



Neutral Citation: [2023] UKFTT 00122 (TC)

Case Number: TC08729

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2021/00829

*Item 2 Group 5 Schedule 8 Value Added Tax Act 1994 – construction services - whether recipient charity using buildings in the course or furtherance of a business – yes - whether buildings intended solely for use for a relevant charitable purpose – no – whether “World of Dinosaurs” a building – no- appeal dismissed*

**Heard on:** 7 December 2022

**Judgment date:** 10 February 2023

**Before**

**TRIBUNAL JUDGE MARK BALDWIN  
MR CHRISTOPHER JENKINS**

**Between**

**PARADISE WILDLIFE PARK LIMITED**

**Appellant**

**and**

**THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS**

**Respondents**

**Representation:**

For the Appellant: Mr Jay Doshi of Haines Watts, High Wycombe

For the Respondents: Mrs Stephanie Skipper litigator of HM Revenue and Customs’ Solicitor’s Office

## DECISION

### INTRODUCTION

1. Between June 2017 and June 2019 The Zoological Society of Hertfordshire (“ZSH”) engaged the Appellant, Paradise Wildlife Park Limited (“PWP”), to construct a lion enclosure, an outside exhibition called the “World of Dinosaurs” and a shop called the “Dino Store” at Paradise Wildlife Park (the “Park”) in Broxbourne, Hertfordshire. PWP “zero-rated” this work on the basis that it fell within Item 2(a), Group 5, Schedule 8, Value Added Tax Act 1994 (“VATA”), which provides for the zero-rating of construction services supplied in the course of the construction of a building intended for use solely for a relevant charitable purpose. The Respondents (“HMRC”) disagreed with this analysis and on 1 May 2020 they raised an assessment on PWP for £411,641, the amount of VAT at the standard rate on PWP’s construction services. PWP subsequently agreed that the work on the Dino Store should not have been zero-rated. This appeal is concerned with whether VAT should have been charged on the construction of the lion enclosure and the “World of Dinosaurs”.

2. The main question for us is whether PWP was constructing buildings designed solely for a relevant charitable purpose, which turns largely on whether ZSH is carrying on a business and, if it is, whether these buildings are used to some extent in that business. There is a secondary issue, whether the “World of Dinosaurs”, which is an outside exhibition, is a building.

3. The hearing bundle included detailed plans of the lion enclosure and “Dinosaurs in the Woods”, mock-up plans for the dinosaur exhibits and photographs of the construction of the lion enclosure, as well as constitutional documents for ZSH and a paper outlining the reorganisation of ZSH and associated entities in 2016. Witness statements were submitted by Mrs Elizabeth Compton (the HMRC case officer dealing with this matter) and Ms Lynn Whitnall, the CEO of ZSH. Both gave evidence before us. We found both witnesses to be frank, straightforward and entirely credible.

### THE LAW

4. As mentioned above, Item 2(a), Group 5, Schedule 8, VATA provides for the zero-rating of construction services supplied in the course of the construction of a building intended for use solely for a relevant charitable purpose. Note (6) to Group 5 provides (so far as relevant) that “use for a relevant charitable purpose” means use by a charity “otherwise than in the course or furtherance of a business”. Note (12) provides that a supply shall not be taken, for the purposes of Item 2, as relating to a building intended for such use unless it is made to a person who intends to use the building for such purpose and that person has given a certificate to that effect in the form required by HMRC.

5. It is accepted that ZSH is a charity, that PWP supplied its services to ZSH and that the required certificate was given by ZSH to PWP. But was ZSH right to give the certificate? To be entitled to do so it must be the case that the buildings (assuming that is what they are) PWP constructed were intended for use solely by ZSH otherwise than in the course or furtherance of a business, in other words, that ZSH was not going to use the buildings for any business purpose at all. To answer this question we need to explore what is meant by “business” for these purposes.

6. Section 94 VATA provides that “‘business’ includes any trade, profession or vocation” and specifically states that “the admission, for a consideration, of persons to any premises” is deemed to be the carrying on of a business.

7. Article 2 of Council Directive 86/560/EEC (the “VAT Directive”) provides that “the supply of goods for consideration” and “the supply of services for consideration”, in each

case “by a taxable person acting as such”, are transactions subject to VAT. A “taxable person” is defined in Article 9 as “any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity”. Article 9 specifically provides that “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”.

8. The question whether an activity amounts to an “economic activity” has been considered in a number of cases. In *Wakefield College v HMRC*, [2018] EWCA Civ 952, the Court of Appeal considered whether services provided to Wakefield College in the construction of a new building, called the skillsXchange, were zero-rated for VAT purposes. The issue in that case turned on whether the provision of further education courses to students paying a fixed but publicly-subsidised fee amounted to carrying out an “economic activity” within the meaning of article 9 of the VAT Directive. Having reviewed the earlier UK and European authorities, David Richards LJ made a number of observations. At [52] and [53] he noted:

“Whether there is a supply of goods or services for consideration for the purposes of article 2 and whether that supply constitutes economic activity within article 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 [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 [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*.

