[2015] UKFTT 0176 (TC)

TC04369

Appeal number:TC/2013/00084

VALUE ADDED TAX – exempt supplies – education – private college – whether supplies exempt under Group 6 Schedule 9 of VATA 1994 – whether "school" for purposes of Education Act 1996 – no- whether "college…of a UK university" – no- whether supplied teaching of English as a foreign language – yes – appeal allowed in principle

FIRST-TIER TRIBUNAL
TAX CHAMBER

Bell's College Limited **Appellant**

- and -

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

TRIBUNAL: JUDGE SWAMI RAGHAVAN
JOHN CHERRY

Sitting in public at 45 Bedford Square, London on 20 November 2013 and 5 June 2014

Zahid Bhatti, director of the appellant for the Appellant

Phil Shepherd, HMRC officer, for the Respondents

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DECISION

Introduction

1. The appellant college is a private company. The appeal concerns whether its supplies of education are exempt under Group 6 Schedule 9 of the Value Added Tax Act 1994 ("VATA 1994"). It argues, contrary to HMRC's view, that:

(1) it is a school as defined in the Education Act 1996 (on the basis of supplies of education it says it makes to students under 19); or

(2) a college, institution, school or hall of a UK university (on the basis of certain arrangements it has with universities); and

(3) that it is a supplier of the teaching of English as a foreign language.

2. The appellant appeals against HMRC's decision to assess for £207,750 VAT for periods 02/11 and 05/11 under s83(1)(p) VATA 1994 and HMRC's decision to impose penalties of £47,743.75 for periods 02/11 and 05/11 under paragraphs 15(1) and Schedule 24 of the Finance Act 2007.

Evidence

3. We heard oral evidence from Mr Zahid Bhatti, a director of the college responsible for admissions and international liaison.

4. He was cross-examined by HMRC and answered the Tribunal's questions. He was a credible witness.

5. We had a bundle of documents including correspondence between the parties and various copies of admissions forms and welcome letters to students, letters in relation to work experience arrangements for local students, certificates of accreditation, and extracts from the websites of awarding bodies.

6. Mr Bhatti brought along a witness statement but with the exception of seven short numbered paragraphs at the start it contained matters of legal argument. As explained to Mr Bhatti at the hearing on 20 November 2013 we considered the arguments contained within this statement as part of the appellant's legal submissions.

Procedural issues

7. The hearing on 20 November 2013 was adjourned to deal with a new argument that the appellant had raised that it was a "school" and directions were issued to allow for amended grounds of appeal, amended statement of case and amended lists of documents.

8. After the 5 June 2014 hearing, Mr Bhatti applied to put further documents before us. HMRC were invited to make written representations on the application and on the documents as appropriate. (These comprised a copy of an agreement between the appellant and a body called MDP in relation to arrangements with Manchester Metropolitan University and various e-mail correspondence and forms). Although they were not on the appellant's list of documents we were satisfied the appellant had intended to bring them to the 5 June 2014 hearing (but had not been able to for reasons out of his control relating to access to the building due to a tenancy dispute in relation to which we saw supporting documentation). If he had brought them to the hearing we would most likely have allowed them in as they were relevant to the appellant's arguments on the issue before us. Given the explanation for not bringing them to the hearing, the relevance of the documents, the fact the appellant was not professionally represented and the fact that it assisted the Tribunal to see copies of the documents in relation to which Mr Bhatti had given oral evidence on in the course of the hearing we decided it was in the interests of justice to admit the documents before us.

Law

9. Group 6 Schedule 9 of VATA provides as follows:

> "Note (1) For the purposes of this Group an "eligible body" is –
>
> (a) a school within the meaning of The Education Act 1996…
>
> (b) a United Kingdom university, and any college, institution, school or hall of such a university."

10. Note 1(f) Group 6 Schedule 9 provides for exempt supplies in relation to:

> "a body not falling within paragraphs (a) to (e) above which provides the teaching of English as a foreign language."

11. Note (2) provides that:

> "A supply by a body, which is an eligible body only by virtue of falling within Note (1)(f), shall not fall within this Group, insofar as it consists of the provision of anything other than the teaching of English as a foreign language."

12. The definition of "school" within the meaning of Education Act 1996 is relevant to the appellant's first argument. The relevant legislation is set out at [82] below.

Background facts

13. Bells' College is a private limited company based in Barking, Essex and at the relevant time had 400 or so students.

14. Mr Bhatti is director of admissions and international marketing at the college and has been involved with it since 2008. He works with international agents, signing contracts relating to students overseas. He had intermittently been a director of the company and was a director of the appellant at the time of the hearing. He told us this current spell of his company directorship began in January 2011.

15. In 2008 the college was small. It offered mostly English courses and access courses; it then expanded to around 21 teaching staff by September 2009. In the

period from June 2010 to February 2012 there were 17 administrative staff and 11 teaching staff. Bell's college is approved to offer various EDI (Education Development International) qualifications.

