TC00948

Appeal number:MAN/07/0718

VAT –zero rate - construction of a building for a charity – business use? – yes – appeal dismissed.
VAT – Art 13 of the Common System of VAT Directive - college of further education a body governed by public law? – no.

FIRST-TIER TRIBUNAL
TAX

WAKEFIELD COLLEGE **Appellant**

- and -

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

TRIBUNAL: Richard Barlow (TRIBUNAL JUDGE)

Sitting in public at Manchester on 14 and 15 December 2009 and 8, 9 and 10 September 2010

Mr Andrew Thornhill QC and Ms S Choudhury of counsel instructed by Deloitte and Touche LLP for the Appellant

Mr James Puzey of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. In this appeal Wakefield College appeals against the respondents' ruling given by letter on 23 May 2007 by which the respondents informed the appellant that they were "unable to accede to [the appellant's] request to issue a zero rating certificate for the construction of the new Glasshoughton Campus". It is not in dispute that that was an appealable decision amounting to a ruling that the supplies to the appellant by the construction company that built a new building for the appellant were not zero rated and had been correctly charged with VAT at the standard rate.

2. The building in question is called the skillsXchange (sic) and is a college building at Glasshoughton West Yorkshire where a large number of students of ages ranging from 14 upwards receive various forms of education and at which other related activities occur.

3. The appellant is a corporation established under the Further and Higher Education Act 1992.

4. The issues between the parties are twofold.

5. The first issue is the contention of the appellant that the construction supplies should have been zero rated under item 2 of Group 5 of Schedule 8 to the VAT Act 1994 which adds an item to the list of zero rated supplies and which, so far as is relevant, reads:

> "2 The supply in the course of construction of –
>
> (a) a building … intended for use solely for … a relevant charitable purpose;
>
> …
>
> of any services related to the construction other than the services of an architect, surveyor or any person acting as a consultant or in a supervisory capacity.
>
> NOTES
>
> …
>
> (6) Use for a relevant charitable purpose means use by a charity …
>
> (a) otherwise than in the course of a business".

6. The respondents agree that the appellant is a charity in the relevant sense and that it intended to use and has used the building for a relevant charitable purpose but they dispute that it intended to or has used it "solely" for that purpose because they contend that the building was also used by the College in the course of business. Some of the activities of the College should be categorised as the operation of a

business according to the respondents. The appellant contends that much of the College's activities were non-business activities and that, even though some of its activities might be characterised as business if conducted by a differently constituted legal entity, the nature of its funding, its mode of operation and its general characteristics were such that it was not in business at all so far as the activities intended to take place at the skillsXchange were concerned.

7. The second issue is whether or not the appellant was at the relevant time a "body governed by public law" in the sense required by Article 13 of the Common System of VAT Directive (2006/112). If so, the appellant contends that it was not to be regarded as a taxable person at all and so could not be conducting a business in the relevant sense. Mr Thornhill QC accepted at the hearing that that argument would not succeed on the current state of the law because the Chancellor had held in *Cambridge University –v- Revenue and Customs Commissioners* [2009] STC 1288 that a body governed by public law and which was not therefore to be regarded as a taxable person could nonetheless be engaged in economic activity (or seemingly, in terms of the UK legislation, as being in business). I have therefore been asked to rule whether the College is a body governed by public law so that, on any appeal which might arise from my decision, it would be open to the appellant to argue that the *Cambridge University* case was wrongly decided in so far as it decided that such a body could be in business even though not a taxable person.

8. The evidence presented at the hearing was extensive. I heard evidence from Jason Pepper, former director of finance of the appellant, George Tait Edwards MBE, a consultant formerly employed by various education funding bodies including the Learning and Skills Council ("LSC") and Professor David Reynolds CBE, Professor of Education at the University of Plymouth and advisor to government bodies in the education field. I also read the agreed statements of John Foster of the appellant and Neil License of the respondents. A very large number and volume of documents were also presented and referred to extensively at the hearing. The truthfulness of the witnesses' evidence was not in dispute and Mr Puzey's cross examination was aimed at elucidating rather than challenging the appellant's evidence. I should mention that Mr Puzey objected to the admissibility of a second witness statement produced by Professor Edwards shortly before the resumed hearing on the grounds that it had been served late. I ruled it should be admitted as evidence as it was relevant to the matters in dispute but on the basis that I would hear any application for an adjournment if Mr Puzey felt it necessary to have more time to take instructions after he had cross examined Professor Edwards. After cross examining Professor Edwards, Mr Puzey stated that he felt no such need and so no adjournment was sought.

