[2015] UKFTT 0535 (TC)

TC04689

Appeal number:TC/2014/0339

VAT – Education – exemption for tuition where subject ordinarily taught in a school or university – appellant's tuition in motocross and motor cycle maintenance –evidence of schools and colleges teaching subjects considered- activity included in GCSE PE and Motor Vehicle and Road User Studies - whether motocross and motor cycle maintenance subjects ordinarily taught in schools or universities - no – grounds of appeal relating to legitimate expectation in relation to HMRC guidance struck out as not within Tribunal's jurisdiction – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Simon Newell t/a Chiltern Young Riders **Appellant**

- and -

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

TRIBUNAL: JUDGE SWAMI RAGHAVAN

Sitting in public at the Royal Courts of Justice, London on 13 February 2015

the Appellant appeared in person

David Ridley and James Edgoose, HMRC Officers, for the Respondents

DECISION

Introduction

1. The appellant offers instruction in motocross riding, motorcycle repair and maintenance to children. He appeals against HMRC's decision of 8 April 2013 that his supplies are not exempt from VAT under the provisions of item 2 Group 6 Schedule 9 Value Added Tax Act 1994 ("VATA 1994") which provides an exemption where private tuition is provided in a subject ordinarily taught in schools or universities. HMRC accept that his tuition constitutes education but do not accept that it is in a subject ordinarily taught in schools or universities.

Evidence

2. I heard oral evidence from Mr Newell which was cross-examined by HMRC. Although no witness statement was provided (none had been required in the Tribunal's directions) Mr Newell had filed a "response to statement of case" to which various documents were annexed and which he was able to adopt as his evidence. He also took me through and spoke to his bundle of documents which included further information on the courses he taught, correspondence between pupils' parents, schools and colleges and materials from the websites of various schools, colleges and universities. I found Mr Newell to be an entirely credible witness who was knowledgeable in his field. After the hearing Mr Newell sent in further correspondence relating to a GCSE in Motor Vehicle and Road User Studies ("MVRUS") course which HMRC were able to make further written submissions on.

Facts

3. Motocross, also known as "MX", is the riding of a specially designed motorcycle (MX bike) on closed courses consisting of variable terrain; up hills, down hills, corners and jumps. Riders may compete according to number of laps or the speed with which laps are completed. Riders have to be physically fit and aware of their bike's limitations on varying surfaces.

4. Mr Newell started teaching motorcycle training in a voluntary capacity at the age of 19. He passed the Institute of Advanced Motorists 100cc plus motorcycle test and was elected as a member of the Institute in 1978. He was the youngest person at the time to pass the test.

5. As reported in various press articles, Chiltern Young Riders, which is the name the appellant trades under, has provided motocross training for more than 14,000 young people in Hertfordshire since 1989. It provides the opportunity "for young people upwards of four years old to experience the thrills of off-road bikes in a safe, controlled and caring environment".

6. The children come for an hour's lesson at a time during the week but mostly at weekends. There are between six to eight children in each session and in the course of the ten sessions over the weekend the appellant teaches between 60 to 80 children.

The sessions are split according to the participant's abilities. The appellant teaches structured courses of various levels of difficulty according to the criteria he has devised, so for instance, the criteria for a "level 1 beginner" refer to the participants receiving a safety talk, learning starting procedures, how to pull away safely, how to use both brakes effectively, front and rear skids, standing up on all exercises, and riding in formation. Safety is taken very seriously and the appellant described how beginners would start by learning the function of the various pieces of safety equipment (body armour, helmets, glasses, boots) and how to put these items on.

7. As the riders progress they would grapple with advanced techniques and technical knowledge such as "Endoing" (pitching forward with back wheel lifted) powerband (optimum rev range) and see-sawing.

Inclusion of Motocross within PE syllabus

8. The Pearson Edexcel GCSE comprises two units. Unit 1 is the Theory of PE and makes up 40%. Unit 2 is performance made up of "practical performance and analysis of performance". Three activities are undertaken as part of this unit so each activity makes up 33% of the total practical work and therefore 20% of the total mark. The activities are split into various groups and certain combinations of activities are prohibited or are only available to candidates with physical disabilities. In December 2013, Edexcel accepted motorised sports into the GCSE PE activity list. The appellant drafted teaching criteria for the activity of motocross which have now been accepted by Edexcel. Mr Newell's efforts in getting the activity recognised were reported in the trade press. Motocross is listed with abbreviation MX as an activity within activity group D. BMX Racing is listed as an activity within activity group E.

9. The specification for motocross consists of a table of 23 "Skills manoeuvres assessed in situations of increasing difficulty to appropriately challenge the level of performance". These range from "1. Perform warm up routine…2. Safety checks, starting procedures…" to "20. Jumping…21. Technical riding: body position and control of powerband acceleration. 22. Cornering on a berm: body position, bike angle of lean, unrestricted speed 23. Lap times to be assessed – track dependant".

10. The assessment criteria for Motocross practical performance are written by reference to the above so for instance for scores 1-2 the person must be:

> "…able to perform skills/ manoeuvres 1-3. Successfully ride flat area without causing ham or injury to themselves, others or the machine. Must be able to mount bike cleanly and kick-start engine. Must have sufficient upper body strength to be able to raise bike from the ground."

11. For a score of 9-10 the person must be able to perform manoeuvres 1-23 without hesitation and "able to ride terrain with mounds and obstacles without causing harm or injury to themselves or others."

12. In order for schools to provide for an activity which counts as part of the GCSE in PE schools have to go through an approval process known as Meeting Local Needs

(MLN). The process supports schools in delivering the National Curriculum and allows schools to apply to Edexcel for accepted list activities between 1 April to 30 October of a given year. The procedure works as follows: a pupil requests an activity from the approved list, the PE teacher and Head Teacher approves and signs a form (the MLN1 form) and sends it to Edexcel. Edexcel then may approve the form having verified the school (the "centre") and also the venue where the activity takes place outside of school property and the duration of the lesson. The appellant's teaching criteria which have been formed into Edexcel criteria are sent on request to the schools.

Teaching of motocross in schools

13. As at the date of the hearing four schools, details of which are set out below, have applied and sent off MLN1s, which have been accepted by Edexcel and have asked the appellant to start the syllabus.

(1) John Henry Newman Catholic School based in Hertfordshire - the PE Assessment team at Pearson confirmed to the PE teacher at the school on 20 November 2014 that motocross could be offered in the school within the examination year 2014/15 provided the activity is available to the whole cohort.

(2) St Christopher's School – the PE teacher confirmed the MLN form had been accepted for the 2015 cohort on 15 January 2015.

(3) Chiltern Way Federation – this is a federation of two schools, Wendover House School and Prestwood Lodge School, for boys with behavioural, emotional and social difficulties. The contact at the school stated on 8 December 2014 that Edexcel confirmed they were content to do motocross. This posits two sessions, one with three boys attending and another with five boys attending.