16. We set out below the background facts relevant to the various issues raised.

Teaching to under 19s

17. In the period 2008 to 2010/11 Mr Bhatti told us there were 17 students under 16 – doing vocational courses such as ESOL ("English for Speakers of Other Languages"), painting and plumbing.

18. The college provides work experience placements to local students through ReBEP (Redbridge Business Education Partnership). The correspondence between ReBEP and the college which we saw indicates the placement is for two weeks and includes clerical work. The student in the letter we saw was 14 years old. The student is interviewed by the appellant and the appellant signs an "employer agreement" agreeing to abide by health and safety legislation and to arrange suitable employer's liability insurance coverage.

19. Mr Bhatti told us that the work experience students who might be interested for instance in working for a solicitor or accountant get experience of the different departments of the college: admissions, academic, dean's office, exam department or that they would work with the teaching staff. They compile files and data sheets and perform tasks such as filing, reception management and making database entries. Their work is recorded and the appellant is asked to complete a report. The report form contains the following:

> "As this report may be used as part of the student's record of achievement your written comments below would be appreciated."

20. The student is awarded a work placement certificate upon completion by the appellant.

21. Out of the 400 or so students Mr Bhatti estimated 30-60 were under 19 years old and of these under 19 years olds around 30 were studying ESOL.

22. We saw various application forms for admission for ESOL courses dated 26 July 2012, 4 May 2010, 6 April 2010 and 3 July 2008. The "office use only" section at the top of the form contained two boxes "full-time" and "part-time" under the heading of "Method of Study". Apart from one form where the "part-time" box was ticked neither box was completed. Mr Bhatti explained that the appellant (and Home Office rules) regarded 26 week courses as part time as the appellant's normal courses were 43 weeks.

23. The ESOL course was class-room based; lasted 9 months spread over three terms, and involved 15-21 hours a week. The first student in the application form referred to above came from Pakistan and could not find a place at school. Another student was doing both ESOL and "functional skills" and was being taught 20-30 hours a week (ESOL plus Maths level 2). Mr Bhatti said that student was there between 10am to 5pm.

24. The ESOL course dates started four times a year in January, April, July and October. The ESOL course for under 19s was for three terms and a maximum of 9 months. For over 19s it ranged from three months to 12 months.

25. Mr Bhatti also told us the college offered "UKOnline" courses to under 16s in IT qualifications. He did not elaborate on how many such students there were and what the nature and length of these courses were. No documentary evidence was provided in relation to these courses. We were unable to make any finding of fact on the numbers of under 16s studying these courses and in relation to what the courses involved.

Arrangements with universities

26. Mr Bhatti gave oral evidence as to the contents of various arrangements the college had with awarding bodies and universities. The only arrangement we saw documentary evidence of was of an arrangement with Manchester Metropolitan University which was made through another body (see below). He explained that various relationships with universities were possible. These were franchise, study centre, progression agreement and validation agreements. Mr Bhatti told us the college had various agreements with universities made through certain other bodies.

University of Wales

27. In 2008 the College had had an agreement with the University of Wales through a body called Resources Development International (RDI) which conducts quality assurance of the centres of study.

28. A letter from "the director of the Validation Unit" of the University of Wales dated 29 June 2009 to a student certifies that the student:

> "is qualified for matriculation in the University, provided that an appropriate Institution recommends that this applicant be registered as a student of the University".

29. The letter (which is copied to RDI) confirms the title of the degree, that a place has been offered on the course and states :

> "The above course is normally studied over a one year period requiring tutor support of at least 18 hours per week at BELLS COLLEGE which is an RDI-approved support centre. On successful completion of the course you will be awarded an MBA by the University of Wales. Access to the University's Online Library will be provided once your Welcome Letter has been issued. The Welcome Letter will confirm your full registration status with the University of Wales."

30. We saw offer letters from the University of Wales in relation to three students to study an MBA top up at Bell's College.

31. There were also e-mails and correspondence relating to confirmation of offer from the University of Wales student on an MBA course to be studied at Bell's College as an RDI-approved support centre.

32. Between September 2009 and March 2010 the arrangement with the University of Wales ran into difficulties following revocation by the Home Office of the college's license.

Manchester Metropolitan / MDP

33. Mr Bhatti says Bell's College is on the MDP website. The college was not on the university website. Under the agreement Mr Bhatti said the college could use the name of the university, that it was not allowed to misuse the name, and that quality assurance was provided by MDP. Bell's College's website, we were told, linked to MDP's website which then sets out a list of MDP's partners.

34. We were shown a document between Management Development Partnership Limited (MDP) and the appellant dated 9 November 2010 which is stated to be: "for the delivery of a "top-up" programme leading to the degree of BSc (Hons.) Management and Business Administration awarded by Manchester Metropolitan University (MMU)".

35. The preamble describes MDP as "a collaborative partner" of MMU and goes on to say that MDP "develops and delivers educational programmes" and that "MMU has validated a one year full time programme at Level 6 delivered by MDP to provide a "top-up" programme leading to BSc (Hons) Management and Business Administration by Manchester Metropolitan University (the Programme)".

