



[2019] UKFTT 0664 (TC)

TC07439

VAT – burden of proof on appellant where assessment on grounds of abuse - transfer of training business to non-profit making company (“newco”) which claimed VAT exemption - commercial and economic reality - contracts ignored - whether abuse of rights under Halifax plc (C-255/02) – yes - supply not made by newco and therefore not an eligible body - even if supply made still not an eligible body as single commercial operation - appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**Appeal number: TC/2017/02583 and
TC/2017/07704**

BETWEEN

**SNOW FACTOR LIMITED
and
SNOW FACTOR TRAINING LIMITED** **Appellants**

-and-

**THE COMMISSIONERS FOR
HER MAJESTY’S REVENUE AND CUSTOMS** **Respondents**

TRIBUNAL: JUDGE ANNE SCOTT

Sitting in public at George House, Edinburgh on 5 and 6 June 2019

Philip Simpson, QC, for the Appellants

**David Thomson, QC, instructed by the General Counsel and Solicitor to HM Revenue
and Customs, for the Respondents**

DECISION

INTRODUCTION

1. The disputed decision (“the Decision”) of the respondents (“HMRC”) in this appeal is a decision communicated in a letter dated 11 November 2016 and Notice of Assessments letters, to both appellants, dated 25 November 2016 for the period 11/14 in the sum of £40,281 and 1 February 2017 for the periods 02/15 to 11/16 inclusive, totalling £382,074.

HMRC’s decisions

2. The decision letter itself is very lengthy but in their Statement of Case HMRC stated that they had decided that: -

(a) Preferred decision – the tax advantage sought under the arrangements in place between SFL and SFTL falls to be disallowed under the general principle of EU law preventing “abuse of rights”.

In that context, in their Skeleton Argument, they argued that the assessments had been raised because, having regard to the commercial reality of those arrangements, SFL, not SFTL, is the supplier.

(b) Alternative decision – if the preferred decision is found to be incorrect, then HMRC decided that SFTL is not an eligible body for the purposes of Item 1 Group 6 Schedule 9 VATA in accordance with Note 1(e) to the Items. The supply is made by SFTL and is therefore liable to VAT at the standard rate.

The Statement of Case makes it explicit that both decisions should be upheld on the basis that SFL should be regarded as the supplier for VAT purposes.

Summary of the opposing views

3. Snow Factor Limited (“SFL”) and Snow Factor Training Limited (“SFTL”) argue that the supply of winter sports training (“the tuition services”) is made by SFTL and that SFTL is an “eligible body” for the purposes of Note 1 Group 6 Schedule 9 Value Added Tax Act 1994 (“VATA 1994”).

4. HMRC allege that the use of two companies whereby the tuition services were supplied by SFTL and all of the other supplies were made by SFL, amounted to an abusive tax avoidance arrangement liable to redefinition under what is generally referred to as the *Halifax* doctrine (see paragraphs 164 onward below).

5. The appellants’ case is that the arrangements entered into fall a long way short of what could fairly be described as abuse.

The appellants’ view of the issues

6. At the outset of the hearing Mr Simpson argued that there were three issues for the Tribunal, namely:-

- (a) Is SFTL an eligible body and therefore exempt from VAT?
- (b) Had a “normal” approach to the identification of the supplier been adopted? Is the supplier SFL or SFTL?; and
- (c) Has there been an “abuse of rights”?

HMRC’s view of the issues

7. HMRC argue that the issues are:-

- (a) Whether the tax advantage sought under the arrangements in place between SFL and SFTL falls to be disallowed by the application of the general EU law principle of prevention of abuse of rights i.e. *Halifax*;
- (b) Whether (alternatively), on a proper analysis, and having regard to the commercial reality, of those arrangements, SFL, rather than SFTL, should be regarded as the “supplier” of the services for the purposes of VAT; and
- (c) Whether (alternatively), if the arrangements between SFL and SFTL are not regarded as falling foul of the principle of prevention of abuse of rights, and if SFTL is properly regarded as the “supplier” of the services in question, SFTL should in any event be held not to be an “eligible body”, for the purposes of VATA 1994, Schedule 9, Group 6.