14. A local school, Berkhamstead Egerton Rothsay which does not use the Edexcel board is working to see if the GCSE criteria can be adapted to BTEC examinations. The school is sending ten pupils after April 2015 to begin their motocross training with a view to it being marked under the Edexcel BTEC.

15. The appellant has also provided motocross teaching to:

(1) the Dacorum Partnership of Schools and through them Longdean School is in the process of applying for a particular pupil to be taught motocross with the appellant.

(2) Falconer's School Watford. This school is also considering registering to do motocross as part of its GCSE in PE.

16. In relation to the Mayflower High School, Essex the deadline for the MLN application had been missed but there was some evidence the PE teacher was keen on helping children to pursue the option in the future. Ashlyn's School, Berkhamstead, were also interested in enabling motocross to be taught as part of the GCSE in PE.

17. The appellant also referred me to documentation on the Herts Motor Project run at Falconer School. It is described as follows:

> "The Herts Motor Project is an accredited alternative curriculum centre delivering auto-motive qualifications to young people between the ages of fourteen and sixteen. We offer the ABC suite of automotive qualifications up to and including certificate level 1"

18. The literature explains:

> "the project works with groups of up to four students in a workshop alongside a motor vehicle tutor. The programme is delivered on a sessional (full day) basis."

19. Referring to the ABC level 1 Introduction to Motor Vehicle Studies and City and Guilds qualifications the material states:

> "These qualifications are intended to provided an additional choice for young people approaching GCSE."

20. The material states they have an on site motocross track and motorcycles with full safety equipment, which enable them to offer rewards for good achievement as well as their UK Youth Momentum "On Two Wheels Course".

21. In relation to the Elizabeth Woodville School, Northamptonshire two boys who were participants on the appellant's course had spoken to their teachers about doing motocross as a GCSE option.

22. The appellant explained that he was one of three experienced providers of teaching on Kawasaki (a well known brand) motorbikes. Lee Dunham, was one such trainer based in Bristol. Bradley Stoke Community School had applied to him to run a GCSE PE motocross activity for them. The approximate number of candidates who were anticipated to be taught was stated on the MLN correspondence to be two. The session was to be for one hour and the training was to take place at Mr Dunham's facility. In relation to Backwell School near Bristol there was evidence that a parent was interested in her son doing motocross and which indicated the school was prepared to let her son do motocross as one of his PE GCSE activities. Mick Extance another one of the Kawasaki experienced instructors, also expressed interest in the appellant teaming up with local schools in Wales to teach the criteria. I was shown a photo of the numerous riders at one of Mick Extance' events and told that they were all potential PE candidates.

23. Other schools such as Mansfield Upper, Parklands Campus and Cottelsloe School have expressed an interest in having their pupils do motocross once the application window for the MLN reopens. In relation to Manshead Upper School a parent was interested in finding out more about what could be done so her son could get to do motocross as one of his sports. Similarly there was parental support for motocross being added to the list of assessed sports in relation to the Cottlesloe School.

24. It also appears that a number of attendees of a major national motor cycle show were interested in their child's school undertaking motocross as part of the GCSE PE.

The appellant had attended the show and had left out an expression of interest form with the statement: "Edexcel (the exam board) now have Motocross on their approved list of activities for GCSE PE. Please register your interest and contact your school's PE teacher". A total of 34 people had accordingly registered their interest on the form and in doing so had given details of schools around the country.

25. I was also referred to an e-mail from Martin Chappell who runs a programme of motorcycle skills, safety and motocross sessions for attendees from Sturminster Newton School and surrounding villages and also to his project "Envolving Youth". He was supportive of a qualification "to give an objective" to these activities stating that "as well as giving a qualification at the end, it would also give a consistent structure, nationwide to these programmes."

Report: "Evidence on physical education and sport in schools"

26. In June 2013 the Department of Education published a report on evidence on physical education and sport in schools. I was referred in particular to the sections in the report entitled "Most Common Sports to participate in" and "School Sports Provision".

27. The introduction to the report sets out that:

> "This evidence note reports domestic and international evidence on physical education (PE) and sport in primary and secondary schools. The majority of the statistics are taken from the most recent PE and Sport Survey (Quick et al. 2010) which was commissioned by the Department for Education…".

28. At Appendix A further detail is set out on the underlying surveys. The 2009/10 PE and Sport survey collected information from all 21,486 schools and 357 Further Edcuation colleges in the network of School Sport Partnerships. The "Taking Part survey (DCMS, 2013) is described as a continuous national household survey looking at adult and child participation in culture and sport. The April 2013 report summarised mid-year findings of the Taking Part child survey based on data collected from October 2011 to September 2012. The findings were based on interviews with an adult respondent on behalf of 1,014 primary aged children (5-10) and interviews directly with 741 secondary aged children (11-15).

29. The "Most Common Sports to participate in" section was based on the Taking Part survey. According to the section on pg 19 "school sports provision", schools in England provided an average of 19 different sports to both girls and boys, an average of 25.6 sports in secondary schools, 17.6 in primary schools and 21.5 in special schools. The tables list 41 sports by the name of the sport or more general categories such as "Fitness" or "Outdoors/advent[ure]" and the percentage of schools participating in the activity ranging from 98% for Football to 2% for Kabaddi. Motocross is not listed. The percentage reported as doing cycling was 55%, Fitness 71%, and Outdoors/advent[ure]72%.

30. There is also a table "Sports that have shown a significant increase in schools over the past seven years". Cycling is listed in this table of 13 sports increasing from 21% in 2003/2004 to 55% in 2009/10.

GCSE in Motor Vehicle and Road User Studies ("MVRUS")

31. There is a GCSE specification for Motor Vehicle and Road User Studies. Schools courses for students in Wales and Northern Ireland are offered at entry and at GCSE level with a combination of classroom based written work and a practical activity which can be car driving, moped riding or both. It is offered to students in Year 10 and/or 11. At Entry level a car driving or moped riding test forms 50% of the test and at GCSE a practical moped riding test forms 20% of the test (The Council for the Curriculum, Examinations and Assessment (CCEA) specification states the "practical riding activity" comprises 30%). The remaining 40% comprises Motor Vehicle and Road User theory which covers variously vehicle control and road user behaviour, legal requirements, road transport and its effect on society, motoring mathematics, accident procedures and motor vehicle technology. A unit described as "investigative study" makes up the final 30%. The motor vehicle technology section (which teachers are invited to spend 20% of their teaching time on) is described as follows:

> "This section explores a motorist's responsibility for maintenance and care of a vehicle. Students gain basic knowledge of vehicle systems and safety precautions. They learn to recognise component parts of vehicle systems and understand and know the checks and safety precautions they need for safe road use."

32. As part of the moped riding element candidates must demonstrate they can:

> "carry out pre-riding safety checks, start the machine, move off from the side of the road, pull in and stop, dismount, turn left, turn right at a STOP sign, pass a parked vehicle, ride a "figure of eight", ride a slalom course, stop safely at a prescribed position and display a responsible and safe attitude and an acceptable level of control."

