



Appeal number: UT/2017/0166

VAT – Exemption – Education – arts 132-134 PVD 2006/112/EC; Group 6 sch 9 VATA 1994 - Sales from student union campus shops – eligible body – closely related supplies - appeal dismissed

**UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER**

LOUGHBOROUGH STUDENTS' UNION

Appellant

- and -

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

Respondents

TRIBUNAL: MRS JUSTICE ROSE

**Sitting in public at The Rolls Building, Fetter Lane, London EC4A 1NL on 8
October 2018**

Noel Tyler (VATAngles VAT Consultancy) for the Appellant

**Joseph Millington, instructed by the General Counsel and Solicitor to HM
Revenue and Customs, for the Respondents**

DECISION

1. This is an appeal by Loughborough Students Union ('LSU') against a decision of the First-tier Tribunal (Judge Peter Kempster) released on 23 June 2017 dismissing its appeal against HMRC's decision to deny its claim for repayment of output tax in respect of sales of stationery, art materials and other items from the shops which LSU operates on campus. LSU maintains that the sales were exempt supplies for VAT purposes and that those supplies had mistakenly previously been treated as standard rated. LSU argues that it is entitled to exemption on the basis of the domestic VAT legislation properly construed. They do not rely on the direct effect of the underlying articles in the Principal VAT Directive (Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ L 347, 11.12.2006 p1) ('PVD') although they rely on a number of decisions of the Court of Justice of the European Union when inviting this Tribunal to construe the domestic provisions in their favour. HMRC seek to uphold the dismissal of the appeal although they disagree with some of the reasons given by the FTT, in particular the criticisms of the drafting of the domestic provisions and the FTT's conclusion that the VAT Act 1994 failed properly to implement the PVD in important respects.

2. The agreed facts are set out in [3] – [6] of the FTT's decision. Loughborough University was established in 1966 by Royal Charter. The statutes of the University state that there shall be a Students' Union of the University and the Ordinances provide for "the constitution, functions, privileges and other matters" relating to the LSU. LSU is an entity separate from the University and is separately VAT registered. LSU is also the Union for students from two other educational establishments, Loughborough College which is a further education college and the RNIB Vocational College.

3. Clause 2(a) of LSU's Constitution set out its objects:

"OBJECTS & POWERS

The Union's objects are the advancement of education of Students at Loughborough University, Loughborough College and the RNIB Vocational College (Loughborough) for the public benefit by:

i) enriching and enhancing the educational experience of its members as people as well as intellects, and in particular to providing opportunities for members to develop their personal maturity, leadership, and communications and other skills.

ii) acting as the principal body representing its members' views and interests within their institutions, to the local community and nationally.

iii) enhancing the student community and student wellbeing providing social, cultural, sporting and recreational activities and forums for discussions and debate.

iv) to ensure that students experiencing problems with student life can get the support and help they need and seek to minimize the likelihood of these problems occurring.”

4. Clause 2(b) sets out LSU’s powers, including:

5 “To further its objects, but not to further any other purpose, the Union may:

...

(xiv) raise funds and invite and receive contributions from any person provided that the Union shall not carry out any taxable trading activities in raising funds

10 ...

xxv) trade in the course of carrying out any of its objects ...”

5. LSU operates a range of commercial activities on the campuses of the University and Loughborough College, mainly bars and catering but also three retail outlets: the shop in LSU’s headquarters on the University campus, another (called 15 Purple Onion) on the University’s campus village, and one on the College campus. The shops are open at least five days per week during term time. Although most of the customers are students, there is no restriction on others using the shops; there is no distinction at point of sale between student and non-student sales. One of the College campus shops sells art materials.

20 6. The relevant EU provisions are Articles 132 – 134 of the PVD:

Article 132

1. Member States shall exempt the following transactions:

...

25 (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;

...

30

Article 133

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 35 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;

40

(b) those bodies must be managed and administered on an essentially voluntary basis by persons who have no direct or indirect interest, either

themselves or through intermediaries, in the results of the activities concerned;

5 (c) those bodies must charge prices which are approved by the public authorities or which do not exceed such approved prices or, in respect of those services not subject to approval, prices lower than those charged for similar services by commercial enterprises subject to VAT;

10 (d) the exemptions must not be likely to cause distortion of competition to the disadvantage of commercial enterprises subject to VAT.

