TC03108

Appeal number: MAN/2007/00718

VAT – keywords – zero rate - building supplies – business use – Tribunal's jurisdiction concerning concessions.

FIRST-TIER TRIBUNAL
TAX CHAMBER

WAKEFIELD COLLEGE **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE RICHARD BARLOW

Sitting in public at Manchester on 20 and 21 March 2013 (Further submissions from the parties concluded 19 July).

Kevin Prosser QC for the Appellant and James Puzey of counsel for the respondents.

DECISION

1. This is an additional decision further to that given by the Tribunal on 20 January 2011 and by the Upper Tribunal (Arnold J) on 20 December 2011.

2. Arnold J remitted the case to me to consider two issues. The first is the application of the *de minimis* principle. The second is that I should make a finding relating to a question left open in the earlier decision.

3. The case concerns the construction of a new building by the College and the issue is whether it was zero rated as being for use solely for a charitable purpose or whether a proportion of business use precluded that. An extra-statutory concession allowing 10% business use before the zero rating ceases to apply was mentioned at the hearing in the First Tier Tribunal. The concession provided for three specific ways in which the 10% could be calculated. It was common ground between the parties and on the part of both the First Tier and the Upper Tribunal that a decision whether or not that concession had been correctly applied, was not a matter falling within the Tribunal's jurisdiction.

4. It was said at the Upper Tribunal hearing that the *de minimis* principle can be applied as a matter of statutory interpretation unless the statute clearly indicates that it cannot. That is not a controversial statement. In paragraph 13 of the Upper Tribunal's decision Arnold J said:

> "Unfortunately, however, the parties did not inform the Tribunal that *de minimis* use could be ignored as a matter of statutory interpretation, and not merely of extra-statutory concession. In particular, the Tribunal was not referred to HMRC's Business Brief 39/09, issued on 1 July 2009, which announced a change in HMRC's interpretation of the law to the effect that the term "solely" in Schedule 8 Group 5 Item 2 could accommodate a *de minimis* margin of 5% business use".

5. It seems likely that the parties did not raise *de minimis* as a matter of statutory interpretation at the First Tier tribunal because they knew that on any reasonable view of what would constitute *de minimis* use the amount of business use was too much to allow the application of the principle as a matter of statutory interpretation. That is also why it was not raised by me.

6. Arnold J mentioned, in the second sentence of paragraph 13 of the Upper Tribunal's decision quoted above, that a Business Brief had said 5% business use could be ignored. By referring to its being unfortunate that the Tribunal was not informed of that and by referring, in the second sentence of paragraph 13, to the Commissioners' interpretation of the law it appears that the Judge was postulating that the Commissioners were committed to the 5% level in a way that would entitle the Tribunal to decide the case on the basis that the 5% level was legally binding on the Commissioners.

7. The 5% allowance (to use a neutral term) replaced the 10% concession but allowed the 5% use to be calculated in any fair and reasonable way rather than one of the three ways allowed under the concession. The Business Brief states that the Commissioners interpret the law as being that 5% business use falls within the *de minimis* level, presumably meaning as a matter of statutory interpretation at common law. Whether that amounts to a concession or to an attempt to limit what the taxpayer would have been entitled to at common law would depend on whether, on the particular facts of a case, the Tribunal found or would have found that the common law *de minimis* level was more or less than 5%.

8. In paragraph 4 of the decision Arnold J had said:

> "Thus, contrary to what the Tribunal understood to be the case, it did have jurisdiction to determine whether the extent of the business use of the building was *de minimis* or not".

9. Paragraphs 13 and 14 of the Upper Tribunal decision read together therefore appear to suggest that the Tribunal does have jurisdiction to decide whether the 5% business use referred to in the Business Brief has been exceeded. That cannot be the case if that 5% is a concession because the Judge had already said that the operation of a concession does not come within the Tribunal's jurisdiction. On the other hand if paragraph 14 is only referring to the rule of statutory interpretation, then it would be a matter for the Tribunal to decide what level of business use fell within the *de minimis* principle and the Commissioners would have no right to determine at what level that should be set or on what basis. A common law *de minimis* level could, arguably, be set by way of a percentage of the money received or the total amount involved or it might be based on a more imprecise analysis.

10. Whilst being obliged to follow the Upper Tribunal's decision the references to the 5% level makes it difficult to understand what that decision was so far as the *de minimis* principle is concerned.

11. A further difficulty arises from the fact that the skillsXchange (the building with which this case is concerned) was constructed before the Business Brief was issued so that it seems the 10% concession was the only relevant document.

