[2020] UKUT 143 (TCC)

Appeal number: UT/2019/0019

VAT – exemption – welfare services – art 132(1)(g) VAT Directive – Item 9 Group 7 sch 9 VATA 1994 – Supporting People Programme – housing related support – relevance of identity of recipient of supplies – meaning of distressed persons – meaning of instruction

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

(1) YMCA BIRMINGHAM
(2) YMCA BLACK COUNTRY GROUP
(3) YMCA LEICESTER
(4) YMCA BURTON UPON TRENT AND DISTRICT

Appellants

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

TRIBUNAL: The Honourable Mr Justice Marcus Smith
Judge Jonathan Cannan

Sitting in public via a remote hearing deemed to be at The Rolls Building, Fetter Lane, London EC4A 1NL on 22 April 2020

Etienne Wong and Hammad Baig, instructed by Booker Associates, for the Appellants

Natasha Barnes, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

A. INTRODUCTION

(1) Parties and this appeal

1. The "YMCA" – or The Young Men's Christian Association – is a well-known worldwide organisation founded in 1844. In England, the YMCA operates through 114 bodies, each registered as a charity and each separately registered for VAT.

2. The Appellants, in this appeal to the Upper Tribunal (Tax and Chancery Chamber), are four such bodies. By four decisions of the Commissioners for Her Majesty's Revenue and Customs ("HMRC"), HMRC decided that provision of "housing related support services" constituted the supply of welfare services that were exempt for VAT purposes.

3. The Appellants appealed those decisions to the First-tier Tribunal (Tax Chamber) (the "FTT"). By a single decision given in each of these four appeals[1] dated 21 June 2018, the FTT (Judge Peter Kempster) dismissed the appeals (the "Decision"). With the permission of Judge Kempster, the Appellants appeal the Decision to this Tribunal.

(2) Factual background

4. The factual background is fully set out in the Decision. This section draws heavily on the facts as found by Judge Kempster. As is well-known, appeals to this Tribunal are on points of law only. None of the parties directly sought to challenge the facts found in the Decision although (as we describe) some of the Appellants' grounds of appeal came close to being a on questions of fact, not law.

5. In April 2003, the Department for Communities and Local Government launched the Supporting People Programme or "SPP". The aims of the SPP were, in essence, to provide housing related support services to vulnerable people.[2] Under the SPP, several funding streams were brought into a single ringfenced grant of £1.8 billion to local authorities to provide these housing related support services (the "SPP Grant").[3] The government allocated the SPP Grant to administering local government authorities, who assumed responsibility for implementing the programme within their local area.[4]

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[1] Appeal Nos TC/2015/6751, TC/2015/6737, TC/2016/5817 and TC/2017/3062.

[2] Decision at [4].

[3] Decision at [5].

[4] Decision at [6].

6. Although some flexibility in how this money was spent was afforded to local government authorities, the SPP Grant could only be spent on what was described as "eligible welfare services", the main category of which was "housing related support services".[5] These services were intended to be developed through a working partnership of local government, probation, health, voluntary sector organisations, housing associations, support agencies and service users.[6]

7. In 2009, the ring-fence protecting the SPP Grant was removed. The SPP became wholly decentralised, with each administering authority exercising complete discretion over where best to direct their funding to meet local needs.[7]

8. Since 2011, the allocation of funds for SPP has been subsumed within the area-based grant made to each local authority. The allocation of funds for SPP is no longer separately identified or capable of identification.[8]

9. Each of the Appellants was involved in the provision of accommodation and eligible welfare services, including housing related support services, as well as other services. These services were provided pursuant to contracts between each Appellant and that Appellant's counterparty local authority. Of course – entirely unsurprisingly – the services were provided to the vulnerable people who needed them, and not to the local authorities specifically.

10. The FTT reviewed the evidence as to the nature of these services in some detail.[9] In our judgment, having reviewed the findings made by the FTT, the following is true of all four Appellants:[10]

(1) The contracts between the various local authorities involved and each of the Appellants were not as specific as they might have been, and the performance obligations of the Appellants were derived by the FTT as much from the contractual terms themselves as from the evidence of the Appellants as to how they performed their contractual obligations.[11]

(2) The best articulation in a contract of the Appellants' responsibilities was in the contract entered into by the Second Appellant, which defined housing

[5] Decision at [7].

