THE HIGH COURT

REVENUE

2007 No. 190 R

BETWEEN

CADBURY IRELAND PENSION TRUST LIMITED
AND CMF TRUSTEES LIMITED

APPELLANTS

AND
THE REVENUE COMMISSIONERS

RESPONDENT

Judgment of Miss Justice Laffoy delivered on 24th May, 2007

Background
1. The background to this case stated pursuant to s. 941 of the Taxes Consolidation Act, 1997, as applied to value added tax (VAT) by s. 25(2) of the Value Added Tax Act, 1972, as amended (VATA), was an appeal by the appellants to R.F. Kelly, Appeal Commissioner (the Commissioner) against a decision of the Inspector of Taxes that the appellants were liable for VAT on assessments raised on them by the respondent for the years 1996 through 2001 on the basis that they were in receipt of specified services in the course of business which gave rise to a reverse charge for VAT pursuant to s. 5(6)(e) and s. 8(2)(a) of VATA.

2. Each of the appellants is the trustee of a pension fund established by Cadbury Ireland Plc (Cadbury), one for employees (established in 1968/1970) and the other for executives (established in 1990). Each of the appellants is a company limited by guarantee not having a share capital. The principal object of each appellant is to act in the State and elsewhere as trustee of any non-contributory or contributory pension or superannuation fund. The objects clause also empowers each company generally to undertake fiduciary offices and duties of all kinds in every part of the world and under every system of law, whether relating to property or not. As a matter of fact, the function of each of the appellants was confined to acting as trustee of the relevant contributory pension scheme established by Cadbury, which, in each case, was a defined benefit scheme funded by the contributions of Cadbury and the employees. The fact that the objects clause empowered each appellant to exercise other functions, in my view, is irrelevant to the issues which arise on the case stated. The memorandum of association of each of the appellants also provided that the affairs of each should at all times be conducted with a view to avoiding the acquisition of any profit or gain of any kind and, if any profit or gain should nonetheless be acquired, that it should be applied in reducing charges made by that appellant for its services.

3. Each of the appellants has its establishment in the State. Each has retained as investment manager Baillie Gifford Overseas Limited (BG), which is established in Scotland and provides the investment management services for each from the United Kingdom.

4. Neither of the appellants is registered for VAT. Originally BG invoiced Cadbury for its services. Cadbury reclaimed the VAT on the fees as input credit against output. However, the respondent contended that the VAT was not reclaimable because the services were provided to the appellants, not Cadbury. The Commissioner found for the respondent on that point and the appellant accepted that finding.

Legislative framework
5. The legislative framework within which the appeal to the Commissioner fell to be decided and by reference to which the issue on the case stated is to be determined is EC Council Directive 77/388 of 17th May, 1997 (the Sixth Directive) providing for a common system of value added tax and a uniform basis of assessment, as transposed in this jurisdiction by the provisions of VATA. The specific provisions of VATA, and the corresponding provision of the Sixth Directive, which are material, specifically or peripherally, to the issue on this case stated are as follows:

> Section 2 of VATA deals with the charge of value added tax, and sub-s. (1) of which, insofar as is relevant for present purposes, provides as follows:
>
> > "With effect on and from the specified day a tax, to be called value added tax, shall subject to this Act and regulations, be charged, levied and paid –
> >
> > > (a) on the supply of goods and services effected within the State for any consideration by a taxable person in the course or furtherance of any business carried on by him …"

6. The word "business" is defined in s. 1 as including –

> "farming, the promotion of dances and any trade, commerce, manufacture, or any venture or concern in the nature of trade, or manufacture, and any profession or vocation, whether for profit or otherwise."

7. Section 2 mirrors article 2 of the Sixth Directive which deals with the scope of value added tax and provides, *inter alia*, that the following shall be subject to value added tax:

> "the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such."

8. Section 5 of VATA deals with the supply of services and paragraph (e) of sub-s. (6) deals with the place of supply and, insofar as is relevant for present purposes, provides as follows:

> "The place of supply of services of any of the descriptions specified in the Fourth Schedule … shall be deemed, for the purposes of this Act to be –
>
> > (i) …
> >
> > (ii) in case they are received, for the purposes of any business carried on by him, by a person –
> >
> > (I) …

(II) who has his establishment in the Community but does not have his establishment, or if he has more than one establishment, his principal establishment in the country in which, but for this sub-paragraph, the services would be deemed to be supplied,

(III) …

the place where he has his establishment or, if he has more than one establishment, the establishment of his at which or for the purposes of which the services are most directly used or to be used, as the case may be …"

9. This is the provision which effects the reverse charge. Its effect is that, if a U.K.-based supplier supplies a service which falls within the services listed in the Fourth Schedule to an Irish-based company which does not have an establishment in the United Kingdom and the service is received by the company for the purpose of business carried on by it, the service is deemed to be supplied in Ireland. It is common case that the services supplied by BG to the appellants are Fourth Schedule services (services that where taxable are taxed where received), which are within the scope of para. (iii) and/or para. (v) of the Fourth Schedule.

10. Section 5(6)(e)(ii)(II) and the Fourth Schedule transpose article 9.2(e) of the Sixth Directive, which provides, *inter alia*, that when specified services are performed for taxable persons established in the Community but not in the same country as the supplier the place where those services are supplied "shall be the place where the customer has established his business or has a fixed establishment to which the service is supplied".

11. Section 8 of VATA deals with taxable persons. Sub-section (1) contains the definition of the expression "taxable person" and defines it as meaning:

> "A person who, otherwise than as an employee of another person, engages in the supply, within the State, of taxable goods or taxable services in the course or furtherance of business …"

12. Sub-section 2(a) is complementary to s. 5(6)(e)(ii) and provides that where by virtue of that provision a taxable service that, apart from that provision, would be treated as supplied abroad is deemed to be supplied in the State –

> "… the person who receives the service shall in relation thereto be a taxable person and be liable to pay the tax charged as if he had himself supplied the service for consideration in the course or furtherance of his business."

13. Section 8 mirrors article 4 of the Sixth Directive. Article 4.1 defines "taxable person" as meaning –

> "Any person who independently carries out in any place any economic activity specified in paragraph 2, whatever the purpose or results of that activity."

