An education in fiscal neutrality? The Court of Appeal upholds the terms of the UK's education exemption.

Finance and Business Trading Ltd v HMRC [2016] EWCA Civ 7

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The education exemption

Article 132(1)(i) of the PVD requires the following supplies to be exempt from VAT:

> *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*

The UK's implementation

The United Kingdom has sought to implement that provision in item 1(a) of Group 6 of Schedule 9 to VATA, which exempts: -

1. The provision by an eligible body of –

   (a) education

   …

Notes:

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

[a list of various bodies including]

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

The appeal by FBT

Finance and Business Training ("FBT") claimed entitlement, under item 1(a) and note 1(b), to the education exemption in relation to courses for which it was accredited by the University of Wales and which involved the preparation and examination of candidates for the award of University of Wales degrees in business administration, marketing and finance. Those courses were university education. However, before the First-tier and Upper Tribunals, FBT failed to show that it was a college of a university and hence an "eligible body" for the purposes of item1. The Tribunals applied domestic case-law to that question (*HMRC v School of Finance and Management* [2001] STC 1690: "SFM") and held that FBT was not a sufficiently integrated part of the University: that is to say, the arrangement between FBT and the University was short-term; FBT held itself out as a partner of, rather than part of, the University; and FBT predominantly carried out other educational activities, which though education, were not university education.

Very shortly after the Upper Tribunal's decision, the Court of Justice of the EU released its judgment in Case C-319/12 *Minister Finansow v MDDP sp z oo Akademia Biznesu, sp komandytowa [2014] STC 699 ("MDDP")*. FBT appealed to the Court of Appeal on the new ground that MDDP showed that the UK's implementation of Article 132(1)(i) was inconsistent with EU law and in particular the principle of fiscal neutrality ("PFN"). That was the only issue on which it was permitted to appeal.

MDDP

MDDP concerned a claim by a Polish provider of business education that Poland had not correctly implemented Article 132(1)(i). Poland had simply exempted all supplies of educational services. But the taxpayer did not want its supplies to be exempt, since it wanted to be able to deduct input tax. It argued that Poland had failed to comply with the PVD. The CJEU agreed. Poland was entitled to exempt supplies by profit-making enterprises (though under Article 133 PVD it was also entitled to exclude such bodies). But Poland was not entitled to create a blanket exemption: it had to limit the exemption (i) to bodies governed by public law and having as their aim the provision of university and other education mentioned in Article 135(1)(i), or (ii) bodies that it recognised as having similar objects. In relation to such non-public law bodies, Poland had to set out conditions or procedures to establish whether they had "*similar objects"*. Such conditions or procedures had to comply with the PFN and other general principles of EU law. Further, if a supply, "*objectively*", met (or failed to meet) the "*similar objects*" condition, then the supplier was entitled under the PVD to benefit from exemption (or non-exemption).

FBT's arguments

FBT first argued that the UK's implementation failed to comply with the PFN. There was a difference of treatment between the VAT treatment of the accredited university courses at issue (standard-rated, as the result of FBT's not being an "*eligible body*" under item 1 as interpreted by SFM) and the supply of equivalent university courses by bodies that were "*eligible bodies*" in accordance with the SFM criteria. Those courses were similar from the point of view of the recipient (the students): cf Case C-259/10 *Rank* [2012] STC 23. That difference of treatment could not, however, be justified by reference to the proper application of the "*similar objects"* test. That was so, in particular, because many of the institutions listed in other parts of note 1 as being eligible bodies (including local authorities or institutions providing teaching of English as a foreign language) did not, under relevant legislation, have to have the main aim of providing education or predominantly supply educational services (which were part of the SFM criteria applied in order to deny recognition to FBT). Indeed, universities themselves supplied services such as research that were not within the scope of Article 131(1)(i): but the "main aim" or "predominant supply" criteria were not applied to them. FBT also noted that the Upper Tribunal had suggested (as, it claimed, had HMRC in their decision) that the SFM criteria included an "all or nothing" rule under which any body that made supplies outside the scope of Article 131(1)(i) would be denied recognition as a college of a university and hence as an eligible body. FBT argued that the fact that it was not allowed to exempt its supplies of degree courses while making other supplies outside the scope of the exemption meant that it was differently treated to bodies falling within the note 1 list, which were all exempted in relation to their supplies of equivalent courses even if they also made other non-exempt supplies.

FBT also argued that item 1 went beyond Article 131(1)(i) by exempting all education supplied by eligible bodies.

Further, it submitted that item 1 failed to comply with the principle of legal certainty in two respects. First, the task of the Member State under *MDDP* was to identify which bodies had similar objects to bodies governed by public law. But it was entirely unclear which body governed by public law was the basis of comparison: it could not be a university because they are not bodies governed by public law (*Cambridge University v HMRC* [2009] STC 1288). Second, the *SFM* criteria, and in particular the "mainly acting" criterion, were vague and incapable of inconsistent application and so could not be said to be neutral, abstract, or defined in advance.

Finally, it submitted that the fact that FBT was a commercial and profit-making body could not be relevant to whether it should enjoy eligible body status.