[6] Decision at [6].

[7] Decision at [8].

[8] Decision at [8].

[9] Decision at [46] to [56].

[10] This process is not quite as straightforward as one might think: [48] to [53] of the Decision make a series of very detailed, Appellant-specific, findings, followed by two paragraphs ([54] and [55]) which seek to synthesise a common position applicable to all four Appellants. The following unsurprisingly draws principally on [54] and [55], but it is occasionally necessary to elucidate by reference to more specific findings in [48] to [53].

[11] Decision at [54].

related support as "support services which are provided to any person for the purpose of developing that person's capacity to live independently in accommodation or sustaining his capacity to do so".[12] A number of conditionalities needed to be satisfied before such support services could be provided. In particular, the persons to whom they were provided – the "service users" – must have "specific and individual vulnerabilities that render them in need of support services". The other contractual provisions do not need to be specifically quoted, but it is clear that there is a degree of formality in the provision of the support services to the service users. Thus, the support service would typically be the subject of a "formal support plan/agreement".[13]

(3) Housing related support was – as has been described – a significant part of the SPP and was the responsibility of the relevant local authorities, who received a central government grant to fund the service.[14] In most cases, the provision of housing related support was "outsourced", pursuant to the sort of contracts described in paragraph 10(2) above.[15]

(4) The housing departments of local authorities acted as a central access gateway to establish the needs and entitlements of homeless or potentially homeless applicants (or potential service users). The local authority would determine whether housing related support should be provided.[16]

(5) Of the persons made "service users", the FTT said this:[17]

"Individuals admitted to supported housing had nowhere else to go. They have suffered some adversity and reached a crisis (which may be shortlived) in their lives. They included young persons released from youth detention, or who had reached the maximum age for youth care eligibility; a frequent cause was serious family breakdown or bereavement, or some other problem usually caused by the adults in their lives."

(6) Suitable individuals would be allocated by the local authority to the Appellants, who would undertake a preliminary evaluation to ensure the relevant criteria were satisfied. In the case of the Appellants, a key expectation would be that the individual in question should be able to develop within a short period of time (say, six months) the skills necessary

[12] Decision at [48]. The FTT considered that this contract gave an accurate representation of the sort of services that all of the parties envisaged: at [54].

[13] See the contractual terms set out at [48].

[14] See above and Decision at [55(2)].

[15] Decision at [55(2)].

[16] Decision at [55(3)].

[17] Decision at [55(4)].

to live independently and so not return to homelessness.[18] A keyworker would be assigned to achieve this:[19]

> "A support worker (keyworker) is assigned to each individual. The keyworker and the individual together draw up a support pathway plan, being a list of issues and problems to be addressed, with a timescale, designed to equip the individual with lifeskills necessary for future independent living…The keyworker meets periodically with the individual to review progress, offer encouragement, and update the plan. The keyworker does not perform the tasks for the individual, but instead advises how to achieve them and assists if appropriate. The keyworker is not expected to deal with serious or specialised problems (e.g., health issues, addictions, financial difficulties, learning difficulties) but would guide the individual to appropriate expert assistance within or known to YMCA."

We do not consider that this statement of the facts leaves out of account any material facts identified by the FTT. Certainly, in the course of submissions, both written and oral, we have reviewed all of the Decision, with particular emphasis on passages referred to us by counsel, and taken those submissions fully into account.

(3) The Appellants' contentions as to VAT chargeable

11. Before the FTT, the Appellants advanced the following contentions:

(1) The supplies, by the Appellants, of housing related support services did not fall within Item 9 of Group 7 of schedule 9 of the Value Added Tax Act 1994 ("VATA 1994" and, under VATA 1994, "Item 9") and so were not exempt from VAT because the recipients of the supply were vulnerable persons who paid no consideration. Each of the local authorities with whom the Appellants contract, who did pay for the housing related support services, were not themselves the recipients of housing related support services. Accordingly, the services provided by the Appellants were not exempt from VAT.[20]

(2) The supplies, by the Appellants, of housing related support services did not fall within Item 9 and so were not exempt from VAT because the supplies were not "directly connected with the provision of…instruction designed to promote the physical or mental welfare of…distressed…persons".[21] This contention has two more specific aspects, which need to be considered separately:

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[18] Decision at [55(5)]

[19] Decision at [55(5)]

[20] See the FTT's summary of this contention at [56] of the Decision.

