Neutral Citation Number: [2015] EWCA Civ 1196

Case No: A3/2014/1413

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2nd December 2015

Before :

THE CHANCELLOR OF THE HIGH COURT
LORD JUSTICE PATTEN
and
LORD JUSTICE CHRISTOPHER CLARKE

- -

B E T W E E N:

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Appellants

-and-

BROCKENHURST COLLEGE

Respondent

- -
- -

Mr Michael Jones (instructed by **HMRC Solicitors**) for the **Appellants**
Ms Laura Poots (instructed by **Lamb Brooks LLP**) for the **Respondent**

Hearing dates : 4th November 2015

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Approved Judgment

The Chancellor (Sir Terence Etherton):

Introduction

1. This is the judgment of the Court.

2. This appeal concerns the application of the exemption from Value Added Tax ("VAT") in Article 132(1)(i) of the Principal VAT Directive (2006/112/EC) (formerly Article 13A(1)(i) of the Sixth VAT Directive (77/388/EEC)) ("the exemption") to certain supplies made by the respondent, Brockenhurst College ("the College"). That exemption is as follows:

> "the provision of children's or young people's education, school or university education, vocational training or retraining, including the supply of services and of goods closely related thereto, by bodies governed by public law having such as their aim or by other organisations recognised by the Member State concerned as having similar objects."

3. There are some restrictions on the application of the exemption. In particular, Article 134(a) provides that the exemption does not apply where the supply is not essential to the transactions exempted.

4. The College, which carries on the business of providing education to its students, teaches courses in (a) catering and hospitality, and (b) performing arts.

5. For the purpose of enabling the students enrolled in the course related to catering and hospitality to learn skills in a practical context, the College runs a restaurant. The catering functions of the restaurant are all undertaken by students of the College, under the supervision of their tutors. The public attend the restaurant and pay for their meal, the charge being around 80% of the cost of the meal.

6. Similarly, for the performing arts course, in order to give practical experience to those students enrolled on those courses, the College - again through those students - stages concerts and performances for paying members of the public.

7. The issue on this appeal, for which the Upper Tribunal (Tax and Chancery Chamber) ("the UT") gave permission, is whether the supplies the College makes of restaurant and entertainment services (that is to say, the supplies that are made by the College to those members of the public dining in the restaurant or attending the performances) are, as the College claims, exempt for VAT purposes pursuant to Article 132(1)(i) because they are "closely related" to the provision of education or, as the Revenue and Customs Commissioners ("HMRC") maintain, are standard-rated.

8. The First Tier Tribunal Tax Chamber ("the FTT") held that they are exempt. The UT dismissed the appeal by HMRC.

The parties' request for a reference

9. In a letter to the Court dated 15 October 2015 signed on behalf of both parties, it was stated that the parties were agreed that the appeal turns entirely on the resolution of important issues of Community law, which cannot be described as *acte clair*, and which have not been addressed before in any reported case either before a court in the United Kingdom or before the Court of Justice of the European Union ("the CJEU"). The parties said that they supported a reference to the CJEU for a preliminary ruling in accordance with Article 267 of

the Treaty on the Functioning of the European Union. An agreed draft of the questions the parties invited the Court to refer to the CJEU was appended to the letter and stated as follows:

> "1. With regard to article 132(i) of the Principal VAT Directive (2006/11 2/EC), are supplies of restaurant services and entertainment services made by an educational establishment to paying members of the public (who are not recipients of the principal supply of education) "closely related" to the provision of education in circumstances where the making of those supplies is facilitated by the students (who are the recipients of the principal supply of education) in the course of their education and as an essential part of their education?
>
> 2. In determining whether the supplies of restaurant services and entertainment services are within the exemption in article 132(i) as services "closely related" to the provision of education:
>
> a. is it relevant that the students benefit from being involved in the making of the supplies in question rather than from the subject matter of those supplies;
>
> b. is it relevant that those supplies are not received or consumed either directly or indirectly by the students but are received and consumed by those members of the public who pay for them and who are not recipients of the principal supply of education;
>
> c. is it relevant that, from the point of view of the typical recipients of the services in question (that is to say, the members of the public who pay for them), the supplies do not represent a means of better enjoying any other supply but are an end in themselves;
>
> d. is it relevant that, from the point of view of the students, the supplies in question are not an end in themselves but participating in the making of the supplies represents a means of better enjoying the principal supply of education services;
>
> e. to what extent should the principle of fiscal neutrality to be taken into account?"

10. The Court considered it appropriate to invite oral submissions from counsel for HMRC, Mr Michael Jones, in order to be satisfied that the application of the exemption to the facts of the present case is not "acte clair" and merits a reference for a preliminary ruling.