...

Article 134

15 The supply of goods or services shall not be granted exemption, as provided for in points ... (i), ... of Article 132(1), in the following cases:

(a) where the supply is not essential to the transactions exempted;

20 (b) where the basic purpose of the supply is to obtain additional income for the body in question through transactions which are in direct competition with those of commercial enterprises subject to VAT.”

7. The way in which these provisions are implemented into domestic law has caused some confusion because the structure of the domestic provisions does not follow the structure of articles 132 – 134 of the PVD. Section 31(1) of the VAT Act 1994 provides that a supply of goods or services is an exempt supply if it is of a description for the time being specified in Schedule 9. Schedule 9 provides so far as relevant:

30 “Group 6 — Education

Item No

35 1 The provision by an eligible body of—
(a) education; ... ; or

(c) vocational training.

...

40 4 The supply of any goods or services (other than examination services) which are closely related to a supply of a description falling within item 1 (the principal supply) by or to the eligible body making the principal supply provided—

45 (a) the goods or services are for the direct use of the pupil, student or trainee (as the case may be) receiving the principal supply; and

(b) where the supply is to the eligible body making the principal supply, it is made by another eligible body.

50 ...

NOTES

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

(a) [various schools]

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

(c) [various institutions falling within the Further and Higher Education Act 1992 and the corresponding Scottish and Northern Irish statutory provisions];

(d) a public body of a description in Note (5) to Group 7 below;

(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;”

8. I start by considering the domestic provisions and whether LSU’s supplies fulfil the criteria laid down by Group 6 of Schedule 9. The logical first question is whether LSU is an “eligible body” within the Notes to Group 6. The paragraph on which LSU rely to bring themselves within the definition of an eligible body is paragraph 1(e). I note here that the possibility that LSU is an institution of a United Kingdom university within the meaning of paragraph 1(b) of the Notes appears to have been ruled out by the decision of the Court of Appeal in *Customs and Excise Commissioners v University of Leicester Students’ Union* [2001] EWCA Civ 1972.

9. On the question of whether LSU is an eligible body the FTT found at [69] that:

(a) LSU can and does make profit or surpluses; it made a surplus of about £163,000 in the year ended 31 July 2014;

(b) LSU is precluded by clause 22 of its Constitution from distributing any profit or surplus it makes; and

(c) LSU does not distribute any surpluses arising and those surpluses are assigned to the continuance or improvements of “LSU’s activities”.

10. HMRC accept that on the basis of these findings, LSU satisfies paragraph 1(e)(i) but contend that it does not satisfy subparagraph (ii). LSU contends that on the basis of that finding the FTT should have held that it was indeed an eligible body. That depends on the meaning of the phrase “supplies of a description within this Group” and hence the meaning of “such supplies”, that is the nature of the supplies to the continuance or improvement of which the profits made by LSU are applied.

11. Mr Tyler appearing for LSU put forward two arguments why subparagraph (e)(ii) was satisfied by LSU. First, he submitted that the kinds of supplies described

within Group 6 for the purposes of subparagraph (ii) are not only the principal supply falling within Item 1 but also the supply of closely related goods and services described in item 4. He argues that LSU does in fact make both principal supplies and closely related supplies and that the FTT was wrong to find otherwise. Alternatively, Mr Tyler argued that there is no requirement that to fall within Note 1(e) the eligible body must actually make supplies of a description within Group 6 - only that if it does so and if it makes a profit on those supplies, the body must be precluded from distributing them and must also apply them to the continuance or improvement of those supplies. Mr Millington appearing for HMRC argues that the reference to “supplies of a description within this Group” must refer only to the principal supply of education or vocational training and not to the supply of ancillary, closely related goods and services. He says further that on its proper construction Note 1(e) does impose a requirement that the putative eligible body itself actually makes principal supplies. If, contrary to that primary submission, the phrase “supplies of a description within this Group” includes closely related supplies, Mr Millington submits that that does not help LSU because the FTT clearly found on the facts that LSU did not make such supplies.

Discussion

12. The apparent breadth of Note 1(e) in the sense that it does not expressly require the eligible body to have anything to do with education clearly perplexed the FTT. Article 132 PVD requires Member States to limit the exemption from VAT to organisations which have similar objects to public law bodies aimed at providing education. The absence of that express link prompted the FTT to conclude that the inclusion as eligible bodies of all bodies falling within Note 1(e), whether or not they actually made principal supplies themselves, meant that the drafting of the domestic provisions was too broad and hence an incorrect implementation of the requirements of article 132.