[21] See the FTT's summary of this contention at [66] of the Decision.

(a) First, it was contended by the Appellants that the vulnerable persons to whom the services were supplied were not "distressed persons".[22]

(b) Secondly, it was contended by the Appellants that there was no "instruction".[23]

Accordingly, for each of these reasons, the services provided by the Appellants were not exempt from VAT. The advantage to the Appellants if their supplies are not exempt arises because claims to recover input tax credits would not be restricted.

(4) The Decision

12. In the Decision, Judge Kempster rejected each of these contentions, and concluded that the housing related support services supplied by the Appellants did constitute VAT exempt welfare services within Item 9.[24]

(5) The grounds of appeal

13. The Appellants appeal each of the three contentions set out in paragraph 11 above. These three grounds of appeal – respectively, "Ground 1", "Ground 2" and "Ground 3" – were revised by the Appellants, after permission to appeal had been given by Judge Kempster. These revisions were permitted by direction of Judge Cannan, and it is these revised grounds (together with the submissions that accompanied them) that we consider and dispose of in this decision.[25]

14. Essentially, the grounds of appeal were that:

(1) *Ground 1:* The housing related support services provided by the Appellants fell outside the scope of Item 9 because of the manner in which they were provided – that is, by way of a contract for the benefit of third parties.

(2) *Ground 2:* The housing related support services provided by the Appellants fell outside the scope of Item 9 because the persons to whom these services were provided were not "distressed persons".

(3) *Ground 3:* The housing related support services provided by the Appellants fell outside the scope of Item 9 because the services did not involve "instruction".

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[22] Decision at [68].

[23] Decision at [71].

[24] Decision at [77].

[25] The reasoned direction is dated 20 April 2020 and followed an earlier direction dated 17 April 2020 given without reasons.

15. The Appellants sought permission to advance a fourth ground of appeal ("Ground 4"). Permission to add Ground 4 was refused by Judge Cannan and requires no further consideration from us.[26]

(6) The structure of this decision

16. This decision is structured as follows. Section B sets out the relevant statutory and related provisions, including in particular Item 9. Sections C, D and E then consider in turn each of the three grounds of appeal. Finally, Section F set out how we intend to dispose of this appeal.

B. THE STATUTORY AND RELATED PROVISIONS

(1) EU law

17. Article 132 of the Council Directive 2006/112/EC (the "VAT Directive") provides, so far as material:

> "*Exemptions for certain activities in the public interest*
>
> 1. Member States shall exempt the following transactions:
>
> …
>
> (g) the supply of services and of goods closely linked to welfare and social security work, including those supplied by old people's homes, by bodies governed by public law or by other bodies recognised by the Member State concerned as being devoted to social wellbeing…"

(2) Implementation into UK law

18. This provision is implemented into UK law by section 31 VATA 1994, which 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 itself lists various "Groups" of goods or services. Group 7 concerns "Health and welfare". Item 9 falls under Group 7, and provides:

> "The supply by –
>
> (a) a charity,
>
> …
>
> of welfare services and of goods supplied in connection with those welfare services."

19. The notes to this provision provide in note (6) as follows:

[26] See Judge Cannan's reasoned direction dated 20 April 2020.

"In item 9 "*welfare services*" means services which are directly connected with –

(a) the provision of care, treatment or instruction designed to promote the physical or mental welfare of elderly, sick, distressed or disabled persons,

(b) the care or protection of children and young persons, or

(c) the provision of spiritual welfare by a religious institution as part of a course of instruction or a retreat, not being a course or retreat designed primarily to provide recreation or a holiday,

and, in the case of services supplied by a state-regulated private welfare institution, includes only those services in respect of which the institution is so regulated."

C. GROUND 1

(1) Questions regarding the nature of the supply

20. It is trite that the supply of services is subject to VAT. What is not trite is that, on occasion, difficult questions may arise as to who the recipient is for the purposes of input tax credit in relation to a particular supply. That is particularly the case where a service is paid for by one person, but supplied to another. In this regard, we were taken to the decision of the House of Lords in *Customs and Excise Commissioners v. Redrow Group plc*[27] and the decision of the Court of Appeal in *Airtours Holidays Transport Ltd v. The Commissioners for Her Majesty's Revenue and Customs*.[28]

21. Both *Redrow* and *Airtours* concerned the recoverability or otherwise of input tax by a taxpayer in respect of services for which the taxpayer had paid, but which were said not to be deductible because the supply was not to the taxpayer but to a third party.