9. As the issues in the appeal relate to how it was intended the skillsXchange building would be used the precise facts as they were at the date of completion are not necessarily determinative of the issue. However, the general nature of the activities carried on in the building has not changed substantially over time. My findings will not refer to precise sums of money, numbers of students and description of courses and my findings are directed to what the nature of the intended use of the building was. That is based on the approach taken by both parties at the hearing which was that the intentions of the College as to the use of the building can be derived from

how it was in fact used. The general operation of the College as a whole in terms of the degree of control over it exercised by other bodies and the financing and economic realities of its operation are also relevant and again the precise day to day variations are not what is in issue rather the picture as a whole provides the relevant factual basis for my decision.

10. I find the facts to be as follows.

11. The College was incorporated in 1992 as the successor to Wakefield District College when further education colleges were taken out of Local Authority control and became corporate bodies under the Further and Higher Education act 1992. The College has over 10,000 students of whom 70% or so are part time. About 35% of the students are under 19. Most of the under 19s are full time students. Most of the older students are part time.

12. The students study a wide range of courses including vocational training for adults working towards National Vocational Qualifications, Skills for Life courses (basic courses in numeracy and literacy), apprenticeships where the College provides the off the job part of the training, business training courses for employers, leisure and pleasure courses in which participants learn what might be termed hobby subjects though these include useful skills such as computing and car maintenance, a Sixth Form College, foundation degree courses where the degrees are awarded by Universities but the teaching is done by and at the College and special vocational courses for younger students of 14 and upwards who are not succeeding at schools because of behavioural problems.

13. The building work for the skillsXchange began in May 2007 and it opened in February 2009. The work cost about £29,000,000 of which about 50% was received from the sale of the College's Whitwood campus and 36% from College reserves which were themselves mainly derived from the sale of another site. The European Social Fund paid just over £1,000,000 and the Learning and Skills Council provided nearly £2,000,000 as grant funding. Capital expenditure exceeding £1,500,000 by a Further Education College requires LSC approval. The governors of Wakefield College would not have gone ahead with the project without the financial contribution from the LSC.

14. The teaching at the College is funded mainly from public funds. In the year ending 31 July 2008 81% of the College's income was received as direct grant funding from the LSC and the Higher Education Funding Council for England ("HEFCE"). Much the larger part of that 81% is from the LSC. The HEFCE grant relates to some of the degree courses and some other degree course income is paid to the College by the degree awarding Universities which in effect sub-contract the teaching to the College often at surprisingly poor rates (typically the Universities may retain half the funding they receive even though the College provides all the teaching and all the University does is to set the curriculum and set and mark the examinations). Other grants are received from local authorities. Less than 10% of the funds are received from tuition fees paid by students or their employers.

15. The LSC grants include some for specific projects but they are mainly based on the planned number of students for the forthcoming year, an assessment of the College's success in previous years, the level of social deprivation in the catchment area and the level of additional learner support needed (which is based on students' prior achievements in state examinations).

16. The grant funding system operated by the LSC is complicated. The Funding Guidance Document it issues to colleges is 119 pages long. In addition the LSC issues an Accounts Direction Handbook (96 pages), Guidance for Financial Management and Control (73 pages), Audit Control Practice (23 pages), Identifying Underperformance (56 pages) and other information and advisory documents. The Funding agreement with the College is 64 pages long.

17. Some of the documents issued by the LSC, rather than imposing legally enforceable obligations give guidance but, as the major funder of the College's activities, it is obvious that in practice the LSC has a high degree of control over the College despite the latter's independent existence as a separate legal entity. I am satisfied from the evidence of the witnesses that Government policy also heavily influences further education colleges and the LSC is likely to use its influence to re-enforce the messages coming from the Executive even in the absence of any legislation specifically requiring the policy to be adopted. Local political considerations may also influence how such a college operates. An example is the fact that the College felt obliged to take on the education of children as young as 14 who were failing in the school system and who it was thought would benefit from a more vocational form of education. Such children are difficult and expensive to educate but the College came under political pressure to take them. These points are relied upon by the appellant in support of its argument that it is not operating a business.

18. The LSC has the power to appoint two governors to the College in certain circumstances and the Secretary of State can dismiss and replace all the governors in certain circumstances or, by Statutory Instrument, dissolve the corporate body and transfer its assets and responsibilities to another such body.

