VAT focus

SAE Education: 'eligible body' for the VAT education exemption

Speed read

The Supreme Court's judgment in *SAE Education Ltd (SAE) v HMRC* concludes a story beginning with the decision in *Customs & Excise Comrrs v SFM*. The case asks whether a body, SAE, making supplies of higher education in collaboration with Middlesex University, is entitled to exemption from VAT under the provisions of VATA1994. In *SAE*, it was found that the 15 point fundamental purpose test set out in *SFM* required refinement. The decision sets out a five point test for a college to be found to be an 'eligible body' as a provider of education; and SAE was found to be entitled to exemption from VAT, in accordance with EU principles.

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The general EU law principle of equality is reflected in article 340 of the Treaty on the Functioning of the European Union (TFEU), which provides for the application of the 'general principles common to the laws of the member states'. The CJEU applies general principles to all aspects of EU law. According to the principle of equality, each independent being must be treated equally by the law; a central tenet of liberalism.

In *SAE Education Ltd (SAE) v HMRC* [2019] UKSC 14, the Supreme Court considered whether SAE, a college making supplies of higher education to students leading to their own and Middlesex University qualifications, was entitled to exemption from VAT under the provisions of VATA 1994. The court found that fiscal neutrality, the principle of equality in VAT law, precludes economic operators carrying on the same activities from being treated differently as far as levying VAT is concerned (para 22). In *Gregg v Customs & Excise Commrs* (Case C-216/97), it was held that 'supplies of the same kind should in principle be taxed in the same way'.

The Supreme Court found that the 15 point fundamental purpose test, set out in *Customs & Excise Commrs v School of Finance and Management (London)* (*SFM*) [2001] STC 1690, required refinement (para 53).

HMRC's argument that a there must be a 'foundation document' linking the college with its university, dating back to Burton J's *SFM* decision, has been found to be a sufficient but not a necessary condition.

Background: relevant judgments

The law has remained uncertain since the High Court decision of *SFM* and the subsequent tribunal decision in *HIBT Ltd v CIR* [2007] STC 465 in which the taxpayers were successful. It has taken the English courts time to wrestle with the EU terms and principles.

- *Customs & Excise Commrs v University of Leicester Students' Union* [2001] EWCA Civ 1972: The VAT tribunal found that the union was an integral part of the university, and so an eligible body and its supplies exempt. In the Court of Appeal, Peter Gibson LJ found that the other entities referred to in note 1(b), such as 'school' and 'hall', were entities separate from, although part of, the university with the common characteristic of all being suppliers of education.
- *Cambridge University v HMRC* [2009] STC 1288: Universities were considered to be 'public law' bodies (see *SFM* (para 11)) until this case. In *SAE*, Kitchin LJ (para 51) found that the UK must be taken to have recognised that a college (or a school or hall) of a university, within the meaning of VATA 1994 Sch 9 Group 6 item 1(1) and note (1)(b), has similar objects to those of a university which is governed by public law and which provides education to young people. Arden LJ considered that an institution 'of' the university in note (1)(b) could not mean 'belong to' or 'form part of' the university. Arden LJ did not agree that an institution had to supply education but it needed to have academic links which the union did not have.
- *Finance and Business Training (FBT) v HMRC* [2016] STC 2190: In the UT, Morgan J ruled that a college could not be both an eligible body in relation to part of its trade and also not an eligible body in relation to the rest. This position was overturned in the Court of Appeal by Arden LJ (para 33), who referred to: *HMRC v Open University* [2015] UKUT 263, where HMRC accepted that the body can be exempt in respect of some only of its activities; and *EC Commission v Germany* (Case C-297/00), where it was held that a university would only be exempt for university education activities (and not for research activities). Despite this finding, FBT was not an eligible body as it had been found in the FTT (para 49) not to have a close enough relationship with the university. This issue was not mentioned in *SAE* by Kitchin LJ.
- *SAE*: Kitchin LJ found that Patten LJ in *SAE* in the Court of Appeal ([2017] EWCA Civ 1116) had fallen into error 'in focusing on the colleges of Oxford and Cambridge, all of which form a part of the structure of their respective universities, he has failed to take into account the variety of reasonable and foreseeable arrangements between a university and a college' (para 66).

Eligible bodies

HMRC considered that the *SFM* decision was at the threshold of the exemption. Note (1)(b) explains that an 'eligible body' is 'a United Kingdom university, and any college, institution, school or hall of such a university'. The test for a university is not relevant or contentious. The test in question concerns 'college … of such a university'. *VAT Information Sheet 03/10* refers to 'companies owned or controlled by universities', steering private providers away from it.

HMRC's policy resulted in cases besides *FBT* being fought and lost by private colleges delivering less than 'wholly or mainly' university level education, including:

- *Westminster College of Computing Ltd v HMRC* [2012] UKFTT 579 (TC);
- *London College of Computing Ltd v HMRC* [2014] STC 404, where in the UT Hellier J and Bishopp J first developed the mutual recognition test (paras 70 and 92); and
- *London School of Marketing Ltd v HMRC* [2017] UKFTT

715 (TC), where the taxpayer claimed a majority but not exclusive university business. Opposed by HMRC, the FTT granted a stay, pending the *SAE* proceedings.