22. This is not the issue before us. The FTT found and there is no dispute that the Appellants made a supply to the local authorities with whom they were contracting, which was subject to VAT unless the supply was exempt. It was the extent of the exemption, not the nature of the supply to the local authorities, that was in issue before the FTT.

23. In these circumstances, we fail to see how questions regarding the nature of the supply matter unless such questions arise out of the terms of the exemption itself. Item 9 exempts from VAT the supply by a charity of welfare services and of goods supplied in connection with those welfare services. It thus presumes what was in issue in *Redrow* and *Airtours*, namely the existence of a supply by the Appellants to their contractual counterparties, the local authorities.

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[27] [1999] STC 161.

[28] [2014] EWCA Civ 1033. The decision of the Supreme Court to which we were not referred is at [2016] UKSC 21

24. It may be that the supply of welfare services by a charity to a local authority for the benefit of a third party falls outside Item 9. That is a question we turn to consider: but the answer to that question turns on the ambit of Item 9, properly construed, and not on the question of the person to whom the supply was made, which we consider to be entirely irrelevant in the present circumstances.

(2) The ambit of Item 9: are supplies to third parties excluded?

25. We accept that derogations from the incidence of VAT ought to be narrowly construed. We accept the point made in paragraph 26 of the Appellants' Revised Grounds of Appeal (the "Grounds"), citing Case C-326/15, *DNB Banka' As v. Valsts ienemumu dienests*[29] that "the scope of the exemptions referred to in Article 132 of Directive 2006/112 is to be interpreted strictly, since they constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person".

26. However, we do not consider that a narrow construction of Item 9 in any way compels an interpretation that excludes from its scope the supply of welfare services to persons other than the party to whom the supply is made. Indeed, we consider that it is intrinsic to many forms of welfare service that the persons who benefit from their provision do not pay for them. Whilst we appreciate that it is dangerous to generalise, we consider that an aspect of welfare service is often that it is provided to those having a need which they cannot themselves pay for. Welfare services are thus provided either altruistically (i.e. for no charge) or where the cost of providing them is discharged by someone other than the recipient of the service. This view is supported by the fact that the supplier of welfare services must be a charity.

27. In short, we see no reason for importing into Item 9 the sort of restriction contended for by the Appellants. To the contrary, we consider that the sort of restriction contended for by the Appellants would result in a perverse narrowing of a class of exemption that seeks to minimise the price of welfare services by exempting them from VAT.

28. This construction is supported by the following points:

(1) As the FTT pointed out, there is nothing in either art 132(1)(g) of the VAT Directive nor in Item 9 to suggest that the identity of the recipient of the welfare supplies is relevant to the exemption.[30] Had the drafter intended to limit the extent of the exemption by reference to the identity of the recipient of the welfare services, it would have been easy to make this clear.

[29] [2018] STC 1915 at [35].

[30] See Decision at [57] and [58].

(2) Given that exemption makes perfect sense without the restriction contended for, we consider that it would be an incorrect approach to import words into the exemption which the legislator could have, but did not, use.

(3) This point has all the more force given that other exemptions in the VAT Directive contain precisely this sort of restriction. Thus, Article 132 also provides:[31]

"*Exemptions for certain activities in the public interest*

1. Member States shall exempt the following transactions:

…

(m) the supply of certain services closely linked to sport or physical education by non-profit-making organisations to persons taking part in sport or physical education."

(3) "closely linked" and "directly connected"

29. The VAT Directive states that only the supply of services and of goods "closely linked" to welfare be exempt. This wording is reflected in the words "directly connected with" in the notes to Item 9. No-one suggested that the difference in wording was significant, and we proceed on the basis that they mean the same thing.