11. In the light of the written skeleton arguments of both parties, and having heard the oral submissions of Mr Jones, we are satisfied that a reference is appropriate. The following brief discussion explains our conclusion.

Discussion

12. In its decision published on 30 January 2014 the UT noted that, in addition to the facts mentioned in the Introduction above, the FTT made the following findings.

> (1) The training restaurant is required to meet the educational needs of the students taking catering and hospitality courses. The restaurant is tantamount to a classroom for such students.
>
> (2) The training restaurant is not open to the public as such. The College operates a database of local groups and individuals who may wish to attend the restaurant. They are informed of events at the College through a newsletter created by the hospitality department.
>
> (3) In relation to the training restaurant, the College requires there to be a full restaurant (serving between 30 and 40 people) for two sittings on the same day and two different groups of students to obtain maximum benefit for the students. If not, the meal is cancelled.
>
> (4) The performance of concerts and plays within the performing arts courses performs, for those students on those courses, a similar function to that of the training restaurant.
>
> (5) Likewise, for the performances, the audience is captive in the sense that they are usually friends and family of the students or from an established database of people registered with the College.

13. It has not been argued at any stage of these proceedings that there is any difference in the application of the exemption as between the restaurant services and the entertainment services.

14. The exemption has been implemented into UK law by section 31 and group 6 of schedule 9 of the Value Added Tax Act 1994. It has not been suggested that the domestic legislation is capable of producing a different result from the Principal VAT Directive.

15. In their decision the UT referred to *Skatteverket v PFC Clinic AB* (Case C-91/12) [2013] STC 1253, *EC Commission v Federal Republic of Germany* (Case C-287/00) [2002] STC 982, [2002] ECR I-5811, *EC Commission v France* (Case C-76/99) [2001] ECR I-249, [2001] 1 CMLR 1244, para 23, *Stichting Regionaal Opleidingen Centrum Noord-Kennemerland/West Friesland (Horizon College) v Staatssecretaris van Financiën* (Case C-434/05) [2008] STC 2145, [2007] ECR I-4793 ("*Horizon College*"), and *Canterbury Hockey Club v Revenue and Customs Comrs* (Case C-253/07) [2008] STC 3351, [2008] ECR I-7821.

16. The UT said that, in relation to the exemption for supplies closely related to education, the following are the principles to be derived from the case law:

> (1) As a general principle, the exemption must be construed so as to be consistent with its objective and so as to ensure its intended effect (see, for example, *Skatteverket v PFC Clinic AB* (Case C-91/12) [2013] STC 1253, paragraph 23).
>
> (2) An especially narrow interpretation of the exception for activities closely related to a principal exempt supply of education is not appropriate, since the exemption is

designed to ensure that the benefits of the principal supply are not hindered by the increased costs of providing it that would follow if the principal supply, or the closely related activities, were subject to VAT (*EC Commission v Federal Republic of Germany*, paragraph 47).

(3) To be closely related to a principal exempt supply, the service in question must be an ancillary supply, that is one that does not constitute an end in itself, but is a means for better enjoying the principal service supplied (*Horizon College*, paragraphs 28 and 29).

(4) The closely related supply must be essential to attain the objective of the principal supply (art 134(a)). In order to satisfy that requirement, the ancillary supply should be of a nature and quality such that, without it, there could be no assurance that the education from which the students benefit would have an equivalent value (*Horizon College*, paragraph 39).

(5) There is no requirement that the closely related supply be made to the same recipients as the principal supply. To be services closely related to education it is not necessary for those services to be supplied directly to those students (*Horizon College*, paragraph 32).

17. The UT rejected the central argument of HMRC that the exemption required the students to have benefited from the subject matter of the supply rather than, as in this case, from participating in the making of the supply. They said as follows in their decision:

> "[43] … We do not consider that, in this context, there is any principled distinction to be drawn between the subject matter of the supply and the making of it. For the exemption to apply to a supply it must be closely related to education and satisfy certain other conditions. None of those requirements is dependent on the subject matter of the supply. It is the supply itself that must be found to be ancillary to the supply of education, in the sense that it is a means for better enjoying the principal service.
>
> [44] The recipient of the supply is not material, so it cannot be right to determine the question by reference to the view of the transaction from the perspective of the recipient. The recipients of the research services in *EC Commission v Federal Republic of Germany* would have had the perspective that the research had an end in itself, but that was not the reason why the ECJ found that the services were not exempt. The question whether the supply in question is an end in itself or is a means for the students to better enjoy the supplies of education to them is one that must be answered by reference to all the circumstances. It is not a narrow analysis of the subject matter of the supply itself, but encompasses a broader examination of the aims and effects of the supply.
>
> [45] The FTT found that the catering and entertainment services were essential to the principal supply of education

> made by the College (FTT decision, at [25]). It found that those supplies were integral to the main supply; they were not an end in themselves but a means of providing the students with a better education (FTT, [26]). The FTT further found that the students directly benefited from the supplies of catering and entertainment services even though the supplies in question were to third parties.
>
> [46] Having regard to the authorities on art 132(1)(i), and the principles derived from them, we consider that the FTT was right to conclude, on the basis of its findings, that the restaurant and entertainment services are exempt as supplies of services and goods closely related to the provision of education by the College."