14. Article 4.2 provides as follows:

> "The economic activities referred to at paragraph 1 shall comprise all activities of producers, traders and persons supplying services including mining and agricultural activities and activities of the professions. The exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis shall also be considered an economic activity."

15. Section 10 of VATA deals with the amount on which tax is chargeable. The general rule provided for in sub-s. (1) is that the amount on which the tax is chargeable is the total consideration which the person supplying the goods or services becomes entitled to receive in respect of or in relation to the supply of goods or services. Sub-section (5) specifically addresses the situation in which there is a reverse charge and provides as follows:

> "The amount on which tax is chargeable in relation to services for the tax chargeable on which the recipient is, by virtue of section 8(2), liable shall be the consideration for which the services were in fact supplied to him."

16. An obvious difference between the provisions of VATA and the Sixth Directive is that the expression "economic activity" in the Sixth Directive is transposed as "business" in VATA. A similar approach was adopted in transposing the Directive in the United Kingdom. The difference in wording was addressed by the House of Lords in *Institute of Chartered Accountants in England and Wales v. Customs and Excise Commissioners* [1999] S.T.C. 398. In his speech, Lord Slynn of Hadley commented as follows on the difference in wording (at p. 402):

> "There is a difference in the wording between s. 4 of the 1994 Act and arts. 2 and 4 of the Sixth Directive. Thus the 1994 Act refers to 'taxable supply made by a taxable person in the course or furtherance of any business carried on by him [emphasis added]'. The Sixth Directive refers to the supply of services ' effected for *consideration* … by a taxable person acting as such [emphasis added]' and taxable person means a person who independently carries out *any economic activity*, including 'the activities of the professions'. The 1994 Act must insofar as possible be construed as to give effect to the Sixth Directive (see *Marleasing SA v. La Comercial Internacional de Alimentacion Service Agreement* (Case C-106/89) [1990] ECR 4135). It does not seem to me that there is any difficulty here in doing that and one would expect the same result to follow from the application of either approach."

17. I respectfully adopt those comments as regards the transposition of the Sixth Directive in this jurisdiction.

The case stated

18. The Commissioner made certain findings of fact in the case stated on the basis of the oral and documentary evidence adduced before him. In relation to the activities of the appellants he found as follows in para. 5(d):

> "The activities of the appellants encompassed, either directly or indirectly, the purchase of investments, the sale of investments, the holding of investments, the receipt of contributions from approximately 500 members and from [Cadbury], the receipt of income from [BG], the payment of benefits to approximately 900 pensioners, the payment of expenses, the carrying out of secretarial, administrative and accounting procedures to record, monitor and control the aforesaid activities including payroll systems, bank records, accounts preparation, actuarial reports, tax returns, regular meetings with [BG] and the preparation of reports."

19. The Commissioner made the following finding in para. 5(e) in relation to the activities of BG, stating that they involved –

"… the collection of pension contribution, collection of dividend income, the paying of benefits, the making of investments, the realisation of investments, the acquisition of properties, the provision of secretarial recording and accountancy services and the furnishing of reports and the provision of advice."

20. The Commissioner noted that BG did not hold shares acquired on behalf of the appellants but arranged for the same to be held in the name of a nominee custodian banker.

21. The Commissioner found that the services were provided by BG to the appellants, not to Cadbury, a finding which, as I have stated, the appellants accept and which, crucially, is the starting point of the issue which gave rise to this case stated. He also found that BG's fee was calculated at .2% per annum of the fund, payable half-yearly.

22. Although the appellants have made a generalised submission that the Commissioner erred in fact, they have not specifically taken issue with any of those findings.

23. Having recited the submissions made on behalf of the appellants and on behalf of the respondent, the Commissioner set out his determination in para. 10 as follows:

"Having considered the evidence adduced and the submissions made I found as follows:-

(i) The trusts received the services of [BG] for the purposes of a business and consequently the charge to VAT arose thereon, in accordance with the VAT Acts, particularly sections 5(6)(e), 8(2)(a) and 10(5).

(ii) A pension fund is, in accordance with the *Wellcome Trust* case, a business or economic activity."

24. The Commissioner stated the question of law for the opinion of this Court as follows:

"The question of law for the opinion of the High Court is whether, on the foregoing facts and evidence, my decision as set out in paragraph 10, that the services received by the trust from [BG] were for the purposes of business, is correct in law."

Submissions of the parties

25. The submissions made by the parties before the Commissioner are outlined in the case stated.

26. The court has had the benefit of written and oral submissions from the appellants and the respondent. Subject to the observations made later, I do not consider it necessary to outline the submissions. There are a number of points, however, which I feel it useful to comment on at this juncture.

27. Counsel for the respondent identified the net issue as whether the Fourth Schedule services provided by BG were received by the appellants for the purposes of any business carried on by them. That is the main issue and it arises from the requirement of sub-para. (ii) of s. 5(6)(e). The effect of that provision is to reverse the charge where the supplier and the recipient of the services are established in different Member States of the European Union where the services are received "for the purpose of any business carried on by" the recipient. Section 8(2)(a) provides for the manner in which the reversal is to operate: in the circumstances which prevailed here, the services are deemed to be supplied in the State; the recipient is deemed to be a taxable person; and the recipient is deemed to be liable for the charge as if it had supplied the services for consideration in the course or furtherance of its business. Section 10(5) identifies the consideration on which the tax is chargeable: the consideration for which the services were in fact supplied to the recipient. So, in the circumstances which prevailed here, the combined effect of the foregoing provisions is that, if the appellants received the services of BG for the purpose of any business carried on by them, the services are deemed to have been supplied in the State (s. 5(2)(e)), the appellants are deemed to be taxable persons and they are deemed to be liable to pay the tax charged as if they had supplied the services for consideration in the course of furtherance of their business (s. 8(2)(a)), and the consideration on which the tax is to be paid is to be deemed to be the consideration charged by BG (s. 10(5)).