The Tribunal’s approach to the issues

- 8. I do not think that the starting point is the question as to whether or not SFTL is an eligible body because, in the first instance, it is the preferred decision which is being appealed.
- 9. Like Judge Mosedale, at paragraphs 158 and 159 in *Julian Massey and Beryl Massey T/A Hilden Park Partnership and Hilden Park LLP v HMRC*¹ (“Hilden”), I find that the question as to whether SFTL was an eligible body depends on the answers to the same questions that would be asked to determine whether the arrangements were abusive.
- 10. For that reason, my starting point is to look at the question of abuse and in that context to consider which company provided the tuition services. If SFTL did then the next question which falls to be determined is: Is SFTL an eligible body?

Other matters

- 11. The parties were agreed that in regard to the question of abuse of rights, that fell to be determined by objective analysis.
- 12. Mr Simpson raised the question as to whether there was indeed a decision by HMRC as to who made the supplies.
- 13. Mr Thomson argued that the decision to assess SFL for making the supplies was implicit in the preferred decision and overt in the assessments. I accept that argument.
- 14. There were originally two bundles of documents and I heard evidence from Mr Smith, the controlling mind of every company to which I refer and Mr Maciver, the officer of HMRC.

Preliminary Issue

- 15. At the outset Mr Simpson sought leave to lodge a late Bundle of additional documentation. Mr Thomson did not oppose the lodgement. However, that was subject to the caveat that most of the documents amounted to opinion evidence and further that that was in the absence of primary documentation so to that extent they should not be admitted.
- 16. I confirmed that to the extent that the witnesses, and supplementary documentation, expressed opinions I agree with, and am bound by, Mrs Justice Proudman in *HMRC v Sunico*² at paragraph 29 where she states:

“29. Accordingly, and in the absence of any expert evidence, much in this case turns upon my assessment of the documentary evidence in the light of the parties’ respective analysis of it. As I have already noted, to the extent that the witnesses expressed their opinions on the documents they discussed I have discounted their evidence.”

¹ [2013] UKFTT 391 (TC)

² [2013] EWHC Civ 941 (CH)

17. In the event, although I admitted the Bundle, as can be seen from my comments thereon below, the documents were of very limited evidential weight. The graphs and projections that were produced were produced in isolation. The author was not present and there was no witness statement setting out the assumptions on which they were predicated.

Background

“Ice Factor”

18. In 1999 Mr Smith started a company called Ice Factor Limited (“IFL”) and he and an accountant, Paul Hammond were the two directors.

19. In 2002, Mr Smith established the Anderson Mountain Trust which provided access to school and youth groups, young people and charitable entities to foster and develop access to and skills training in mountain sports.

20. IFL has been registered for VAT with effect from 3 November 2003.

21. The Ice Factor Mountaineering Centre, which was designated “The National Ice Climbing Centre” by the Mountaineering Council of Scotland, was established by IFL in Kinlochleven after years of planning and commenced trading on 19 December 2003. It provided and provides:

- (a) A year round facility for climbers and mountaineers to practice, train and learn mountain skills.
- (b) Instruction on a range of mountaineering skills.
- (c) Support facilities including a café bar/restaurant and a retail unit.

22. In 2005, at a meeting of the Outdoor Industry Learning Council, the discussion led Mr Smith to believe that most outdoor centres operated what he described as a Non-Profit Sporting Leisure Trust into which all instructor led income and costs were decanted and which was described as being a vehicle which had a number of advantages including: -

- (a) The ability to separate instructor led activities from other operations with a view to reducing the premium for Public Liability Insurance (“PLI”).
- (b) It was argued that it would be possible to mitigate the cost of Non-Domestic Rates whereby 80% relief (“NDRR”) could be achieved if the operational site were split into commercial and non-profit making activities. In addition, there was the possibility of a further 20% discretionary relief.
- (c) There was the possibility of access to additional funding sources such as the then Sports Lottery and Highland Opportunities etc.
- (d) If the VAT exemption for sport, physical recreation and physical education could be obtained there was a potential significant saving on the VAT liability.