The 'mainly acting' test

In *LCC* [2012] UKFTT 342 (TC) (para 59), an insufficient number of the college's student body progressed to degree courses of the university. In the *SAE* UT decision, Judges Bishopp and Brannan (para 100) identified the 'mainly acting' test as the most important integration factor. In the Court of Appeal's *FBT* decision, Arden LJ found no HMRC policy or rule that 'only those whose activities are primarily the provision of university education could apply for the exemption' (paras 32–33).

In the FTT's *SAE* decision, the tribunal found that 'diploma courses constitute higher education of university standard' (para 244); and that over 90% of the combined total of students were higher education students (para 245).

The tests that a taxpayer must satisfy to qualify for eligible body status will remain fact and circumstance based in which the 'objects' of the college are found in accordance with article 132(1)(i) of the Principal VAT Directive (PVD) 2006/112/EC, based on its activities and its level of integration with its university.

Straightforward?

Article 131 of the PVD requires that exemptions from VAT be 'in accordance with conditions … ensuring the correct and straightforward application of those exemptions'. While the 'hard edged' test adopted in *SAE* by the Court of Appeal was strict, it left this area of law with a moment of clarity, requiring the college to be a 'constituent part' of 'a' university which could easily be determined by reference to the Education (Listed Bodies) (England) Order, SI 2013/2992.

Lord Kitchin adopted Arden LJ's formula, as stated in *FBT* (para 55). He summarised his decision (para 56) by asking whether the college and the university are so integrated that the entity is imbued with the objects of the university.

In *SAE*, Lord Kitchin's decision sets out a five point test for a college to be found to be an eligible body under the VAT Act 1994 Sch 9 Group 6 items 1(1) and note (1)(b); namely, the provider by an 'eligible body' of 'education'.

Lord Kitchin considered that it was material that the college provided education (paras 47–53). He also considered that as private (for profit) universities were permitted to exist, so (for profit) colleges of universities should be permitted (para 49).

He considered that to require a college to be a constituent part of a university would exclude commercial providers in breach of the principle of fiscal neutrality (para 50); and that to assess the objects of the college, it is necessary to examine the characteristics of its education services and the context in which they are delivered, rather than the legal and constitutional relationship of the body providing them (para 51).

Lord Kitchin's tests are:

1. whether [the university and the college] have a common understanding that the body is a college of the university (the combined first and second limb of the multi-stage recognition test devised by judges Bishopp and Brannan in the UT (paras 109, 110));
2. whether the body can enrol or matriculate students as students of the university (*SFM* test 12);
3. whether those students are generally treated as students of the university during the course of their period of study (*SFM* test 12);
4. whether the body provides courses of study which are approved by the university (approximates to *SFM* test 11); and
5. whether the body can in due course present its students for examination for a degree from the university (approximates to *SFM* test 14).

This five-point test considerably liberalises prospective colleges from the remainder of the 15 *SFM* tests. Tests 1 to 7 (seven of eight HMRC's *SFM* tests) have been expressly demoted (para 55).

The common understanding test is open to criticism on the grounds of being a subjective test. According to *Kingscrest Associates and Montecello* (Case C-498/03) and *Minister Finansów v MDDP* (Case C-319/12), the criteria for the exemption must be 'neutral, abstract and defined in advance'. In *FBT*, Arden LJ considered that a state must lay down criteria for recognition of an eligible body which can be objectively ascertained (para 60). She considered that UK law, including the *SFM* factors, complied in this regard. Perhaps common understanding is a subjective test in which compliance with it can be assessed objectively.

What next?

SAE won its appeal in the FTT, lost both in the UT and the Court of Appeal, but won again where it counted, in the Supreme Court. It seems highly unlikely that HMRC will apply for leave to appeal to the CJEU. Elizabeth Kelsey's case note for Melanie Hall QC (who acted for the appellant) states that this decision is 'the end of the story', so perhaps HMRC has indicated that it will not apply.

Private colleges providing university education as a college of a university must ensure that they are integrated with the university of which they are a college

Private colleges providing university education as a college of a university must ensure that they are integrated with the university of which they are a college. While not needing representation on one another's boards, they should ensure that they have and document an academic agreement.

One of HMRC's objections in *SAE* was that the academic agreement with Middlesex University was not UK specific, but established a global relationship with the university via a Dutch subsidiary of an Australian company. This criticism was considered by Kitchin LJ not to be fair (para 73), but a UK specific academic agreement may be advisable in documenting a common understanding of a college relationship. HMRC's policies, including not recognising as exempt colleges other than those providing exclusively university education, will need to change. A for-profit private body supplying mostly university level education as a college of universities with which it is integrated may exempt those university level education outputs and charge and reclaim VAT on the remainder. ■

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- Cases: *SAE Education Ltd v HMRC* (10.4.19)
- *SAE Education Ltd*: Court of Appeal defines 'colleges' of universities (Robert Holland & Laurie Pay, 14.9.17)
- *The Open University*: what is education? (Robert Holland & Laurie Pay, 19.4.16)