[2019] UKFTT 658 (TC)

TC07433

VAT - Land & property - Group 5 sch 8 VATA 1994 - educational charity - whether college used buildings otherwise than in course or furtherance of a business - whether building constituted a qualifying annexe

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/03448

BETWEEN

MADINATUL ULOOM AL ISLAMIYA **Appellants**

-and-

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

TRIBUNAL: JUDGE PETER KEMPSTER
MRS MARYVONNE HANDS

Sitting in public at Centre City Tower, Birmingham on 4 September 2019

Mr Julian Potts (Landmark PT Ltd) for the Appellant

Mr Dan Hopkins (HMRC Solicitor's Office and Legal Services) for the Respondents

DECISION

INTRODUCTION

1. The Appellant ("**the College**") appeals against a review conclusion by the Respondents ("**HMRC**") dated 23 April 2018 that certain supplies of construction services received by the College do not qualify for zero-rating for VAT purposes.

LEGISLATIVE PROVISIONS

2. Article 2 Principal VAT Directive (2006/112/EC) ("**PVD**"), provides, so far as relevant:

> "1. The following transactions shall be subject to VAT: …
>
> (*c*) the supply of services for consideration within the territory of a Member State by a taxable person acting as such; …"

3. Article 9 PVD provides, so far as relevant:

> "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. …"

4. Section 4 VAT Act 1994 ("**VATA**") (scope of VAT) provides:

> "(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."

5. Section 94(1) VATA (meaning of business) provides: "In this Act "business" includes any trade, profession or vocation."

6. Section 30(2) VATA (zero-rating) provides:

> "A supply of goods or services is zero-rated by virtue of this subsection if the goods or services are of a description for the time being specified in Schedule 8 or the supply is of a description for the time being so specified."

7. Group 5 sch 8 VATA 1994 (Construction of buildings etc) provides, so far as relevant:

> "Item 2: The supply in the course of the construction of —
>
> (*a*) a building … intended for use solely for … a relevant charitable purpose;
> …
>
> 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.
>
> …

Item 4: The supply of building materials to a person to whom the supplier is supplying services within item 2 or 3 of this Group which include the incorporation of the materials into the building (or its site) in question.

…

Note 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; …

…

Note 11: Where, a service falling within the description in items 2 or 3 is supplied in part in relation to the construction or conversion of a building and in part for other purposes, an apportionment may be made to determine the extent to which the supply is to be treated as falling within items 2 or 3.

…

Note 16: For the purpose of this Group, the construction of a building does not include—

(*a*) the conversion, reconstruction or alteration of an existing building; or

(*b*) any enlargement of, or extension to, an existing building …; or

(*c*) subject to Note 17 below, the construction of an annexe to an existing building.

Note 17: Note 16(*c*) above shall not apply where the whole or a part of an annexe is intended for use solely for a relevant charitable purpose and

(*a*) the annexe is capable of functioning independently from the existing building; and

(*b*) the only access or where there is more than one means of access, the main access to:

(i) the annexe is not via the existing building; and

(ii) the existing building is not via the annexe.

Note 18: A building only ceases to be an existing building when:

(*a*) demolished completely to ground level; or

(*b*) the part remaining above ground level consists of no more than a single facade or where a corner site, a double facade, the retention of which is a condition or requirement of statutory planning consent or similar permission.

…"

AUTHORITIES

8. The following authorities were cited and are referred to by the abbreviations given below.

Case	Court	Citation	Abbreviation
Gateshead Jewish Nursery v HMRC	FTT	[2014] UKFTT 685 (TC)	

St Brendan's Sixth Form College v HMRC	FTT	[2018] UKFTT 128 (TC)	
Yeshivas Lubavitch Manchester v HMRC	FTT	[2019] UKFTT 427 (TC)	*Yeshivas Lubavitch*
Roman Catholic Diocese of Westminster v HMRC	FTT	[2018] UKFTT 0522 (TC)	*Westminster*
Macnamara v HMRC	VAT Tribunal	[1999] BVC 4,092	*Macnamara*
HMRC v J3 Building Solutions Ltd	UT	[2017] UKUT 253 (TCC)	*J3*
Capernwray Missionary Fellowship of Torchbearers v HMRC	UT	[2016] STC 172	
CEC v Morrison's Academy Boarding Houses Association	Court of Session	[1978] STC 1	*Morrison's Academy*
CCE v Yarburgh Children's Trust	High Court	[2002] STC 207	*Yarburgh*
CCE v St Paul's Community Project Ltd	High Court	[2005] STC 95	*St Paul's*
Cantrell (t/a Foxearth Lodge Nursing Home) v CCE	High Court	[2000] STC 100	*Cantrell No 1*
Cantrell (t/a Foxearth Lodge Nursing Home) v CCE (No 2)	High Court	[2003] STC 486	*Cantrell No 2*
Wakefield College v HMRC	Court of Appeal	[2018] STC 1170	*Wakefield*
HMRC v Longridge on the Thames	Court of Appeal	[2016] STC 2362	*Longridge*
European Commission v Finland (Case C-246/08)	CJEU	[2009] ECR I-10605	*Finland*
Gemeente Borsele v Staatssecretaris van Financien (Case C-520/14)	CJEU	[2016] STC 1570	*Borsele*