28. One aspect of the appellants' submissions in this Court was that the appellants performed their functions as trustees of the pension funds without receiving any consideration for so doing. Counsel for the respondent submitted that the appellants' submission in relation to consideration was a new submission and that it was not addressed in the case stated. It is correct, as was submitted by counsel for the respondent, that in order to get the Fourth Schedule services into the tax regime in the circumstances of this case, all that was necessary was to prove that the appellants had received the services of BG for the purposes of business carried on by them. However, the appellants' argument in this Court was that the presence or absence of consideration for the performance of their functions as trustees of the pension funds by the appellants is relevant to the issue as to whether they received the services of BG for the purposes of business carried on by them. While, for the reasons set out later, I do not accept the underlying premise that the appellants did not receive consideration for performance of their functions, for completeness I propose considering the authorities which the appellants submitted support their argument.

The authorities

29. No relevant Irish authority was identified by the parties.

30. I propose considering the authorities relied on by them in the following order:

(a) the *Wellcome Trust* case, which each side asserted supported its argument;

(b) cases in relation to pension schemes and VAT, on which the appellants relied;

(c) cases which the appellants advanced as supporting their contention that consideration is a necessary constituent for business or economic activity, some of which I consider are generally persuasive as to the meaning of "for the purposes of any business carried on" in s. 5(e)(ii);

(d) cases on investment holding; and

(e) a case on the meaning of economic activity in the context of competition law cited by the respondent.

Wellcome Trust case

31. The authority primarily relied on by the respondent and the authority which informed the decision of the Commissioner was the decision of the European Court of Justice (ECJ) in *Wellcome Trust Limited v. Customs and Excise Commissioners* [1996] S.T.C. 945. That is the decision which the Commissioner referred to in para. 10 of the case stated.

32. Wellcome Trust Limited was a charitable trust established for the advancement of medical research and study. It was subject to regulation by the Charity Commissioners and the national court in the United Kingdom. In 1992 a sale of shares held by it, which raised £Stg.2.18 billion, was carried out. Because of the scale of the sale, it was not effected by public subscription. It was effected by "book building", a form of auction in which tenders were invited for a period, at the end of which the size and price of the offer were fixed in the light of demand. Wellcome Trust Limited became liable for payment of considerable fees to lawyers and financial and other experts in connection with the sale. In reliance on article 17(3)(c) of the Sixth Directive it sought a refund of the proportion of value added tax paid by it on the professional services rendered in connection with the sale which corresponded to the percentage of shares sold to purchasers resident outside the European Community, which represented 32.2% of the shares. The application was refused by the Customs and Excise Commissioner on the ground that the share disposals were not "economic activities" within the meaning of article 4.2 of the Sixth Directive as they had not been made in furtherance of any business carried out by the trust but in pursuance of the normal management of investments in order to fund charitable activities and therefore, the sums of tax charged in the provision of professional services did not constitute input tax. On an appeal by Wellcome Trust Limited, London Value Added Tax Tribunal referred to the ECJ for a preliminary ruling on a number of questions. One was whether the term "economic activities" in article 4.2 was capable of covering sales of shares and securities by a person who is not a dealer in shares and securities. Another was whether a multiplicity of share sales by a person who is not a dealer in shares to a large number of purchasers on the same day involving sophisticated preparation over a considerable period of time of itself could constitute "economic activities" within the meaning of article 4.2.

33. In its judgment, having referred to article 2.1 and article 4.1 and article 4.2, the court continued (at para. 31):

> "31. Although, as is clear from the information provided in the order for reference, the trust does not have the status of a professional dealer in securities in the United Kingdom, that fact does not necessarily mean that an activity, such as that at issue in the main proceedings, consisting in the acquisition and sale of shares and other securities cannot, in some cases, be treated as an economic activity within the meaning of art 4 of the Sixth Directive. According to the court's case law, art 4 confers a very wide scope on VAT (see the judgment in *Polysar Investments Netherlands Bv v. Inspecteur der Invoerrechten en Accijnzen, Arnhem* (Case C-80/90) … [1991] E.C.R. 1-3111 at 3137, para. 12).
>
> 32. However, it is also clear from the case law that mere exercise of the right of ownership by its holder cannot, in itself, be regarded as constituting an economic activity. The court has so held with regard to financial holdings acquired by holding companies in other undertakings (see, in particular, the judgments in *Polysar* … at 317, para. 13, and in *Satam SA v Ministre Chargé du Budget* (Case C-333/91) [1993] E.C.R. 1-3513, para. 12).
>
> 33. As the Commission appositely pointed out, if such activities do not in themselves constitute an economic activity within the meaning of the Sixth Directive, the same must be true of activities consisting in the sale of such holdings.
>
> 34. Now, the trust manages the assets it holds, consisting in part of its shareholding in the [Wellcome Foundation] and of other financial instruments. Its investment activities, as described above, consist essentially in the acquisition and sale of shares and other securities with a view to maximising the dividends and capital yields which are destined for the promotion of medical research."

34. The court went on to acknowledge that transactions in shares, interests in companies or associations, debentures and other securities may fall within the scope of VAT. It gave examples: where such transactions are effected as part of a commercial share dealing activity; or where the transactions are effected in order to secure a direct or indirect involvement in the management of the companies in which the holding is acquired. However, Wellcome Trust Limited was forbidden to engage in such activities.

35. It had been argued on behalf of the Wellcome Trust Limited that, like an investment trust or a pension fund, whose investment activity is treated in the United Kingdom as coming within the scope of VAT, Wellcome Trust Limited had to ensure that its capital increased within reasonable proportions, which necessitated regular sales of shares and other securities. Having adverted to the restriction on the investment activities of Wellcome Trust Limited, the court went on to say (at para. 36):

> "Consequently, and irrespective of whether the activities in question are similar to those of an investment trust or a pension fund, the conclusion must be that a trust which is in a position such as that described by the referring tribunal must, in the light of art 4 of the Sixth Directive, be regarded as confining its activities to managing an investment portfolio in the same way as a private investor."

36. The court also determined that neither the scale of the share sale nor the employment in connection with the sale of consultancy undertakings could constitute criteria for distinguishing between the activities of a private investor, which fall outside the scope of the Sixth Directive, and those of an investor whose transactions constitute an economic activity. The court summed up its reply to the reference in para. 41 as follows:

> "The reply to the question submitted by the national VAT tribunal must therefore be that the concept of economic activities, within the meaning of article 4.2 of the Sixth Directive, is to be interpreted as not including an activity, such as that at issue in the main proceedings, consisting in the purchase and sale of shares and other securities by a trustee in the course of the management of the assets of a charitable trust."