Satisfaction of the test for a supply for consideration under article 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 [49], “the same outcomes may often be expected”.

9. As far as article 9 itself is concerned, he commented:

“Whether article 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 [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 article 9. It is an entirely objective enquiry.”

10. He concluded that the supply of courses to students paying subsidised fees was an economic activity for the following reasons (at [79]-[85]):

“First, the sole activity of the College, in the most general terms, is the provision of educational courses. It is not comparable to the municipality

in *Borsele* for whom the provision of school transport was very much ancillary to its principal activities.

Second, the provision of courses to students paying subsidised fees is a significant, albeit minority, part of the College's total undertaking.

Third, the fees paid by such students are significant in amount. Taking the example of the BTEC civil engineering course, the fee was £896 pa in 2007/08. The proportion of the cost of courses assumed by the LSC to be covered by fees was set to rise in the following years. The total fee income from courses run in the new building in 2009/10 was approximately £290,000, all but a small part of which was represented by subsidised fees.

Fourth, the subsidised fees made a significant contribution to the cost of providing courses to the students paying those fees, to the extent of some 25-30%.

Fifth, the level of fees was fixed by reference to the cost of the courses. The national base rate for a course, with an adjustment for a more costly course, may not have precisely equalled the cost to the College of providing the course but it was intended to reflect the cost of the course. It was by reference to that rate that the fee was fixed, although generally at a lower level than that assumed by the LSC.

Sixth, the fees were not fixed by reference to the means of the students or employers or others paying the fees. The fee was a fixed fee for each course, published each year in the College's prospectus. It may be the case that the College charged less than it was entitled to, as a response to the prevailing economic circumstances in its local catchment area, but that is a factor that any economic activity must take into account and is not comparable to an individual means-tested basis for fixing fees.

Seventh, it is undeniable that there is a market in the provision of further and higher education, whose viability is underpinned by a combination of grant aid and fees. There is no reason to suppose that the College is other than a typical participant in that market or that it provides courses to students paying subsidised fees on anything other than a typical basis, allowing no doubt for some variations between different institutions."

11. David Richards LJ reviewed an earlier Court of Appeal authority, *Longridge on the Thames v HMRC*, [2016] EWCA Civ 930. There the taxpayer was a charity which operated an outdoor activity centre, mainly for young people. It charged for the use of its facilities but adjusted the charges to meet the ability of the users to pay. It had built a new training centre, and the issue was whether supplies made in the construction of the training centre should be zero-rated. David Richards LJ reviewed Arden LJ's decision and found that there was "some confusion" in her judgment (and in HMRC's submissions) between the question whether a supply is being made for a consideration (article 2) and whether there is an economic activity (article 9). Nevertheless, it is instructive to set out why she held that the taxpayer was carrying on a business/economic activity. Starting at [91], she said:

"The starting point has to be the General Rule [that an activity will be an economic activity where it is "permanent and is carried out in return for remuneration which is received by the person carrying out the activity"]. The General Rule can be displaced by evidence that there was no direct link between the service and the payment or by other evidence which shows that there was no economic activity. I agree with Mr Thomas that, as his various examples show, that evidence can be of varying kinds and involves the FTT when making its factual findings looking widely at the circumstances of the case.

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

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

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

12. We should briefly note two earlier decisions of the Court of Justice of the European Union ("CJEU"). The first is *Gemeente Borsele v Staatssecretaris van Financiën* (Case C-520/14). This case dealt with the question whether a local authority which provides a service for the transport of schoolchildren carries out an economic activity and is therefore a taxable person (or not). Approximately one third of parents of pupils for whom school transport was provided paid contributions, equivalent to 3% of the amount paid by that municipality to fund school transport services. The difference was financed by the authority from public funds. The CJEU held that the authority was not carrying on an economic activity. At [33]-[35] the CJEU explained the reasoning behind its conclusion:

"In that regard, it should be noted, first, that the municipality of Borsele recovers, through the contributions that it receives, only a small part of the costs incurred. The contributions at issue in the main proceedings are not payable by each user and were paid by only a third of the users, with the result that they account for only 3% of the overall transport costs, the balance being financed by public funds. Such a difference between the operating costs and the sums received in return for the services offered suggests that the parental contribution must be regarded more as a fee than as consideration (see, by analogy, judgment of 29 October 2009 in *Commission v Finland*, C-246/08, EU:C:2009:671, paragraph 50).

It therefore follows from that lack of symmetry that there is no genuine link between the amount paid and the services supplied. Hence, it does not appear that the link between the transport service provided by the municipality in question and the payment to be made by parents is sufficiently direct for that payment to be regarded as consideration for that service and, accordingly, for that service to be regarded as an economic activity within the meaning of Article 9(1) of the VAT Directive (see, by

analogy, judgment of 29 October 2009 in *Commission v Finland*, C-246/08, EU:C:2009:671, paragraph 51).