FINDINGS OF FACT

9. We had a bundle of documents including photographs and plans of the relevant building works, and correspondence from the architect, Mr Philip Chelverton. The Headmaster of the College, Mr Abdullah Memi, provided a witness statement and was present to answer questions from the Tribunal.

10. The College is a registered charity which operates a residential Islamic faith school near Kidderminster. Boys aged 11 to 16 follow the national curriculum and also receive teaching in Islamic studies; there are around 207 full-time boarders for a 40 week year and 16 day students. Older students up to age 24 follow Islamic studies to equip them to become scholars within the Muslim community; there are around 23 such students. The College values good conduct and behaviour, and strives to maintain a sense of community and family within the College. The College is OFSTED inspected.

11. The constitutional objects of the College are:

> "To promote the advancement of education and the advancement of the Islamic faith by the establishment of an institution in particular for the purposes of:-
>
> A) training adults and children for the Islamic priesthood and for the further education of suitably qualified Islamic priests.
>
> B) making adequate provision for higher studies of the Holy Qur'an, Hadith, Fiqah, Tafseer, Islamic history and philosophy.
>
> C) assisting such persons as aforesaid to engage in missionary activities designed to spread the Islamic faith to any part of the world.
>
> D) otherwise achieving the objects of the charity as the trustees reasonably think fit."

12. Admission to the College is selective. Applicants complete a form which gathers information including details of Islamic education and medical background, and includes a page of "Rules and Regulations" which deal with matters such as the admission test, attendance at classes, the need to follow Islamic laws (including prayers, dress and social affairs), examinations, and leave from the College. An applicant who is successful at interview is admitted as a pupil and is charged a £200 administration fee and, for pupils in Years 7-11, a further £200 to assist in the teaching of his secular education. Pupils pay £300 per month as boarders or £170 per month as day pupils. Admission of students is not based on their ability to pay; students who are unable to pay are not obliged to do so; where arrears of fees were unpaid for good reason, the College would usually forgive the debt and allow the student to continue.

13. The level of fees is fixed by the College trustees by reference to the charges made by other residential Islamic faith schools. The running costs of the College exceed the payments received from pupils. The balance is met by donations from the wider faith community (ie not

necessarily the families of pupils). In 2015 fees from pupils accounted for 53% of total receipts, and in 2016 61%.

14. The College occupies a 22 acre site, acquired in the 1980s. There is an ongoing programme of maintenance and improvements to the College buildings. OFSTED reports had commented on the desirability of updating the buildings. In 2015 it was decided to demolish one wing of the College's existing buildings and erect a new hall. One of the main aims was to create a space for the annual graduation ceremonies which were hitherto located in a temporary marquee hired and placed in the College grounds. Planning permission was granted on 4 April 2016 for, "Demolition of existing halls to rebuild new multi-functional examination & lecture hall with recreational facilities within and the erection of perimeter fencing." By planning conditions: use was confined to the educational activities of the College; use for general public worship, prayer or assembly was forbidden; events where family and guests were invited (graduation ceremonies, induction days and open days) were limited to ten per annum.

15. The building ("**the Hall**") is a steel framed structure approximately 50 metres long by 31 metres in width and extending to 7.7 metres high at its ridge – approximately the same size an Olympic swimming pool – and includes a mezzanine floor about 5 metres wide that wraps around two sides of the Hall. The Hall abuts the retained adjacent College buildings on one side; the separating wall has five fire doors which were not in the original design but were included after consultation with the Fire Officer; the fire doors will normally be closed and can be opened only from the Hall side by push-bar mechanisms. The Hall has a dedicated entrance from the outside car parking area. The Hall is serviced by its own electrical supply and heating/ventilation system. Toilet and welfare facilities are located externally to the Hall, for cultural and religious reasons. The exterior design of the Hall references the Islamic heritage of the College with decorative band courses of brickwork and shaped windows.

