[2018] UKFTT 197 (TC)

TC06438

Appeal number: TC/2016/01059

VAT – exemption for educational or vocational training –whether the EU directive had been applied correctly in the circumstance of a for-profit enterprise - held that domestic law was within the limits of the discretion given by EU law and that the principle of fiscal neutrality was not breached.

FIRST-TIER TRIBUNAL
TAX CHAMBER

PERFORMERS COLLEGE LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE SARAH ALLATT

Sitting in public at Fox Court on 24 November 2016
Further joint submission received 13 January 2017

Mr George Peretz QC for the Appellant

Mr Mark Fell, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal under section 83(1)(t) of the Value Added Tax Act 1994 ("VATA") against HMRC's decision of 11/11/2015 rejecting a claim by Performers College Ltd (PCL) for repayment of £871,323 of overpaid VAT under section 80(1) VATA. The Decision was upheld on statutory review on 20/1/2016.

Background

2. There is no dispute as to the facts, which I shall therefore set out quite briefly.

3. PCL is an independent further education college for performing arts, located in a purpose-built performing arts centre near Southend-on-Sea in Essex. It trains students aged 16 and over for employment in the performing arts industry. It runs a three-year course in dance and musical theatre leading to a national diploma in either professional dance or in music theatre. The diploma is awarded by Trinity College, London. Around 160 students are on the course at any one time, and around 60 of them at any one time have all or part of their fees for the course paid for by the Secretary of State.

4. The VAT at issue was accounted for by PCL on its supplies of the three year course in theatre, dance and music ("the Supplies") over the VAT periods 05/11-02/15 ("the Period").

5. At all times during the Period, the Secretary of State has paid part of the consideration for the Supplies, as set out below.

Until 11 February 2014, the Secretary of State made payments to PCL under one or both of regulations 7 and 8 of the Education (Grants etc.)(Dance and Drama)(England) Regulations 2001 (SI 2001/2857) ("the Grants Regulations"), which gave the Secretary of State power to pay a grant to a "relevant institution" in respect of an "award student". By Schedule 2 to the Grant Regulations, PCL was a "relevant institution" and the minimum amount of grant was set at £5,280. PCL was required to remit its fees to the student by that amount. The Secretary of State had a further power under regulation 8 to pay a further grant to a "relevant institution" in respect of an "award student", in such amount as the Secretary of State might determine having regard to the income of the student and his parents: the relevant institution was required also to remit the student's fees by that amount.

As a matter of fact, during the part of the Period when the Grants Regulations were in force, the Secretary of State paid PCL a fixed amount per student for around 23 students (chosen by merit in the course of the entry audition process). As far as those students were concerned: -

a. No VAT was accounted for by PCL in relation to the payments made by the Secretary of State.

b. In addition, many of those students paid an additional sum to PCL, and PCL accounted to HMRC for VAT on those sums.

c. The rest of those students (those who were entitled on the basis of low family income, under a different scheme, to maintenance grants from the Secretary of State) made no additional payment to PCL.

The remaining students on the course paid in full for the supplies made to them and PCL accounted for VAT on those fees to HMRC.

After 11 February 2014, the Secretary of State has continued to pay PCL part of the consideration for PCL's courses under the Dance and Drama Awards, or "DaDAs" scheme. The powers under which she does so are now those under sections 14 to 17 of the Education Act 2002. Under that scheme, the Secretary of State pays a fixed sum to PCL over the course of a year. PCL awards a certain number of DaDAs each year based on assessment of merit during entry auditions. Since the payment made by the Secretary of State is a fixed amount, the number of students whose fees are paid or part paid depends on the income profile of the students who win the award. PCL charges students in receipt of a DaDA only a "top up" fee prescribed by the scheme (there is a sliding scale based on family income): the balance of the fee is taken from the fixed sum provided by the Secretary of State. The amount of the top-up fee depends on the student's family income, assessed on a sliding scale. In some cases, the top-up fee is zero. In addition, in some cases where the top up fee is zero, PCL makes a maintenance grant under the scheme to that student: the amount of any such grants is taken out of the fixed sum provided by the Secretary of State.

For the students who receive DaDAs: -

a. PCL accounts for VAT on any top-up fee

b. PCL does not account for VAT on the contribution to the fee made by the Secretary of State.