23. No minutes have been produced for that meeting despite requests from HMRC. At the hearing Mr Smith confirmed that there were no minutes because it had been a “meeting of minds” sharing best practice.

24. Mr Hammond, having checked with a sailing friend, who worked for Ernst & Young, advised that a Company Limited by Guarantee should be established to provide the instruction services. Anderson Mountain Training Centre (“AMT”) was then incorporated on 23 June 2005 and Mr Smith was the sole Director.

25. From that point onwards, IFL provided all of the commercial activities at Kinlochleven and charged VAT at the standard rate, and AMT provided all of the instructor led activities, and in the belief that it was an eligible body in terms of VATA 1994, charged no VAT.

26. Mr Smith stated that at an unspecified date in 2010 the then Finance Director reviewed the structure and instructed “Ritsons Auditors and Accountants” (sic) to conduct a detailed review of this trading model. No documentation in that regard has been produced.

27. On 10 May 2010, Ice Factor International Limited (“IFIL”) was incorporated and was registered for VAT. It acquired the whole share capital of IFL. IFIL had multiple stakeholders but Mr Smith had the single largest shareholding at 39.25%. Mr Smith has at all times been the Managing Director of both companies.

28. At some stage before 2013, IFL became Ice Factor (Kinlochleven) Limited (“IF(K)L”).

“Snow Factor”

29. On 16 December 2011, IFIL acquired the issued share capital of Sno! Zone (Braehead) Limited and changed that company’s name to SFL. It operated the UK’s longest indoor real snow ski slope at the site in Braehead which had been constructed in 2008 at a cost of £32 million.

30. SFL is located at a large leisure and adventure complex promoted as a family entertainment destination and operates what it describes as an “indoor snow sport resort” with two slopes and an ice wall (“the Snow Dome”). It includes a licensed café/bar. The appellants consider that it ranks with the five outdoor resorts in Scotland.

31. SFL has been registered for the purposes of VAT from 16 December 2011.

32. In terms of a Concession Agreement SFL traded under the Sno! Zone brand until May 2012. It has traded as SFL since that date.

33. At some point before May 2012, Mr Smith, the Managing Director of SFL and the then Finance Director, Mr Todd, prepared a paper for the Board of SFL proposing that a separate company be established and that it should operate in the same way as AMT (see paragraph 89 below).

34. That paper has not been produced and nor have any Board minutes.

35. It appears that the other two Directors of that Board were two of the Directors of IFIL, Messrs Sykes and Stanners.

36. SFTL was incorporated as a Company Limited by Guarantee on 18 May 2012. It has never been registered for VAT. It is not registered with OSCR.

37. SFTL has no shareholders. Mr Smith is a Director and SFL’s Finance Director is the Company Secretary. Until 3 July 2013, Mr Todd was also a Director.

38. Its primary objects are: -

- “(a) To provide training and tuition to the Public in relation to Snow Sports;
- (b) To foster and develop amongst the Public skills in relation to Snow Sports;
- (c) To promote safety and awareness of snow and ice environment to the Public;
- (d) To promote Snow Sports generally to the Public; and
- (e) To provide education to the Public in relation to Snow Sports.”

39. Its Memorandum and Articles of Association provide that: -

“... the income and property of the Company shall be applied solely towards the promotion of its objects as set out at Article 4.1 and no part of such property and income may be paid or transferred, directly or

indirectly, by way of such dividend, bonus or otherwise howsoever by way of profit, to members of the Company”.

40. SFTL has never paid salaries, fees, expenses or emoluments to any director or office bearer.

41. Commencing in May 2012, SFL was restructured, the Snow Dome redeveloped with a significant building programme and the teams and operating structures were amended with 88 redundancies and the recruitment of 158 staff. Mr Smith left the Human Resource issues to the Finance Director.