APPELLANT'S CASE

16. Mr Potts submitted as follows for the College.

17. Several building contractors had been used, and VAT had been charged by the suppliers. The College had also made some direct purchases of materials, for which "DIY builder" reclaims would be made in due course (s 35 VATA refers).

18. The two questions for the Tribunal are:

(1) Whether the Hall is a qualifying annexe within Note 17.

(2) Whether the Hall is used solely for a relevant charitable purpose (as defined).

Qualifying Annexe

19. The Hall was a new building. It was not a conversion, reconstruction or alteration of the old buildings – those had been demolished to ground level and thus ceased to exist. Similarly, it was not an enlargement of or extension to the old buildings - HMRC were incorrect to say that part of the Hall (the mezzanine level) extended over the existing buildings; that was a misreading of the architect's drawings; in fact the separating wall ran the full height of the Hall. The purpose of the Hall was not to rehouse previous facilities but instead to provide a new facility for religious studies, recreational activities, and large gatherings such as graduation ceremonies (which can attract up to 3,000 guests).

20. The Hall is a large single space roughly the size of an Olympic swimming pool in a double storey open span building. The Hall is adjoined to an existing single storey building that comprises a number of classrooms, offices, stores, prayer hall/dining room. The potential uses are quite different due to the scale and design of the Hall. The relevance of the demolished structures is less as the annexe is to the existing retained building not the one that has now been demolished (per *J3*). The physical characteristics of the Hall clearly give opportunities for different uses to those possible in the existing buildings.

21. The planning permission and the information included therein is largely irrelevant in terms of potential use of the space – HMRC place much reliance on this point whereas *Cantrell* clearly steers one away from this approach.

22. The Hall is formed from a steel frame commonly used for industrial units and is quite distinct in construction methodology from the adjacent buildings – the buildings are physically linked but the different construction styles mean there is no integration (other than the shared wall containing the fire doors.)

23. The fact the College has continued to run successfully without the use of the incomplete building again points to a degree of independence between the two areas.

24. The Hall is an annexe within Note 17 – it is capable of independent functioning, and the main access is not via the existing buildings. Access is via the new external entrance; the fire doors are for emergency use only, would normally be closed, and could only be opened from the Hall side. The Hall has separate electrical and heating facilities; there is no reliance on the other College buildings.

Relevant Charitable Purpose

25. There was no commerciality in the operation of the College. The position of the College could be distinguished from the facts in the recent Court of Appeal case of *Wakefield* in several respects:

> (1) Unlike *Wakefield* the activities of the College are not entirely focused on the provision of a wide variety of college courses for school leavers and adults. The College focuses on Islamic Studies and providing a suitable environment for prayers and worship and living away from home.
>
> (2) Unlike *Wakefield* <u>all</u> charges for attendance at the College are set at the lowest level possible and do not cover the costs of operating the College. The level of costs is less than those that a typical family raising a child might incur. The charges allow for food and boarding which are provided elsewhere on the site, so is not relevant to the use of the Hall in itself. There are no other income streams and no grant funding is received from the Government for the College. It is also not possible for the College to earn outside income from the Hall due to the planning conditions imposed on it.
>
> (3) The charges are at a level such that there is not a barrier to entry for students from less well-off backgrounds. There is a philosophy of discounting charges and not pursuing those who cannot pay, and a student would not be excluded for non-payment. The charges also do not vary whether the student is 11 years old or 24 years old despite the varying requirements that arise at different ages. The fees charged were around 10% of those of other independent schools.

(4) The College has no website or prospectus like almost all other colleges and makes no attempt to promote its offering as is traditional for educational establishments. As such the College does not attempt to put itself into any specific market place for promoting its offering of training students to be scholars in Islamic matters. It is not possible (like *Wakefield*) to say the College is "a typical participant in that market" or that "it provided courses …. on anything other than a typical basis" even "allowing no doubt for some variations between different institutions". It is reasonable to say the College is atypical in its behaviour and general operation. The College is not operated in a way that resembles a typical educational establishment and this points to the use of the Hall not being for any business activity.

26. The College's position was similar in many respects to that of the school in *Yeshivas Lubavitch*, where the Tribunal recently concluded that zero-rating was applicable.

27. The following factors support the use of the Hall as not "for remuneration":

(1) The College is run on a not-for-profit basis.

(2) The sole activity of the College is the delivery of its charitable objects, not generating income to deliver these objects.