It should be noted, second, that the conditions under which the services at issue in the main proceedings are supplied are different from those under which passenger transport services are usually provided, since the municipality of Borsele, as the Advocate General observed in point 64 of her Opinion, does not offer services on the general passenger transport market, but rather appears to be a beneficiary and final consumer of transport services which it acquires from transport undertakings with which it deals and which it makes available to parents of pupils as part of its public service activities.”

13. The second case is *Commission v Finland* (Case C-246/08). Finland provided legal aid which was financed from public funds to citizens. Recipients received the services free or they were required to contribute to the costs depending on their level of income and savings. The legal aid work could be supplied by public officers or private practitioners. The services of the public officers were not subject to VAT whether the services were provided free or there was a fee paid.

14. The Commission took the view that, when the public advisers provided their services in return for a contribution, they were engaging in economic activity and VAT must be accounted for on the part payment to avoid distortion of competition with private advisers providing the same services. It took action to make Finland charge VAT on the services.

15. At [48]-[50] the CJEU explained its conclusion that the link between the legal aid services provided by public offices and the payments made by recipients was not sufficiently direct for those payments to be regarded as consideration for those services and, accordingly, for those services to be regarded as economic activities as follows:

“Although this part payment represents a portion of the fees, its amount is not calculated solely on the basis of those fees, but also depends upon the recipient’s income and assets. Thus, it is the level of the latter – and not, for example, the number of hours worked by the public offices or the complexity of the case concerned – which determines the portion of the fees for which the recipient remains responsible.

It follows that the part payment made to the public offices by recipients of legal aid services depends only in part on the actual value of the services provided – the more modest the recipient’s income and assets, the less strong the link with that value will be.

As the Advocate General has observed in points 50 and 51 of his Opinion, that finding is borne out by the fact that, according to the data provided by the Finnish Government in the present proceedings, the part payments made in 2007 by recipients of legal aid services provided by the public offices (which relate to only one third of all the services provided by public offices) amounted to EUR 1.9 million, whilst the gross operating costs of those offices were EUR 24.5 million. Even if those data also include legal aid services provided other than in court proceedings, such a difference suggests that the part payment borne by recipients must be regarded more as a fee, receipt of which does not, per se, mean that a given activity is economic in nature, than as consideration in the strict sense.”

16. We will come to what HMRC and PWP made of the “business” issue in due course. For now (and acknowledging the sometimes blurred boundary or overlap between the concepts of supply and economic activity David Richards LJ noted in *Wakefield College*) we will merely note the points which we have taken from these cases as being relevant to the

question whether an entity is carrying on an economic activity (whether it is “in business” in UK terms):

- (1) Firstly, it does not matter whether the entity is looking to make a profit or has some wider social/charitable purpose. What matters is how the entity operates.
- (2) Charges which are calculated by reference to cost (even if they do not completely cover costs) rather than other factors (such as the payer’s means) suggest an economic activity (and “consideration” for a supply, which is essential for there to be a business, rather than a fee).
- (3) Charges which are significant in absolute terms or make a significant contribution to costs suggest an economic activity.
- (4) If there is a market where similar services are supplied by others on a commercial basis and the entity operates like a typical participant in that market (rather than as a final consumer), this would suggest an economic activity.
- (5) Is this activity part of the principal function of the entity? Is it set up to do this? If so, that would suggest an economic activity.
- (6) Is the activity conducted seriously on a regular basis (i.e. in an organised, business-like manner over a period and with prudent financial management)? If it is, this would suggest an economic activity.

17. Against that background, we turn to look at how ZSH operates.

#### **MS WHITNALL’S EVIDENCE**

18. Ms Whitnall explained that she had been involved in Paradise Wildlife Park for most of her working life, which is more than 30 years. Her parents purchased the Park, then called Broxbourne Zoo, when it was in a completely run-down state with a very poor reputation within the zoo community. By means of many years of hard work, they turned it into an organisation that has gradually become accepted and recognised by its peers. Over her 30-year involvement with the Park she has been involved in all aspects of running the zoo, from catering through to human resources and finance as well as animal welfare. She expressed her pride at her father’s achievements “in transforming the zoo from its neglected state 38 years ago into a modern conservation organisation that meets the needs of the 21<sup>st</sup> century”.

19. Ms Whitnall described a number of features of ZSH’s work. The first is its educational role. Visitors walk round the park and learn about the animals by observation and from talks from keepers. In addition, there is more focussed education which includes an outreach programme, where keepers in the education team go out to talk to children and young people of all ages. There is a programme for university students and interns which includes business-focussed as well as animal related matters. There is research work, where students come into look at animal behaviour as part of their research and team members have written research papers, both on veterinary subjects and animal management. Students working on the Duke of Edinburgh Award can volunteer in various departments.

20. Conservation is an important feature of what ZSH does, and this was the case even before it became a charity. ZSH transfers funds and equipment to overseas projects and sends keepers to support other zoos and projects, both in the UK and abroad. ZSH will pay the cost of staff travelling abroad and also sends equipment for foreign projects, sometimes out of its own resources and sometimes as a result of specific fundraising projects. ZSH keepers have been all around the world, including to Russia, the Far East and Brazil. Locally, they help with badger and hedgehog projects. There is a programme of welfare and breeding of, for example, white tigers, meerkats, jaguars, snow leopards, tapirs and Chinese crocodiles.