42. On 1 June 2012, SFL entered into a Business Transfer Agreement (the “BTA”) with SFTL the terms of which provided that for a consideration of £1 SFTL purchased the Assets and the Business as a transfer of a going concern. “Assets” was defined as “... the Equipment, the Contracts, the Goodwill and the Debts” and Business was defined as “... the business of ice and snow sports training and tuition carried on by...” SFL at the Snow Dome. There was also provision for “Excluded Assets” which was everything which did not specifically relate to training.

43. On the same date SFL entered into a Training Services Agreement (the “TSA”) with SFTL whereby SFTL would provide training services, as defined, at the Snow Dome.

44. The key provisions of that Agreement include: -

“3.1 SFTL shall provide Training Services at the Premises to all customers who have booked for such services at the Premises (“Customers”). ...

3.2 All equipment required by SFTL to provide the Training Service (“Equipment”), including but not limited to skis, ski boards, poles, clothing and helmets, shall be ordered and purchased from the Company ...

4.1 The Company shall provide all booking and administration services in relation to the booking of Customers for Training Services ...

5.1 SFTL shall pay to the Company the following sums:

(a) 100% of each fee paid by or on behalf of a Customer for Training Services;

(b) All costs apportioned by Snow Factor Limited that relate to the delivery of the Training Services; and

(c) all sums due for the purchase of Equipment.

5.2 Payment of sums due under Clause 5.1 shall be due on production of an appropriate invoice (to include VAT where necessary) except in relation to sums due under Clause 5.1(a) which may be deducted by us where we receive payment directly from the Customer ...”.

45. Although Mr Smith’s witness statement said that instructors were “...employed exclusively by SFTL”, and initially he confirmed that in oral evidence, that is quite simply not the case. On a rolling programme from June 2012, the instructors and the Customer Contract Team Members (reception and clothing etc) entered into joint contracts of employment with SFL and SFTL. Those contracts referred to “...employment with the Company” and referred to the principal place of work as being at the “Company’s premises”. Only SFL had premises. It states that “The Company offer on site discounts” and that can only be SFL. The only mention of SFTL is in the preamble and the contract is only signed by the employee and by someone “...for and on behalf of the Company”.

46. At all material times all employees were paid by SFL. SFTL has never been registered for PAYE.

47. Although both SFL and SFTL have PLI policies, both premiums are paid by SFL.

48. Customers can book online, by telephone or at reception. SFL promotes more than 150 products including corporate and party activities quite apart from lessons. The vast majority

relate to either skiing or snowboarding. Those bookings distinguish between tuition services and others.

Finance

49. All accounting and cash management is dealt with by SFL's finance department. The tills at reception are configured to distinguish between standard rated and exempt supplies. Lessons are keyed in as being exempt. The receipt issued to customers distinguishes between vatable and exempt supplies and is issued in the name of SFL. The tills and credit card machines are owned or leased by SFL. Although at paragraph 10 of his witness statement Mr Smith said that there were separate merchant terminals his oral evidence was that there was only the one for each composite transaction and that the terminal was capable of splitting the payments.

50. All cash receipts are reconciled with the till receipts and those that are attributable to SFTL are remitted to its bank account. Finance also reconciles the card information.

51. IFIL, ICF(K)L, SFL and SFTL all bank with HSBC. Each company has its own bank account. It is a group facility with an online banking portal. The overdraft facility was £50,000.

52. On 1 December 2012, SFL invoiced SFTL for the "salary cost" for the months of June to November 2012. That cost varied in each month with lowest being £36,183.82 in October and the highest £42,722 in June. Curiously, no VAT was charged.

53. On the same day invoices were also issued for each month and the subject matter was "Call Centre Salary Cost, Engineering Salary Cost and Electricity Cost". Only the last carried VAT.

54. These invoices were issued on that date as the accounting year end was 31 November.

55. The practice changed thereafter and on 31 December 2012 and on the last day of the subsequent months until May an invoice was raised including all of these items, but no VAT was charged on the electricity cost, and an additional charge was levied for a "management charge". That charge varied between £989.14 in April 2013 and £74,531 in January 2013. There was no management charge from May until August 2013 inclusive. The management charges in September and October 2013, exclusive of VAT, were £7,139.90 and £17,652 respectively.