(3) The College has a high level of donations compared to other educational establishments.

(4) The donations are not "remuneration".

(5) The College does not participate in a market in the normal way that a college might be expected to; it cannot be said to be a "typical participant"; it has no website or brochure acting as a "shop window" for its offering; it receives no government grants or funding; it prioritises its teaching over all over factors (as commented on in its OFSTED reports) and as such the College is in a position that is "atypical".

(6) The Hall cannot be hired to outside public so cannot be used to generate income

(7) Students spend in excess of 50 hours per week in prayers or worship – these activities which will occur in the Hall cannot be said to be an "economic activity".

(8) The factors in the binding decisions of *Yarburg*h and *St Paul's* are still relevant as the narrow *Longridge* approach is no longer seen as valid.

(9) HMRC have a policy of limiting the application of *Yarburgh* and *St Paul's* to nurseries or creches run by a charity. This is despite the fact that the operation of a nursery is similar to that of the College in terms of delivering its charitable objects, having trained teachers and a need to care for the welfare of attendees. The only difference is the age of the recipients attending the College.

(10) The College is also similar to *Yarburgh* in that charges are kept to a minimum so students from financially disadvantaged backgrounds are not prevented from attending and where students or their families cannot pay they are not excluded from attending the College.

(11) The charges made are not sufficient for the College to break even. Without the donations the College would run at a loss and would quickly cease to exist.

(12) The charges are fixed for all students irrespective of the age and needs of that student – there is no direct relationship between the charge and specific student costs

(13) The ability of the College to exist and carry out its charitable purpose depends on donations. The supply of educational services were not made for the purposes of obtaining income therefrom on a continuing basis. The charge enabled the educational services to be supplied but the charges were not sufficient for those purposes.

RESPONDENTS' CASE

28. Mr Hopkins submitted as follows for HMRC.

29. HMRC considered that:

(1) The Hall was not designed solely for use for a relevant charitable purpose (as defined), in that the College operates in the course or furtherance of a business for the purposes of VAT; and

(2) The works do not qualify as the construction (as defined) of a building, in that they constitute the conversion, reconstruction, alteration, enlargement or extension of an existing building; and

(3) Even if the works created an annexe (rather than a conversion etc of an existing building), they did not meet the specific tests in Note 17.

30. Even if the College were successful in its appeal, HMRC would be unable to repay any VAT incorrectly charged to the College; as a third party appealing the rate charged for services undertaken by a supplier, the College will be required to liaise with its contractor and, subject to time limits for VAT error corrections, may need to submit a s 80 claim to protect its position.

Not a relevant charitable purpose

31. The College is a fee-paying school and thus engaged in the course or furtherance of a business for the purposes of VAT. Operating as a fee-charging school to students demonstrates a direct link between the service which the feepayers receive and the payment they make for a supply of education. This is economic activity in the course of a business and demonstrates that the supply was for consideration for the purposes of s 4. Article 9 defines a taxable person as "any person who independently carries out in any place an economic activity whatever the purpose or result of that activity". *Longridge* (following *Finland*) held an activity was considered an economic activity where it is "permanent and is carried out in return for remuneration which is received by the person carrying out the activity". The Court of Appeal agreed with HMRC that there were inconsistencies between UK and ECJ caselaw (including those referenced by the College such as *Yarburgh* and *St Paul's)* and stated that tribunals could not displace the approach required by ECJ caselaw.

32. Education for a fee is a business activity for VAT purposes. A business activity is possible even in the absence of a profit motive. Activities that do not make a profit, or activities where any profit is only used to further the aims and objectives of the charity can still be

business activities. This interpretation was confirmed by the Court of Appeal in *Longridge* which supported the principle that the primary test for economic activities was whether there exists a direct link between the payment and the service provided.

33. The College contends (with reference to both *Longridge* and *Yarburgh)* that its position is "non-business", arguing that as 40% of its income is from "donations" and the 60% balance is not compulsory and deemed a "contribution" not a "fee", then providing services at a concessionary rate does not amount to economic activity. The distinguishing features in both *Yarburgh* and *St Paul's* were that the taxpayers were concerned with social concern for the welfare of disadvantaged children, lack of commerciality in setting charges and the intention to simply cover costs. HMRC have since adopted those decisions but restricted the application to crèche and preschool activity.