Ms Whitnall explained that zoo breeding programmes are all about keeping the bloodlines pure and animals raised in one zoo will often be sent to another zoo. ZSH will rear animals here and send them back to participating breeding programmes in other zoos; for example, two lionesses were sent to Uganda having been reared at PWP.

21. As far as funding for all this activity is concerned, Ms Whitnall explained that money come from charges for park admission and animal experiences (meeting meerkats, feeding (from a distance) big cats, being a “junior zookeeper” etc) in addition to legacies and donations. About 90% of the income comes from admissions (plus Gift aid) and other commercial activities, with the remaining 10% taking the form of donations (some general and some for a specific external project). The admission fee to the Park is set by looking at the cost of operating the zoo. The aim is cover this entirely and build up a surplus which can be used for improvements (such as the works which are the subject of this appeal) and also to build up a fund to cope with contingencies. Charges are set with the aim of meeting these targets whilst making sure that they are affordable for families. The surplus ZSH had built up enabled it to keep operating during the pandemic, when it was difficult to operate the zoo for a considerable period of time. Funds for improvements and contingencies are essentially built up out of admission fee surpluses.

22. Turning to the reorganisation in 2016/17, Ms Whitnall explained that there were two motivations for this. The first was to “leave a legacy” and the second was to help with financing. She said that her father had observed how other zoos were converting into charitable status and he was “keen to do this as it would help to establish his legacy and would mean the continuance of the zoo for the foreseeable future”. On the financing side, it is possible for visitors to make a donation and add Gift Aid. The reorganisation into a charity was not, Ms Whitnall said, driven by obtaining VAT benefits. We should note here that there was absolutely no suggestion by HMRC that the reorganisation was “tax driven” in any way.

23. Helped by external advisers, work was undertaken to convert the organisation into a charity and ZSH began operations on 1 January 2017. Ms Whitnall explained that she was happy with the additional scrutiny that being a charity brings. She said that “the welfare of the animals is paramount and of course that is reflected in the conservation and education related conditions of having a zoo licence. That all comes at a cost of course and while being a charity gives us certain benefits, the trustees encourage us to exceed the requirements and to excel in all our activities.”

24. ZSH leases the Park (under a lease signed in December 2016) from Parkside Leisure Limited (“PLL”) which owns the freehold. PWP is a wholly-owned subsidiary of PLL. There is an operations agreement between ZSH and PWP under which PWP runs the catering, retail and souvenir shop operations at the Park and makes a payment to ZSH for the right to do this. Note 19 (Related Party Disclosures) to the 2018 accounts of ZSH (which can be found on the Charity Commission website<sup>1</sup>) shows that ZSH incurred rent and other costs from PLL of £911,633 and received rent and other sundry income from PWP of £50,856.

25. Before the reorganisation, the Park was operated by PWP. PLL owned (and still owns) the site on which the Park operates. The Park was associated with two registered charities founded by the Sampson family, the “Friends of Paradise Wildlife Park”, an unincorporated association which supported the charitable activities of the Park, and Wildlife Heritage Foundation Limited, a private company limited by guarantee which is involved in Big Cat conservation and is based at a separate site in Kent.

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<sup>1</sup> [www.gov.uk/government/organisations/charity-commission](http://www.gov.uk/government/organisations/charity-commission)



26. A paper prepared by Hewitsons, a firm of solicitors, in advance of the reorganisation and included in the hearing bundle identified a number of advantages that would be obtained by running the Park through a charity. These included a corporation tax exemption for profits on “primary purpose trading”, business rates relief, certain specific VAT reliefs (for example, on certain fundraising activities and advertising), claiming Gift Aid on donations and (subject to certain restrictions) on entrance fees. In addition, having charitable status was thought to be helpful in terms of general reputation in the eyes of the public and businesses which would help with grant funding and the likelihood of people volunteering.

27. As far as this reorganisation was concerned, the paper explained that the intention was that the non-charitable activities of the Park were to be retained within PWP “allowing the commercial business of the family to continue in parallel with the charitable aspects of the park”. The paper explained the need to be careful in dividing charitable and commercial activities and in managing conflicts of interest, as the family would be operating parallel business ventures via PWP, which would be paying a licence fee to the charity, and acting as landlord of the charity via PLL.

28. A number of ways of achieving these ends were explored, including the one that was finally chosen, using Friends of Paradise Wildlife Park, as the entity for the charity. The objects of this charity were expanded and it was renamed (as ZSH). There was then a transfer of certain business activities from PWP to ZSH.

29. The constitution of ZSH (as amended in November 2016) provides that its objects are:

“(a) to promote for the benefit of the public the conservation, protection and improvement of the physical and natural environment (by providing the biological diversity,

(b) to promote humane behaviour towards animals by providing care, protection, treatment and security for animals which are in need of care and protection by reason of poor circumstances or ill usage and to educate the public in matters pertaining to animal welfare in general and the prevention of cruelty and suffering among animals.”