13. Mr Millington argues that the link with the provision of education services which the FTT thought was missing from Note 1(e) should be read into its wording. He submits that one must read into subparagraph 1(e)(ii) a requirement that the body does actually make supplies of a description within the Group and he submits further that the only relevant supplies described within the Group are principal supplies of educational and vocational services. He invites me to reject the contention that closely related supplies are also “supplies of a description within” Group 6.

14. There are however difficulties with that approach to construing Note 1(e)(ii). It is true that most of the other potential eligible bodies in Note 1 are education providers; schools, United Kingdom universities and colleges and institutions falling within certain provisions of the Further and Higher Education Act 1992 and its Scottish and Northern Irish equivalents. However, Note 1(d) provides that the class of eligible bodies for the purposes of Group 6 includes “a public body of a description in Note (5) to Group 7 below”. That Note to Group 7 defines a public body (for the purposes of the exemption for health and welfare) also without any reference to educational aims. In the light of that apparently deliberate inclusion of such a body within the scope of “eligible body” for the purpose of the Notes to Group 6, I am

doubtful whether it is appropriate to rely on Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentation SA* [1990] ECR I-4135 to construe Note 1(e) as requiring that the body must itself make principal supplies in order to fit within Note 1(e).

5 15. Mr Millington’s second argument however is in my judgment undoubtedly correct namely that one cannot look at the definition of “eligible body” in the abstract. The breadth of the exemption and therefore whether the domestic provisions properly implement articles 132 – 134 must be assessed by looking not just at the definition of “eligible body” but by looking at the supplies on which exemption is conferred taking
10 the Group as a whole. As Mr Millington put it, there is little point in being an eligible body within the Notes if none of your supplies fall within any of the exempted Items listed in the Group. All those items are firmly linked to education and vocational training, except for youth clubs in Item 6 which Mr Millington submits implements a different exemption required by article 132. Regardless therefore of whether LSU is
15 an eligible body within Note 1(e) it can only claim an exemption for supplies which fall within one of the Items.

16. The relevant item here is Item 4 which I have already set out above. In order for LSU’s supplies of goods and services to fit within item 4:

20 (a) they must be closely related to the provision by an eligible body of education or vocational training;

(b) they must be supplied by or to the eligible body making the principal supply; and

(c) they must be for the direct use of the students receiving the principal supply.

25 17. The parties referred me to two cases on the meaning of “closely related supplies” in Item 4. The leading authority is Case C-434/05 *Horizon College v Staatssecretaris van Financiën* [2007] ECR I-4821. Horizon College was itself an educational establishment but also made available some of its teachers to other educational establishments, the latter being referred to in the judgment as the “host establishments”. There was a contract between Horizon College and the host
30 establishments stipulating that the teachers’ salaries would continue to be paid by Horizon College (reimbursed by the host establishment) but that the host establishment would define the teachers’ duties whilst they were working there. The CJEU held first that the mere supply of a teacher for the purpose of carrying out teaching duties cannot itself be described as educational activity for the purposes of
35 the exemption even if the body providing it was of a kind described in article 132: [19]. The second question was whether the supply of the teachers was closely related to the supply of education. The Court noted that there is no definition in the PVD of the term “closely related”. It then set out the following principles:

40 (a) the supply of goods or services can be closely related only where they are actually supplied as services ancillary to education which constitutes the principal service;

(b) a service may be regarded as ancillary to a principal service if it does not constitute an end in itself but a means of better enjoying the principal service;

5 (c) it does not matter that there is no direct relationship between Horizon College and the students of the host establishment; in fact it is not necessary for the closely related supplies to be supplied directly to those students. Any lack of a close connection between the principal supply of education by Horizon College and the secondary activity of making closely related supplies is irrelevant;

10 (d) Both the principal activity of education and the supply of the closely related goods or services must be provided by an eligible body;

15 (e) in order to qualify for exemption, the closely related supplies must be essential to the transactions exempted, that is to say they must be of a nature and quality such that, without recourse to such a service, there could be no assurance that the education provided by the supplier of the principal activity would have an equivalent value; this is a matter for the national court to determine;

(f) the closely related supplies must not fall within article 134(b), that is they must not be for the purpose of obtaining additional income for bodies which are in direct competition with commercial enterprises liable for VAT;

20 (g) the closely related supplies must also satisfy any conditions that the Member State has imposed pursuant to article 133.