36. "Student" is defined as "Those Students from time to time registered with MDP to study the Programme at a Centre".

37. The appellant is referred to as a "Centre" which is defined as:

> "a private sector educational institution that has been designated by MDP as an Approved Centre and entered into a formal contract with MDP for the delivery of the Programme."

38. The contract allows for intakes to the Programme in October 2010 and January 2011 and may be suspended by MDP if the number of students in an intake falls below 30.

39. Clause 3 sets out the responsibilities of the Centre, which include complying with all requirements stipulated by MDP to ensure students receive "a high quality learning experience." The centre must refrain from offering directly competing programmes but is not precluded from working with other educational providers to deliver other degree programmes. The centre can only market using MDP approved material. Acceptance on the programme is stated to be at the sole discretion of MDP. The centre is to provide administrative support, classrooms, tutorials, library and computing facilities, administer exams and collect feedback, pay fees to MDP's nominated account, carry out checks on students' suitability, maintain student records, and ensure that only MDP approved tutors deliver the programme.

40. MDP is responsible for the content and structure of the programme, management of the process whereby the Centre can be appointed as an approved centre, processing applications and making offers of places and forwarding the application to MMU, marking and moderating the dissertation, carrying out quality assurance, and appointing a full time programme manager.

41. There is an "adverse reputation" clause relating to the centre not bringing the standing of MDP or MMU into disrepute.

42. On 29 October 2010 MDP wrote a letter inviting expressions of interest in relation to the above programme. The letter is not addressed to the appellant but we infer it was received by the appellant given he has produced it and given the above agreement. On 18 November 2010 MDP wrote to Mr Bhatti noting that Bell's College were hoping to have an intake of 15-20 students for the January intake and attaching a timetable, student registration form and information sheet. The e-mail also advises that:

> "the only things [Bell's College] can say on [its] website is "for details of the BSc (Hons) Management and Business Administration top up click here" and put a link to our site [mdp's website]"

43. On 22 June 2012 an e-mail from MDP to Mr Bhatti refers to MDP being happy with an intake of the normal one of 10 "as this would ensure that we got Bell's College approved by the University".

44. In July 2012 there was an exchange of e-mails between MDP and Mr Bhatti referring to a need for "the University" to visit to approve Bell's College.

45. Mr Bhatti told us the college pays MDP £1800 per student. He said the college had to offer 20 students and the agreement could be cancelled if it did not.

46. He described how the college verified assignments before they were sent on to the university by for example carrying out word and plagiarism checks. The college also carried out checks on the students' attendance.

47. Students obtain a university ID card and can access the library through an on-line portal and also use the library. The third year students had to go to Manchester for the award ceremony.

Leeds Metropolitan University

48. Mr Bhatti also mentioned Leeds Metropolitan University as a university with which the college had an arrangement. In June 2010 Mr Bhatti told us an agreement was entered into through MDP with Leeds Metropolitan University. However we did not see any documentary evidence on what the arrangement was and Mr Bhatti's oral evidence was unclear on what the arrangement was.

Liverpool John Moores University

49. In September 2010 the college, through MDP had a relationship with Liverpool John Moores University (LJM).

50. We saw e-mails dated 16 August 2011 and 11 September from LJM to named students at the Bell's College address in relation to applications / joining the MBA top up at LJM.

51. The final year coursework had to be sent to the university, but the appellant did not have complete control of any courses. Only a small number of students – 45 were accepted by LJM.

52. In relation to LJM, Mr Bhatti mentioned the teaching of MBA level 7. There was also an e-mail to a Bell's College student giving enrolment information to the MBA Management Studies course from LJM.

University of the West of England

53. In November / December 2012 there were exchanges of e-mails between MDP arising from MDP stating that the University of the West of England was withdrawing from a validation arrangement and setting out what alternative arrangements were to be made.

Arrangements with other bodies / university progression

54. Mr Bhatti told us of an agreement made in 2006 with ICM (the Institute of Commercial Management). ICM gave a one year certificate that "Bell's College is an approved ICM Teaching and Examination Centre." ICM's website informs that "ICM course can provide students with access into a number of levels of degree programme". A number of links to various university hyperlinks are listed under the heading "University Progression Routes:"

55. Bell's College is also certified by the Confederation of Tourism and Hospitality (CTH) as a teaching centre for various diplomas e.g. Hotel Management, Travel Agency. The accreditation was valid from 27 November 2008 to 31 March 2010. CTH's website has a section on progression opportunities of graduates of the level 7 postgraduate diploma to various universities to various Masters level programmes.

56. Similarly the appellant was an approved centre to deliver EBMA educational programmes for academic year 2011/12 (EBMA stands for Education for Business Managers and Administrators). The section of EBMA's website on university routes mentions amongst other universities, Liverpool John Moores. Mr Bhatti says in January 2012, 42 students got onto the fast track MBA management programme, and in September 2011, 45 students went on to take the MBA top up.