34. HMRC do not accept that any part of the fee charged for education at the College is a donation for the purposes of VAT; a donation by definition must be freely given with nothing received in return. The fees are the making of supplies for consideration on a regular and ongoing basis. There is no evidence that the College's activities are pursued otherwise than in the course or furtherance of business, nor is the provision of services made to preschool or nursery-age children (as per the *Yarburgh* and *St Paul's)*. In *Morrison's Academy* the Inner House held that the activity amounted to the carrying on of a business because it was carried on in a business-like way and with reasonable continuity; it did not matter that there was no profit motive; the activity was regular, conducted on sound and recognised business principles, with a structure which can be recognised as providing a familiar constitutional mechanism for carrying on a commercial undertaking.

35. Any element of fees paid by students for their education, including trivial amounts, results in economic activity causing the supply to fail the test of satisfying the conditions for solely relevant charitable purposes (as defined).

Not construction

36. The Tribunal in *Westminster* had summarised the correct approach on this issue.

37. The primary test of whether a building is an annexe, extension or enlargement is a physical one. Determining which category of construction a new development falls within hinges on the level of integration between the old and the new. On the basis of the building plans provided and the extensive information on the local authority planning portal, the project is best summarised as part demolition of an existing building and subsequent reconstruction.

38. The VAT legislation does not provide a definition of the term 'annexe'. In *Macnamara* the VAT Tribunal stated, "The term annexe connotes something that is adjoined but either not integrated with the existing building or of tenuous integration."

39. The task of analysing and characterising building works is to be approached objectively and by way of considering what existed at the site before and after the construction work was completed. Enlargements, extensions and annexes can be seen as a descending sequence in terms of integration with an existing building. Annexes are the least integrated of the three and whilst they may adjoin an existing building, they are either not integrated or of tenuous integration. An annexe is an adjunct, accessory or supplementary structure.

Not an annexe within Note 17

40. The Hall will provide a lecture theatre, examination/graduation halls, and a recreational area; the Hall merely serves the existing building and in effect becomes part of its everyday functions. The Hall has no independent existence and functions as part of a single, larger structure. The level of integration between the old and new parts of the development is greater than tenuous. For example, the plans illustrate four sets of double doors allowing free access between both structures, and the upper mezzanine floor of the new structure, is in part, located on top of the existing school building. The architect had not been presented as a witness, and his correspondence should be treated with caution. Regular activities for both structures overlap and will be organised in conjunction with each other.

41. The planning conditions state that the Hall must be used as a multi-functional hall and teaching facility and will only be used in operations associated with the existing boarding school and their associated educational events. Thus the Hall is not able to operate independently of the school and fails to satisfy the conditions of Note 17.

CONSIDERATION AND CONCLUSIONS

42. In order to succeed in its appeal the College must satisfy us on two points. The first point is that the Hall must be "a building … intended for use solely for … a relevant charitable purpose" – item 2, group 5 sch 8. That is explained by Note 6: "Use for a relevant charitable purpose means use by a charity … otherwise than in the course or furtherance of a business".

43. If the College satisfies the first point then it must also satisfy the second point, which is that the building works to the Hall constitute "the construction of a building" – item 2 again. Note 16 gives a restrictive definition of "construction": "the construction of a building does not include - (*a*) the conversion, reconstruction or alteration of an existing building; or (*b*) any enlargement of, or extension to, an existing building …; or (*c*) subject to Note 17 below, the construction of an annexe to an existing building." The saving in Note 17 is applicable where, "the whole or a part of an annexe is intended for use solely for a relevant charitable purpose and (*a*) the annexe is capable of functioning independently from the existing building; and (*b*) the only access or where there is more than one means of access, the main access to: (i) the annexe is not via the existing building; and (ii) the existing building is not via the annexe."

44. We take the two points in that order.

Relevant charitable purpose

45. The College is a registered charity. The dispute is whether the Hall is "intended for use solely … otherwise than in the course or furtherance of a business."

46. The issue of whether an educational establishment operates as a "business" (or in the terminology of the PVD, "an economic activity") has been considered in a number of cases. We have, in particular, the recent Court of Appeal decision in *Wakefield*, where the earlier European and domestic caselaw was reviewed.

47. In *Wakefield* the Court of Appeal stated:

> "[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* [(Case 102/86), [1988] STC 221]. 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'."

48. We find that the fees charged by the College to students constitute consideration received for a supply of education services. There is a legal relationship between the College and the students (or for minors, their parents/guardians) pursuant to which there is reciprocal performance whereby in return for the fees the College educates the students. We do not accept the College's submission that the fees are instead some form of donation or contribution to the running of the College, independent of the education received by the students. The College does receive (significant) donations from the faith community but these are distinct in nature from the fees charged to students; that is recognised in the College's financial statements where "income from activities in furtherance of objects" is stated separately from "donations, legacies and similar". Thus there is a supply for consideration within art 2.