18. The principles in *Horizon College* were applied by the Upper Tribunal in *HMRC v Brockenhurst College* [2014] UKUT 0046 (TCC). That appeal concerned the VAT status of sales by a restaurant run by the College for the purpose of enabling students enrolled in courses relating to catering and hospitality to gain some practical experience. The catering functions of the restaurant were all undertaken by students and the public attending the restaurant paid about 80% of the cost of the meal. Similarly, for performing arts students, the College staged concerts and performances for paying members of the public. In that case there was no dispute that the College was an eligible body making principal supplies. It was accepted that the supplies of restaurant and theatre services were not exempt under Item 1 of Group 6. The issue was whether they were closely related to the provision of education or vocational training by the College. The Tribunal referred to *Horizon College* and other CJEU decisions, emphasising that the closely related supply must be an ancillary supply rather than “an end in itself” and it must be essential to attain the objective of the principal supply. The Tribunal held that there is no requirement that the closely related supplies be made to the same recipients as the principal supply. The Tribunal rejected a submission that the exemption applies only if the imposition of VAT on the supplies in question would increase the cost of education. The wish to minimise costs was part of the underlying purpose of the exemption but there is no additional requirement to examine in an individual case whether the costs of providing education would increase. The Upper Tribunal upheld the decision of the FTT that the catering and entertainment services were essential to the principal supply as a means of

providing students with a better education. The fact that it was third parties rather than the students who consumed the meals or watched the performances did not lead to a different conclusion since the supplies were still “for the direct use” of the students within the meaning of Item 4(a) of Group 6.

- 5 19. Applying the principles in those cases, in my judgment the supplies of goods and services made by LSU do not fit within Item 4. LSU has not precisely identified the goods for which exemption was being claimed, describing them only as including sales of “stationery and art materials etc”. The FTT said at [87]:

10 “ ... The LSU website description of the shop on the University campus (there are similar descriptions for the other shops) is: “The LSU Shop is your local shop on the ground floor of the Students’ Union. We are open every day for your convenience, selling tasty & great value meal deals, snacks, confectionery, grocery, household goods & toiletries, fresh fruit & vegetables, fresh chilled and frozen food, a large range of Oriental food, soft
15 drinks and alcohol. Not forgetting of course, all of the Loughborough University stash & memorabilia, stationery, newspapers & magazines, greetings cards and much more!” The description for the art, craft and design shop is more helpful for LSU in that it states “We have a wide range of art, craft and design and technical drawing materials. Everything you need from
20 drawing to presentation material, whether you’re an art’s student or an engineer!” However, no attempt has been made by LSU to stipulate particular goods and justify why each is closely related to the educational supplies made by the University (and the other two educational bodies).”

- 25 20. The FTT was right to hold that the evidential burden lies on LSU to show that the goods for which it was seeking exemption fall within Item 4. Mr Tyler argued that using common parlance, at least the art materials supplied from the LSU shops are closely related to the provision of art courses. If the Tribunal considers that only some the goods and services supplied from the shops qualify as closely related then he
30 accepted that the case might need to be remitted to the FTT for an apportionment between what is exempt and what is not. I do not accept that common parlance is the test here, given the principles set out in *Horizon College*. I agree with the assessment of the FTT that the supplies are not ‘closely related’ to the provision by an eligible body of education or vocational training. The food, newspapers, household goods are
35 “ends in themselves” and not ancillary to education; the education provided by the University would be just as good if the students did not buy these items. The goods offered which come closest to being “closely related” appear to be the art materials. But there is no further evidence here about what these art materials are or how they relate to the course work that the students may be undertaking. There are many
40 reasons why students might buy art materials other than for course work. In my judgment, the FTT was right to find that LSU had not shown that any of the goods sold in the shops fall within the narrow definition of closely related supplies.