12. Fortunately and for whatever reason, the parties at the further hearing agreed that the *de minimis* issue did not have to be resolved by me. It appears that Mr Prosser QC is satisfied that if the remaining issue of fact is resolved in the appellant's favour then the level of business use would fall within the Commissioners' concession or the 5% limit, however that is classified. So it would not be necessary for him to rely on any decision by the Tribunal about what level of use falls within the *de minimis* level, so far as that is within the Tribunal's jurisdiction, namely as a question of the statutory interpretation level at common law.

13. The other matter that was remitted to me to decide is one which arose from paragraph 37 of the First Tier Tribunal decision. This was in the context of an argument by the appellant that the fees of students who paid only part of the fee for

their course should be regarded as non-business receipts. The appellant, differently represented at the First Tier hearing, had invited the Tribunal to give such guidance as it could about that and some other matters with a view to enabling the parties to reach agreement about the *de minimis* issue, albeit that it was accepted the Tribunal would not be able to give an actual ruling on that issue as it fell outside its jurisdiction.

14. HMRC argued before the Upper Tribunal that I had decided the factual issue of the part-payment of fees but Arnold J rightly identified, in paragraph 22 of the Upper Tribunal decision, what I had attempted to do namely as he said; "It seems to me, however that [the First Tier Tribunal] did not actually reach a conclusion in [37], but rather indicated that further information – or at least argument – was required on the point".

15. I would add that although I might have implied that further information or argument might be needed the intention was that the parties would apply the guidance given and agree the conclusion.

16. As the case has been remitted I now need to make specific findings based on the evidence. Additional evidence has now been given before me and I am of course also required to consider the evidence given at the earlier hearing as well.

17. The findings required now are those mentioned in paragraph 37 of the First Tier Tribunal decision which is to say the question of how part-payment of fees affects the calculation of the non-business receipts. It was not ultimately in dispute that where students pay full fees that is a consideration for a supply by way of business. Initially the appellant had argued that the effect of grants from state bodies had the effect of taking even those payments outside the concept of business because the College depended on the receipt of the grants to enable it to put on the courses. And so the appellant argued that even where students paid the full fee set by the College that was still not consideration in the ordinary sense because it lacked the necessary direct connection between the supply and the consideration. The appellant has now abandoned that argument.

18. Students paying part of the fee set by the College fall into five categories.

19. The first are students aged under 16 who are in full time education and not overseas students. Students in this category pay £6.20 per hour for any course they are taking. The only requirements are that the student is in fact under 16, in full time education at a school and has a letter from his/her head teacher supporting enrolment at the College. There are no conditions or concessions for children from poorer backgrounds or with any other characteristics specific to themselves.

20. Secondly, anyone under 19 is allowed to enrol on certain courses without paying fees at all. Some students in this group are not allowed exemption of they are in full time education elsewhere and if they have lived abroad within three years before they enrol. The College does charge re-sit fees if students in this category fail their exam and re-sit. Failure to attend the course or exam can also lead to payment. In practice although the prospectus refers to all those under 19 the exclusion for those in full time

education effectively means this group are limited to those between the ages of 16 and 19. Apart from the residence and living abroad rules there are no further conditions specific to the young people concerned.

21. Thirdly are those over 19 who are not overseas residents. This category has six sub-categories:

1) Anyone studying for a first full level 2 qualification who does not hold a higher qualification. The remitted fees are tuition fees but other additional fees are payable by the student.

2) Anyone under 25 who is studying for a first full level 3 qualification who does not hold a higher qualification. The remitted fees are tuition fees but other additional fees are payable by the student.

3) Anyone aged 25 or over who is studying for a first full level 3 qualification and does not hold either a level 2 qualification or a higher qualification. The remitted fees are tuition fees but other additional fees are payable by the student.

4) Anyone aged over 25 who is on income based benefits. Which benefits are income based is defined but it is not necessary to spell out what that means as the parties to the appeal will be able to identify them. The remitted fees for this category of students are tuition fees and certification fees only.

5) Anyone who is an unwaged dependant of a person in category (4).

6) Anyone who is within certain other categories set by the College such as an offender serving a sentence in the community or an asylum seeker.

22. Fourthly, are students on low incomes and not receiving income based benefits. The College remits tuition fees for certain courses only for this category and they have to pay their own certification fee and for materials. The low income is a figure set by the College which is adjusted upwards for each additional dependent child.

23. Fifthly, students over 19 who are not otherwise entitled to remission of tuition fees but who are not overseas students pay £896 per annum for BTEC courses, which is itself a reduced fee compared with what overseas students pay.