56. Mr Smith stated that, effectively, the invoice was raised to meet the surplus in SFTL "after labour charges". When SFTL had no money then it was not invoiced because it could not trade whilst insolvent. SFL supported SFTL which would never be able to make any profit if full overheads were charged.

57. The formula that would be operated in the event that if full overheads were to be recovered would be to divide the training revenue by the slope revenue to produce a percentage. Mr Smith stated that in practice that would usually produce a figure of 30%. (see paragraph 143 below).

58. The different methods of invoicing were apparently adopted because the two different Finance Directors had "slightly different ideas" and there were changes in external advisors. However, neither appear to have implemented or reflected the terms of the TSA.

Contact with HMRC

59. On 9 April 2013, RSM Tenon wrote to HMRC stating: -

"RSM Tenon has recently been appointed as advisers to the company mentioned below. We have been asked to make this disclosure on behalf of the company because it has come to its attention that it is using designated Scheme 7. Snow Factor Limited has been using the Scheme since its first VAT return in 2012. The Company regrets that this is a late disclosure.

The Company implemented the Scheme on the advice of previous advisers who made no mention of the regulations surrounding the disclosure of avoidance schemes. Having had the requirements brought to their attention the Directors of Snow Factor Limited wished to correct this unintended omission.”

That was a disclosure as a disclosable Listed Avoidance Scheme under Schedule 11A VATA 1994.

60. On 15 August 2013, HMRC wrote to RSM Tenon about ICF(K)L and AMT and SFL and SFLT seeking detailed information and warning about penalties.

61. On 10 December 2013, Officers Marshall and Maciver of HMRC visited SFL’s premises. Mr Smith, and unspecified others, had prepared a “Background Note” for that meeting setting out in detail their understanding as to the rationale for hiving off the tuition services. In particular it stated that SFTL had been incorporated as SFL were “...acting on specialist counsel” and they had sought “professional counsel” (see paragraph 125 *et seq* below). That was one of the very few background documents that was produced.

62. Correspondence ensued. There was another such meeting on 17 September 2014.

Statutory Accounts

63. Paragraph 44 of the Decision identified the fact that the accounts for SFTL for the years ended 20 November 2013 and 2014 disclose that the entire gross trading profit had been paid back to SFL by way of SFL’s charges leaving a net nil profit for SFTL in each of those years.

64. I have set out in this table the entries in the profit and loss account for each of the four years for which the statutory accounts were provided.

	2012	2013	2014	2015
Turnover	374,152	1,032,555	1,073,104	1,013,054
Cost of sales	42,450	184,683	514,061	751,477
Gross profit	331,702	847,872	559,043	261,577
Administrative expenses	331,702	847,872	559,043	261,577

65. As can be seen, in each year, the administrative expenses simply stripped out the gross profit as the Decision narrates. In the course of the hearing I had been taken to Note 5 in the Notes to the statutory accounts for 2014 to demonstrate that the turnover was always the figure collected as “customer receipts”. When I looked more closely at that Note I was somewhat perplexed.

66. Superficially, that Note, which is under the heading “Related party transactions” was in broadly the same format in each year. It disclosed that customer receipts were collected for SFTL by SFL and wages and other expenses were paid on behalf of SFTL by SFL. However, whilst the turnover in the profit and loss account was always the sum of the customer receipts, the other figures quoted each year in that Note and the profit and loss account were lacking in consistency.

A. Wages and expenses

67. In 2012 it was exactly the same figure as “administrative expenses”. In 2013, it was £564,222 and is presumably part of administrative expenses. In 2014, it was £564,222 and is therefore larger than either the cost of sales or the administrative expenses. In 2015 what was described as wages and expenses in the Note was the whole amount of the turnover but as can be seen in the table that was not reflected in the profit and loss account.