30. Turning to the World of Dinosaurs, Ms Whitnall explained that this involves a walkway through a densely wooded area. Visitors have to follow a path which twists and turns through the woodland. At intervals in the woods along the path are large, life size animated models of dinosaurs. These models move and make noises. Ms Whitnall explained that she had wanted to set up World of Dinosaurs because of its educational value. Dinosaurs feature in all school curricula and there is a natural synergy between what is the case (that all these dinosaurs are now extinct) and what could be the case in the future (there are lots of animals on site that are endangered and which could quite easily become extinct in due course). Visitors will also see a historical perspective on animals; as Ms Whitnall put it, dinosaurs are “how it all started”. This is an opportunity to see them “in the flesh” (or as near to that as is currently possible). Ms Whitnall accepted that dinosaurs are a draw for small (and maybe not so small) children and the World of Dinosaurs forms an obvious attraction for the Park as a whole.

#### **MRS COMPTON’S EVIDENCE**

31. Mrs Compton has worked for HMRC for over 37 years. She gave evidence (primarily in a witness statement, although orally before us too) about the history of HMRC’s dealings with PWP as regards the matters before the tribunal. We mean no disrespect when we say that this narrative does not particularly help us to resolve the issues before us. She usefully described the impression she formed of the lions’ den and World of Dinosaurs, as follows:

“I examined the drawing and the plans provided. The dinosaur exhibit appeared to show a woodland walk with dinosaur exhibits peeking out from the trees. This did not appear to me to be a building in the accepted sense of the word. The lion enclosure included some structures but also a great deal of fenced area within which the animals could roam freely, calling into question whether the projects qualified as “buildings”.”

It is, of course, now accepted that the lions’ den is a building. She also noted that it is not possible to view any of the attractions at the Park without paying the entrance fee.

#### **HMRC’S ARGUMENTS**

32. HMRC say that allowing people entry to any premises for a consideration is a deemed business by virtue of section 94(2)(b) VATA. Here there is an admission fee charged for access to the wildlife park premises and all the attractions in it, including the lion enclosure and dinosaur exhibit. They say that the section 94(2)(b) definition of ‘premises’ includes all structures within the curtilage of the Park. An admission fee is charged to see everything within the Park and individual structures are not to be viewed in isolation from the premises as a whole.

33. HMRC say they do not dispute the charitable aims and objectives of ZSH. However, the fee paid by visitors to the Park is charged in respect of admission and that is categorised as a business activity.

34. HMRC contend that there is a direct correlation between the admission fee and the ability to visit the lion enclosure and dinosaur exhibit (and any of the other buildings within the Park), and it would not be a true reflection of the situation to try to separate them. Visitors are unable to access any of the buildings within the Park without first paying the admission fee. Because charging a fee for admission to premises is a business activity under section 94 VATA, the supply of these construction services by PWP to ZSH cannot be zero-rated, as Item 2, Group 5, Schedule 8, VATA provides for the zero-rating of construction services in respect of a building intended ‘solely’ for a relevant charitable purpose and Note 6 to Group 5 states that a relevant charitable purpose is otherwise than in the course or furtherance of a business.

#### **PWP’S ARGUMENTS**

35. Mr Doshi argues that ZSH is a charity, engaged in the conservation and education activities that Mrs Whitnall described and that it was quite valid for ZSH to provide a zero-rate certificate. There is nothing in the fact that there is an admission charge for the public to enter the Park and to enjoy everything that the Park provides that could taint the fundamental charitable objectives of ZSH.

36. There are non-public areas designated/designed for welfare of animals (for example, to carry out veterinary services) and some of the construction costs related to these facilities. HMRC are wrong to say that the public have access to everything; they cannot access the lions’ den and, in the World of Dinosaurs, must keep to clearly marked pathways. The costs incurred were purely for ZSH’s charitable activities. As he put it, to state the obvious, the zoo is based in the Park, but the Park is not based in the zoo. It is the ‘zoo’ aspects that enabled ZSH to provide the zero-rate certificate. There is no zoo entrance charge. The zoo and the required associated facilities must all be run on a professional basis regardless of the income received at the gates; indeed, that is the purpose and objective of ZSH as a charity. The welfare of animals and the upkeep of the zoo etc is at the forefront of its aims and objectives. Visitors have viewing access to the animals, but the costs were incurred on buildings that were necessary to look after the animals and not premises for the public to have access to.

37. As far as the World of Dinosaurs is concerned and in response to HMRC's point that a building needs to have walls and a roof, Mr Doshi says that there is no statutory definition of "building" here, the World of Dinosaurs needs to be "fit for purpose" and so it is in the nature of a building.