49. Moving on from art 2 to art 9, the Court of Appeal stated:

> **"[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 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'. …

> **[58]** … 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."

50. In *Wakefield* the Court of Appeal concluded (at [78]) "that the supply of courses to students paying subsidised fees is an economic activity being carried on by [Wakefield] College." In making our own enquiry in the current case, assessing all the facts, we have come to the same conclusion in respect of the College. In doing so, we consider the following factors particularly important.

51. First, the sole activity of the College is the provision of education (both national curriculum and specialist Islamic teaching) to its fee-paying students. It is clearly not some form of ancillary activity.

52. Secondly, the fees charged are significant in amount, both in respect of each student and in aggregate. The annual fees for a day-boy are around £2,000; in *Wakefield* the Court of Appeal considered (at [81]) annual fees of £896 as significant in amount; while the amount may be less than other local independent schools, it is clearly not a token charge and is more than nominal in amount. The aggregate fees were over £500,000 in 2015 (and also in 2016); in *Wakefield* (again at [81]) the comparable amount was around half that, and was considered significant.

53. Thirdly, the fees make a significant contribution to the cost of providing the education of the students paying the fees. In 2015 fees from students accounted for 53% of total receipts and 93% of total resources expended, and in 2016 61% of total receipts and 98% of total resources expended; in *Wakefield* (at [82]) the comparable amount was 25-30% of costs, and was considered significant.

54. Fourthly, the level of fees is fixed by reference to the charges made by other residential Islamic faith schools. They are not calculated by reference to the cost of providing the education. Nor are they calculated by reference to the means of the students or their families. We accept the College's evidence that it would not pursue unpaid fees where there was good reason for non-payment, and that a pupil would not be excluded solely for arrears of fees; however, that practice is more in the nature of a forgiveness of fees in individual circumstances (akin to a bursary) rather than an overall policy of means-testing.

55. Fifthly, there are other Islamic faith schools providing education for broadly similar fees.

56. All the facts point to the supply of education being made for the purpose of obtaining income.

57. We note that in *Longridge* the Court of Appeal confirmed that an economic activity can exist even though (i) there is no motive of making a profit (Arden LJ at [72]), and (ii) the supplier's predominant concern is to further its charitable objectives (at [94]).

58. We were referred to several decisions of this Tribunal and the VAT Tribunal (none of which are binding on us) but all these bar one predate the decision in *Wakefield* and so cannot be assumed to be consistent with the latest explanation of the law on the relevant point. The exception is *Yeshivas Lubavitch*; that case concerned the provision of a nursery school by a charity and HMRC appear to treat crèches and nurseries as a special case – see Business Brief 02/05 issued after the decisions in *Yarburgh* and *St Paul's* – and that does not match the facts in the current appeal.

59. For the above reasons we conclude that the provision of courses by the College to students is an "economic activity" carried on by it for the purposes of art 9 of the PVD and is therefore a "business" within note 6 group 5 sch 8 VATA, with the result that the relevant charitable purposes test is not met, and so the building works to the Hall do not qualify for zero-rating. Accordingly, the appeal must be dismissed.

Construction of a building

60. Our conclusions at [59] above dispose of the appeal. However, as we heard evidence and argument on the second point and as this Tribunal is the primary fact-finding body, we give our conclusions on the second point in case it should prove relevant if this dispute proceeds further.

61. We adopt the same approach as this Tribunal in *Westminster*:

> "*The Group 5 sch 8 provisions*
>
> 16. By Item 2 the legislation grants zero-rating for the supply in the course of the construction of a building intended for use solely for a relevant charitable purpose, of any services related to the construction other than the services of an architect, surveyor, consultant or supervisor. Item 4 extends the zero-rating to building materials (defined by Note 22) supplied by the supplier of Item 2 services which include incorporation of the materials into the building. Note 6 defines "relevant charitable purpose" and it is common ground that the Diocese satisfies that test in relation to the Church. Note 12 requires the customer to certify the supply relates to such purpose, and the Diocese issued such a certificate.
>
> 17. Notes 16 & 17 adopt a restrictive definition of what construction can qualify for zero rating. "Construction of a building" does **not** include:
>
> - The conversion of an existing building
> - The reconstruction of an existing building
> - The alteration of an existing building
> - Any enlargement of an existing building
> - Any extension to an existing building
> - The construction of an annexe to an existing building **except** where:
>   - the whole or part of the annexe is intended for use solely for relevant charitable purposes, and

- the annexe is capable of functioning independently from the existing building, and
- the only or main access to the annexe is not via the existing building (and vice versa).

