

## VAT focus

## Finance and Business Training: the UK VAT education exemption and fiscal neutrality

## Speed read

The principal issue facing the Court of Appeal in *Finance and Business Training v HMRC* was whether EU law meant that a provider of university courses was entitled to the VAT education exemption in the same way as a university, even if not so entitled under UK VAT law. The court noted that Parliament had taken a cautious view of who should be a non-public body entitled to the exemption, especially when compared with Poland's (non-compliant) law before the *MDDP* case. However, FBT had failed to establish that UK law was not compliant with EU law. For the exemption, the supplier must have similar objects. This is an integration and primary purpose test.



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This article examines *Finance and Business Training v HMRC* [2016] EWCA Civ 7 (reported in *Tax Journal*, 5 February 2016). *Finance and Business Training* (FBT) sought a reference to the CJEU. This was refused by the Court of Appeal, which considered that it had 'sufficient jurisprudence' in the CJEU decisions to decide the issues.

The law of university level education in the UK is complex. Higher education (HE) colleges have the right to issue degrees under the Further and Higher Education Act 1992 (FHEA 1992), but have their own VAT exemptions under VATA 1994 Sch 9 Group 6 Note 1(c). The term education has been defined by the CJEU in *Horizon College* (Case C-434/05). The term 'university' is protected, however (FHEA 1992 s 77); a university includes any college or institution of the university (FHEA 1992 s 90(3)).

EU law exempts the supply of education made 'by bodies' governed by public law, having such as their aim, or by other organisations recognised by member states concerned as having similar objects (Principal VAT Directive (PVD) article 132). UK universities are not governed by public law (see *University of Cambridge v HMRC* [2009] STC 1288). They are exempt as 'other organisations'. The aims of an organisation are assessed objectively by reference to their activities.

In order to succeed, FBT needed to persuade the Court of Appeal, relying on the directive having direct effect, that a company could have similar objects to a public law body for parts of its business but not for others. FBT appears to have persuaded the Court of Appeal that parts of a specified body may be exempt from VAT, but not that it had a close enough relationship to the university in its own case.

The right to a VAT exemption for the supply of education services has generated a plethora of litigation recently, much of which was considered in *FBT*:

- on 28 November 2013, the CJEU released its decision in *Minister Finansow v MDDP sp z oo Akademia Biznesu, sp komandytowa* (Case C-319/12) (*MDDP*);
- HMRC's appeal to the Upper Tribunal (UT) in *Open University* [2015] UKUT 263 (TCC) was refused;
- HMRC's appeal in *SAE Education* [2014] UKFTT 218 (TC) in the UT was reserved in November 2015;
- the Court of Appeal ordered a reference for a preliminary ruling to the CJEU in December 2015 in *Brockenhurst College* [2015] All ER (D) 48 (Dec); and
- on 19 January 2016, the Court of Appeal released its decision in *FTB*.

### The MDDP case

Two days after Morgan J's *FBT* UT decision was released, the CJEU released its decision in *MDDP*, which found that Poland's legislation providing for the VAT exemption was non-compliant. Counsel for *FBT* Melanie Hall QC argued that the *MDDP* decision undermined its tribunal decisions.

*FBT* claimed that UK law does not observe fiscal neutrality (para 22); and that the UK Parliament in implementing PVD article 132 did not provide compliant criteria to recognise bodies supplying university education, which should be exempt from VAT, by reference to the objectives of the body and by reference to the supply being in the public interest (para 22).

In *MDDP*, Advocate General Kokott referred to the opinion of Advocate General Ruiz-Jarabo Colomer in the earlier case of *Kingscrest* (Case C-498/03) (relied on by the CJEU in *MDDP*), who had advised the CJEU on 22 February 2005 that criteria must be neutral, abstract and defined in advance to be EU law compliant (para 42).

*FBT* argued that the CJEU guidance on how a state should lay out such criteria for recognition in *Kingscrest* (a care home case) was not applicable to the education exemption. HMRC argued that the guidance referred to in the *Kingscrest* decision was sufficient.

Arden LJ decided the complaint of failure of legal certainty (at para 57): "The criteria have to be "neutral, abstract and defined in advance". In my judgement, this is achieved by the combination of Note 1(b) and the SFM factors. These factors are neutral, they are abstract and defined in advance. By applying them, it is possible to know what supplies and which suppliers qualify for exemption."

### SFM criteria

*FBT* argued that the criteria laid out in the *School of Finance and Management* [2001] STC 1690 (*SFM*) – the 'mainly' and fundamental purpose tests – unlawfully discriminate against private colleges, because these criteria and tests are not also applied to universities; and some of the *SFM* tests are unlawful as they are not compliant with PVD article 132.

### Exemption of specified bodies

*FBT* asked the Court of Appeal to accept, applying PVD article 132 directly, that its education services were provided in the public interest. Article 132(1) limits the exemption of certain supplies to 'bodies governed by public law', 'other duly authorised establishments', 'non-profit-making organisations', and 'other organisations recognised by the member state concerned as having similar objects'.

Specific exemptions appear to have priority over the principle of fiscal neutrality.