30. The Appellants drew to our attention paragraph (15) of Annex III to the VAT Directive. Annex III contains a list of supplies of goods and services to which reduced rates of VAT may be applied. Paragraph (15) identifies:[32]

"…supply of goods and services by organisations recognised as being devoted to social wellbeing by Member States and engaged in welfare or social security work, in so far as those transactions are not exempt pursuant to articles 132, 135 and 136…"

The point made by the Appellants – and we consider the point to be well-made – is that "[t]he existence of paragraph 15 shows that Article 132(1)(g) is not intended to exempt every supply of services that relate to welfare. Some services that relate to welfare are intended to fall outside Article 132(1)(g) – they are intended to be taxable, whether at the standard rate or the reduced rate".[33]

31. The parties also referred us to:

(1) The opinion of Advocate General Bot in Case C-335/14, *Les Jardins de Jouvence SCRL v. Belgian State*, which (at [43]) considered the meaning of "services "closely linked" to welfare", observing that such services are

[31] Emphasis added.

[32] Introduced into UK law by Group 9 of Schedule 7A of VATA 1994.

[33] Paragraph 28 of the Grounds.

linked to a welfare activity where they are actually provided as ancillary services relating to that activity".

(2) The Judgment of the FTT in *Cheshire Centre for Independent Living v. The Commissioners for Her Majesty's Revenue and Customs*,[34] in which the FTT considered the term "closely linked".

32. Drawing on other areas of tax law, the Appellants sought to give clearer meaning to these limiting provisions. The Grounds state:

"29. …The "closely" or "directly" qualification places a proximity limitation on the Welfare Exemption.

30. Whether one item has a "direct" link with another comes up for consideration often, mainly in the context of input tax recovery. One such example is the CJEU judgment *BLP Group plc v. Customs & Excise*, Case C-4/94 ("*BLP*").

31. The taxpayer in *BLP* sold shares to raise capital to fund its general business. The issue was whether the input tax it had incurred in connection with the share sale was recoverable. This depended on whether there was a direct and immediate link between such input tax and a taxable transaction. The share sale was an exempt transaction; supplies made by the taxpayer in its general business were taxable transactions.

32. It is clear from paragraph 12 of the CJEU judgment that although it was generally accepted that there was a link between the input tax and both the exempt transaction (constituted by the share sale) and the taxable transactions (constituted by the taxpayer's general business activities), the link with the former was direct, whereas the link with the latter, because of the degree of separation, was insufficiently direct.

33. As mentioned in paragraph 22 above, what is supplied by the Appellants to local authorities is the right to have young individuals referred to, and taken in by, the Appellants. Such right is at least once removed from the provision of any instruction designed to promote the physical or mental welfare of distressed persons. Adopting the approach taken in *BLP* on proximity limitations, such a degree of separation is sufficient to render any connection between the Subject Services and the provision of any such instruction indirect rather direct."

33. Whilst we would not wish to go so far as to state that this articulates the test to be applied in every case of Item 9 exemption, we do consider that, in this case, at least, the distinction between direct and indirect linkage or degree of separation is a helpful one. However, we do not consider that the test of direct/indirect focuses on the legal technicalities of what is supplied. Paragraph 22 of the Grounds suggested that this was a case where what was supplied was "the right to have young individuals referred to, and taken in by the Appellants. It is a supply

[34] [2019] UKFTT 354 (TC) at [71]*ff*.

pursuant to which certain services are to be carried out for the benefit of the young individuals, but it is not itself the supply of those services".

34. This echoes the argument made by the Appellants on the question of third party supply,[35] and we consider that it fundamentally misses the point. We consider that the "direct/indirect" test must focus not on the legal manner in which welfare services are procured, but on the practical reality of how the welfare services are provided. In short, the test must be applied in relation to what is actually supplied, and it is the directness of this performance of the welfare services that matters. In this case, the Appellants directly provided housing related support to those vulnerable persons referred to them by their counterparty local authorities.

(4) Perverse effect of exemption

35. The Appellants contended that if the housing related support supplied by them to the local authorities fell within Item 9, then it would increase the cost of those services to the local authorities. That is because, if the services were not exempt, whilst that would mean VAT was chargeable, the local authorities would be able to recover any VAT paid, and the Appellants would be entitled to deduct the input tax on goods and services which they had themselves paid in supplying the services. The Appellants say that a directive intended to reduce the cost of welfare provision should not be construed in that way. Essentially, they say that it would be perverse to do so.

36. Conversely, if the housing related support were exempt as falling within Item 9, VAT would not be chargeable, but the Appellant would be obliged to pass on to the local authorities their additional costs arising because of their inability to deduct input tax. Such a price increase would not comprise VAT, would not be recoverable by the local authorities, and would represent a real additional cost to them.