33. HMRC accept that the course is taught in some schools in Northern Ireland and Wales (but not England). There was evidence, for instance, that Ysgol Friars, a school based in Wales, offers the above Certificate as one if its options for 2013-15.

34. In response to a Freedom of Information Act request, Mr Newell had made to the CCEA asking for the number of schools in England and Wales who offered MVURS at GCSE, the following information was given.

35. In 2010 there were 14 schools, in 2011, 15 schools, 2012, 14 schools, and in 2013, 11 schools. In response to the question "Why does CCEA no longer offer this subject in England and Wales?" it was stated that the decision arose "as a result of emerging policy differences between England and Northern Ireland. It did not relate specifically to this subject." It was stated that the qualification continued to be offered in Wales.

36. In relation to Northern Ireland the number of schools offering the MVRUS was stated to be as follows: 2010 – 74 schools, 2011- 84 schools, 2012 – 84 schools, 2013 – 82 schools, and 2014 – 75 schools.

37. Mr Newell suggests that the number of secondary schools in England was 3268 in 2012, that it was 183 in Northern Ireland in 2009 and 223 in Wales that year. I was not referred to any evidence covering the position in Scotland.

Motor cycle maintenance courses

38. The appellant refers to the following examples of schools and colleges with school age children attending full-time or greater than just day release teaching motor cycle maintenance: 1) Waltham Forest College, 2) Wakefield College, 3) Barnfield College, 4) Prestwood Park School, 5) Falconer School, 6) Havering College. Also a total of 17 schools attend Barnfield academy which runs a motorcycle maintenance course.

39. A print out from www.enginecycle.co.uk /motorcycle-technical-training-schools-directory listed, in addition to Waltham Forest and Wakefield College, the following colleges as offering various motorcycle maintenance and repair courses: Merton College (Morden London), New College (Bromsgrove West Midlands), Stockport College (Greater Manchester). It showed that the University of Derby offered courses in Motorcycle Technology, and motorcycle repair and maintenance and that Swansea Metropolitan University offered a course in Motorcycle Engineering.

40. City and Guilds accredit Motor Vehicle maintenance courses. One of these is offered at Wakefield College West Yorkshire. I saw evidence that a fifteen year old student studying at Barnfield College on day release had received an E3 motorcycle course certificate.

Law

41. Section 4, VATA 1994 sets out the scope of the VAT charge on supplies of goods and services:

> "(1) VAT shall be charged on any supply of goods or services made in the United Kingdom, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him.
>
> (2) A taxable supply is a supply of goods or services made in the United Kingdom other than an exempt supply."

42. Section 31(1), VATA 1994 provides:

> "A supply of goods or services is an exempt supply if it is of a description for the time being specified in Schedule 9 ... "

43. Schedule 9, VATA 1994 sets out those supplies, categorised in Groups, which are exempt. Group 6 is headed "Education".

44. The Item of Group 6 which is relevant to this appeal is Item 2. It states:

> "The supply of private tuition, in a subject ordinarily taught in a school or university, by an individual teacher acting independently of an employer."

45. This implements Article 132 of the Principal VAT Directive (Council Directive 2006/112/EC) which is within Chapter 2 and which bears the heading "Exemptions for certain activities in the public interest". The relevant part of Article 132, provides:

> " Member States shall exempt the following transactions:
>
> …
>
> (j) tuition given privately by teachers and covering school or university education;"

46. In order to understand certain of the parties' submissions and the case law they referred to it is also necessary to set out Article 132(1)(i) which provides:

> "(i) 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, provided by bodies governed by public law having such as their aim or by other organisations defined by the Member State concerned as having similar objects;"

47. Turning first to the relevant European case law in *Haderer v Finanzampt Wilmersdorf* (Case C-445/05) [2008] STC 2171, the European Court of Justice (ECJ) gave guidance on the term "school and university education" having noted at [22] that there was no definition of the term for the purposes of the exemption. The reference was from a German court and concerned the applicability of the exemption to Mr Haderer who worked freelance for one of the states in Germany; he provided assistance with schoolwork at an adult education institute, ran ceramics and pottery courses at another adult education institute and at a parents' centre. One of the arguments the tax authority made was that the ceramics and pottery courses provided by Mr Haderer did not involve the same demands as those of the courses normally given in schools or universities and that they were intended purely for leisure purposes. The ECJ responded as follows at [24] to [26]:

> "24. In that regard, although the terms used to specify the exemption envisaged under Article 13A(1)(j) of the Sixth Directive are, admittedly, to be interpreted strictly, a particularly narrow interpretation of 'school or university education' would risk creating divergences in the application of the VAT system from one Member State to another, as the Member States' respective education systems are organised according to different rules. Such divergences would be incompatible with the requirements of the case-law referred to in paragraph 17 of this judgment.
>
> 25. Furthermore, in so far as the Finanzamt's arguments on that point are based on a particular interpretation of 'school' or 'university' in terms of the German education system, it should be noted that whether a specific transaction is subject to or exempt from VAT cannot depend

> on its classification in national law (see *Kingscrest Associates* and *Montecello*, paragraph 25).
>
> 26. While it is unnecessary to produce a precise definition in this judgment of the Community concept of 'school or university education' for the purposes of the VAT system, it is sufficient, in this case, to observe that that concept is not limited only to education which leads to examinations for the purpose of obtaining qualifications or which provides training for the purpose of carrying out a professional or trade activity, but includes other activities which are taught in schools or universities in order to develop pupils' or students' knowledge and skills, provided that those activities are not purely recreational."

48. From this extract it can be seen that school or university education did not, for the purposes of the exemption, encompass activities that were purely recreational. However, in the current appeal there is no dispute that the appellant's tuition constitutes education. This, as pointed out by the appellant, is in contrast to a number of the VAT Tribunal and First-tier Tribunal (FTT) cases we were referred to by HMRC where that issue was in contention and where the relevant tribunal came to the view that what the appellant was teaching was not educational (*Colin Beckley t/a The College of Meditation (Decision 19860), Audrey Chevalier t/a Fleur Estelle Belly Dance School* [2014] UKFTT 007 (TC), *Stuart Tranter t/a Dynamic Yoga* which, perhaps unsurprisingly given their trading names, concerned respectively, meditation, belly dancing, and yoga).

49. While I do not find it necessary as a result to go into the detail of those decisions the most recent FTT decision in this area, *Christine Joy Hocking v HMRC* [2014] UKFTT 1034 (TC), does bear further consideration. In that case, which concerned a pilates teacher, the Tribunal was satisfied that the teaching of pilates by the appellant in her private capacity was educational in character and therefore its decision turned on the issue of whether pilates was ordinarily taught in schools or in universities.

50. The FTT noted at [57], as I do, that the number of decisions of the VAT Tribunal and the FTT considering the exemption are not binding and are of limited value to the extent they depend on their own particular facts. Further, I did not understand there to any significant dispute between the parties as to the meaning of "ordinarily taught". Rather their disagreement was around what the outcome of the test was as it applied to the particular facts of this case.