Other students receiving the Supplies and who are not in receipt of DaDAs pay the full fee. PCL accounts to HMRC for VAT on those payments.

6. I received a joint submission after the hearing in relation to the contractual position in relation to consideration payable by students for partially funded courses.

7. PCL states that in its opinion the consideration payable by students is determined by an implied term in PCL's contract with those students that they pay the amount PCL invoices them. PCL advises that in the case of students in receipt of DaDAs which partly cover course fees, the students will only be invoiced for the balance of the course fee excluding the sums covered by DaDA funding from the Secretary of State.

8. HMRC's position on that is that PCL has not provided evidence confirming the analysis summarised immediately above is correct.

9. I have not been asked (and therefore the Tribunal is not properly constituted) to decide a question of fact. I therefore address below the situation both if a partially funded student receives a partially exempt supply, and also if the supplies from which a partially funded student benefits are two separate supplies, one to the student and one to the Secretary of State.

The Law

10. There is no dispute as to the UK law that applies to this issue.

11. This UK law is contained in Group 6 of Schedule 9 to the VAT Act 1994. This exempts from VAT:

> *1. The provision by an eligible body of—*
>
> *(a) education; or*
>
> *(c) vocational training.*
>
> *...*
>
> *5. The provision of vocational training, and the supply of any goods or services essential thereto by the person providing the vocational training, to the extent that the consideration payable is ultimately a charge to funds provided pursuant to arrangements made under section 2 of the Employment and Training Act 1973, ...*
>
> *5A. The provision of education or vocational training and the supply, by the person providing that education or training, of any goods or services essential to that provision, to the extent that the consideration payable is ultimately a charge to funds provided by*
>
> *(b) the Chief Executive of Skills Funding under Part 4 of [the Apprenticeships, Skills, Children and Learning Act 2009;*
>
> *...*
>
> *5B. The provision of education or vocational training ... to persons who are: -*
>
> *(a) aged under 19 [or],*
>
> *(b) aged 19 or over, in respect of education or training begun by them when they were aged under 19,*
>
> *...*
>
> *to the extent that the consideration payable is ultimately a charge to funds provided by the Secretary of State.*
>
> *...*
>
> *Notes:*

(1) For the purposes of this Group an "eligible body" is—

(a) a school ...

(b) a United Kingdom university, and any college, institution, school or hall of such a university;

(c) an institution—

(i) falling within section 91(3)(a), (b) or (c) or section 91(5)(b) or (c) of the Further and Higher Education Act 1992; or

...

(e) a body which–

(i) is precluded from distributing and does not distribute any profit it makes; and(ii) applies any profits made from supplies of a description within this Group to the continuance or improvement of such supplies;

...

(3) "Vocational training" means – training, re-training or the provision of work experience for–

(a) any trade, profession or employment; or

...

12. It is agreed that until April 2012, the funding was from the Young People's Learning Agency under Pt.3 of the Apprenticeships, Skills, Children and Learning Act 2009, and item 5A(a) of Group 6 therefore applied.

13. From April 2012, the funding was from the Secretary of State, acting through the Education Funding Agency, and item 5B of Group 6 therefore applied.

14. This UK law derives from the Principle VAT Directive. Under a heading 'Exemption for certain activities in the public interest' Article 132(1)(i) of that directive provides that

1. Member States shall exempt the following transactions:

...

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

…

Article 133 provides that

> *Member States may make the granting to bodies other than those governed by public law of each exemption provided for in points … (i) … of Article 132(1) subject in each individual case to one or more of the following conditions:*
>
> (a) the bodies in question must not systematically aim to make a profit, and any surpluses nevertheless arising must not be distributed, but must be assigned to the continuance or improvement of the services supplied;

The Appeal

15. PCL contends that, by exempting only the part of the training that qualifies for Government funding, UK law has not properly applied the directive. PCL considers that the full supply of the course to all students should be exempt from VAT.

16. PCL contends that by exempting the supply that relates to funding by the Secretary of State, the UK has determined that PCL is an 'other organisation recognised by the Member State concerned as having similar objects'. It further contends that the distinction drawn between 'funded supplies' and 'un-funded supplies' exceeds the limits of the discretion allowed and breaches the concept of fiscal neutrality.