## DISCUSSION

### Is ZSH carrying on a business?

38. The first and most important question we need to decide is whether ZSH is carrying on a business. HMRC put their case primarily on section 94 VATA, which states that "the admission, for a consideration, of persons to any premises" is deemed to be the carrying on of a business. In answer to a question from the tribunal, Mrs Skipper was very clear that HMRC regard the effect of this provision as deeming a person who charges for entry to premises to be carrying on a business even if they would otherwise not be. Although there is some support for that view in the early Tribunal decision in *The Eric Taylor Deceased Testimonial Match Committee* (VAT Decision number 139), it is not entirely clear to us that any admission charge for premises automatically leads to a deemed business. We say this for two reasons. First, Article 12 of the VAT Directive allows Member States to treat as a taxable person someone who carries out "on an occasional basis" a transaction related to the activities in the second paragraph of Article 9(1). The second paragraph of Article 9(1) refers to the "exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis" (which would clearly include charging for admission to premises), and it is the words "for the purposes of obtaining income therefrom" which have largely given rise to the debate on the meaning of "economic activity" or "business". As David Richards LJ explained in *Wakefield College* (at [15]):

"As will be seen, "consideration" in article 2 means only some value given to the supplier in return for the goods or services by the person to whom they are supplied. It is this amount on which VAT is payable. It need not be full value or indeed bear any particular relation to the value of the goods or services supplied. By contrast, "remuneration" has a broader meaning, and may be said to encapsulate the concept of carrying on an economic activity "for the purposes of obtaining income therefrom on a continuing basis". Those words appear in article 9(1) as qualifying only the exploitation of tangible or intangible property, but it is established that they apply generally to "economic activity": *Landesantalt für Landwirtschaft v Götz* (Case C-408/06) [2007] ECR I-11295 at [18], *Finland* at [37]. It can readily be appreciated that goods or services may be supplied for "consideration" without the supplier doing so as an economic activity or for "remuneration". In that event, the supplier will not be supplying the goods or services as a "taxable person", so that VAT will not be payable on the consideration."

39. We appreciate it may be difficult to apply all of the tests for a business to a "one off" event, but it would seem to run counter to modern CJEU and UK authority to regard someone who allows admission to premises on an occasional basis in return for a wholly notional charge to be making a supply in the course of a business. That suggests to us that there must be some limits on the deeming effect of section 94(2)(b). Secondly, for section 94(2)(b) to apply, there must be "consideration" for admission. In the passage just cited, consideration is equated with "some value given to the supplier in return" for whatever goods or services are supplied and it is said that the amount need not be full value or "bear any particular relation to the value of the goods or services". However, the CJEU decisions in *Borsele* and *Finland* draw a distinction between a "fee" (a wholly notional payment with no economic link to the supply) and "consideration", where there is some relationship between cost/value and charge. Whilst we are not sure, for these reasons, that Mrs Skipper's proposition at its widest (that

any payment for any admission to premises inevitably means that there will be a deemed business) is correct, we do not need to come to a conclusion on that point.

40. The reason why we do not need to come to a conclusion on this point is that we consider that ZSH is carrying on a business even without the deeming provision in section 94(2)(b). We have reached this conclusion by considering the activities of ZSH in the light of the factors we identified in [16] above. We start by noting that it does not matter whether ZSH is looking to make a profit or has some wider social/charitable purpose. What matters is how the entity operates.

41. Charges which are calculated by reference to cost (even if they do not completely cover costs) rather than other factors (such as the payer's means) suggest an economic activity (and "consideration" for a supply, which is essential for there to be a business, rather than a fee). Mrs Whitnall explained that the admission fee to the Park is set by looking at the cost of operating the zoo. The aim is cover this entirely and build up a surplus which can be used for improvements and also to build up a fund to cope with contingencies. Charges are set with the aim of meeting these targets whilst making sure that charges are affordable for families.

42. Charges which are significant in absolute terms or make a significant contribution to costs suggest an economic activity. Here, about 90% of the income comes from admissions (plus Gift Aid) and other commercial activities. In addition PWP pays ZSH an annual fee of around £90k

43. If there is a market where similar services are supplied by others on a commercial basis and the entity operates like a typical participant in that market (rather than as a final consumer), this would suggest an economic activity. There is clearly a market in family "attractions" and Mrs Whitnall herself explained that charges are set at a level which seeks to make the Park affordable for a family outing. The 2016 reorganisation was designed to bring ZSH's operating structure into line with that which had been observed in other zoos.

44. Is this activity part of the principal function of the entity? Is it set up to do this? ZSH clearly carries on conservation and educational functions. No one doubts (and HMRC accept) that ZSH is a bona fide charity and makes real contributions in these areas. Nevertheless, the operation of the Park represents a very significant part of ZSH's activities. It is how it finances its charitable activities and, at least as far as the educational activities are concerned, the Park is the vehicle through which it delivers many of them.

45. Is the activity conducted seriously on a regular basis (i.e. in an organised, business-like manner over a period and with prudent financial management)? This is clearly the case. ZSH had a significant turnover (just over £5m from the zoo) in 2018 and over 90 employees. The Park has clearly been operating for a significant period and operates on a well-managed, resilient basis, having successfully navigated the storms of the Covid-19 pandemic. The 2016 reorganisation was designed to put the Park on a stable footing akin to the arrangements used by other zoos (and so "leave a legacy") and to help with financing. There is a careful separation between the Sampson family interests (via PWP and PLL) and ZSH itself.