51. There are nevertheless two points which arose in *Hocking* which are helpful to consider in the context of this case. The first of these illuminates how the UK's implementation of the provision "tuition, in a subject ordinarily taught in a school or university" should be read in view of the Directive wording which refers to "tuition …covering school or university education".

52. In response to an invitation by the appellant that "ordinarily taught" should be construed in accordance with the guidance in *Haderer* the FTT noted at [55] that the intended scope of the exemption did not depend on a particular activity being taught universally in schools or universities, or being taught regularly. It went on to say:

> "However, the mere fact that an activity might be included, exceptionally, as part of a school curriculum would not be sufficient to enable it to be regarded as part of "school or university education". We consider the most helpful test is that referred to by the Advocate General in *Haderer*, namely that the activity must be one in which "instruction is *commonly* given" (our emphasis). It is a matter of judgment whether that test is satisfied in any particular case, but we find it helpful to approach the question from the opposite end, namely to ask whether the activity is only taught uncommonly."

53. The second point relates to the FTT's response to an argument made by HMRC that the private tuition had to be analogous or comparable in its nature, and level to the way the subject or activity was taught in schools or universities. At [53] the FTT set out that it disagreed with this requirement saying that to impose such a test would be an unwarranted gloss on the legal test and that it would introduce a restrictive requirement. This followed from its consideration of *Haderer* and a later ECJ case which followed *Haderer* (*Ingenieurbüro Eulitz GbR Thomas und Marion Eulitz v Finanzamt Dresden I* (Case C-473/08) [2010] All ER (D) 79 (Feb). According to the FTT the requirement was as follows:

> "first, that the subject or activity should be one that is commonly taught in schools or universities, and not one that is purely recreational; it must be part of school or university education. Secondly, the supply must be one of tuition in that subject or activity, in the sense of a transfer of knowledge or skills. The tuition must be educational in character but, beyond that, there is no test of comparability."

54. The FTT went on to note at [58] of its decision that the above was inconsistent with the view expressed in *Cheruvier* at [47] that supplies by an individual giving private tuition were exempt "if what is taught accords with what is taught in an educational institution." I agree with the FTT's rejection of a test of comparability for the reason it has stated. It should be noted that the FTT in *Hocking* did not have the opportunity to consider the decision in *Tranter* as that decision was not released until after the hearing in *Hocking*. To the extent the observations (which were obiter) in *Tranter* by the panel which I formed part of endorse a test of comparability (see [100] to [102]), albeit a laxer one than HMRC in that case was arguing for, then I depart from that view.

55. I also need to deal with the VAT Tribunal case of *T K Philips t/a Bristol Motorcycle Training Centre* (1982) VAT Decision 7444, a case which Mr Newell argues involved similar facts to his and where the Tribunal found in favour of the appellant. The appellant in that case had an off road motorcycle circuit in the Bristol area. He ran a business which amongst other things offered practical training to pupils on motorcycles with a strong emphasis on road safety. HMRC emphasise that the legal test under consideration there was different so it is necessary to set out the law which was relevant in that case.

56. The Directive provision was Article 13A(1) of the Sixth Directive which was worded in identical terms to that set out above at [46].

57. The relevant domestic provisions were contained in Group 6 Schedule 6 Value Added Tax Act 1983: Group 6 – Education referred at Item 2(a) to "education or research of a kind provided by a school or university". The Notes to the Schedule defined "Education" as including "training in any form of art". Notes (2) and (3) defined "School" by reference to various domestic education statutes and "University" as meaning a United Kingdom university including "any college, institution, school or hall of such a university."

58. Having concluded that the appellant was providing the courses otherwise than for profit the Tribunal Chairman considered the issue of whether the appellant was providing "education".

59. In a passage which HMRC rely on to show the tribunal was applying a wider test than that which is relevant for the purposes of the current appeal the Chairman stated:

> "…I…would be reluctant to confine the meaning of education to formal instruction in the classroom and I consider that Item 2 has been drafted particularly broadly to embrace such an interpretation. Item 2 does not say education of a kind provided in every or most schools or universities nor is it limited to education of a kind normally provided in schools or universities."

60. Concluding that what the appellant was providing was education she then went on to consider whether it was education of a kind provided by a school. She was satisfied it was summarising the evidence before her as follows:

> "There is ample evidence before me that in 1992 many schools in the Bristol area either make use of [the appellant's] facilities as part of their curriculum or alternatively send their teachers on an intensive course so that they can provide education in road safety and training on how to safely use a motorcycle. In addition I have the evidence of Mr Moss [the Chief Road Safety officer for Cheshire County Council] that this subject is taught in schools in a wider geographical area than Bristol and Avon. The Crown has asked me to be satisfied [the appellant] was involved in the teaching of a subject of a kind that is taught in a school. I am so satisfied."

Parties' submissions

61. The parties' more detailed submissions are dealt with in the discussion section below but in summary the appellant argues that he has shown that the subject is ordinarily taught in schools or universities. Motocross has been included within the "meeting local needs" provisions of the GCSE for Physical Education from September 2014. Further it is relevant to his case that analogous activities such as mountain biking and BMX are taught in schools. Also, as mentioned above, he argues the facts of his case are similar to the VAT Tribunal case of *TK Phillips*, where motorcycle training was accepted to be school or university education. The appellant also argues that his courses comprise motor cycle maintenance and that this too is a subject ordinarily taught in schools. Both motor cycle riding and maintenance are

included in the GCSE in Motor Vehicle and Road User Studies which many schools teach.

62. HMRC dispute that the appellant's tuition falls within the exemption and argue that the examples the appellant has provided only show that motocross and motorcycle maintenance are taught variously in community projects, after school clubs, further education colleges and day release arrangements.

Discussion

63. The issue to be decided in this appeal is whether the supply of tuition in motocross and motorcycle maintenance can be considered as tuition in subjects which are ordinarily taught in a school or university. For the reasons set out below I have come to the view, having considered the evidence that was before me, that neither are subjects which satisfy this statutory test. This is the case whether those subjects are considered individually or in a combined way by reference to the GCSE provided in some schools in Motor Vehicle Road User Studies ("MVRUS") which contains elements of both motor cycle riding techniques and maintenance.

Is motocross a subject ordinarily taught in schools or universities?

64. I should explain at the outset that there are certain aspects to HMRC's arguments which I did not agree with and have discounted. In particular HMRC argue that the appellant's practical tuition is not similar to what is taught in schools. As a matter of fact I do not think this is correct – certainly in relation to what is taught in schools by the schools outsourcing the instruction of motocross to Mr Newell, by definition the fact the tuition in schools is carried out by him will mean that what he teaches corresponds to what is taught in those schools. In any case as explained in *Hocking* there is no basis for such a requirement of comparability in the legislation.