57. EBMA's website has a section on university exemptions and progressions.

> "Our higher education qualifications are designed to be highly relevant to the workplace and offer a fast and affordable option to those wishing to gain a related Masters degree and Advanced Masters…learners who successfully completed our qualifications can be admitted onto a specific or a range of degree –level courses offered by the recognised body. There is a progression link between EBMA Level 4 diploma to EBMA Level 8 qualification and UK universities."

58. There was also correspondence from EBMA in the form of a generic letter addressed to "Head of Centre" informing that EBMA had arranged an articulation agreement with the University of South Wales for EBMA Level 5 Advanced Diploma in Business Administration onto the BA (Hons) International Business Top-up.

59. Bell's College was listed and eligible to offer OTHM training programme (OTHM is the Organisation for Tourism and Hospitality Management).

Format of admission letter to student

60. Mr Bhatti says each student of the 400 at the college would get details of the progression arrangement in their admission letter.

61. The unconditional letter of acceptance sent to students refers along with the course title, and the duration of the course to an "awarding body". In this case I.C.M. (the Institute of Commercial Management.) The letter goes on to state:

> "Please note that you will be required to enrol with the respective awarding body at least 90 days prior to your first exam after getting entry clearance from British High Commission / British Embassy. After completing your said course with us you will be able to progress to a Partner British University into 2nd or final year of Bachelor and/or Master Programme for degree completion."

Analysis of applications we saw in bundle

62. In relation to the documents in the bundle we note the following. Offers were made to 76 students (the vast majority were made for a commencement date of 23 June 2011, a handful for 21 March 2011). Out of these 69 were offers where the awarding body was ICM (Institute of Commercial Management) mainly for 3 year graduate diplomas in business management but also for one year postgraduate diplomas. Five were for the course described as ACCA with the awarding body being ACCA (Association of Chartered Certified Accountants). Two were for Diplomas where the awarding body was CTH (Confederation of Tourism & Hospitality).

63. We also saw copies of applications relating to seven students applying to study ESOL (apart from one dated 26 July 2012 and another stated to be for academic year 2010 these forms were undated).

Teaching of English

64. There were two types of English courses offered. The first consisted of a 24 week "English language support course" taught to all students in their first year.

65. The unconditional offer letter to students states:

> "The Institute provides a 12 week English language support course to all registered students and will be available throughout the academic year. If upon assessing the language skills the college finds them not up to the required level you will be required to undertake another 12 weeks classes. The fee for these classes will be adjusted into your tuition fee."

66. The 24 week course was thus made up of two elements, 12 weeks being an "assessment" course and further 12 weeks being offered if more tuition was needed.

67. The 12 week support courses were even for PhD international students - they were to help with pronunciation and help students to understand the teachers. These courses were taught by the teachers who taught the ESOL courses described below. There was no qualification obtained at the end of the course. Mr Bhatti also referred to these as "business communications" courses and said that there were a 100 or so students studying the course.

68. The college also offered ESOL courses. There were two sessions of ESOL – three hours each on Monday and Tuesday. The English course timetable was not mixed with the main timetable.

69. On 10 January 2009 Bell's College received certification from TOEIC (Test of English for International Communication) that it was "approved by ETC Europe UK to be a TOEIC Test Centre until 10th January 2009". A list of authorised TOEIC test invigilators is set out.

70. Bell's College is certified as being approved by EDI to offer EDI ESOL.

71. ESOL has different levels from beginners to advanced. The courses were all taught in English. The beginners' level is very basic. Around 30-60 students were studying ESOL. The class sizes were around 40-45 at beginner level and around 10-20 at advanced level.

72. Mr Bhatti also told us that around 100 of the 400 or so students studied business communication and this included all of the international students. These courses were also taught in English.

73. There were five to six teachers teaching a minimum of six hours and up to 18 hours per week. Mr Bhatti told us records were kept of attendance at the classes but they were not in the document bundle.

Procedural background

74. While some of the fees noted on invoices to students in an earlier period (2007) were expressed to be inclusive of VAT it appears that thereafter and in relation to the period under appeal VAT was not charged on those fees.

75. The first two returns showed VAT accounted for on all the recorded turnover, but not thereafter.

76. Assessments for output tax for VAT periods 02/11 and 05/11 in the amount of £207,750 were raised on 11 September 2012. On 23 October 2012 HMRC confirmed its decision that the supplies of education were not exempt and the assessments were upheld.

77. On 20 February 2013 penalties of £109,068.75 were raised in respect of periods 02/11 and 05/11 and on 13 May 2013 these were reduced to £46,743.75.

Parties' submissions

78. The appellant argues it is a school within the meaning of the relevant statute. HMRC disagree and say that while the appellant has provided evidence of work experience none of the records show pupils under the age of 18 were engaged in any full-time course of education.

79. The appellant argues it is a college of a university. HMRC say there is no evidence of agreements between the appellant and a UK university which shows that it has sufficiently close links to be a college of the university.