18. Note 18 provides that a building only ceases to be an "existing building" when (a) demolished completely to ground level; or (b) the part remaining above ground level consists of no more than a single façade (or double façade on a corner site) the retention of which is a condition or requirement of statutory planning consent or similar permission.

The approach

19. The approach to be followed in cases such as this one is set out in High Court authorities, and I adopt the explanation provided by the Upper Tribunal in *Colchester* [2014] STC 2078 (for clarity, although similar in name this is a different case from *Colchester Sixth Form College* cited above):

> **"[12]** The leading authorities on the meaning of annexe for the purposes of Group 5 of Sch 8 to the VATA are two decisions of the High Court which both relate to the same appellant and supplies. Mr and Mrs Cantrell operated a nursing home which consisted of two units, in separate buildings, accommodating patients with different needs. Having obtained planning consent, Mr and Mrs Cantrell demolished an existing building at their nursing home and built a new one to house elderly severely mentally infirm patients. The new building was completely self-contained. It abutted an extension ('the New Barn') to the other unit's building at one corner; a fire door, which was for emergency use only, connected the two units. HMRC considered that the construction of the new building was standard rated as the enlargement of or an extension or annexe to an existing building. Mr and Mrs Cantrell appealed to the VAT and Duties Tribunal which held that the new structure was an enlargement and might also be an annexe. Mr and Mrs Cantrell appealed to the High Court.
>
> **[13]** In *Cantrell (t/a Foxearth Lodge Nursing Home) v Customs and Excise Comrs* [2000] STC 100 ('*Cantrell No 1*'), Lightman J held that the tribunal had made a material mistake of fact and had taken into account extraneous and irrelevant considerations. He remitted the matter for a rehearing. In his judgment, Lightman J observed, at para 4 of the judgment, that the question was one of fact, not law, to be determined by applying a two-stage test as follows:
>
> > 'The two-stage test for determining whether the works carried out constituted an enlargement, extension or annexe to an existing building is well established. It requires an examination and comparison of the building as it was or (if more than one) the buildings as they were before the works were carried out and the building or buildings as they will be after the works are completed; and the question then to be asked is whether the completed works amount to the enlargement of or the extension or the construction of an annexe to the original building … I must however add a few words regarding how the question is to be approached and answered … First the question is to be asked

> as at the date of the supply. It is necessary to examine the pre-existing building or buildings and the building or buildings in course of construction when the supply is made. What is in the course of construction at the date of supply is in any ordinary case (save for example in case of a dramatic change in the plans) the building subsequently constructed. Secondly the answer must be given after an objective examination of the physical characters of the building or buildings at the two points in time, having regard (inter alia) to similarities and differences in appearance, the layout and how the building or buildings are equipped to function. The terms of planning permissions, the motives behind undertaking the works and the intended or subsequent actual use are irrelevant, save possibly to illuminate the potentials for use inherent in the building or buildings.'

[14] Lightman J remitted the case to the VAT and Duties Tribunal with the guidance at para 12 that:

> '… regard must be only to the physical character of the buildings in course of construction at the date of the relevant supply and that the subjective intentions on the part of Mr and Mrs Cantrell as to their future use, their subsequent use and the terms of the planning permission regulating their future use are irrelevant, save only in so far as they throw light upon the potential use and functioning of the buildings.'

[15] In its second decision, the tribunal found that the new building was an annexe and dismissed the appeal. Mr and Mrs Cantrell appealed again to the High Court. In *Cantrell (t/a Foxearth Lodge Nursing Home) v Customs and Excise Comrs (No 2)* [2003] EWHC 404 (Ch), [2003] STC 486 ('*Cantrell No 2*'), Sir Andrew Morritt V-C defined annexe in Note (16) to Group 5 of Sch 8 as follows:

> '[16] … The reference to an "annexe" in Note (16) when compared with the references to "enlargement" of or "extension" to the existing building introduces a different concept. Thus they may be physically separate so that the connection between the two is by way of some other association. But the Tribunal seems to have thought that any association is enough. In my view that cannot be right. If there were a sufficient association between building A and building B, on the Tribunal's conclusion each would be an annexe of the other. So to hold would ignore the plain inferences to be drawn from the use of the word "annexe".
>
> [17] An annexe is an adjunct or accessory to something else, such as a document. When used in relation to a building it is referring to a supplementary structure, be it a room, a wing or a separate building.'