65. I also discount HMRC's submissions as to the significance of the low numbers of the students taking up the course in the schools where it is offered. I note that for the activity to be approved under the "MLN" process it must be offered to the whole cohort of pupils. In any case a subject which might due to its nature only be of interest to a minority of students within a school might nevertheless be viewed as one which is ordinarily taught in schools or universities.

66. Further I also disagree with their submission that the tribunal is restricted to looking at the evidence which was in existence at the time at which HMRC's decision was made in 2013. The issue is not whether HMRC were correct to have reached the decision they did at the time but whether the courses in the subjects taught by Mr Newell fall within the exemption or not. However, to the extent Mr Newell has invited me to look at what schools might do in the future and expressions of interest I take account of the inherent limitations of that sort of evidence in terms of throwing light on whether a subject is, at the time of the supply in respect of which exemption is sought to be applied, one which is ordinarily taught. Those intentions do not obviously carry as much weight as evidence of what schools or universities actually do at a given point in time. The appellant pointed out that in relation to motocross as a

PE activity the window for applications did not open until a date after the hearing (1 April 2015) however this tribunal can only evaluate the evidence as to the prevalence of the teaching of the subject which was before it at the hearing, or to the limited extent it was permitted to be adduced post-hearing (as was the case on the evidence the appellant produced in relation to replies to his Freedom of Information Act requests). It would not be appropriate for the tribunal to speculate on what numbers of schools might decide to take the subject up in the future without specific evidence on their intentions.

67. Considering then the question of how many schools or universities teach motocross it is clear that a number of schools do. The facts are perhaps unusual in that many of the schools the appellant refers to as teaching motocross are doing so at his centre and due to his efforts in promoting the subject – HMRC rightly do not make any point on this as I cannot see why that fact should make any difference as long as the upshot is that the subject which the appellant gives private tuition in is one which is ordinarily taught in a school or university.

68. HMRC ask me to note that motocross is not mentioned at all in the Department of Education's 2013 Report on "Evidence on physical education and sport in schools" 2013 (described at [26] above). A similar argument was made by HMRC in *Hocking* (at [38] of the decision) in relation to the fact that pilates was not mentioned in the report. In line with the way the FTT in that case dealt with that argument, the tribunal cannot, in my view, draw anything from this absence as although motocross is not mentioned as a separate category, it could be captured within various other more generic headings for example "cycling", "fitness" or "outdoor / advent[ure]". While the absence of motocross does not undermine the appellant's case the high percentage figures for those generic categories does not assist it either there being no further information on the extent to which motocross was included in any of these figures.

69. Summarising the evidence, there are then a total of 17 schools where either pupils are being taught motocross or where the schools were intending to do so. There are potentially 34 schools with parents or pupils have expressed an interest in the subject being taught.

Relevance of being on GCSE activities list

70. The appellant emphasises the inclusion of motocross within the activities list for GCSE PE. However in my view the fact a subject is included in a syllabus or a qualification as a potential activity that may be taught does not mean it is a subject which is ordinarily taught in a school. This approach is consistent with that taken in *Hocking* and *Tranter*. There pilates and yoga respectively were activities within the PE GCSE but the tribunals were not satisfied that that meant the activity was ordinarily taught in a school or university. I accept that if an activity is on a formal syllabus or an education standard setting authority has already devised a qualification that makes it more likely than would otherwise be the case that a school would teach the course but what is more relevant in my view is the actual take up of the course by the school as this will provide an indication of how commonly schools teach the subject. In the case of optional activities within wider subjects which an appellant

maintains corresponds to the subject they give private tuition in, it is relevant to look at how extensively those options have been taken up by participants and the incidence of actual teaching in schools and universities of the activity. The appellant makes the point that there are activities on the list of activities (of which motocross is now a part of) such as golf and horseriding which HMRC acknowledge as falling within the exemption. However, the fact HMRC have treated those subjects in this way is irrelevant to this appeal. It merely discloses HMRC's views on the matter and the issue of whether those views are correct does not fall to be decided in this appeal.

Analogous to BMX and mountain biking?

71. In seeking to demonstrate that motocross is a subject ordinarily taught in a school or university the appellant argues it is relevant to look at the provision of cycling and in particular BMX and mountain biking activity on the basis that these activities are analogous to motocross.

72. In order to understand the why the appellant has put this argument forward in the way he has it is necessary to set out the following guidance from HMRC's manual VATEDU40200:

> "What does "subject" mean? Private tuition is only considered to be in subject ordinarily taught in a school or university if it is analogous to what is actually taught in a number of schools or universities. It does not have to be identical to a course provided by a number of schools or universities but should be of a similar nature and level."

73. It will be apparent that this position reflects the argument relating to a test on comparability which HMRC argued before the FTT in *Hocking.* As explained above at [54] above the FTT, at [53] of its decision, rejected such a test as an unwarranted gloss on the legislation. The tuition had to be educational in character but beyond that there was to be no test of comparability. That said, returning to the appellant's argument, it is important to note that what the tribunal was rejecting was the proposition that it had to be shown that the subject being taught by the person was similar in nature and level to a course provided in schools or universities. The FTT's rejection of the argument did not extend to saying that the exemption is available if a *subject* which is similar or analogous to that which is taught by an appellant is taught in schools or universities. Indeed the passage in *Hocking* dealing with the point states "the supply must be tuition in *that* subject or activity" (emphasis added).

74. Therefore, while I was referred to some materials showing the similarity in skills between mountain biking and BMX (which is an abbreviation of bike motocross) and motocross and the similarity in features such as safety equipment, the fact that schools may provide instruction in BMX or mountain biking does not in my view assist the appellant. The courses provided in relation to which he seeks the exemption are specifically in motocross riding techniques using motorcycles, and safety. While it does not matter if a school or university provides instruction (provided it is not purely recreational) in motocross riding, techniques, and safety at a different level or in a different way to that in which the course is taught in a school or university it does matter if the course does not relate to motorcycles. In any case there was insufficient

evidence on how widespread the teaching of mountain biking or BMX was within schools to make a finding of fact on the point (the reference in the 2013 report to cycling is far too generic in my view to allow me to make any inference as to what percentage of the 55% noted for "cycling" consisted of mountain biking or BMX teaching). Similarly the appellant cannot reference the teaching of cycling in schools or more generally of PE because he does not teach cycling or PE; he teaches motocross.

GCSE in Motor Vehicle and Road User Studies ("MVRUS")

75. HMRC argue that the appellant has not demonstrated that what he teaches is similar to what is taught in relation to motor cycle riding as part of the GCSE in MVRUS. This amounts however in my view to the same type of comparability argument that was rejected in *Hocking*. The question remains however as to how prevalent the teaching of motor cycle riding and technique instruction is in schools within the context of the MVRUS GCSE. Mr Newell highlights the fact that the subject, which includes 30% motorcycle riding training and 7% motorcycle maintenance is offered in 41% of the secondary schools (84 out of 183 schools) in Northern Ireland, and that in Wales it is offered in 7% of schools in Wales (15 out of 223 schools). While the subject is not taught in the 3268 secondary schools in England, Mr Newell submits that the fact the English education policy does not cover motorcycle education for young people in England should not skew the "ordinarily taught" criteria by dint of the "overwhelming and disproportionate" numbers of schools there are in England.