37. Advocate General Lenz had taken a similar view on the argument advanced by Wellcome Trust limited that its activity resembled that of pension funds and investment trusts. He found that its activity was similar to that of a private individual managing his own assets. He stated at para. 19 of his opinion:

> "Although such a person will on occasion buy and sell shares, he is nevertheless – and this is not in dispute – not regarded as a person exercising an economic activity within the meaning of the Sixth Directive. It is only in respect of its extent (particularly in the case of the second share sale) that the trust's activity can be distinguished from that of a private investor. However, even the second share sale cannot be regarded as an economic activity within the meaning of the Sixth Directive, despite the fact that it was the largest private sale of shares in the United Kingdom. As the appellant itself submits, the sale of the shares was carried out in order to diversify the trust's holdings. This, however, means that the original holdings were first realised and then transformed into new holdings. This also is not analogous to the activity

of a dealer …"

38. Later, at para. 23 of his opinion, the Advocate General dealt with the principle of tax neutrality and stated:

> "Although the appellant submits that all economic activities must be treated equally for the purposes of taxation, the activity of the trust cannot be treated as if it were an economic activity within the meaning of the Sixth Directive since – as has been demonstrated – it cannot be regarded as being such an activity. On the contrary, for reasons of tax neutrality, its activity must be classified in the same way as an activity of a private person. The appellant's argument that its activity resembles that of pension funds and investment trusts and must for that reason – in the same way as such funds – be regarded as an economic activity within the meaning of the Sixth Directive cannot lead to any different result. Unlike pension funds, the trust manages its own assets – in precisely the same way as a private individual."

39. The position of the appellants is undoubtedly distinguishable from the position of Wellcome Trust Limited in that the appellants have outsourced the management of their investments to BG. I do not accept, however, that the appellants are not subject to the type of restrictions to which the ECJ found that Wellcome Trust Limited was subject – against engaging in trade and acquiring majority stakes in other companies. While the parties did not address the investment powers of the appellants as set out in the trust documents annexed to the case stated, it seems to me that, when one considers the investment powers in the context of the objects of each of the appellants, the reality is that the appellants are subject to such restrictions.

40. On my reading of the decision in the *Wellcome Trust* case, it does not present such an obvious answer to the net issue in this case – whether the appellants received the services of BG for the purpose of business carried on by them – as was argued by counsel for the respondent and as the Commissioner considered it constituted. The activities of the appellants require more in-depth analysis than merely assuming by reference to the *Wellcome Trust* case that they are involved in economic activity.

Cases relevant to appellants' activities

41. In addition to submitting that the *Wellcome Trust* case is authority for the proposition they advanced, that the appellants are not engaged in business or economic activity because they are involved in "mere administration of pension schemes", an activity they suggested was akin to the activity of a private investor, counsel for the appellants referred the court to a number of authorities from fora in the United Kingdom dealing with pension schemes and VAT.

42. The first was a decision of the Court of Appeal in *Customs and Excise Commissioners v. British Railways Board* [1976] S.T.C. 359. There the issue was whether the taxpayer, which was a statutory railway undertaker, was entitled to deduct value added tax paid for professional services on the investment of pension funds as input tax. The case turned very much on its own facts. The Court of Appeal held that the management of the pension fund and the execution of the fiduciary duties connected with it were matters which were all part of the taxpayer's function as employer in the railway undertaking. Further it held that there was no justification in the Finance Act, 1972 for the contention that the taxpayer was to be regarded as other than one body. The court rejected the Commissioner's argument that there was a dichotomy of capacities in which the Board acted: in respect of its general undertaking, including its function as employer, on the one hand, and its administration of the pension fund, on the other. On the contrary, the administration of the pension fund was all part of the conduct of the general undertaking. It followed that the professional advice had been given to the Board for the purpose of its business and the Board was therefore entitled to deduct value added tax on the fees paid for that advice as input tax. That decision, in my view, is of no assistance in resolving the issue on this case stated. The submission of counsel for the appellants that there is implicit in the decision the proposition that, had the pension administration been undertaken not by the employer but by separate pension trustees, the pension administration activity would not amount to a business in its own right simply does not stand up to scrutiny.

43. The second was a decision of a Manchester VAT tribunal in *Linotype and Machinery Limited* (Decision 594, 9th June, 1978). The issue in that case was whether Linotype and Machinery Limited was entitled to credit for input tax in respect of taxable services rendered by a firm of accountants, an insurance company and a financial consultancy firm, in relation to its pension fund which had been set up under deeds of trust. For the reasons set out in its decision, the tribunal did not find it necessary to consider whether the trustees of the pension trust, if it was them rather than the company which received the services, received them for the purpose of a business carried on by them, as the following passage at p. 10 illustrates:

> "In order that input tax may be properly deductible under the provisions of s. 3(1) of the Finance Act, 1972 two conditions must be satisfied: first, the supply of goods or services which incur output tax must be made to a taxable person and, secondly, the supply must be for the purpose of a business carried on or to be carried on by such taxable person. We accept that the Company is a taxable person: it is registered for the purposes of the tax. We do not consider that the Trustees are a taxable person: apart from the fact that they are not registered they are not such by definition. The only supplies which, on any view of the matter, are being made by them are the supplies of pensions and these are exempt supplies by virtue of the provisions of item 1 of Group 5 of Schedule 5 of the Finance Act, 1972. Being exempt, and not taxable supplies, it is evident that by virtue of sections 4(1) and 46(1) of the Finance Act, 1972 the Trustees cannot be a taxable person. This view of the matter makes it unnecessary, in the event that the tribunal found that the provision of services … was made to the Trustees and not to the Company, for the tribunal to proceed to consider the question whether or not the Trustees were carrying on a business for the purpose of which such supplies were made to them: the first condition of section 3(1) of the Finance Act, 1972 would not have been satisfied and it would be unprofitable therefore for us to consider the second condition."

44. The tribunal held that, given that the company and the trustees were separate legal persons, the professional services in connection with the management and administration of the fund were rendered to the trustees. Nothing in that decision advances the applicant's case, in my view.

Cases on necessity for consideration for business/economic activity

45. In support of their contention that there can be no business or economic activity in the absence of consideration, counsel for the appellants referred to the following authorities:

> (1) *Customs and Excise Commissioners v. Morrison's Academy Boarding Houses Association* [1978] STC 1, which was a decision of the first division of the Inner House of the Court of Session as the Court of Exchequer in Scotland.