19. The funding agreement between the College and the LSC imposes specific obligations on the College in numerous respects both as to its procedures and the nature of the education to be given. The Funding Guidance document, already referred to, states itself to be part of the funding agreement.

20. Much of that funding relates to activities which it was agreed between the parties were not such as to constitute the operation of a business for VAT purposes because the grant income involved falls outside the scope of VAT, as it is not consideration for a supply. Therefore the provision of education which is funded by the grants is not an economic activity as understood in the successive EU Directives or given effect to by the UK legislation, albeit that the latter refers to business rather than economic activity. On the other hand the Commissioners contend that the provision of education is an economic activity or business if it is paid for by consideration rather than by grant. Indeed the appellant does not deny that the provision of education can

amount to the operation of a business when paid for by consideration but contends that on the facts of this case it is not operating a business at all.

21. I find as a fact that the College is subject to a great deal of regulation both as a matter of law and as a practical result of its high degree of dependence on funding bodies, particularly the FSC, which inevitably gives those bodies a good deal of power to influence if not dictate how the College operates and what it does. It is also subject to political influence. The result is certainly that, although the College has an independent existence, its autonomy of action is considerably curtailed. The degree of autonomy that remains to it is not quantifiable in any meaningful way.

22. The major part of the College's activities which the Commissioners contend are the operation of a business are the provision of education where fees are paid by or on behalf of the students. The Funding Guidance document precludes the College from charging fees to anyone under 19 except in a very small range of cases. In principle the College can set fees for persons aged 19 and above at a level chosen by the College but the LSC monitors the levels set in order to ensure that they do not adversely affect provision of that type of education in the area. Where the College can charge fees it is assumed that it will succeed in doing so at a predetermined rate (37.5% in 2007-08 rising each year until 2010-11 when it will reach 50%) and, under paragraph 40 of the Funding Guidance document, the relevant grant to the College is reduced by that percentage whether or not it recovers any fees. In fact the College recovered less than the assumed fees and so suffered a reduction in the grant received.

23. The reduction in the grant does not prevent the College from putting on the courses but the College argues that the grant income it does receive and the fact that the College's general overheads are already covered means that the fee paying students are subsidised. The appellant's evidence is that the fee paying students do not pay sufficient to cover the whole cost of the course or their share of it and that such fees as are successfully collected are not sufficient to cover the reduction in the grant caused by the assumption that fee income will be 37.5% rising to 50% of the grant. In that sense the fee paying students do receive a subsidy from the grant and the funds used to cover the College's general overheads. However, it is also the case that, given that the College will suffer the reduction anyway, it might as well take on such fee paying students as it can muster because such fees as they do pay will reduce the effect of the reduction. If the College were able to take on sufficient fee paying students to more than cover the reduction in the grant it would be able to retain the extra amount received. That is clear from paragraph 133 of the Funding Guidance document.

24. The College charges members of the public for hairdressing by trainees at the skillsXchange but, although they are charged at below the local market rate because of the lack of expertise on the part of the as yet unqualified hairdressers, there is no evidence that the amount charged was such that the College was losing money as a result of allowing members of the public to have their hair dressed for payment.

25. The skillsXchange has a café which is open to the public but which is seldom if ever used by anyone other than students and staff of the College. The College brings

in outside caterers who operate the café on the basis that they receive a percentage of the takings. In fact the payment of that percentage to the caterers means that the College makes a loss on the operation of the café. It was not suggested in evidence that the caterers made the sales to the customers. The sales were made by the College as principal.

26. The College makes some sales to students of goods such as protective clothing. It was the uncontested evidence of the College that the sales were at cost without a mark up being added. It also allows students to use photocopying facilities at cost.

27. Against the above factual background I now turn to the legal issues.

28. The first issue is whether or not the College is correct in its contention that the nature of the control effectively exercised over it by the FSC and other outside bodies is such as to preclude it from being in business in the sense required by the legislation, even in respect of such of its activities as might otherwise be categorised as the carrying on of a business.

29. By way of a preliminary remark I should repeat that the parties are in agreement that the delivery of grant funded education is not a business for VAT purposes and I agree that is correct. Reference was made to the cases of *Commission of the European Communities –v- Finland* (C-246/08) [2009] ECR I-10605 and by analogy *Institute of Chartered Accountants of England and Wales –v- Commissioners of Customs and Excise* [1999] STC 398. In light of the parties' agreement I need not go into detail about those cases except to note that the reasoning of the Court in the *Finland* case was that the fact that the legal aid services in question were mainly paid for by grants from the government precluded the services from being economic activities because there was no price or consideration stipulated in the transaction between the parties to the transaction. Some recipients of the services had to pay a means tested contribution but that was held not to be consideration of the sort that would give rise to a taxable transaction because it was not directly related to the services provided. The Court's reasoning did not depend on any wider consideration of whether the providers of the legal aid were in business.