- 45 21. The second reason why Item 4 is not satisfied is that the goods and services supplied by LSU are not supplied “by or to the eligible body making the principal supply”. Clearly the goods and services are not supplied “to” an eligible body since they are supplied to the students and not to Loughborough University or

Loughborough College or the RNIB College. Even if LSU can bring itself within Note 1(e) and establish that it is an eligible body, it is not “the eligible body making the principal supply”. It is certainly not making the principal supply to which the goods and services are said to be closely related.

5 22. LSU try to overcome the hurdle of the requirement in item 4 that the closely
related supplies are “by ... the eligible body making the principal supply” in two
ways. First Mr Tyler points to the constitution of the LSU to say that by involving
students in running the shop or the bars, taking part in charitable activities such as
RAG week, and teaching them to arrange sporting activities it is educating them in
10 useful skills for the future. I do not accept that that kind of on-the-job training which
is provided by many employers or voluntary organisations amounts to a principal
supply within the meaning of Group 6.

23. The second argument is that Group 6 goes beyond what is required by articles
132 – 134 PVD in requiring the closely related supplies made by the eligible body to
15 be closely related to the principal supplies that it is making itself rather it being
sufficient that the ancillary supplies are closely related to principal supplies made by
another eligible body. Mr Tyler relied on *Horizon College* as authority that there is
nothing in article 132 that prevents an eligible body which itself makes principal
supplies from claiming an exemption for closely related supplies even if they are not
20 closely related to its own principal supply as long as they are closely related to
another eligible body’s principal supply. On this point I do not see that *Horizon
College* is authority for the proposition that there is no need for the eligible body
claiming exemption to show that its closely related supplies are closely related to its
own principal supply rather than to the principal supply of a different eligible body.
25 That case was dealing with the case where the exemption applied because the eligible
body was making supplies “to” another eligible body. The question whether the
exemption can only apply if the supplies are closely related to the eligible body’s own
principal supply was discussed briefly in the Opinion of Advocate General Sharpston
in *Horizon College*: see [73] – [74] as it was a point raised in argument by the
30 Netherlands Government. She considered that none of the cases relied on by the
Netherlands Government in support of the need for that link were determinative but
that the point did not arise in the case before her. Similarly here, I do not need to
decide whether, if LSU could still claim the benefit of the exemption if it were an
eligible body making principal supplies of a different kind but the shops’ goods and
35 services were closely related not to those principal supplies but to the principal
supplies of the University.

24. Mr Tyler suggested in his skeleton argument that if Item 4 is too restrictive then
the modification needed would be to remove all the words “by or to the eligible body
making the principal supply”. That cannot be right because it is the reference in Item
40 4 to the eligible body making the principal supply that provides the link between the
eligible body and the making of principal supplies that the FTT was concerned was
missing from the definition of eligible body in Note 1(e) itself. In other words, if it is
right (contrary to HMRC’s submissions) that a tax payer can be an eligible body
within Note 1(e) even if it has no connection with education, it is the requirement in
45 Item 4 that the eligible body makes the principal supply that provides the missing link

required for the domestic provisions properly to implement Article 132. Articles 132 – 134 clearly do require that any taxpayer claiming exemption must make a principal supply because the taxpayer must either be a public body which has the aim of providing education or vocational training or it must be a recognised other organisation “having similar objects”. If Mr Tyler is right that Item 4 is too restrictive, the only modification that would be needed to the wording of Item 4 to make it compliant with the PVD position would be to construe it as if it said, for example “by or to the eligible body making a principal supply” rather than “**the** principal supply”. But that would not help LSU in this case since it does not make any principal supply.

25. Mr Tyler pointed to other respects in which he argued that the domestic provisions failed properly to implement the PVD. He pointed out the absence of any statutory wording reflecting article 134(b) that precludes exemption where the basic purpose of the supply is to obtain additional income for the body in question through transactions which are in direct competition with those of commercial enterprises subject to VAT. I am not tempted to express a view on the lacuna which Mr Tyler submits exists, since it was not one of the bases on which HMRC contended that the exemption did not apply.

26. I therefore dismiss the appeal because even if LSU is an eligible body within the meaning of Note 1(e), it is not an eligible body making a or the principal supply as required by Item 4 and the supplies for which exemption is sought are not “closely related” to any principal supply, as that term has been interpreted by the European Court.

MRS JUSTICE ROSE

UPPER TRIBUNAL JUDGE
RELEASE DATE: 31 OCTOBER 2018