46. The taxpayer in that case was a company limited by guarantee and it was a charity. Its principal object was to provide residential accommodation for pupils and scholars at Morrison's Academy. It charged a fee for the accommodation. For the purposes of its liability to value added tax, it was not in dispute that it was a taxable person and that the services supplied by it to boarders were taxable supplies. The issue was whether, as it contended, the services were not supplied by it "in the course of a business carried

on" by it, and thus not liable to VAT. The definition of "business" in the relevant statute, unlike the definition in s. 1 of VATA, did not refer to profit and merely provided that "business" included any trade, profession or vocation.

47. The Court of Sessions held that the services were supplied to the boarders "in the course of a business" and were chargeable to VAT. The court held that, in the context of the Finance Act, 1972, the word "business" was wide enough to embrace any occupation or function actively pursued with reasonable continuity. Where, therefore, the activities of a taxable person were predominantly concerned with the making of taxable supplies to consumers for a consideration, the taxable person was in the "business" of making taxable supplies, and the taxable supplies made by him were supplies made "in the course of" carrying on that business, even though the activities were not carried on with the object of making a profit. The activities of the Association, which were deliberately and continuously carried on by it in a businesslike way, constituted "a business" within the meaning of the relevant provision, although the motive underlying the activities was to assist the Academy.

48. While the appellants relied on this decision as authority for the proposition that receipt of consideration is an essential element of the concept of business, in my view, it is persuasive on a broader basis on the meaning of "business" as the transposition of the expression "economic activity" in the VAT code. Lord Cameron's approach to the issue before him is instructive. What has to be looked at is the activity, he stated. He posed the question how would the activity in issue be properly described without any reference to issues of tax liability. His answer (at p. 10) was as follows:

> "I think the answer would be that it is essentially a business activity of a very usual and normal kind. It has every mark of a business activity: it is regular, conducted on sound recognised business principles, with a structure which can be recognised as providing a familiar constitutional mechanism for carrying on a commercial undertaking, and it has as its declared purpose the provision of goods and services which are of a type provided and exchanged in course of every day life and commerce. Not only so, but to some extent the association is necessarily competing in the market with other persons and concerns offering precisely similar services to the same clients and customers."

> (2) *Customs and Excise Commissioners v. Royal Exchange Theatre Trust* [1979] STC 728, which was a decision of the Queen's Bench Division of the High Court in England and Wales.

49. The issue in that case was whether the assignment of a lease of a theatre by Royal Exchange Theatre Trust, a charity, to a company incorporated by it and registered as a charity was a supply in the course of business within the Finance Act, 1972. The determination of that issue in favour of the Trust would have validated the registration of the Trust for the purposes of VAT, which would have allowed the Trust to recover input tax charged to it on supplies made in connection with the theatre. The position of the Commissioners was that the assignment was not in the course of business. What had happened was that the Trust, in accordance with the terms of its trust deed, raised substantial sums of money by appealing to the public for funds. The great majority of the sums raised did not involve taxable supplies. The Trust acquired a lease of a building and converted it into a theatre. It then assigned the lease "as a gift" to the company. Neill J. held that the assignment did not constitute a supply in the course of business carried on by the Trust. He regarded the complete absence of any monetary consideration moving from the company as of the greatest importance, following the *Morrison's Academy* case. In his judgment he stated (at p. 733):

> "In reaching this conclusion I have not overlooked the line of reasoning which led the tribunal to come to a different conclusion. I take the view, however, that the fact that the Commissioners recognised some of the activities of the trustees as business activities does not affect the question of how all the activities looked at collectively are to be classified. The trustees no doubt carried on their affairs with great skill and in a 'business-like' manner. But so might a private philanthropist. It is the nature of the activities and not the efficiency with which they are undertaken which is the determining factor. Looking at the activities of these trustees as a whole it seems to me that they lacked any commercial element at all and that they cannot properly be regarded as business activities."

50. That case, in essence, involved a voluntary assignment from one charity to another, where there was patently no consideration.

> (3) *Institute of Chartered Accountants in England and Wales v. Customs and Excise Commissioners*, which was the decision of the House of Lords to which I have already referred.

51. The Institute was a recognised professional body authorised under various statutory schemes to issue licences to persons carrying on investment business, auditors and insolvency practitioners. It charged fees to those seeking to be licensed in order to recoup its costs. However, the evidence was that the fees were fixed so as to enable the Institute to break even, taking one year with another. The position of the Commissioners was that the Institute's practice regulation activities did not constitute the carrying on of a business for the purpose of s. 4 of the Value Added Tax Act, 1994, or an economic activity for the purposes of article 4 of the Sixth Directive. In his speech, Lord Slynn reviewed decisions of the ECJ, "on both sides of the line". On the application of the Sixth Directive he stated as follows (at p. 404):

> "For the purposes of the Sixth directive, it is thus not sufficient that what was done can be described as an activity of the professions for the purposes of art 4(2) nor that it was a supply of services for consideration for the purposes of art 2(1). It must still be an economic activity.
>
> On the basis of cases like *Eurocontrol* [1994] E.C.R. 1-43 and as a matter of ordinary language, I do not consider that what is done here by the Institute is such an economic activity. The Institute is carrying out on behalf of the state a regulatory function in each of these three financial areas to ensure that only fit and proper persons are licensed or authorised to carry out the various activities and to monitor what they do. This is essentially a function of the state for the protection of the actual or potential investor, trader and shareholder. It is not in any real sense a trading or commercial activity which might justify it being described as 'economic' and the fact that fees are charged for the granting of the licences (to be assessed overall on a break-even basis) does not convert it into one."

52. As to the meaning of the word "business" in the Act of 1994, in a passage relied on by counsel for the appellants, Lord Slynn referred to a decision of Ralph Gibson J. in *Customs and Excise Commissioners v. Lord Fisher* [1981] S.T.C. 238. He reiterated six indicia which were listed in that case by counsel for the Commissioners as the test as to whether an activity was a business, namely, whether it was:

> (a) a "serious undertaking earnestly pursued";
>
> (b) pursued with reasonable continuity;

(c) substantial in amount;

(d) conducted regularly on sound and recognised business principles;

(e) predominantly concerned with the making of taxable supplies to customers for a consideration; and

(f) such as consisted of taxable supplies of a kind commonly made by those who seek to make profit from them.