46. If Mrs Skipper's reading of section 94(2)(b) is correct, ZSH is carrying on a business because it charges for admission to the Park, and that is the end of the matter. On the other hand, if there needs to be some economic link between the charge levied and admission (more than just a "fee") for there to be "consideration" which engages section 94(2)(b), that is clearly present here, as Mrs Whitnall's evidence on the way the charges are set makes clear. Finally, and for the reasons we have just explained, we would go further and hold that ZSH is carrying on an economic activity in the terms of the Directive (to be "in business" in the terms of VATA) even without the deeming effect of section 94(2)(b). Whilst, on any of these bases, ZSH is carrying on a business, it is important to be clear about the scope of ZSH's

business (if any) we are considering. This is because, for the construction services relating to them to qualify for zero-rating, the buildings constructed for ZSH must be “intended for use solely” for a non-business purpose. The scope of ZSH’s business may affect the answer to the question whether this expenditure was (at least to some extent) for the purposes of that business.

**Were the lions’ enclosure and the World of Dinosaurs intended for use solely for a non-business purpose?**

47. HMRC’s reliance on section 94(2)(b) as the route to finding a business resulted in a focus by both Mrs Skipper and Mr Doshi) on the “premises” to which people are admitted. HMRC regard the Park as a whole as the relevant premises. They say that there is an admission fee charged for access to the Park and all the attractions in it, including the lion enclosure and the World of Dinosaurs. They say that the section 94(2)(b) definition of ‘premises’ includes all structures within the curtilage of the Park. An admission fee is charged to see everything within the Park and individual structures are not to be viewed in isolation from the premises as a whole.

48. Mr Doshi, on the other hand, focused a significant part of his submissions on the fact that people are not admitted to the lions’ enclosure or the World of Dinosaurs. Self-evidently and for obvious reasons, there is no public admission to the lions’ enclosure. Visitors are not allowed to wander all over the World of Dinosaurs; they are required to follow (and keep to) a clearly defined pathway through the woods. To the extent “admission” is a requirement for a business, there is no admission to the parts of the Park we are concerned with. Moreover, as far as the lions’ enclosure is concerned, its primary purpose is to provide a safe home for the lions and enable ZSH to look after them (for example, there are spaces for veterinary care) and carry out its wildlife conservation activities. Visitors have what Mr Doshi described as “viewing access” to the lions’ den, but very definitely not admission. Mr Doshi criticised HMRC for saying that paying the admission fee for the Park means visitors have access to “everything”; clearly, there are parts of the Park which are “out of bounds”. He also submits that it is possible, having paid the entrance fee, to have a perfectly enjoyable time without going into the zoo (the part of the Park where the animals are).

49. For Mr Doshi’s argument (that the works we are concerned with are not part of ZSH’s business) to succeed, section 94(2)(b) would need to be read as providing that, where there is consideration for admission to premises, the only business being carried on for VAT purposes is in respect of those parts of the person’s activity which directly relate to charging for admission, so that a new construction is not part of that activity if there is no separate/additional charge for admission to it, *a fortiori* if there is no admission to it anyway. We do not read section 94(2)(b) as limiting the scope of ZSH’s business in such an artificial way.

50. If we start by focusing on any deemed business section 94(2)(b) might create, that deemed business is admitting people to premises for consideration. Here, as HMRC stress, ZSH charges visitors for admission to the Park as a whole, and so its deemed business would be charging for admission to the Park. Even accepting that it may be the case (although, having looked together at the plan of the Park on the website<sup>2</sup> during the hearing and also noted the way “Paradise Wildlife Park” is marketed on the website, we would be surprised if this were the case for many, if any, visitors) that some visitors might pay for admission to the Park and not visit all or most of the attractions, that does not alter the fact that the premises ZSH charges for admission to are the Park and its deemed business is charging for admission to the Park.

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<sup>2</sup> <https://www.pwpark.com>

51. The deeming in section 94(2) operates (to quote the opening words of section 94(2)) “without prejudice to the generality of anything else in [VATA]”. We have already held that, even without the assistance of section 94(2)(b), we would have found that ZSH is carrying on a business in the way it operates the Park as a commercial attraction to raise money to finance its charitable activities. On that basis, and given the opening words of section 94(2), we consider that there is no place for section 94(2)(b) to deem there to be a business, when ZSH already admits visitors to the Park as part of an actual business, still less is there any warrant for section 94(2)(b) to be read as narrowing down the relevant scope of ZSH’s business from what it actually is to some artificial shadow of itself.

52. As we have already noted, for the construction services relating to them to qualify for zero-rating, the buildings constructed for ZSH must be “intended for use solely” for a non-business purpose and so we need to understand the scope of ZSH’s business. As we have just explained, we consider that, in operating the Park as a commercial attraction to raise money to finance its charitable activities, ZSH is carrying on a business and its business encompasses the full spectrum of activities it carries out in order to do this. The effect for these purposes of our analysis (that there is an actual business of operating and charging for admission to the Park) is not far (if at all) removed from that of Mrs Skipper’s (that there is a section 94(2)(b) deemed business of charging for admission to the Park).