37. We accept, as a matter of general principle, that the consequences of a particular construction of legislation may be relevant to take into account when construing it: but a court must tread very carefully, when doing so, for the consequences of a particular construction may be very difficult to determine and may even require evidence.

38. In this case, even accepting the Appellants' assertions at face value, we do not consider that it can affect our conclusions regarding the construction of Item 9, as we have set them out in this Section. This is for two, related, reasons:

> (1) First, although we can see that the consequences alleged by the Appellants might be regarded as marginally disadvantageous to the local authorities, to describe the effect of our construction as "perverse" (and we should say this is our term, not that of the Appellants) would be wrong. We

[35] See paragraphs 20 to 24 above.

do not consider the fact that a particular construction involves marginally disadvantageous consequences on a limited number of persons can be of any great weight in statutory construction.

(2) Secondly, if legislation is clear and unequivocal, then – even if the consequences of this clear and unequivocal means are perverse – effect must be given to this meaning. In this case, we consider the meaning of Item 9 to be clear and unequivocal.

(5) Conclusion

39. For all these reasons, we dismiss Ground 1 of the appeal.

D. GROUND 2

40. In order to fall within the scope of the Item 9 exemption, the welfare services must involve the provision of "instruction designed to promote the physical or mental welfare of…distressed…persons".[36]

41. The FTT's approach to this question was as follows:

(1) The FTT began with the definition of "distressed" in the Oxford English Dictionary, which was:

"Afflicted with pain or trouble; sorely troubled; in sore straits. Applied *spec* to a person living in impoverished circumstances."

(2) The FTT considered HMRC's view – expressed in paragraph 5.18.2 of HMRC's Notice 701/1 Charities – as to the meaning of "distress":

"By 'distressed' we mean someone who is suffering severe mental or emotional pain, anguish or financial straits. It denotes severe, rather than mild emotional or physical discomfort."

At [70] of the Decision, the FTT commented as follows:

"The contents of the HMRC Notices are HMRC's views and, of course, are not binding on this Tribunal. I agree with HMRC that mere mild emotional or physical discomfort is unlikely to constitute "distress", but I think that the use of the descriptor "severe" is unfortunate, and that there can be genuine distress experienced short of severe circumstances."

(3) The FTT found in terms that the persons in this case fell within the *OED* definition:[37]

"The appropriate definition of "distressed" in the *OED* is, "Afflicted with pain or trouble, sorely troubled; in sore straits. Applied *spec* to a person living in impoverished circumstances". I consider that is an accurate description of the young people whom YMCA accommodate and provide with HRS services. The witnesses explained that the individuals were already homeless or expected to become homeless soon; that this was not a voluntary choice made by the young

[36] Emphasis added.

[37] At [69] of the Decision.

person; that this was almost always through no fault of their own thus they were the victims of circumstance; that other avenues were also available and would be explored by the local authority before nominating the individual for supported housing with the YMCA. All those factors point to the young people being "afflicted with trouble", "in sore straits" and "living in impoverished circumstances".

42. We remind ourselves that appeals to this Tribunal are on points of law only. If the FTT correctly articulated the meaning of "distress" and did not misdirect itself as to that term, then we do not consider that we can interfere in the FTT's decision, unless that conclusion was so egregious so as to cross the line and become an error of law.

43. Some of the submissions advanced by the Appellants seemed to us more in the nature of a challenge to the FTT's factual findings, rather than its application of the law. Thus, paragraph 43 of the Grounds states:

"The FTT finds that the young individuals in the present case "had suffered some adversity and reached a crisis (which may be shortlived) in their lives" ([55(4)]), and considers that they are "distressed" for the purposes of Note 6(a) because they are "afflicted with trouble", "in sore straits" and "living in impoverished circumstances" ([69]). While these are all circumstances that undoubtedly would benefit from care or instruction, they are not circumstances that require any such support. Indeed, in some (if not most) cases, the adverse circumstances can be – and are – remedied by the individuals themselves, without the need for any intervention."