76. This point essentially raises the issue of what the appropriate population of schools or universities should be by reference to which the "ordinarily taught" test is to be applied (EU, Member State (UK) or subdivisions of the Member State), and whether if, for instance it was at the level of the Member State, it would still be possible to take account of the greater prevalence of the teaching of the subject in one part of the Member State as compared to another. The point is of potential significance because in my view if the test were to be applied at the level of Northern Ireland then I think it would be possible to say that a subject which is taught in 41% of schools is ordinarily taught (or putting it in the way that the FTT in *Hocking* found helpful that it was not uncommonly taught). This contrasts with the percentage of 0.027% (99 schools out of a total of 3674) if account is taken of England, Wales and Northern Ireland (I had no evidence before me about the position in relation to the provision of any similar kind of course in Scotland) which would quite clearly to my mind suggest the test was not satisfied.

77. HMRC's submissions did not cover this point as their position was that Mr Newell's courses were not similar in nature and scope to what was taught on the MVRUS in the first place. Having turned back to the European case law and in particular the decision of the court and the Advocate-General's opinion in *Haderer*, these point in my view rather more clearly towards considering the question of whether a subject or activity is covered by school or university education at the European level.

78. At [17] of its decision the ECJ in *Haderer* refers to its case law setting out that the exemptions provided for in the Directive article "constitute independent concepts of Community law whose purpose is to avoid divergences in the application of the VAT system from one member state to another". In the passages quoted from *Haderer* above at [47] the court refers to the "Community concept of "school or university education" for the purposes of the VAT system. This is consonant with the Advocate General's opinion at [89] where she stated "the concept of school or university education within the meaning of the exemption must be given a Community definition." (Although that opinion is advisory and is not binding in the way that the court's decision is the opinion may often give helpful insights into the context and interpretation of the provision to be interpreted). At [88] the Advocate General noted that one of the activities in that case (making ceramic or pottery articles) was "very common in schools throughout Europe."

79. In reaching this view I do not mean to suggest (in line with what was said in *Tranter* at [65]) that an exhaustive survey would need to be conducted of educational provision across the EU. Further, in my view, while information on provision in other Member States might be relevant to an appellant in cases of this type the absence of such information would not be fatal to the application of the exemption as it would be open to an appellant to bring forward evidence of the teaching of the subject domestically and invite the tribunal to consider whether an inference might reasonably be drawn that the position was similar in other Member States. I also do not mean to suggest that the matter is necessarily a simple matter of percentages; account would need to be taken of the nature of the subject and the circumstances in which it was taught. For example if the teaching of a subject by its nature, such as because it is a language, is prevalent only in a small part of the European Union then private tuition in that language would not in my view fall outside the exemption simply because the percentage of schools teaching the language across the EU as a whole was small.

80. Another factor that might need to be taken account of is the extent to which the diversity of subjects taught and the optionality around them increases as education becomes more advanced. This might mean that the take up rate required of a subject at university in order for it to be regarded as "ordinarily taught" there might be lower than in relation to the take up rate of a subject in a population of primary schools (on the basis that universities tend to teach a wider range of specialist subjects than primary schools).

81. I accept that Mr Newell's argument could be seen as containing within it the argument that the particular circumstance of the MVRUS GCSE that should be taken account of is that it is for some reason not offered as a matter of educational policy in England, albeit a policy reason which is stated to be unrelated to the particular subject (so that the lack of prevalence in England is to be discounted). But, in my view that situation can be distinguished from the language example above where the more limited provision stems from the particular nature of the subject.

82. Taking account of the number of schools where motocross is taught or likely to be taught (17), and the schools where MVRUS GCSE is taught (99), while motocross is

a subject which is certainly taught in schools it is not, in my view, a subject which is ordinarily taught in a school. That conclusion would remain the case even taking into account in addition the number of schools (34) in relation to which there is a possibility that it will be taught (on the assumption that interested parents will pursue the matter with the school and the school will be amenable).

83. Although the appellant referred extensively to the case of *TK Philips* I do not consider this decision to assist his case or to dissuade me from the conclusion I have reached above. (The decision could in any case only as a VAT tribunal decision, as with FTT decisions, have been of persuasive value rather than binding on this tribunal.) As HMRC point out the test at issue there was the wider one of whether the education was "of a kind provided by a school" and the Chairman went as far as saying that the exemption was not limited to education of a kind normally provided in schools or universities. The tribunal had evidence that 62 schools in Cheshire taught the course, that many schools in Bristol provided such education in 1992 and that the courses were taught in addition in Cleveland, Leicester and Lancashire. While it can be seen how the tribunal in that case could be satisfied the courses at issue in that case were "of a kind provided by a school", having interpreted that test as it did (so as not to require that the subject was necessarily one which was normally taught in schools), in my view it does not follow that the tribunal would necessarily have been satisfied the courses were "ordinarily taught in a school or university".

Is motor cycle maintenance a subject ordinarily taught in schools or universities?

84. Following from the rejection of the comparability test in *Hocking* I do not think there is anything in HMRC's argument that the way in which Mr Newell teaches motor cycle maintenance lacks the structure of the course taught in schools and universities.

85. Moving on to consider whether the subject is ordinarily taught in "schools or universities" it is necessary first to deal with a legal argument raised by HMRC in order to consider the extent to which certain evidence the appellant has put forward relating to the teaching of the subject in various Further Education colleges is relevant.

Are examples provided in relation to colleges of further education ruled out because they are not schools or universities?

86. HMRC argue that the appellant cannot rely on examples of the motor cycle maintenance being taught in further education colleges. While the appellant has referred to paragraph 24 of *Haderer* (above at [47]) they say this is not an invitation to expand the compass of schools and universities to include Further Education colleges and other institutions. They argue that [23] of the decision in *Haderer* establishes that the reference in Article 132(1)(j) to "school or university education" is to the exclusion of any other type of education or training. They contrast the wording of Article 132(1)(j) which omits the reference to vocational training in 132(1)(i).

87. I do not agree with HMRC that the decision in *Haderer* supports their arguments. While paragraph 23 sets out the point that in contrast to Article 13A(1)(i), Article 13A(1)(j) "merely refers to school or university education, to the exclusion of any other type of education or training" it is clear the court was there recording the German tax authority's argument. It went on to highlight in [24] the difficulties of taking too narrow a view of school or university education and at [25] of taking particular interpretations of "school" or "university" in terms of classifications under the domestic system of law. While at [26] the court's observations were concerned with not restricting school or university education to education which led to examinations for the purpose of obtaining qualifications or providing training for the purposes of carrying out a professional trade or activity the earlier proposition that terms in the directive should not be construed by reference to domestic classifications remain just as applicable. Accordingly there is no basis in my view for ruling out tuition in a subject from the scope of the Article 132(1)(j) exemption simply by virtue of the fact the subject is taught at an institution which is classified under domestic law as a Further Education college. It would of course still be necessary to consider whether the particular circumstances of the college meant that it could be considered to be a "school" or a "university". The appellant supplied information showing examples of various colleges which offered courses for 14-16 year olds (e.g. Waltham Forest College).