53. Commenting that at first instance before the VAT tribunal it was accepted that the first four tests were satisfied, and the debate turned on whether tests (e) and (f) were satisfied, Lord Slynn continued:

> "The tribunal held that neither was satisfied and … that for similar reasons, the activity in question here was 'outside the economic circuit within which the VAT charge operates'. *The Lord Fisher* case is a long way from the present, but it does indicate that business, too, in its ordinary sense and for the purposes of the 1994 Act needs to be given an 'economic' content."

54. Lord Slynn concluded that performing on behalf of the State the licensing function was not carrying on a business.

55. In my view, the test in the *Lord Fisher* case is one which can be usefully deployed in this jurisdiction in determining whether the supply of goods or services "is in the course of furtherance of business" within the meaning of s. 2(1) of VATA or whether services are received "for the purposes of business" carried on by the recipient within the meaning of s. 5(6)(e)(ii) of VATA.

(4) *Staatssecretaris van Financiën v. Hong-Kong Trade Development Council* (Case C-89/81), which was judgment given by the ECJ on 1st April, 1982 on a reference for a preliminary ruling from the Supreme Court of the Netherlands.

56. The Council was an organisation founded in Hong Kong in 1966 with the object of promoting trade between Hong Kong and other countries, which opened an office in Amsterdam in 1972. Its activities in the Netherlands consisted of providing free of charge for traders information and advice about Hong Kong and the opportunities for trade with Hong Kong and also in providing similar information concerning the European market for Hong Kong traders. The income of the Amsterdam office was provided in the form of a fixed annual grant from the Hong Kong Government and from proceeds of a charge amounting to 0.5% on the value of products imported into and exported from Hong Kong. The question posed by the Court of the Netherlands was whether a person who habitually provided services for traders could be regarded as a taxable person within the meaning of article 4 of the Second Directive (1967) in the event of those services being provided free of charge. Article 4 defined "taxable person" as meaning any person who independently and habitually engages in transactions pertaining to the activities of producers, traders or persons providing services, whether or not for gain. The reply from the ECJ was that a person who habitually provides services for traders, in all cases free of charge, could not be regarded as a taxable person within the meaning of article 4 of the Second Directive. That decision did not turn on the meaning of economic activity. On my reading of the judgment the *ratio* of the decision is to be found in para. 10 in which it was stated:

> "Where a person's activity consists exclusively in providing service for no direct consideration, there is no basis of assessment and the free services in question are therefore not subject to value added tax. In such circumstances the person providing services must be assimilated to a final consumer because he is at the final stage of the production and distribution chain. In fact, the link between him and the recipient of the goods or service does not fall within any category of contract likely to be the subject of tax harmonisation giving rise to neutrality in competition; in those circumstances, services provided free of charge are different in character from taxable transactions which, in the framework of the value added tax system, presuppose the stipulation of a price or consideration."

(5) *Customs and Excise Commissiioners v. Yarborough Children's Trust* [2002] S.T.C. 207, which was a decision of the Chancery Division of the English High Court.

57. In that case, the Trust, a charity, procured the erection of a building to provide day care facilities for young children in need thereof at a cost of approximately Stg.£100,000. The building contractors charged VAT on their services. The Trust sought to have these services zero rated under a provision of the Value Added Tax Act, 1994 on the basis that they constituted supply in the course of construction of a building intended for use solely for a "relevant charitable purpose". That phrase, as defined, required use by a charity in either or both of the following ways: otherwise than in the course or furtherance of a business; or as a village hall or similarly in providing social or recreational facilities for a local community. The Trust had leased the building to a playgroup under a lease at an annual rent of Stg.£2,800, which provided security of tenure for the playgroup. On an appeal by the Commissioners against a decision of a VAT tribunal deciding that the grant of the lease did not constitute an economic activity so as to bring it outside the scope of the provision which required use "otherwise than in the course or furtherance of a business", the court held that there was material from which the tribunal had been entitled to conclude that the 1998 lease to the playgroup, although at an annual rent, did not constitute the carrying on of an economic activity, and did not amount to the exploitation of property for the purpose of obtaining income therefrom. Furthermore, the evidence before the tribunal showed that the playgroup was not profit led and struggled to maintain the balance between remaining affordable, and meeting its operating costs, and playgroup fees were fixed on that basis. The court held that, in those circumstances, the tribunal had been entitled to conclude that no business user was involved, and that, accordingly, the supplies of building work fell to be zero rated.

58. Counsel for the appellants have advanced that decision as authority for the proposition that receipt of consideration plays a critical part in the concept of an "economic activity", to the extent that, in some circumstances, the receipt of consideration is not sufficient to give rise to the existence of an economic activity. It is true that Patten J. did conclude (at para. 22) that the balance of authority, including the *Wellcome Trust* case, was against treating a transaction or activity as economic or as part of a business merely because it results in a consideration or produces income. He stated (at para. 23) that the transaction in issue in that case, the lease, was not to be looked at in isolation. The test, whether the transaction was being carried out by a person carrying on some form of economic activity necessitated an enquiry into the wider picture: the nature of the activities carried on by the person alleged to be in business, the terms upon which and the manner in which these activities (including the transaction in question) were carried out and the nature of the relationship between the parties to the transaction. Later (at para. 29) he made the point that the fact that an essentially business operation is intended to further the charitable objects of the body which carries it out does not of itself alter the nature of the operation for VAT purposes, giving the example of a charity shop run for profit. However, he contrasted the playgroup, which itself was charitable, with that of the charity shop, which itself was not a charitable activity, and concluded that the fact that the playgroup itself was charitable had to be taken into account in deciding whether, in the words of Lord Slynn, the playgroup had "an economic content".

59. In essence, in that case the fact that it concerned a lease from one charity to another, albeit at a rent, was a significant factor. Like the *Royal Exchange Theatre Trust* case, I am of the view that it does not provide guidance in relation to the issue which arises here: both are distinguishable on the facts.

> (6) *National Coal Board v. Customs and Excise Commissioners* [1982] S.T.C. 863, which was a decision of the Queen's Bench Division of the English High Court.