44. It is not clear to us that this paragraph is identifying any error of law on the FTT's part. For instance, it is noted that the FTT found that the crisis in the young individuals' lives might be "shortlived". If the Appellants were contending that shortlived "distress" could not amount to "distress" within the meaning of Item 9, then we consider such a proposition to be untenable. No doubt the length or duration of the crisis afflicting an individual is a <u>factual</u> matter to be taken into account in determining whether or not a person is "distressed". However, we do not regard the FTT's failure to incorporate a requirement that any discomfort be sustained for "a significant period"[38] in its definition of distress as even coming close to an error of law.

45. We consider that the FTT's reference to the ordinary English meaning of the word "distress" to have been entirely right. That, as [69] of the Decision makes clear, was the test applied.

46. In this regard, the Appellants make two criticisms of the FTT's approach, neither of which we consider has any foundation:

(1) First, it was suggested that:

"The term "distressed" should be construed in the context of the other categories of persons referred to in Note 6(a) – the elderly, the sick and the disabled. These

[38] To take up a point made in paragraph 44 of the Grounds.

are persons who have long-term or chronic conditions who require care, treatment or instruction. The term "distressed", as it is used in Note 6(a), should be read *ejusdem generis* to include only persons whose distress is so serious, or who are distressed for such a significant period, that they require care treatment or instruction."

In some cases, the *ejusdem generis* rule provides real insight into the meaning of a specific term. This is not such a case: the fact is that none of the other categories provides any insight into the degree of severity or duration necessary to render a person "distressed". Thus, there are degrees of sickness (both in terms of duration and severity) and degrees of disability (again, both in terms of duration and severity). We do not consider that the FTT can sensibly be criticised for not mentioning the *ejusdem generis* rule.

(2) Secondly, it was suggested that the FTT erred in criticising HMRC's attempt to define "distress". The Appellants were careful not to say that the FTT was in any way bound by HMRC's Notice 701/1: rather, the criticism made was that the FTT disregarded a definition that was, as a matter of law, correct and in doing so itself erred in law.[39] We see no error of law: the FTT made clear that it was applying the *OED* definition of distress (see [69] of the Decision), and only in [70] did the FTT explain why it considered HMRC's own definition to be deficient. The FTT did not, in light of this criticism, amend or vary the test that it applied.

47. Although it does not feature in the Grounds, in his oral submissions Mr Wong – counsel for the Appellants – raised a point that had been run before the FTT. Before the FTT it was contended that "while the individuals may have suffered some distress at being actually or potentially homeless, that distress was relieved when the individual was accommodated by YMCA, and so HRS services were then provided to a person who was no longer distressed".[40]

48. The FTT rejected this point in the following terms:[41]

"I do not accept Mr West's [the Appellents' then representative] distinction between pre-accommodation distress and an absence of distress after accommodation was offered. I accept that a young person who is accommodated by YMCA will be more comfortable than he/she was before securing the offer of supported housing; however, the witnesses' descriptions of the challenges still faced by the individuals after acceptance into the supported housing programme showed, to my satisfaction, that they can still properly be described as distressed while they were resident and receiving the [housing related support]."

[39] See paragraph 47 of the Grounds: "…the question is not whether the Respondents' views in relation to the unemployed are binding on any Tribunal or Court, but whether they are right…".

[40] Decision at [68].

[41] Decision at [69].

49. We do not consider that this point was an appropriate one to raise on appeal: as the FTT' reasoning makes clear, the point whether an individual's "distress" continues is factual one, and not a legal one.

50. For all these reasons, we dismiss Ground 2 of the appeal.

E. GROUND 3

51. In order to fall within the scope of the Item 9 exemption, the welfare services must involve the provision of "instruction designed to promote the physical or mental welfare of…distressed…persons".[42]

52. In the Decision, the FTT said this:

> "71. Mr West contends that "instruction" connotes compulsion, and the HRS is voluntary not compulsory. I do not agree that compulsion is necessary or inferred by "instruction". There are several definitions in the *OED* and the one that I consider most applicable to the current situation is, "That which is taught; knowledge or authoritative guidance imparted by one person to another.
>
> 72. I consider the [housing related support] services meet that definition. The keyworker draws up, maintains and reviews an individualised support plan for each young person; the key worker does not perform identified tasks for the individual (who is expected to perform them himself) but instead imparts the knowledge of what is required and how to do it, and provides guidance to the individual."