17. PCL maintains this argument applies whether or not partially funded students benefit from two supplies (one to them and one to the Secretary of State) or one supply.

18. The law is set out above, and I was referred to a number of cases during the course of the appeal. EU law requires that (Article 132(1)(i)) educational or vocational training must be exempt when provided by a body governed by public law or by 'other organisations recognised by the Member State concerned as having similar objects'. The exemption for 'other organisations' may, under Article 133(a), be subject to a condition that the 'other organisation' is a not-for-profit organisation.

19. UK law applies this in the following way. Firstly, in item 1 of Group 6 it exempts the provision by an 'eligible body' of education and training. It defines eligible body to include all public law bodies, and in addition 'schools', 'universities' and 'further education institutions', each defined, and lastly not for profit organisations. It then partly exempts, under items 5-5C, supplies by for-profit organisations to the extent they have received state funding.

20. In other words, it applies the qualification that 133(a) allows but does not compel it to apply, but it only partially applies it, as it does not apply the not for profit qualification to 'the extent of the funding that derives from the Secretary of State'.

21. It is common ground that PCL is not an eligible body.

Case Law

22. There have been a number of cases in the European Court that I have considered.

23. Firstly turning to the limits of discretion.

24. Minister Finansow v MDDP (Case C-319/12) concerned a situation where Polish law exempted all educational services, whether or not performed by a not for profit organisation. It did not attempt to distinguish between those which 'have similar objects' to a public law body and those which do not.

25. It was held that Polish Law exceeded the discretion given under EU law in this regard. Wide discretion was given to EU Member States, the Advocate General suggesting this was probably due to the very different nature of educational systems throughout the European Union, but local law had to set down a method to distinguish which non public law bodies had 'similar objects' otherwise the second limb of Article 132(1)(i) was redundant.

26. The case of Finanzamt Steglitz v Ines Zimmermann (C-174/11) concerns similar legislation for the supplies of medical care. Here Member States must grant the exemption to supplies made by 'organisations recognised as charitable'. The German law required a test to be met concerning the proportion of treatments which in the preceding calendar year had been born by social security. It was held that the German government had exceeded the limits of its discretion in this area, particularly as it was not possible using that test for any profit making entity to satisfy the condition in the first year of its operation.

27. HMRC firstly contend that the method that they apply to distinguish between non public law bodies that have 'similar objects' and those that do not is as follows: Firstly, if the non-public law body is an eligible body (see 11 above), it is determined to have a 'similar object'. Secondly, if it is not an eligible body, then if it receives funding as set out in items 5-5C, it is determined to have a 'similar object' to the extent that it receives funding. The 'similar object' in question is 'the receipt of public funding of education under enactments concerned with education and/or in relation to certain age groups'. They contend this does not exceed the limit of the discretion set out in Article 132(1)(i).

28. Alternatively, they contend that if I find that does exceed the limit of the discretion under 132(1)(i), then they are within the limits of their discretion under 133 (a), which allows them to place a not-for-profit condition on non public law bodies.

29. As an exemption to the general principle that VAT should be imposed on all good or services supplied by consideration by a taxable person, the exemption must be construed strictly, but not so strictly as to remove its intended effect.

30. The exemption is intended to facilitate access to educational and vocational services in the public interest by avoiding the increased cost that should be imposed if they were subject to VAT.

31. Turning to Article 132(1)(i) in isolation, it requires the exemption of vocational training by non-public law bodies that are recognised by Member States as having similar objects to public law bodies with vocational training as their aim.

32. In the specifics of this situation, it is relevant that the funding is for a fixed amount for the college to award. The number of recipients depends on the income profile of the students. Individual students can therefore be partially funded, and receive supplies that are partially exempt and partially not.

33. I judge that Article 132(1)(i) does not, under the limb allowing for recognition, allow for recognition 'to the extent of' funds being ultimately borne by the Secretary of State. The case of JP Morgan (C-363/05) illustrates the point of bearing in mind the purpose of the exemption, and the limits of discretion where the provisions of a directive are sufficiently precise.