88. As to the question then of whether motor cycle maintenance is a subject ordinarily taught in a school or university the evidence does not suggest this test is fulfilled even if it is accepted that some further education colleges, because of their particular circumstances, might be regarded as schools or universities. A City and Guilds course and a certificate is offered in the subject. There was evidence of a college teaching the course and another teaching a certificate in the subject which also worked with 17 schools. This provides an insufficient basis in my view to find that the numbers of schools or universities in which the subject is taught is enough for the statutory test to be regarded as fulfilled. Putting aside whether any of those particular colleges could be regarded as a "school" or a "university" in this context and whether a university course described as motorcycle engineering offered by Swansea University is the same subject as motorcycle maintenance, the number of bodies offering such courses amounts to eleven. Adding in the schools teaching MVRUS GCSE which contain a component of motor cycle maintenance (99) and the 17 schools working with Barnfield Academy the total is 127. While it is clear motor cycle maintenance is taught in schools it certainly not a subject which is "ordinarily taught" in a school. Even if it assumed that it is taught as part of a wider course at two universities (and taking account that the take up rate at university might be less for specialised subjects (as suggested in [80] above)) it is clear to me that the subject is not one which is ordinarily taught in a university. Further, even if the appellant's tuition is looked at as a combination of motocross tuition and motor cycle maintenance and accordingly the figures for the teaching of both those elements in schools, further education college and universities are put together they do not in my view demonstrate that the subjects of motocross and maintenance are ordinarily taught in a school or a university.

89. I appreciate that the appellant may regard it as unfair that despite the obvious determined and pioneering efforts he has made, and by all accounts continues to

make, to raise the profile of motocross teaching for young people, the subject he teaches does not currently fall within the exemption and that as he put it he is penalised for being an "early adopter". That position is unfortunately for his case one which is inherent in the way the exemption is drafted and the fact a person giving private tuition will not fall within it unless the subject is one which is "ordinarily taught" in a school or university.

Application to strike out appellant's argument relating to legitimate expectation

90. Encompassed within the appellant's grounds of appeal are matters relating to guidance HMRC published and the manner in which the guidance was retracted and new guidance published. In particular the appellant's case is that while motorcycle training was potentially allowed under HMRC guidance given pre October 2011, after that date HMRC changed the guidance but failed to publish the change adequately. The appellant argues that he and his advisers were thereby misled to the appellant's detriment.

91. HMRC argue that these claims which they say in essence amount to claims of breach of legitimate expectation fall outside the FTT's jurisdiction and must accordingly be struck out under Rule 8(2)(a) of the Tribunal's Rules. They refer to *HMRC v Abdul Noor* [2013] UKUT 071 (TC) and *CCE v National Westminister Bank* [2003] EWHC 1822 (Ch). They say that Sales J's comments which suggest otherwise in *Oxfam v HMRC* [2009] EWHC 3078 are obiter dicta and are as such not binding on the tribunal, and that they are in any event in conflict with other High Court authority.

92. I have some sympathy with Mr Newell when he states that as a taxpayer and a litigant in person he has found it very difficult to navigate the various opinions, advice, HMRC internal and external guidance and finally the convoluted case law. To his credit Mr Newell in formulating the arguments which he has below and in responding to the arguments HMRC raised has not been deterred by such difficulties. He has also, I understand, taken the sensible precaution of lodging his complaints in relation these matters before the Adjudicator as well in case this part of the appeal could not be dealt with by the FTT.

93. Mr Newell's arguments in relation to why he considered that the FTT did have jurisdiction to deal with matters he raised were as follows:

> (1) The December 2014 Tax Law Review Commission papers which after referring to *Noor* stated that "On the other hand this does not mean the FtT can never take into account, or give effect to, public law issues such as legitimate expectation. That could take place when it was necessary to do so in the context of deciding issues clearly within its own jurisdiction".
>
> (2) If HMRC are correct he must run two actions; one before the FTT and one for judicial review before the High Court.
>
> (3) In practical terms this meant he did not have a right to a fair and impartial hearing under Article 6 (the Adjudicator being part of HMRC)– the FTT should in cases of natural justice should be able to hear the application.

Argument that Noor can be distinguished?

94. Mr Newell did not seek to disagree with the decision in *Noor* but argues the facts of his case are different and that the UT left scope for certain matters namely those where HMRC were acting within its powers to be considered by the FTT.

95. As identified at [1] of the Upper Tribunal's decision the central issue was whether the FTT had any jurisdiction when dealing with a VAT appeal to consider a taxpayer's claims based on the public law concept of "legitimate expectation". The claim of legitimate expectation was in relation to incorrect advice the taxpayer said he had received on the telephone from HMRC's National Advice Service that he could recover input tax shown on certain pre-registration invoices. The UT's decision was the FTT did not have jurisdiction to give effect to any legitimate expectation which the appellant in that case might have been able to establish in relation to any credit for input tax.

96. Earlier in the decision the UT set out at [30] that it was clear that under the legislation (TCEA 2007, s83(1) VATA 1994 or any other provision) no general supervisory jurisdiction was conferred on the FTT in relation to legitimate expectation. At [31] in a passage Mr Newell referred to and which is also set out in the Tax Law Review Commission paper Mr Newell relies on the UT went on to say that it did not follow from the absence of such a general supervisory jurisdiction that the FTT could never take account of or given effect to matters of public law as there were many example of a court or tribunal with no judicial review function giving effect to public law rights. As set out by the UT:

> "It would, however, be open to the FtT to consider public law issues only if it was necessary to do so in the context of deciding issues clearly falling within its jurisdiction. The central question in the present case is whether it was open to the Tribunal to consider Mr Noor's case based on his legitimate expectation in deciding an issue within its jurisdiction. The answer to that question turns on the extent of the jurisdiction which is conferred by section 83(1)(c) VATA 1994 , which comes down to a point of statutory construction."

97. While this passage at [31] makes the point that the absence of a supervisory jurisdiction does not preclude public law rights being considered or given effect to it makes it clear that whether that can happen or not depends on the statutory construction of the provision conferring jurisdiction.

98. Mr Newell relies on the distinction drawn in *Noor* between legitimate expectation cases arising from situations where HMRC are acting within their powers which he argues are within the FTT's jurisdiction and those which are not within their powers which fall outside of the FTT's jurisdiction. His case is that in giving guidance HMRC were acting within their powers and that the FTT therefore does have jurisdiction.