The CJEU decision in *Bridport* [2014] STC 663 was

relied on by HMRC and quoted by Arden LJ (at para 45): 'In this connection, it should be observed that the scope of the exemptions in article 132(1)(b), (g), (h), (i), (l), (m) and (n) of Directive 2006/112 is defined not only by reference to the substance of the transactions covered, but also by reference to certain criteria that the suppliers must satisfy.'

In *The Open University v HMRC* [2015] STC 2324 in the UT, Henderson J considered the aim of the BBC in relation to article 13A(1)(i) of the Sixth VAT Directive. He recorded (at para 58) that the FTT found, in its decision (para 84), that the BBC had education in a broad sense as one of its aims but not in the sense described in *Horizon*. Henderson J, applying the directive directly, ruled that the BBC, while not being a public law body did, have education as its aim and that it was a 'another organisation with similar objects'. Regarding its aim (at para 59), he said: 'the educational aim must be considered in relation to all of the BBC's educational activities, and not merely those which it performed for OU.'

And at para 68: 'Looking at the BBC's educational output as a whole, I would find it paradoxical to conclude that the BBC did not have an educational aim.'

Open University did not have to prove that it was integrated with a university, as it claimed the exemption as 'another organisation' with similar objects to a public law entity akin to a UK university.

### All or nothing

In general, VAT is a tax on a supply. For the supply of education services to be recognised by the member state as exempt, according to PVD article 132, the body supplying them must satisfy the 'similar objects' threshold. If it can do so, HMRC treats all that body's supplies as exempt. HMRC's *VAT Information Sheet 03/10* states: 'Once a company falls within Note (1)(b), all of its supplies of education and training (not only university education leading to a qualification) are exempt.'

Despite refusing FBT's appeal, Arden LJ stated (at para 15): 'FBT had other activities which did not involve the University of Wales. Those activities did not negate integration. However it was the primary purpose of FBT's activities and they were not part of university education.'

Arden LJ also stated (at para 32): 'As the question of differential treatment is a threshold point, I shall set out my conclusion at this stage. I agree with HMRC's position on this. In my judgement, Ms Hall has misread HMRC's statements quoted above. In the passage quoted from the decision letter, HMRC states correctly that to determine whether the education exemption applies it has to examine all the circumstances. The First-tier Tribunal also took this approach. HMRC proceeds to mention one of those circumstances, namely that FBT's are primarily (non-university related) activities. HMRC's reference to that one factor signals that it took that factor to be the most important indication that FBT was not an eligible body. In the context of its decision, I do not consider that HMRC can be read as saying that there is some rule that only those whose activities are primarily the provision of university education could apply.'

*VAT Information Sheet 03/10* was referred to in the *FBT* FTT decision (paras 33–35). Arden LJ appears to have erred when she said (at para 33): 'there is no evidence that HMRC applies an all or nothing test in practice.'

Private colleges seeking VAT exemption are, in the writer's experience, required to prove the details of the whole of their business. The all or nothing test is applied.

Arden LJ, however, allowed FBT a pyrrhic victory of sorts

saying (at para 33): 'Indeed, Ms Hall took us to *HMRC v Open University* [2015] UKFTT 263 (TCC), where the HMRC accepted that the body can be exempt in respect of some only of its activities. Moreover, a university may also be a research institution but the education exemption would not apply to its research activity (as Mr Hill confirms): see *EC Commission v Germany* (Case C-297/00) [2002] STC 982. It would only be exempt for university education activities. I would therefore respectfully disagree with the Upper Tribunal's conclusion on this point. However, that does not get Ms Hall home, as FBT also lost before the tribunals on the SFM factors (which is as I have explained essentially an integration test).'

## Parliament correctly extended the VAT education exemption to bodies which provide education in a like manner to a body governed by public law

Arden LJ (at para 33) referred to the FTT judgement (para 49), which concluded that the FBT's relationship with the University of Wales, of which it claimed to be a college, was not close enough.

### Where does this leave us?

*FBT* argued that, to the extent that it supplied university education, it should be treated the same as a university, as all of its education activities have a public purpose; and that the UK VAT education exemption had not been implemented correctly. *FBT* was unable to establish that Parliament's implementation of article 132 was not compliant.

Arden LJ considered that Parliament correctly extended the VAT education exemption to bodies which provide education in a like manner to a body governed by public law, saying (at para 55): '[Parliament] has decided to draw the line in the case of universities to those colleges, halls and schools which are integrated and which are therefore imbued with its objects.'

Other activities not involving the university did not negate integration; however, in *FBT*'s case, they were the primary purpose.

Although many private colleges teaching university level education ceased to exist when they lost their 'tier 4' sponsorship licences in 2014, a few remain and await the next round of proceedings. Comparing the aims and activities of *FBT* to the BBC, it is difficult to see why one should be exempt while the other is not. It remains to be seen whether the *Open University* decision leads the way for others to claim the VAT education exemption. ■

*The author acts for a private college whose case has been stayed pending the outcome of FBT case, and appeared in the FBT and SAE hearings as noting brief.*

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- ▶ Cases: *HMRC v The Open University* (27.5.15)
- ▶ Cases: *SAE Education v HMRC* (12.3.14)
- ▶ VAT and further education colleges (Graham Elliott, 20.2.14)
- ▶ Higher education: widening the exemption (Richard Woollich & Mark Annear, 1.11.12)