80. In relation to the appellant's argument that it teaches English as a Foreign Language courses HMRC argue that the length of the course and the letters to students indicate that this is not the provision of teaching English as a Foreign Language.

Discussion

Issue 1 – is the appellant a "school"?

81. The reference in the VAT legislation to "school" is to school as defined in the Education Act 1996.

82. Section 4(1) of the Education Act 1996 provides:

> "4 Schools: general
>
> (1) In this Act … "school" means an educational institution which is outside the further education sector and the higher education sector and is an institution for providing—
>
> (a) primary education,
>
> (b) secondary education, or
>
> (c) both primary and secondary education,
>
> whether or not the institution also provides . . . further education.
>
> …
>
> (2) …
>
> (3) For the purposes of this Act an institution is outside the further education sector if it is not—
>
> (a) an institution conducted by a further education corporation established under section 15 or 16 of the Further and Higher Education Act 1992, or
>
> (b) a designated institution for the purposes of Part I of that Act (defined in section 28(4) of that Act), or
>
> (c) a sixth form college;
>
> and references to institutions within that sector shall be construed accordingly.
>
> (4) For the purposes of this Act an institution is outside the higher education sector if it is not—
>
> (a) a university receiving financial support under section 65 of that Act,
>
> (b) an institution conducted by a higher education corporation within the meaning of that Act, or
>
> (c) a designated institution for the purposes of Part II of that Act (defined in section 72(3) of that Act);
>
> and references to institutions within that sector shall be construed accordingly."

83. There was nothing before us to suggest the appellant fell within the definitions of further or higher education sectors set out above or that it was not an educational institution. The issue is whether it was an educational institution which provides "secondary education".

84. The term "secondary education" is defined in section 2(2) of the Act as follows:

> "(2) In this Act "secondary education" means—

(a) full-time education suitable to the requirements of pupils of compulsory school age who are either—

(i) senior pupils, or

(ii) junior pupils who have attained the age of 10 years and six months and whom it is expedient to educate together with senior pupils of compulsory school age; and

(b) (subject to subsection (5)) full-time education suitable to the requirements of pupils who are over compulsory school age but under the age of 19 which is provided at a school at which education within paragraph (a) is also provided."

85. The term "senior pupil" is defined in s3(2) of the Education Act as "a person who has attained the age of 12 but not the age of 19."

86. The appellant offers two week work placements entailing clerical work. The appellant argues that work-based learning is an important part of modern day apprenticeships and education. Mr Bhatti argues the experience is educational in that the student will learn how to write letters, basic ESOL, purchase orders, invoices, how to fax and photocopy and what it is to work in a professional atmosphere.

87. We find that the work placement will no doubt have some educational value in the broad sense, but it is certainly not full time education. The whole point of it is for the student to get experience of something outside of education in a school. The fact that school students do work experience at Bell's College does not turn Bell's college into a school.

88. It should also be noted that the reference in s4(1) of the Education Act 1996 to "…institution *for* providing" [emphasis added] suggests that it is relevant to look at the purpose of the institution. The fact the legislation contemplates that an educational institution may also provide further education and yet remain a school does not detract from the requirement that it is an institution *for* providing primary and/or secondary education as defined.

89. It is therefore not enough in our view that as a matter of fact some-one of below the compulsory school age limit of 16 attends courses at the appellant. In any case it is not clear to us that the examples of under 16s Mr Bhatti referred us to were obtaining a full-time education suitable for under 16s. In relation to the "UKOnline" IT courses for under 16s Mr Bhatti told us about there was no evidence indicating that such students were studying those courses by way of full-time education and it seems highly unlikely that the education of under 16s would be permitted to be so specialised. In relation to the student who had come from Pakistan it seemed to us that she had come to the appellant simply as a stop gap pending placement elsewhere.

90. In relation to education of under 19s this only counts as secondary education where it is carried out at a place where there is also education of under 16s. The fact that under 19s are taught at the appellant does not make it a school. The teaching of ESOL courses to under 19s would not in any case count as full-time secondary education.

91. The appellant is not a "school" in our view.

Issue 2 – is the appellant a college of a university?

92. The parties referred us to a number of cases which have considered what is meant by the terms "college…of …a [United Kingdom] university" in Note 1(b) to Group 6 Schedule 9 VATA 1994.

London College of Computing Limited [2013] UKUT 04040 (TCC)("LCC")

93. In this case the college (LCC) appealed to the Upper Tribunal against the decision of the First-tier Tribunal (FtT). The FtT had found that the college was not a college of a university. The Upper Tribunal (Judge Hellier and Judge Bishopp) concluded the college's appeal should be dismissed but got to that result by slightly different routes.

94. Judge Hellier approached the matter by way of two overlapping tests (described at [56]) as:

> "(1) whether the body had "similar objects", and (2) "whether the body was sufficiently integrated with the university to be capable of being called a college of a university."