30. It is firstly so far as the payment of fees is concerned that an issue arises in this case and in the appellant's skeleton argument and at the hearing Mr Thornhill made it clear that where "full consideration" is charged to the students he accepts that the provision of education would be a business activity and the fee would be consideration but for one factor. That factor is that the appellant contends that its "core activity" takes it outside the scope of a body which is in business at all. The core activity is the provision of education funded by grant income. The appellant argues that as that activity is by far the larger part of its total activities the effect is that when it provides education for payment of fees it is not conducting a business because it would be wholly uneconomic for it to supply the education for those fees without the overheads and other costs having already been covered by the grant income.

31. The well known cases of *Customs and Excise –v- Morrison's Academy* [1978] STC 1, *Customs and Excise –v- Lord Fisher* [1981] STC 238 as approved in the *Chartered Accountants* case (already cited) establish the following general propositions which need to be considered when a question arises at to whether an activity is to be categorised as a business or economic activity for VAT purposes.

No possible exhaustive definition of what constitutes a business is possible.

The whole of an activity has to be considered when deciding whether it is a business.

Regard is to be given to whether the activity is carried on as a serious undertaking earnestly pursued.

Whether it has reasonable continuity.

Whether it has reasonable substance in terms of the value of the supplies made.

Whether it is carried on in a regular manner with sound business principles.

Whether it is principally concerned with making supplies to consumers.

32. The education of students who pay fees is, on the facts of this case, certainly an activity carried on as a serious undertaking earnestly pursued. The College is encouraged to maximise its income from this source both by it having as one of its aims the provision of further education and more specifically because of the incentive provided by the reduction of the grant by the assumed fee income. A college that did not seek to educate any paying students would suffer the reduction in its grant without any amelioration from such fee income as it managed to secure. It is clear from the documents that the College markets itself with a view to securing such fee income and does so vigorously.

33. The fee paying students are a small minority of the total but they and their fees are of reasonable substance. Their education is an activity carried out in a regular manner and does amount to the making of supplies to consumers. The appellant's argument implies that the fee paying students do not represent an activity conducted on sound business principles because the teaching of those students would not be possible without the subsidy in effect provided by the grant income on which the existence of the College itself and the courses it runs depend. I do not agree. Given that the College will put on such courses and as a consequence will receive grants but given also that it will then receive a grant reduced by the assumed income, it makes very good business sense to take on the fee paying students as well in order to off set as far as possible the effect of the assumed fees.

34. In my opinion the analogy sought to be drawn between the appellant and the playgroup and nursery that were considered in *Customs and Excise –v- Yarburgh Children's Trust* [2002] STC 207 and *Customs and Excise –v- St Paul's Community Project* [2005] STC 95 is not a valid one. Those organisations were conducted on a wholly different scale from that of the College and those cases were decided on their own facts which are too far removed from those of the appeal under consideration for them to support any such analogy.

35. A number of other cases were cited but I do not think they alter the principles established by those I have mentioned. I hold therefore that when the College provided education for fee paying students who paid full fees it was carrying on a business and that when the skillsXchange was constructed that was an intended use of the building with the consequence that the construction of it was not eligible for zero rating.

36. Although that holding would be enough to dispose of the appeal I was told that the Commissioners operate a concession for cases where only a small element of business use is intended. Such concessions fall outside the scope of the Tribunal's jurisdiction but the parties invited me to make findings about other aspects of the College's activities the better to enable them to decide whether the concession might apply. In any event in case I am wrong about the conclusion I have reached about the fee paying students I should make those findings as well.

37. I was told that some fee paying students are entitled to partial remission of their fees and the appellant argues that those fees should not be regarded as consideration on the same basis as the part payment of legal aid costs was so treated in *Commission of the European Communities –v- Finland* [2009] ECR I-10605. The part payments made by some of the recipients of the legal aid in Finland were based on the aided party's income and bore no specific relationship to the aid granted. If that is the case where students receive partial remission of fees then I agree that should be treated the same way but if the remission is based on factors such as the student coming from a deprived area so that all students of a particular category would be entitled to the same remission regardless of their personal circumstances then that would only amount to a reduced level of consideration and the relevant supply would still be by way of business.