53. On that basis, we turn to the question whether the lions’ enclosure and the World of Dinosaurs were “intended for use solely” for non-business purposes.

54. Mrs Whitnall in her evidence to this tribunal accepted that dinosaurs are a draw. The trustees’ report that accompanies the 2018 accounts says this of the World of Dinosaurs:

“2018 started with a very busy schedule with the development work on our largely unutilised woodland area turning it into the brilliant attraction which is now World of Dinosaurs. Not only was this one of our first projects ever to be finished on time, but this also bought continued success through the remainder of the year with our visitor numbers increasing by 20.5% compared to 2017 and our best financial year to date. This is a huge credit to everyone involved in this project and our entire team.”

55. Turning to the lions’ enclosure, the plans in the hearing bundle show visitor-related features such as an overhead walkway with viewing fence and viewing windows. In their 2019 report the trustees say this of the lions’ enclosure:

“2019 continued to be successful mainly due to continued development work for improved welfare of our animals and the visitor experience including our brand new Lion Pride Lands.

... Work has completed on our brand new Lion Pride Lands. This new habitat consists of a high quality landscaped enclosure with state of the art inside dens, multiple glass viewing and a pride rock for our lions to relax.”

56. We readily accept that the lions’ enclosure provides an improved, modern (and most attractive by the sound of things) home for them, which must have a positive effect in relation to ZSH’s conservation work, and also that the World of Dinosaurs has an educational function, but both of these constructions also make the Park a more attractive place to visit and perform a role in that (business) side of ZSH’s activities. These constructions do not perform functions which are restricted to ZSH’s non-business activities. Mr Doshi did not suggest that there was any difference between what these constructions were intended to be used for and the use actually made of them or that, if there were business use, it would fall within any permitted *de minimis*. We consider that he was right to take that approach, and so

we determine that the lions' enclosure and the World of Dinosaurs were not intended for use solely for non-business purposes.

### **Is the “World of Dinosaurs” a building?**

57. The physical features of the “World of Dinosaurs” are described at [30] and [31] above. We were not referred to any authority on the question of what constitutes a “building” nor was there a great deal of argument on the point. The points made to us on this issue have been noted earlier in this decision notice.

58. In *Upper Don Walk Trust v HMRC*, (2006) VAT Decision 19476, the Tribunal observed (at [15]) that:

“In our view, the word 'building' connotes an enclosure of sorts. It will enclose a volume of space or provide a place within which persons or things can be accommodated. All the structures which, in ordinary speech would undoubtedly be regarded as buildings have this characteristic in common: for example a house, a factory, a warehouse, an amphitheatre. A building will usually have walls and, although not invariably, a roof. All these structures enclose a volume of space and provide a place within which something can be accommodated and by any view must be regarded as “buildings”.”

On that basis they held that a bridge was not a building, commenting:

“A bridge does not enclose a volume of space or provide a place within which anything can be accommodated. Its purpose is purely and simply to be a means of access from one side of something to another. Some celebrated bridges do include buildings but these are normally buildings which are erected onto the bridge and do not alter the nature of the bridge itself.”

59. In *Wheeled Sports 4 Hereford Ltd v HMRC*, [2011] UKFTT 190 (TC), the tribunal held that a skate park was not a building, observing (at [8] and [9]):

“The word “building” is not defined in the statute and various tribunals have taken different approaches, but certain common threads can be drawn. The New Oxford Dictionary definition of a building contains the word “a structure with a roof and walls...”. The Shorter Oxford Dictionary includes “a permanent fixed thing built for occupation”. Tribunals have highlighted the sense of enclosure which would come with a building. Again, merely because a structure is built, it does not mean that the result is a building - for example a wall or a ship.

The skate park has clearly been built and is clearly a permanent structure. It is capable of being occupied in the sense of being used but beyond this in no sense can it be viewed as a building. There is no sense of enclosure, having neither walls nor roof. Further, although not in any way definitively, it is not a structure which anyone looking at it and attempting to describe it would term a building.”

60. The same comments can be made of the World of Dinosaurs as were made of the skate park. It has been built. It is a permanent structure. It can be used, but in no sense is it a building. There is no enclosure, no walls, no roof. No one looking at it would naturally describe it as a building.

### **DISPOSITION**

61. We have determined the issues before us as follows:

- (1) ZSH is carrying on a business of operating and charging for admission to the Park;

(2) The lions' enclosure and the World of Dinosaurs were intended for use at least in part for the purposes of that business; and

(3) The World of Dinosaurs is not a building.

62. It follows that the services PWP supplied in the construction of the lions' enclosure and the World of Dinosaurs were not supplies in the course of construction of a building intended for use solely for a relevant charitable purpose within Item 2(a) of Group 5, Schedule 8 VATA.

63. This appeal is dismissed.

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

64. 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.

**MARK BALDWIN  
TRIBUNAL JUDGE**

**Release date: 10<sup>th</sup> FEBRUARY 2023**