18. At the heart of the Commissioners' case, as presented by Mr Jones in his oral submissions, are the following propositions (not necessarily in the order he presented them).

19. First, exemptions from VAT must be given a strict interpretation but nevertheless one which is consistent with their objectives: *Skatteverket v PFC Clinic AB* at paragraph [23]

20. Second, the FTT decided that the supplies of food, concerts and performances by the College are not principal supplies of education. There was no appeal against that conclusion. The question is whether they are "closely related" to the supply of education by the College within the meaning of the exemption.

21. Third, the fact that the supplies of catering and entertainment services may be of real assistance in educating students is not sufficient. That is apparent from the reasoning and decision in *EC Commission v Federal Republic of Germany*, in which both the Advocate General (Jacobs) and the Court accepted that research projects for consideration may be of great assistance to university education but they rejected the claim that the exemption extended to research paid for by third parties.

22. Fourth, even if the supplies of catering and entertainment services by the College are essential to the education of the students, that is not of itself necessarily determinative of whether they are "closely related" to the supply of education within the meaning of the exemption. Article 134(a) excludes from the exemption the supply of services which are not essential to the transactions exempted. Necessity (for educational purposes) is, therefore, no more than a pre-requisite for exemption.

23. Fifth, the correct approach to the "closely related" issue in cases like the present one is to establish whether the relevant services are ancillary to the principal supply of education. This approach was endorsed by the Advocate General (Sharpston) (at paragraph [30]) and by the Court (at paragraphs [28] and [29]) in *Horizon College*. It was expressed as follows by the Court in *Card Protection Plan Ltd v Commissioners of Customs and Excise* (Case C349/96) [1999] ECR I-973 at [30].

> "There is a single supply in particular in cases where one or more elements are to be regarded as constituting the principal

> service, whilst one or more elements are to be regarded, by contrast, as ancillary services which share the tax treatment of the principal service. A service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied (Joined Cases C-308/96 and C-94/97 *Commissioners of Customs and Excise v Madgett and Baldwin* [1998) ECR 1-6229, paragraph 24)."

24. Sixth, this requires identification of the customer to whom both the principal service and the ancillary service are supplied. *Horizon College*, in which the supply of teachers by Horizon College to other schools was held to fall within the exemption, shows that the ancillary service may be "closely related" within the meaning of the exemption even if it is received indirectly by the customer of the education services (in that case the students at the other schools). There must, nevertheless, be some element of receipt of the ancillary service by the customer enjoying the principal service.

25. Seventh, in the present case, the customers for whom food, concerts and entertainment by the College are supplied are not the students but the persons consuming and paying for them. The students are the providers of those services, which are an end in themselves from the point of view of the consumers. The students are not directly or indirectly the recipients or consumers of the services. The supply to those customers is a principal supply. It is not an ancillary supply. It is not possible for VAT purposes, and the operation of the exemption in particular, for a principal supply to be also an exempt ancillary supply. By contrast with *Horizon College* where there was a linear relationship between the supply of teachers and the provision of education to the students of the schools to which the teachers were supplied by Horizon College, in the present case the provision of education to the students and the provision of food and entertainment services to the public are two distinct principal supplies.

26. Eighth, that approach to the interpretation of the exemption and its application in the present case is supported by the principle of fiscal neutrality inherent in the common system of VAT. That principle is that supplies of goods or services which are similar, and which are accordingly in competition with each other, may not be treated differently for VAT purposes: see, for example, *Finanzamt Steglitz v Ines Zimmermann* (Case C-174/11) (15.11.2012) at paragraph [48]. In the present case, the catering and entertainment services provided by the College are in competition with other non-educational establishments providing similar services.

27. We did not call on Ms Laura Poots, counsel for the College, to make oral submissions since the College was in agreement with HMRC that the application of the exemption in the present case is not *acte clair* and that there should be a reference to the CJEU; and we also had the benefit of reading the decisions of the FTT and the UT in favour of the College and the College's written skeleton argument for this appeal.

Conclusion

28. We are satisfied that, in the absence of any direct authority and in the light of the written and oral submissions of HMRC on this appeal, the interpretation and

application of the exemption in Article 132(1)(i) on the facts of the present case is not *acte clair*. The facts are not unusual and so the decision in the present case has a potentially wide impact. We therefore propose to make a reference.

29. The parties will liaise with the court to agree the terms of the reference.