95. In relation to the second test (the "of" test) Judge Hellier noted the following at [29]:

> "The requirement that a college be "of" the university indicates that some adequate link or measure of integration is required between the body and the University. Given the differing ways in which universities and their institutions are organised the question of whether there is an adequate link or adequate integration will depend upon the circumstances. It will be a matter of weighing the relevant facts. That would generally involve both the consideration of the organisation of the university and the role played by the college. Sometimes the formal links - the constitution of the university – may be enough to conclude the issue, in other cases the nature of the body may be more relevant. But it is clear that the link must be sufficiently substantial. It may not be necessary for the whole of the body's activities to contribute to the university but it is necessary that a substantial portion of them can be said to be part of the life of the university, and that the university plays a part in the life of the body."

96. Judge Bishopp suggested the "similar objects" test is not a discrete test but is a factor albeit the most important one in showing that the college was a college "of" a university (at [86] of the decision). Both judges in essence agreed that the test referred to by the FtT of "typical progression" (which considered the numbers of students realistically expected to progress to university) was not conclusive but that it could be relevant, to the "integration" or "of" test (Judge Bishopp's view being obiter on this point)).

97. Judge Bishopp noted at [90]:

> "that there are several ways in which an institution may be, or become, a college of a university ranging from formal constitution as a college to something less well-defined".

98. At [92] of the decision Judge Bishopp noted that while the university had supervisory rights over the quality and content of the college's diploma course the university did not have influence over the college's other courses or participation in

the governance of the college. He also noted that there was a lack of evidence as to the university recognising that the other institution was a college of the university. The lack of evidence as to what the perception of the university was was not fatal but made the task more difficult.

School of Finance and Management (SFM)[2001] EWHC 1175 (Ch)

99. The appeal by HMCE to the High Court against the decision of the VAT Tribunal concerned whether the School of Finance and Management (SFM) was the college of the University of Lincolnshire and Humberside (ULH). The parties between them had suggested 15 features or factors to be considered. At [22] Burton J considered the Tribunal was "amply entitled" to decide on the balancing of the factors that on the facts of the case SFM was a college of ULH.

100. The FtT observed in *SAE*, a case we outline further below (at [122] of their decision), that the process of weighing factors as adopted in *SFM* was considered by the Upper Tribunal in *LCC* to be an appropriate way of approaching the expression "a college…of…a university".

101. However, we agree with the appellant's point that the 15 factors listed in *SFM* are not conclusive. This point chimes with Judge Hellier's observation in *LCC* at [47(2)] to the effect that not all of the 15 factors set out in *SFM* will necessarily be relevant and that assessment of whether the college is sufficiently integrated with the university is a matter which requires consideration of all the relevant facts.

102. In any case Mr Bhatti argues that the appellant meets most of the criteria mentioned in the *SFM* factors.

103. He commented as follows in relation to the factors:

(1) *Presence or absence of foundation document establishing the college as part of the University by way of a constitutional link* – Mr Bhatti referred to the agreement the appellant had with MDP.

(2) *Financial dependence / inter-dependence* – Mr Bhatti was not aware of any financial link. The college pays MDP £1800 per student.

(3) *Physical proximity* – Mr Bhatti notes that both the University of Sunderland and Coventry University have London campuses.

(4) *Obligation to offer minimum number of university places* – Mr Bhatti referred to the minimum number of places set out in the contract with MDP.

SAE Education Limited [2014] UKFTT 218 (TC)

104. SAE was an FtT decision where the appellant college was successful in arguing it was a college of a university.

105. HMRC say the appellant has not shown evidence of any agreements between a United Kingdom university to show that its links were sufficiently close to the arrangement of SAE Education Limited.

106. However as the UT in *LCC* points out (at [90] of Judge Bishopp's decision) –

> "…the relations between colleges and the universities of which they are properly to be regarded as colleges may take a variety of forms, with the consequence that one must consider the circumstances of each case"

107. Further the FtT in *SAE* noted at [287] that comparisons between the facts of different cases were of little help. In any case the passages HMRC referred us to do not suggest that the appellant needs to show agreements between the appellant and the university in order to show it was sufficiently close. The FtT noted at [288] that in being satisfied the appellant was an Associated College of the university:

> "The appropriate documentation does not appear to have been entered into, but both [the appellant] and [the University] have proceeded on the basis of this status having been continued for some time."

108. The appellant referred us to *HIBT v HMRC* [2007] Decision 19978 (a case where the appellant college was found to satisfy the requirement as it was a college of the University of Hertfordshire. The appellant argues it is similar to the college in *HIBT*.

109. That too was a non-binding tribunal decision. For similar reasons comparisons with that case are not helpful. In *HIBT* the college was found to satisfy the requirement. But there are in any case several differences of fact as between HIBT and the appellant. HIBT was located on the campus of the University of Hertfordshire, the university and college had concluded a recognition agreement under which students having received a conditional offer from the university, could upon completion of certificates, diploma or postgraduate courses (of which diploma courses were the majority) directly access courses at the University. In contrast it appears in this case that a significant number of students do courses which do not directly put them on university courses but which give them the opportunity to apply / get credit for such courses.