99. In order to deal with the point it is necessary to set out [87] of *Noor* which Mr Newell relied on:

> "In our view, the F-tT does not have jurisdiction to give effect to any legitimate expectation which Mr Noor may be able to establish in relation to any credit for input tax. We are of the view that Mr Mantle is correct in his submission that the right of appeal given by section 83(1)(c) is an appeal in respect of a person's right to credit for input tax under the VAT legislation. Within the rubric "VAT legislation" it may be right to include any provision which, directly or indirectly, has an impact on the amount of credit due but we do not need to decide the point. Thus, if HMRC have power (whether as part of their care and management powers or some other statutory power) to enter into an agreement with a taxpayer and that agreement, according to its terms, results in an entitlement to a different amount of credit for input tax than would have resulted in the absence of the agreement, the amount ascertained in accordance with the agreement may be one arising "under the VAT legislation" as we are using that phrase. In contrast, a person may claim a right based on legitimate expectation which goes behind his entitlement ascertained in accordance with the VAT legislation (in that sense); in such a case, the legitimate expectation is a matter for remedy by judicial review in the Administrative Court; the FtT has no jurisdiction to determine the disputed issue in the context of an appeal under section 83. As Mr Mantle puts it, the jurisdiction of the F-tT is appellate (ie on appeal from a refusal of HMRC to allow a claim). The F-tT has no general supervisory jurisdiction over the decisions of HMRC. That does not mean that under section 83(1)(c) the F-tT cannot examine the exercise of a discretion, given to HMRC under primary or subordinate VAT legislation relating to the entitlement to input tax credit, and adjudicate on whether the discretion had been exercised reasonably (see eg *Best Buys Supplies Ltd v HMRC* [2012] STC 885 UT at [48] – [53] – a discretion under Reg 29(2) of the VAT Regulations). Although that jurisdiction can be described as supervisory, it relates to the exercise of a discretion which the legislation clearly confers on HMRC. That is to be contrasted with the case of an ultra vires contract or a claim based on legitimate expectation where HMRC are acting altogether outside their powers."

100. It can be seen from this extract that the UT was not contrasting two types of legitimate expectation cases but making the point that, in construing the provision giving rise to jurisdiction, matters done under HMRC's powers affecting entitlement could be viewed as falling within the provision. A credit under the VAT legislation might encompass a credit given pursuant to an agreement made under VAT legislation which gives entitlement to a credit. This is different from a right arising out of legitimate expectation. For Mr Newell to succeed in his argument he would need to show that HMRC's guidance or the way in which they retracted it created an entitlement which was within the scope of the VAT legislation (in the sense that term was used by the UT in *Noor*).

101. Mr Newell's situation is analogous to the situation described in [89] of *Noor* of express representations having been given that certain supplies would be treated as exempt rather than standard rated. If, legally, the supplies were standard rated, but Mr Newell had a legitimate expectation that the supplies were nevertheless to be treated as exempt, the order the Administrative Court could make would not change the

character of the supplies but would put him in the position he would be in if the supplies had been exempt. As the UT explained in that paragraph the credit Mr Noor would have received in that situation would not be a credit for input tax but a financial adjustment to give effect to his legitimate expectation.

102. The head of s83 under which this appeal comes before the tribunal is s83(1)(b):

> "Subject to [sections 83G and 84], an appeal shall lie to [the tribunal] with respect to any of the following matters—
>
> …
>
> (b) the VAT chargeable on the supply of any goods or services…;

103. The arguments made in *Noor* concerning credit in relation to input tax are just as applicable in my view to "VAT chargeable on the supply…". The FTT can deal with the statutory provisions on VAT, but rights accruing from any legitimate expectation in relation to guidance given or retracted by HMRC on VAT chargeable on the supply would not be "with respect to" the "VAT chargeable on the supply". Rather they would be rights relating to sums that might arise due to a financial adjustment awarded to give effect to the appellant's legitimate expectation.

104. While, as Mr Newell pointed out, the UT acknowledged the difficulty of dealing with the legal issue of jurisdiction in the absence of legal representation from Mr Noor (at [96]) the decision plainly went ahead to deal with the issue of the tribunal's jurisdiction clearly and comprehensively. It remains a decision which is binding on this tribunal.

Argument that despite Noor, can argue legitimate expectation under Oxfam?

105. Although this point was not raised by the appellant I should deal with it as I raised with HMRC whether it was correct to say, as they had argued, that Sales J's comments in *Oxfam* were obiter given what was said on that point in *Noor*. In particular at [50] the UT stated that despite what it had said earlier in *Hok v HMRC* [2012] UKUT 363 it inclined to the view that Sales J's conclusion was a matter of decision. However as is apparent from [52] the UT in *Noor* did not express a final view on the matter (as it was not necessary for its decision). The UT in *Noor* disagreed and departed from Sales J's decision. It acknowledged that under the legislative provision under consideration there could be situations where e.g. contracts within HMRC's powers under the legislation would fall within jurisdiction but pointed out that legitimate expectation was different in nature from such cases.

106. Even if Sales J's conclusion on the Tribunal's jurisdiction was to be regarded as part of the decision and there were then two authorities of equivalent jurisdiction on the point then there is authority to suggest that barring the exception where e.g. some binding authority has not been cited in either of the two cases, a second decision (i.e. *Noor*) which has considered the first decision is to be preferred (*Colchester Estates (Cardiff) v Carlton Industries Plc [1986] Ch 80* which refers to Lord Denning's judgment in *Minister of Pensions v Higham* [1948] 1 All ER 863).

Article 6 ECHR

107.In relation to Mr Newell's Article 6 ECHR arguments these do not assist him. Article 6 entitles a person to a "fair and public hearing…by an independent and impartial tribunal established by law". The right applies (in addition to criminal charges which are of course not relevant at all here) to the determination of a person's "civil rights and obligations". However that concept does not extend according to the case law of the European Court of Human Rights (*Ferrazzini v Italy* [2001] STC 1314 at [29]) to disputes which determine a person's liability to pay tax. In any case the appellant's remedy is not limited to pursuing a complaint with the Adjudicator (which he says is part of HMRC) but also includes judicial review. This is a remedy which as set out by the UT in *Revenue and Customs Commissioners v Bosher* [2013] UKUT 0579 (TCC) at [41] referring to the authorities in this area, and after having been addressed on the practical concerns that taxpayers would have to grapple with when contemplating a judicial review, was considered to afford an adequate protection in vindication of ECHR rights.

108.There is accordingly no basis I can identify upon which Mr Newell's arguments relating to legitimate expectations arising from the former guidance of HMRC or any unfairness in the change in such guidance can properly be considered under the FTT's jurisdiction. Those matters are properly for judicial review proceedings and/or the Adjudicator. (I should make it clear that I have not considered and given no assessment of the merits or otherwise of these further arguments). Under Rule 8(2)(a) of the Tribunal Rules where the Tribunal does not have jurisdiction it must strike the matter out. The remainder of the appellant's arguments are accordingly struck out. It follows from the conclusions I have reached in relation to the substantive issues discussed earlier that the appeal is dismissed.

109.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: 28 OCTOBER 2015