT's conclusions that Babylon failed the fifth and sixth criteria were correct.

68. For these reasons, in remaking the FTT's decision on this issue, we consider that Babylon was not carrying on an economic activity during the relevant period, so its appeal must fail.

**Disposition**

69. The appeal is dismissed.

[8] There was no evidence of Babylon's costs of carrying out its haymaking activity.

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**MR JUSTICE SNOWDEN**
**JUDGE THOMAS SCOTT**

**RELEASE DATE: 8 September 2021**