110. As to the approach to construction the appellant argues Group 6 Schedule 9 must be construed in the light of the Article 13 European Directive provision which it implements and refers to *Blasi* C-346/95 and *The Expert Witness Institute v CCE* [2001] EWCA Civ 1882. The appellant says the exemption should not be narrowly construed but should be construed purposively.

111. As pointed out in *Blasi* at [18] the terms used to specify exemptions are to be interpreted strictly and as noted by the Court of Appeal at [16] of *Expert Witness Institute* a strict construction is not to be equated with a restricted construction. There is little we think in these arguments around construction to assist the appellant. There is no significant dispute between the parties as to the approach to construction; rather the issue between them is on how such provisions are to be applied to the facts of this case.

112. We agree with the appellant's point that the provider need not be a part of a university and that the nature of services supplied and the inter-relationship between the supplier and the university must be considered. We also agree with HMRC's point that the case law shows there must be sufficient integration with a university.

113. There is however one legal issue of interpretation which arises; namely whether when looking at whether the appellant is a college or institution of a UK university it could be a college or institution of various universities simultaneously. Our view is

that, given the integration test and the drafting of the legislative provision in the singular, this is not what is envisaged by the legislation. There must, we think be at least one university where the links are such that there is sufficient integration. That does not preclude links with other universities but it might suggest that the more links there are to different universities the more difficult it might be to demonstrate a sufficiently substantial level of integration with any one particular university.

114. The appellant's arguments as to why it is a college of a university may be broadly summarised as follows. We consider these points individually and together:

(1) The fact that the appellant is approved by organisations such as ICMA and that students doing approved courses may having completed the course get credit for that at certain universities.

(2) The fact that certain students may study a whole course at the appellant and may on completion be awarded a university degree.

(3) The fact that a student may study a one year course which leads to an award by a university at the appellant but having on-line access to a particular university's library.

(4) The fact that validation of the appellant is carried out by the bodies RDI, and MDP, and that universities visit and approve the appellant.

(5) The fact that the appellant offers university type / courses / diplomas.

115. In relation to (1) above, students who gain qualifications by a particular body (e.g. ICM, CTH, EBMA) can then with that qualification progress to various universities as shown on the websites of those bodies.

116. It is clear that the progression route does not make the appellant a college of the university. This falls squarely within the example referred to by Judge Bishopp in *LCC*. (Note [91] of Judge Bishopp's decision in *LCC*). It is like school matriculation. The student must apply separately to be accepted onto the university course. They just get credit for what they have done. This is clearly insufficient in our view to make the appellant a college of any particular university. There was no evidence that students progressed automatically into a particular university having obtained the qualification or in what numbers. Further the benefit they gained was that gained through doing the ICM / CTH / EBMA validated course which was respected by certain universities. It did not arise as a result of any particular status the partner university had accorded to the appellant.

117. Situations (2), (3) and (4) may be conveniently considered together. In principle it is not inconceivable in our view that if all or most of the students were in these categories in relation to one particular university that the appellant could be a college of that university.

118. There appears to be little in the way of involvement by any particular university in the governance of the appellant and this perhaps is a reflection of the small numbers of students involved in relation to any one particular university. There is no direct evidence of what any particular university's perception of Bell's College is. In relation to Manchester Metropolitan University the fact that MMU's intermediary does not want the appellant linking direct to the university suggests that a certain level of distancing is positively sought between the university and the appellant by the university.

119. However the adverse reputation clause in the agreement with MDP is indicative of some kind of affiliation (the argument being that there is no reason to be embarrassed by the behaviour of another body if you have nothing to do with that other body). Nevertheless while it is not inconceivable that a university might outsource its quality assurance, or regulatory matters to someone else to do in relation to its college one would still expect to see some recognition by the University of its college. We have no evidence of that. While the lack of such evidence is not fatal (as pointed out in *London College of Computing*) it adds to the picture that any relationship between the appellant and MMU is a one-sided one rather than one of integration.

120. In relation to the e-mails from Liverpool John Moores (LJM) to certain students (see [50] above) these do not suggest the student was studying the MBA at Bell's College. They also do not suggest that an acceptance at Bell's College meant the student transferred automatically to LMJ – a separate application was necessary.

121. Even if there were some students doing Manchester Metropolitan University MBAs at the appellant there is no evidence that they were doing this in sufficient numbers to make Bell's College a college "of" Manchester Metropolitan University. The inference from the numbers of admission letters which make no reference to Manchester Metropolitan University is that only a small proportion of students were doing such courses.

122. Similarly there is no evidence in relation to any of the other universities the appellant mentioned that sufficient numbers of students were studying a particular university's courses at the appellant (as opposed to courses which enabled to the appellant to apply to study at the university or to get credit towards the university degree) such that the appellant then could be considered a college of such university.