60. That was a case involving a pension scheme. The Board operated a pension scheme for its employees which was funded by contributions from both the employees and the Board. The scheme had a committee of management which was responsible for the investment of the funds of the scheme. The Board was responsible for the collection of contributions and the payment of benefits. The general management and administration of the scheme, including implementing the committee's investment decisions, were carried out by the Board. Initially, the committee paid the Board the costs incurred by it in participating in the administration of the scheme and for any services rendered by the Board to the committee in connection with or for the purposes of the scheme. The Board accounted for value added tax on those payments. Subsequently, with a view to avoiding tax on such payments, the Board amended the scheme by adding a proviso (iii) to clause 2.1 of the scheme, the effect of which was to allow the total amount of contributions due by the Board to be reduced by such costs. The Customs and Excise Commissioners took the view that the Board had supplied services to the committee and that the reduction of the Board's contributions to the scheme constituted consideration for those supplies and, accordingly, assessed the Board to value added tax in respect of those supplies. A VAT tribunal upheld the decision of the Commissioners. An appeal by the Board to the High Court was successful. Woolf J., having identified the solution as depending on the proper construction of the proviso and another clause of the pension scheme under consideration, stated at p. 870:

> "If we put on one side the motive for the insertion of the proviso, as I have already indicated that we should do, then it seems to me that the correct answer here is to look on cl. 2 as providing no more than the method of calculating the amount which the board is required to provide. It is to be noted that the proviso (iii) does not stand alone; there are also deductions to be made under provisos (i) and (ii). Furthermore it is to be remembered that the contribution may be increased by reason of the board's liability to pay a deficiency contribution.
>
> It seems to me that looked as a whole, the scheme is one whereby the board's contribution was to be calculated on a basis which took into account the cost of running the scheme. So far, following the arguments that were advanced before me, I have considered the issues of supply and consideration separately. However, both questions are linked. I have already indicated that part of the board's activities should not be characterised as a supply of services. With regard to those activities, the amount deducted under the proviso can hardly be regarded as consideration and the fact that some charges which are not consideration have to be deducted under the proviso is an indication that other charges should also not be regarded as a consideration."

61. The Board's activities which Woolf J. had held should not be characterised as a supply of services were the collection of contributions and the paying of benefit, which functions he found the Board carried out on its own behalf, being its responsibility, rather than by way of providing a service to the committee of management.

62. Counsel for the appellants submitted that, by analogy to the decision of Woolf J., the court should find that the appellants get no consideration for the performance of their functions, contending that, not only are the appellants not paid a fee for their services, but the reimbursement of their expenses by Cadbury is reflected in increased contributions. I will return to the question whether the appellants get consideration later. As regards the relevance of the decision of Woolf J., I do not accept that the point at issue here against the factual backdrop here is analogous to the issue which arose in the *National Coal Board* case against the factual background there. The issue with which Woolf J. was concerned was whether there was a supply of services from the Board, the employer, to the committee and, if so, whether it was for consideration so as to render the committee liable for VAT for which the Board was accountable. Here, while the net issue is whether the appellants, being legal entities which are separate from Cadbury, the employer, which manage and administer the pension schemes, received the services of their investment manager, BG, "for the purposes of business carried on" by them, so as to render them liable to VAT under s. 5(6)(e), the question to which the exploration of the meaning of business gives rise is whether the appellants as trustees of the pension scheme supplied services to Cadbury and the members of the schemes for consideration. To put it another way, in the *National Coal Board* case the question was whether the committee gave consideration for the services supplied, whereas here the issue is whether the appellants receive consideration for services they supply. In my view, the decision of Woolf J. is not of assistance in determining the issue which arises here.

Cases on investment holding

63. Counsel for the appellants also referred to a series of cases in which the ECJ held that holding of investments was not an economic activity within the meaning of article 4.2 of the Sixth Directive. The decision of the Court of Justice in the *Polysar* case was applied in the *Wellcome Trust* case, as is clear from the commentary on the *Wellcome Trust* case set out above. The principle in *Polysar* was extended to the holding of bonds in *Harnas & Helm CV v. Staatssecretaris van Financiën* [1997] S.T.C. 364. In that case the ECJ held that article 4.2 of the Sixth Directive was to be interpreted as meaning that the mere acquisition of ownership in and the holding of bonds, activities which were not subservient to any other business activity, and the receipt of income therefrom were not to be regarded as economic activities conferring on the person concerned the status of a taxable person.

64. As the findings of the Commission at para. 5(d) of the case stated illustrate, the functions of the appellants extend far beyond investment holding. In my view, the reliance of the appellants on these cases and on the *Wellcome Trust* case in support of the proposition that the appellants are not engaged in economic activity is fundamentally flawed because it ignores the essential facts.

Economic activity in the context of competition law

65. Finally, counsel for the respondent cited the decision of the ECJ in *Pavel Pavlov v. Stichting Pensioenfonds Medische Specialisten* (Joined Cases C-180/98 and C-184/98), in which the ECJ gave judgment on 23rd March, 2000, as supporting the proposition that a pension fund is a business or an economic activity. That case, however, was decided in the context of issues arising in the area of competition law and the application of articles 85, 86 and 90 (now articles 81, 82 and 86) of the EC Treaty.

66. The context in which economic activity arose in that case is seen in para. 74 of the judgment, in which the court stated that it had consistently held that, in the context of competition law, the concept of an undertaking covers any entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed. Counsel for the respondent then pointed to the decision of the court on the issue as to whether the fund in issue in that case was an undertaking, which is to be found in paras. 117-199 inclusive, and to the summary of the findings at para. 9 in the headnote, which is in the following terms:

> "A pension fund which itself determines the amount of the contributions and benefits and operates on the basis of the principle of capitalisation, which has been made responsible for managing a supplementary pension scheme set up by a

profession's representative body and membership of which has been made compulsory by the public authorities for all members of the profession, is an undertaking within the meaning of Articles 85, 86 and 90 of the Treaty.

Neither the fact that such fund is non-profit-making nor aspects of solidarity in the way in which it operates is sufficient to relieve it of its status as an undertaking within the meaning of the competition rules of the Treaty. Conditions, such as the pursuit of a social objective, the presence of the said solidarity aspects and of restrictions or controls on investments made by the fund do not prevent activity engaged in by such a fund from being regarded as a economic activity."