The Court of Appeal's analysis

The Court of Appeal (Arden LJ giving the only substantive judgment) rejected those arguments. It started (§§23-35) by rejecting the "threshold" contention that there was a difference of treatment (essential to the PFN argument). First, there was (contrary to the holding of the Upper Tribunal) no "all or nothing" rule: HMRC did not apply any such rule to universities (which they accepted made supplies falling inside and outside the scope of Article 131(1)(i)), and the First-tier Tribunal had not applied such a rule in order to reject the claim for eligible body status. Secondly, the "mainly acting" or "predominant supply" test was only an indication of eligible body status and formed only one aspect of a wider "integration" test.

The Court of Appeal then dealt, together, with the remaining arguments (§§53-64). At §55, it held that item 1 represented a legitimate view by Parliament that, in order to be eligible for the exemption, a non-public body had to have a public interest element in its work. In the case of colleges and halls of universities, it had drawn the line at bodies that were integrated into universities and were imbued with its objects. FBT was not so integrated. The test was, when read with SFM, neutral abstract and defined in advance and met the requirement of legal certainty (§57). Nothing in that test discriminated between profit-making and non-profit activities (§58). Further, a supply, "*objectively*", met (or failed to meet) the "*similar objects*" condition as long as the Member State set out its criteria in a way that could be objectively ascertained (§60). It was not appropriate to make any reference to the CJEU because the answers were sufficiently clear.

Comment

The Court's reasons for rejecting the "threshold" argument that there was a difference of treatment between similar supplies are, with respect, not easy to follow. It does not appear to have been disputed that, from the point of view of the customer or student, there was nothing to differentiate FBT's standard-rated supplies from exempt supplies by universities. Rather, the Court's analysis concentrates on whether FBT had correctly characterised the criteria that had been applied so as to create that distinction.

That approach seems to the present writer to have two flaws.

- *First, it does not deal with the point that where there is, as there clearly was, a difference of tax treatment of similar supplies (degree courses supplied by FBT and degree courses supplied by universities or other note 1 bodies) the PFN is at least potentially engaged.*

- Second, it fails to engage with the critical question that then follows under Case C-174/11 Finanzamt Steglitz v Zimmermann ECLI:EU:C:2012:716 as to the lawfulness of the UK's approach in the light of the PFN. Zimmermann makes it clear, first, that the PFN permits different treatment of similar supplies by different suppliers where provisions of the PVD clearly provide for different treatment of different suppliers by reference to their status: §52. But it also makes it clear that the PFN does require that where the Member State is implementing a discretion as to which suppliers meet a test laid down in the PVD it must place candidates "*on an equal footing for the purposes of their recognition for the supply of similar services*": §43 (a paragraph recorded as being relied on by FBT but which, perhaps significantly, is not quoted or discussed by the Court). Even if FBT had not accurately and completely characterised the SFM test as applied by HMRC and the Tribunals, that did not detract from its key point that the SFM criteria (which included, at least to some extent, the "mainly acting" or "predominant supply" tests) were applied to it to refuse its exemption to its degree courses whereas they would not have been applied to a body that was, in law, a university or other institution listed in note 1 so as to take out of exemption their supplies of similar degree courses (or education in general), and that the application of those criteria failed to meet the *Zimmermann* test.

Nor the Court does engage in any satisfactory way with that critical question at §§53-64. Given the long and varied list of eligible bodies in note 1, and given that some of those bodies may in law be bodies with a purely commercial ethos, the basis for the Court's robust conclusion that the list encapsulates a test of whether there is a "public interest element in their work" is rather unclear: no reasoning in support of that conclusion is advanced. Moreover, even the Court's own formulation of the SFM test as applied to bodies such as FMT (that that such bodies must be "*integrated into universities and … imbued with its objects")* suggests that a further *"imbued with university objects*" test was being applied to bodies such as FBT: but the Court does not deal anywhere with FBT's point that that extra test (not applied to other note 1 bodies) meant that FBT was not on an "*equal footing*" as required by *Zimmermann*.

Finally, the Court's approach to the question of whether the exclusion of FBT's degree courses from the exemption was "*objective*" fails, in the present writer's submission, correctly to understand the test set out in *MDDP*. The Court's approach was that a supplier was not entitled to rely on the PVD in order to claim exemption if the Member State had laid down "*criteria which can be objectively ascertained, as opposed to (say) exemptions which are available if a minister so decides on the basis of some unspecified criteria"*: §60. But it is hard to see how that can be the right interpretation of what the CJEU meant. Indeed, at §51 the CJEU states the position as being that, even where a Member State has discretion to define an exemption a supplier is entitled to

rely on a right to exemption under the PVD if "*according to objective evidence, the supply at issue meets the criteria for that exemption*". That appears to require a national court to do more than just check whether its Member State has laid down ascertainable criteria for recognition: rather, it has to consider for itself whether, on the evidence, the taxpayer claiming exemption meets the Article 131(1)(i) criteria.

Finance and Business Training is therefore, in the present writer's view, unlikely to be the last word on the UK's application of Article 131(1)(i).

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The comments made in this case note are wholly personal and do not reflect the views of any other members of Monckton Chambers, its tenants or clients.

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