53. Thus, before the FTT, the legal argument turned on which of two meanings of "instruction" was to be preferred:

(1) The first meaning was *instruction as command*: "*A* instructed *B* to post the letter to C."

(2) The second meaning was *instruction as education*: "The teacher instructed the class about Shakespeare's use of metaphor."

Mr West, for the Appellants, appeared to contend for the former meaning. The FTT decided that the latter meaning was the correct one.

54. We have no doubt that the FTT was right in this question. Instruction as education is obviously what is intended in Item 9. The Appellants' contentions changed significantly on appeal. Before us, the Appellants' contended:

(1) That the term "instruction" in Item 9 needed to be contrasted with and was coloured by the terms "advice" and "information" which could be subject to the reduced rate regime under Group 9 of Schedule 7A of VATA 1994.

[42] Emphasis added.

(2) This was a point raised *en passant* by the FTT in [78] of the Decision, but which was not (or appears not) to have been the subject of argument before the FTT. Before us, the Appellants contended that a distinction was obviously intended between "instruction" on the one hand and "advice" and "information" on the other.

(3) Thus, the substance of the Appellants' argument before us was not the distinction between instruction as command and instruction as education,[43] but the distinction between instruction as education, advice and information.

(4) The Appellants contended that the supply in this case did not amount to instruction, but was rather advice or information.[44] In this regard, the Appellants referred to the evidence of the various witnesses before the FTT, who testified as to the relative informality of the services provided:

(a) "Residents at the Orchard needed nudging and encouragement" (Mr Fraser).

(b) "For YMCA, it was provision of advice, guidance and support" (Mr Clay).

(c) "The aim was to ensure individuals had the skills to apply for independent accommodation and would not return to homelessness. They were shown the door, but they had to walk through it" (Mr Lin).

(d) "The support worker provides information to assist the service user to arrive at a reasoned solution to the problem but it is up to the user to resolve the issue raised" (Mr Laffey).

(e) "There is no compulsion to follow the plan" (Mr Laffey).

55. We consider that we must tread very carefully when it comes to the Appellants' contentions regarding "instruction". The point advanced before us is very different from the point that was made before the FTT, and (when evaluating the factual evidence) Judge Kempster would have been focussing principally on the distinction between the two meanings of "instruction", rather than the distinction between "instruction", "advice" and "information". Indeed, the evidence cited by the Appellants (set out at paragraph 54(4) above) seems to us primarily to have been directed to the point that this was not a case of instruction by command.

56. That said, it seems to us that the FTT made two findings that are of importance, which we have set out earlier in this decision:

(1) First, the housing support services were provided under an umbrella involving a fairly high degree of process and formality: see paragraphs 10(2) and 10(6) above.

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[43] See, in particular, paragraph 53 of the Grounds.

[44] Paragraph 50 of the Grounds.

(2) But, secondly, "[t]he keyworker does not perform the tasks for the individual, but instead advises how to achieve them and assists if appropriate": see paragraph 10(6) above.

57. The Appellants, unsurprisingly, placed reliance on the second of these two findings.[45] But we consider the first to be as important.

58. We consider that it is impossible to draw a bright-line distinction between where "instruction" ends, and "advice" or "information" begins. It is a matter for the judge, considering all the evidence, to reach a view treating these terms as matters of ordinary English. Here, on the basis of the facts found by the FTT, we consider that this was clearly a case of "instruction", in the educational sense. There was a formal process, whereby the vulnerable individuals admitted to the programme were the subject of a plan, which involved their learning how to achieve/perform certain tasks, which plan was, however, in no sense compulsory.

59. It seems to us that – although the point was not argued before him – Judge Kempster actually had the distinction between "instruction", "advice" and "information" well in mind, and that he concluded that this was a case of "instruction". We can see no basis in law for overturning this factual finding.

60. Accordingly, for these reasons, Ground 3 is dismissed.

F. DISPOSITION

61. For the reasons we have given, the Appellants' appeal is dismissed.

62. Any application for costs in relation to this appeal must be made in writing within one month after the date of release of this decision. As any order in respect of costs will, if not agreed, be for a detailed assessment, the party making an application for such an order need not provide a schedule of costs claimed with the application as required by rule 10(5)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

The Hon Mr Justice Marcus Smith

Upper Tribunal Judge Jonathan Cannan

Release date: 1 May 2020

[45] Paragraph 52 of the Grounds.