67. The fund in issue in that case was a fund set up as a foundation governed by private law, but it was subject to public law regulation (para. 33). The fund itself determined the amount of contributions and benefits and operated on the basis of the principle of capitalisation, so that the level of benefits provided depended on the performance of the investments and in that respect it was subject, like an insurance company, to supervision by a regulator (para. 114). It was those characteristics, together with the fact that persons in the sector to which it applied, medical specialists, might opt to purchase their basic pension either from the fund or from an authorised insurance company and the fact that the fund had power to grant certain categories of medical specialists exemption from membership as regards other components of the pension scheme, indicated that the fund carried on an economic activity in competition with insurance companies (para. 115).

68. It will be clear from that outline of one aspect of a very complex case, that the fund which was the subject of that case was different in substance from the private occupational pension fund which was managed and administered by the appellants.

Conclusions

69. It is timely to reiterate what the core issue on this case stated is. It is whether the appellants, who have been found to be the recipients of the services provided by BG, received those services for the purposes of a business carried on by them. Counsel for the appellants suggested that that issue could be reduced to two elements: whether the appellants carried on a business or economic activity; and, if they did, whether the investment management services were received for the purposes of the business. While that is a correct analysis, in reality and in fact, the appellants' only functions at the material time were the fiduciary functions reposed in them by the trust deeds which govern the respective pension funds of which they are trustees and they received the services of BG for the purposes of those functions. Therefore, the issue is whether the performance of those functions constituted business or economic activity. In broad terms, the parties agree that those functions involved the administration and management of the trust funds of the pension scheme.

70. The service provided by BG was investment portfolio management in accordance with a letter dated 10th November, 1987 from BG to Cadbury which set out BG's responsibility as managers of the funds. In the respondent's written submission it was asserted that the investment management function in relation to the trust funds performed by BG was a substantial activity conducted regularly on sound recognised principles by a professional dealer in securities. That is so. However, insofar as there is an implication in that assertion that BG's professional status as an investment manager is in some way determinative of the issue whether the appellants carried on a business, I do not accept that it is.

71. The Commissioner did not specifically address the question whether the appellants received consideration for the services which they provided in managing and administering the pension schemes, which, in my view, is a mixed question of fact and law. However, he did find, as set out at para. 5(b) of the case stated, that the appellants' functions under the trust deeds, which were appended to and formed part of the case stated, were to hold the funds in trust to pay out pensions and other benefits to the members of the schemes, as well as all administration and other expenses incurred by them in connection with the schemes as they considered necessary or desirable. What the trust deeds disclose is that, as counsel for the appellants submitted, the appellants recoup the costs and expense of the management and administration of the pension schemes through the contribution of Cadbury: clause 3.1 of the trust deed of 24th October, 1994 governing the functions of the first appellant; and clause 3 of the trust deed of 26th February, 1990 governing the functions of the second appellant.

72. I reject the appellant's submission that there was no consideration for the performance by the appellants of their functions in the management and administration of the pension schemes and that reimbursement of the costs and expenses of such performance being reflected in increased contributions from Cadbury cannot constitute consideration. Because of the definition of "business" in s. 1 of VATA it is immaterial that the appellants are not paid a fee and are precluded from making a profit. They are paid for the performance of their functions in the management and administration of the pension schemes; they do not provide them gratis. In my view, it is immaterial that payment is achieved through the medium of the contribution of Cadbury, as certified by the actuary in accordance with the provisions of the trust deed, rather than by a payment by Cadbury to the appellants. In fact, historically, the fees of BG were discharged directly by Cadbury to BG so that the appellants were paid indirectly, but, in my view, that is also immaterial. In substance, the appellants were and are entitled to be paid and the method or mechanism used to pay them is irrelevant.

73. In determining whether the performance of their functions in the management and administration of the pension schemes by the appellants constitutes a business or economic activity, I consider it appropriate to adopt the approach which Lord Cameron adopted in the *Morrison Academy* case and to look at the entirety of the activity which each is involved in and to ask whether that activity, leaving aside the question of tax liability, can be properly described as business or economic activity. In this context the entirety of the activity of each appellant is the activity which each was found to be engaged in by the Commissioner, as set out in para. 5(d) of the case stated.

74. I also think it is appropriate, in examining the activity in which each appellant is involved to determine whether it comes within the wide definition of "business" in s. 1, to apply the criteria listed in the Lord Fisher case, which were ultimately derived from the *Morrison Academy* case. In doing so, I find as follows:

(a) the activity of each appellant is a "serious undertaking earnestly pursued";

(b) the activity of each of the appellants is pursued with reasonable continuity, not on a one-off basis, and, in fact, it is pursued continuously;

(c) as a matter of inference, the activity of each of the appellants is substantial an amount, noting that the Trustee Report of the Cadbury Ireland Pension Scheme, for 1996, which is appended to the case stated discloses that the value of the fund at 5th April, 1996 was IR£110.65million;

(d) the activity of each of the appellants is conducted regularly on the basis of sound and recognised business principles;

(e) having found that each of the appellants receives consideration for the performance of its functions, notwithstanding that it is precluded from pursuing profit, each is predominantly concerned with making taxable supplies to customers for consideration; and

(f) the taxable supplies are of a kind commonly made by those who seek to make a profit from them.

75. In relation to the last point, I am taking judicial notice of the fact that large pension schemes such as the schemes involved here are frequently managed by professional trustees on a fee basis with a view to making a profit. (*cf*. Finucane *et al* on Irish Pensions Law and Practice, 2nd Edition (2006), Thomson Round Hall at p. 215)

76. As the criteria are met, I am satisfied that the performance by each of the appellants of its functions and the activity involved in such performance, as outlined in para. 5(d) in the case stated, constitutes "business" within the meaning of s. 1 of VATA and "economic activity" within the meaning of the Sixth Directive. I am further satisfied that each received the services of BG for the purpose of business carried on by it.

Answer to the question posed in the case stated

77. The answer to the question of law posed in the case stated is that the decision of the Commissioner as set out in para. 10 of the case stated, that the services received by the appellants from BG were for the purposes of a business, is correct in law.