34. Article 132(1)(i) refers to 'similar objects' in the plural. This envisages looking in the round at objects of the non public law body, and objects of their comparator public law body. HMRC themselves called this a 'multifaceted approach'. Whilst both sides agree that using the receipt of public funding for a particular course to be a sensible and allowable method of determining the 'similar objects' question, drawing the line between funded and unfunded parts of this course, when that distinction is based on income factors of the recipient, is in my judgement a step too far.

35. The next question, therefore, is in relation to Article 133(a). This allows Member States to impose a not-for-profit condition on any non-public law body.

36. The UK has chosen to partially impose this condition. It does not impose it for the part of the course that is funded by the Secretary of State.

37. As Article 133(a) gives wide discretion to the Member States, I do not consider that the UK has exceeded the limits of its discretion in this area, provided that it has not breached the concept of fiscal neutrality.

38. PCL points out in relation to fiscal neutrality that this case relates to the same supplies, from the same supplier, being supplied in some cases to the same individual, being treated differently for VAT.

39. It is possible that there could be 3 students on a course at this college, studying the same course at the same time, one fully funded, where the supplies would be fully exempt, one partially funded where the supply is partially exempt (or is made up of two supplies, one exempt and one not), and one not funded where the supply is not exempt.

40. I was referred to a number of cases on fiscal neutrality, or equal treatment of all supplies or all taxpayers as regards the levying of VAT and the applicable rate. As explained in JP Morgan Fleming v Revenue and Customs Commissioners (Case C-363/05), 'The principle of fiscal neutrality precludes...economic operators carrying on the same activities from being treated differently as far as the levying of VAT is concerned [and]..precludes treating similar supplies of services, which are thus in

competition with each other, differently for VAT purposes.....The principle of neutrality also requires equal treatment for supplies which serve the same purpose, are interchangeable, and are therefore in competition with each other.'

41. The European Court has addressed the principle of fiscal neutrality many times, and I was referred to the cases of Zimmerman (C-174/11), JP Morgan (C-363/05), Commission of the European Communities v French Republic (C-481/98) and K Oy (C-219/13) among others, and in domestic case law to the recent Court of Appeal case Finance and Business Training v The Commissioners for HM Revenue and Customs [2016] EWCA Civ 7.

42. In each of these cases, the distinction was drawn between one service or supplier, and a comparable, competitor, service or supplier.

In K Oy, the comparator was explained 'To determine whether….services are similar, account must be taken primarily of the point of view of a typical consumer….services are similar where they have similar characteristics and meet the same needs from the point of view of consumers, the test being whether their use is comparable, and where the differences between them do not have a significant influence on the decision of the average consumer to use one or the other of those….services.'

43. PCL make the point that in this case the supplies are not just similar, they are the same. They are of the same course, by the same supplier, to, in some cases, the same individual.

44. HMRC contend that firstly, no different supplier has been used as a comparator. PCL itself has not shown it is at a competitive disadvantage to any other supplier in relation to the supplies that it makes. Secondly, the differentiating point between the supplies (the receipt of public funding) is a 'decisive difference' in the view of the consumer.

45. In Commission of the European Communities v French Republic (C-481/98), the position was that differing rates of VAT were charged on medicines that were reimbursable by social security and those that were not. It was held that 'the two categories of medicinal product are not in a competitive relationship in which taxation could play a determinative role, because they are not substitutable at a consumer's free choice'.

46. PCL lacks a supplier competitor that is advantaged by the domestic VAT legislation. In addition, from the point of view of any one student, not only is the 'choice' of a funded or an unfunded supply so different that the funded supply is always going to be preferred, the 'choice' is not actually a choice on the part of the individual. They either qualify (by reason of talent and income level) or they do not.

47. I therefore do not consider that the principle of fiscal neutrality has been breached.

Decision

48. For the reasons given above, I consider that domestic law in this area has not exceeded the limits of the discretion given in Articles 132(1)(i) and 133(a). I do not consider that the principle of fiscal neutrality has been breached.

49. I make this judgement without determining whether supplies to partially funded students is made up of one supply, partially exempt, or two supplies, one exempt and one not. I consider that in each of these cases the principle of fiscal neutrality has not been breached.

50. I therefore dismiss this appeal.

51. 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.

TRIBUNAL JUDGE
SARAH ALLATT

RELEASE DATE: 15 MARCH 2017