24. None of the relevant students pays a fee that is enough to amount to a full payment of the cost of putting on the courses in question and the College is dependent upon grants to cover its costs.

25. As far as VAT law is concerned the requirement in both the Sixth VAT Directive and the Common System Directive (which had effect at relevant times) that a person becomes a taxable person only if they are engaged in an economic activity and is thus a requirement for the tax to become chargeable, has been considered in a number of

well known cases. In particular the *Commission –v-Finland* case, C-246/08, is relied upon by the appellant.

26. In that case payment of legal aid fees by recipients of the services of the public legal aid office were not charged with VAT whereas the same types of services paid for in part by the recipients but provided by private lawyers were charged with VAT. The Government made up the difference between what the recipients paid and what the provider, whether public or private, received and the recipients paid on a scale depending on their income. Legal aid was not available to those over a certain income and the proportion paid by those who were eligible for the scheme varied from 0% to 75% of the amount payable. Further variation in the amounts payable by recipients took account of their capital assets and whether the recipient was one of a couple but income level was the main determining factor.

27. The Court acknowledged two well established principles. The first was that, before a payment can be payment for a supply for VAT purposes, it must be made pursuant to a legal relationship between recipient and supplier under which there is reciprocal performance consisting of the remuneration paid to the supplier and the service provided in return, which satisfies the requirement that the service should be "for consideration". That is referred to in [44] of the judgment. Secondly, there must be a "direct link" between the service and the consideration. That is referred to in [45] of the judgment which begins with the word "consequently" which appears to mean that the direct link is a consequence of the requirement for consideration and in effect it means that the direct link is what makes the supply "for" consideration.

28. The Court then went on to consider, in paragraphs [47] to [51] of the judgement, whether the fact that there was only part-payment of the fees took the services outside the scope of VAT when they were supplied by the public offices. The Court concluded, in paragraphs [52] and [53] of the judgment, that the public offices were not engaged in economic activities because there was no direct link between the payment and the service.

29. The *Finland* case was fairly fact specific, as Advocate General Ruiz-Jarabo Colomer mentioned in his opinion, but the Court took particular account of the following in concluding that there was no direct link:

1) The payment was only part-payment and concerned only part of the fees set by the national legislation.

2) The proportion payable was not set solely according to the scale of set fees but was also dependent on the recipient's income and was not dependent on the hours worked by the provider or the complexity of the case. Accordingly the actual value of the service (seemingly the value being the amount set by the scale of fees) was not the determining factor as to what the recipient paid. The court added that the more modest the recipient's income was the less strong would be the link between the value of the service and the payment made for it.

3) The aggregate of all the part-payments made amounted to only a small proportion of the gross operating costs of the offices (1.9 million euros of a total 24.5 million euros). That suggested that that part-payments must be regarded more as a fee than as a consideration in the strict sense.

4) The Court concluded from those points that the link was not "sufficiently direct" for the payments to be regarded as consideration for the services.

30. In this case the College does not set a scale of fees against which the part-payment can be compared in the way the Finnish Government had set a scale of fees payable from which the part-payments could be calculated.

31. I hold that the varying factors such as age, previous academic achievements, receipt of benefits, low income and personal factors such as those referred to in paragraph 21(6) above are factors that are analogous to the income levels in the *Finland* case in their effect on the directness of any postulated link between the fees payable and the services provided. The effect of the variations in income levels was sufficient to make the link between the payments and the services "insufficiently direct" in the *Finland* case. In this case the variations between what students pay is affected by factors other than income levels in most cases but they are factors applicable to individual students and with varying consequences so far as the amount of payment is concerned. I hold that those variable factors are closely analogous to the income levels in the *Finland* case and have the same effect namely that the part-payments are not "sufficiently direct" to amount to consideration in the relevant sense and so the supplies of services to the students who make part-payment are not to be included in any calculation of the level of business use.

32. The overall contribution the students make to the cost of running the College is also small and so the point referred to in paragraph 28(3) above also applies.

33. The case therefore remains open but the parties may well now be able to conclude the dispute between them. The parties are directed to inform the Tribunal in writing within three calendar months of the release of this direction whether any further hearing will be needed and, if not, to inform the Tribunal whether the appeal should be allowed or dismissed. Any applications so far as costs or any other ancillary matter are concerned should also be made within three calendar months.

34. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

RICHARD BARLOW
TRIBUNAL JUDGE

RELEASE DATE: 6 December 2013