38. I hold that the supplies in the café are clearly a business. No doubt the café in effect receives a subsidy from the College and indeed the appellant's case is that it made a loss but that does not prevent its being a business. The same applies to the hairdressing services provided to members of the public who submit themselves as training opportunities to the trainees but nonetheless pay for the hairdressing. The fact that they pay reduced rates is not a reason to hold that the supplies are not by way of business.

39. The fees the College receives from Universities in exchange for the provision of courses for the students who read for the Universities' degrees are payments for supplies by way of business. The service is provided to the Universities and paid for by them and, as with the fees paid by the College's own students, the fact, if it be a

fact, that these courses are in effect being subsidised by the College's grant income because it has paid for general overheads does not prevent the services being by way of business. In the case of the University students they are on separate courses which the College's own students do not attend. There is no assumed level of fees which is deducted from any grant income. However, given that the College has premises with capacity to take on these students, it makes good business sense for the College to maximise the use of those premises and to achieve some income from them even if it would not have been possible to do so without the grants. The reasoning is therefore the same as that set out in paragraph 33 above.

40. For those additional reasons the building was intended for business use and the construction did not qualify for zero rating.

41. Finally, I need to consider whether the College is a body falling within article 13(1) of the Common System of VAT Directive (2006/112EC) which reads;

> "13.1. States, regional and local government authorities and other bodies governed by public law shall not be regarded as taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with those activities or transactions.
>
> However, when they engage in such activities or transactions, they shall be regarded as taxable persons in respect of those activities or transactions where their treatment as non-taxable persons would lead to significant distortions of competition.
>
> In any event, bodies governed by public law shall be regarded as taxable persons in respect of the activities listed in Annex 1, provided that those activities are not carried out on such a small scale as to be negligible".

42. The College could not on any reasonable view of the facts be regarded as a state, regional or local government authority. The word authority clearly envisages a body that controls or governs some aspect of the life of a community and the College does not act in that way at all. It follows that the most it could claim would be that it is an "other body governed by public law". It seems clear that even in that phrase the type of body that is intended to be covered must be something akin to a state, regional or local government body because the "other bodies" would as a matter of normal rules of construction be likely to be restricted to those that have some similarity to those specifically listed. That is re-enforced by the fact that the activities and transactions which are mentioned must be engaged in "as public authorities" and that phrase refers back equally to the other bodies governed by public law as it does to the states, regional and local authorities.

43. On purely textual grounds I would therefore hold that the College does not fall within article 13(1).

44. The appellant cited the *Edinburgh Telford College –v- Revenue and Customs Commissioners* [2006] STC 1291 in support of its contention that a further education

college is a public body of the relevant sort and was acting as such when proving education. In particular the appellant cited paragraph 26 of the judgement of the Inner House of the Court of Session. It is important to note that that paragraph was directed to deciding the question whether the Telford College was acting as a public body when it provided education not to the question whether it was a public body. That was because the Commissioners had conceded that the Telford College was a public body. The Inner House's judgment is therefore authority for the proposition that a public body is acting as such when it carries out its core activities but I hold that it is not authority for the proposition that a further education college is a public body in the sense required. Mr Puzey made it clear at the hearing of this appeal that he was not repeating the concession made in the Telford case. Mr Thornhill argued that the Inner House must have been satisfied the concession was correct or else it would not have acted upon it but I am satisfied that the Court simply proceeded on the basis that the concession had been made and did not decide the issue.

45. Support for the contention that a further education college is not a body governed by public law falling within article 13 can be found in paragraph 48 of the judgment in the *Cambridge University* case (already cited) where the Chancellor held that the question is to be decided on the basis of considering whether a body is "part of the public administration of the relevant member state". There are differences in the constitution and operation of the College and the University of Cambridge but I hold that on the facts of this case it would be incorrect to conclude that the College is part of the "administration of the state". If it were to be so held it would be difficult to imagine why every primary school, doctor's surgery or public library should not also enjoy that status.

46. I agree with Mr Puzey that the tribunal case of *Riverside Housing Association* (VAT Decision 19341) supports the same conclusion.

47. For the reasons stated above therefore the appeal is dismissed on the basis that the use for which the skillsXchange was intended was not restricted to us for non-business purposes and so accordingly the supplies of construction services did not qualify for zero rating.

48. 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.

RICHARD BARLOW

TRIBUNAL JUDGE
RELEASE DATE: 20 January 2011