123. The documentary evidence before us on admission letters suggests a significant number of students were not doing university-run courses but were doing courses accredited by other bodies such as ICMA, and ACCA which would enable them subsequently to join university courses with a further application.

124. If we were wrong on the legal interpretation set out at [113] above and it turns out that the question is whether the appellant is a college of universities more generally rather than any one particular university then there would in any case in our view be insufficient evidence of enough students studying the universities' degree level courses.

Similar objects?

125. In relation to the last of the appellant's arguments, namely the teaching of university type courses (number (5) in our summary at [114] above), this factor is, we think, one which needs to be considered in the context of whether the appellant had similar objects to a university.

126. According to Judge Bishopp's decision in *LCC* this is an important factor. On the evidence, looking at the range of courses offered which include ESOL, and various vocational courses, although there are elements of what the appellant provides which are similar to university education it would we think be too much of a stretch to say that Bell's College has similar objects to university education. While it offers some students courses which result in the award of a degree, on the evidence, what it

offers to others in far greater numbers are diploma courses which provide a pathway to getting onto a degree. See [91] of Judge Bishopp's decision in *LCC*.

127. In terms of other relevant factors –the college is not geographically close to the relevant universities. However as Mr Bhatti noted some universities have campuses which are geographically far away from the university so it may be that this factor should not be given undue weight.

128. There is however no constitutional or other direct link between the appellant and any particular university. The appellant is at best approved to carry out courses leading to an award of a degree for certain students but this is a relatively small proportion of students most of whom are doing diplomas. The appellant is not integrated into the life of any particular university or vice versa. Consequently we find that it is not a college or institution of a university.

Issue 3 – English taught as a foreign language

129. HMRC suggest that the English course described by the offer letter does not indicate sufficient content of teaching English as a foreign language. The letter indicates, they say, that the recipient is expected to have a good grasp of English already. According to Mr Bhatti the courses were on pronunciation / understanding of the English spoken by the teachers to persons who already knew English. Mr Bhatti told us that from 2012 the foreign students all had to take an English test at the UK Border Agency.

130. We are not persuaded by HMRC's arguments as to the relevance of the fact that communications to the participants were in English and any inference from that that the participants already knew English. The teaching of foreign languages can obviously be at different levels, and as a person's knowledge of the foreign language progresses the teaching may well increasingly be taught through the medium of the foreign language being taught. There is no reason to think the same would not be true when English is taught as a foreign language.

131. While we can see an argument that courses designed to acclimatise speakers of English from other countries to the English as used in teaching at the college might not be viewed as teaching English as a foreign language, the fact that the correspondence to the student (see [65] above) suggests that students will be assessed and if not found to be up to the required level will have to undertake a further course seems to envisage that there might be some students whose standard of English was so poor that they would need to be required to attend further courses in order to remedy that. That does not suggest the further courses were simply about pronunciation / acclimatisation to English pronounced in a different way but that they were courses designed to ensure a minimum standard of communication in English for students whose first language was not English.

132. In relation to the ESOL courses that the appellant referred to these appear to clearly fall within the definition of teaching of English as a foreign language.

133. Although we accept that some element of the appellant's supplies to students was made up of the teaching of English as a foreign language (made up both of the "acclimatisation" and further courses which did not lead to a qualification and the ESOL courses), we have insufficient evidence before us to make any kind of reasoned determination of what the amount of that element is. While we can see that despite

requests by HMRC the appellant has not provided further details on the courses which would enable a sum to be quantified our concern is that if HMRC's assessment is upheld this would result in an excessive amount of tax being assessed on the appellant.

134. Further we note that the appellant has not been professionally represented and that from what we can see of the pre-hearing correspondence, the appellant became drawn into the issue of whether the acclimatisation courses amounted as a matter of principle to the teaching of English as a foreign language. In doing so it did not properly engage with the issue of what relevant proportion of the supply could be attributed to such courses, (or the ESOL courses which clearly amounted to teaching of English as a foreign language).

Conclusion

135. We therefore make our decision on the appeal against the assessment in principle. While the appellant was at the relevant time neither a "school" nor a "college…of…a university" so as to fall within the relevant exemptions in Note (1) (a) or (b) of Group 6 Schedule 9 VATA 1994, it was a body which provided the teaching of English as a foreign language falling within Note 1(f).

136. Note 2 to Group 6 of Schedule 9 envisages that supplies by such a body which consist of anything other than the teaching of English as a foreign language will not however be exempt. The parties should seek to agree the amount of the assessment taking into account our decision that the acclimatisation and ESOL courses which the appellant taught fell within the provision for teaching English as a foreign language and to revise any penalty determination accordingly. In the absence of an agreement on amount, or should the assessment be agreed but not the issue of liability or amount of the penalty, the parties may revert to the Tribunal to seek appropriate further directions for determination of such outstanding matters.

137. The appeal against the assessment is allowed in principle.

138. 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.

SWAMI RAGHAVAN
TRIBUNAL JUDGE

RELEASE DATE: 25 April 2015