[16] Sir Andrew Morritt observed, at [20] of the judgment, that:

> 'The judgment of Lightman J was directed primarily to the conclusion of the Tribunal in their first decision that the Phase I works constituted the enlargement of the New Barn. In that context, and in the context of an extension, I understand and

> agree that the relevant considerations are those which arise from the comparison of physical features of the existing building before and after the works in question. But in the case of an alleged annexe the requirement that such a construction should be an adjunct or accessory to another may require some wider inquiry. It is unnecessary to reach any concluded view on that question to decide this case.'
>
> **[17]** The reason why Sir Andrew Morritt considered that it was not necessary for him to reach a concluded view on the issue of whether a wider inquiry was necessary in *Cantrell No 2* is made clear in the next paragraph of the judgment. At [21], Sir Andrew Morritt said:
>
> > 'It is clear from the quotations of the Tribunal's findings I have set out … above and from the plans and photographs put before the Tribunal and me that there is nothing in the physical features of the building … to suggest that it was an adjunct of or accessory to the New Barn so as to be an annexe to the New Barn. Neither contiguity, common ownership nor inclusion in the building complex as a whole does so. If it is legitimate to look more widely than the purely physical characteristics then the medical requirements for the separation of [one] unit from [the other] unit show clearly that the latter is in no sense an adjunct of or accessory to the former.'"

62. The first step (per *Cantrell No 1*) is to conduct an objective examination of the physical characters of the building as it was and as it is after completion of the works, having regard (inter alia) to similarities and differences in appearance, the layout and how the building or buildings are equipped to function; the terms of planning permissions, the motives behind undertaking the works and the intended or subsequent actual use are largely irrelevant.

63. The Hall is physically large – about the size of an Olympic swimming pool. It is built on the site of some former buildings; those previous buildings were completely demolished to ground level. We find there is little similarity between the demolished buildings and the Hall – the old buildings consisted of a number of rooms/spaces and had a number of different educational uses (most of which have been reassigned to other parts of the school buildings that have continued unaffected by the works under consideration) while the Hall is a dedicated single, large, open space for recreational use and for holding events such as graduation ceremonies. Further, the architectural style of the Hall is different from the demolished buildings, being designed to convey certain features of Islamic buildings. We also find there is little similarity between the Hall and the retained school buildings– as already mentioned, the Hall is a dedicated single, large, open space for recreational use and for holding events such as graduation ceremonies, while the retained school buildings perform the wide range of functions to be expected in any school complex. Again, the architectural style of the Hall is different from the retained buildings. We find that the Hall is designed to function differently from both the demolished buildings and the retained buildings.

64. The second step (also per *Cantrell No 1*) is to ask whether (as at the date of supply) the completed works amount to the enlargement of or extension of the existing building, or the construction of an annexe to the original building. In deciding whether the construction is an annexe, we may (per *Cantrell No 2*) make wider enquiry than just the physical appearance and functionality, to determine if the construction is an adjunct or accessory or supplementary structure.

65. The Hall is physically attached to the existing school buildings on one wall. However, we find that the Hall is physically distinct from the existing buildings – bar the fire doors, which will normally be shut and used in emergencies only, there is no internal access between the Hall and the existing buildings. The Hall has its own main entrance, from the car park, and its own electrical and heating systems. As already commented, it is a large, self-contained structure.

66. Taking all these matters together we conclude that, within the terms of Lightman J's test, the Hall is not an alteration, extension or enlargement of the existing building. It is instead an adjunct and supplementary structure to the existing building, and thus constitutes an annexe to the existing building

67. Having concluded that the Hall is an annexe, it only qualifies for zero-rating if it meets the tests in Note 17. The first test in Note 17 is, whether the annexe is capable of functioning separately from the existing buildings. We find that this test is met; the Hall has its own electrical, heating and ventilation systems separate from the rest of the school, and its own dedicated toilet/washroom facilities (outside the Hall).

68. The second test in Note 17 is, whether the only/main access to/from the annexe is via the existing buildings. We also find that this second test is met; the main entrance to the Hall is via doors to the car park. We consider that HMRC have placed incorrect emphasis on the fire doors in the wall between the hall and the existing buildings; those are a fire officer requirement but will not be used for access or egress except in emergency.

69. Therefore, we conclude that the tests in Note 17 are satisfied in relation to the Hall.

DECISION

70. The appeal is DISMISSED.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

71. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

PETER KEMPSTER
TRIBUNAL JUDGE

RELEASE DATE: 30 OCTOBER 2019