B. Contribution to the cost of the Snow Dome

68. In 2012 and 2013 the Note disclosed that SFTL had accrued a contribution to SFL towards the cost of the Snow Dome and that is shown in the profit and loss account as being “cost of sales” (there is possibly a typographical error in 2012 showing £43,450). In 2014 and 2015 the Note stated that SFTL had paid SFL £286,398 and £nil respectively. The former figure is presumably in either cost of sales or administrative expenses or both.

C. Balance due to or from SFL

69. In 2012, £43,450 was allegedly due to SFTL from SFL but there was £nil due in 2013. In both 2014 and 2015, SFTL owed SFL £110,000.

70. The Notes to the statutory accounts for SFL for the year ended 30 November 2013 contained two Notes which are relevant:

(a) Under the heading “Contingencies” at Note 11 it is reported that HMRC “...had opened an inquiry into the Company and its related Companies’ use of certain notifiable VAT structures...”.

(b) Note 12 is headed “Related party transactions” and reads:

During the period the company was charged management charges of £229,798 (gross) (2012: £333,423) by Ice Factor International Ltd. The company was also recharged expenses of £20,230 (2012: £3,000) by Ice Factor International Ltd. A further management charge of £170,881 (2012: £26,905) has been accrued at the year end. An amount of £325,000 (2012: £227,077) was paid by the company to Ice Factor International Ltd during the period leaving a balance due to Ice Factor International Ltd at the period end of £141,700 (2012: £86,252).

A management charge of £184,684 (2012: £42,450) was included as accrued income, due from Snow Factor Training Limited. During the period the company received payment from customers on behalf of Snow Factor Training Limited of £1,032,555 (2012: £374,152). The company made payments to suppliers on behalf of Snow Factor Training Limited of £246,713 (2012: £55,686) and paid salaries on the company’s behalf of £564,222 (2012: £276,015). The amount due to Snow Factor Training Limited at the year end was £nil (2012: £42,450). These companies are connected by common directors.”

71. The auditors were Baker Tilly UK Audit LLP and the Accounts were signed in August 2014.

72. The second paragraph of that Note is relevant since what is there described as a “management charge” is what was described as “Cost of Sales” in SFTL’s accounts and the payments to suppliers and salaries are what was described as “administrative expenses” in SFTL’s accounts.

73. Lastly, Mr Mciver’s assertion that his analysis of SFL’s accounts showed that it had paid significant management charges to IFIL and that the directors of IFIL had been remunerated in the sum of £198,000 in 2014 and £154,000 in 2013, is not disputed and is obviously correct as Note 12 indicates.

Summary

74. I am not an accountant and I am not attempting to analyse these accounts but it is very clear to me that the transactions between the companies were not at arm’s length. Mr Smith had confirmed that the overheads did not vary much but the table makes it explicit that the re-charges and management charges were at best very “flexible”.

Miscellaneous

75. In November 2013 (see paragraphs 138 *et seq* below), the appellants’ current advisors, having reviewed the structures that had been put in place, recommended that the disclosure be

retracted as it could have been unnecessary not least because the management charges were below cost.

76. No application has been made to the Local Authority for NDRR for the Snow Dome.

77. SFL has made no applications for grants.

78. The website has been amended on a number of occasions since 2012. Reference is almost exclusively to “Snow Factor” or “Snow Factor instructors”.

79. In 2018 (and there is no evidence in relation to the period with which we are concerned) there is one clear reference to SFTL on the website and that reads:

“SNOW FACTOR TRAINING

We are passionate about our investment in people.

Snow Factor Training Ltd was created in May 2012, and has since recruited and trained 54 new snow sport instructors...”.

It does not say that the tuition services are provided by SFTL.

80. The print out in the additional Bundle was of no assistance because although it stated that “All instructed activities are provided by Snow Factor Training LTD” the copyright is 2019.

Discussion on the key facts

81. Mr Maciver’s evidence in relation to factual matters was uncontentious and, as appropriate, I have included those facts in the narrative above. I have disregarded his opinion evidence.

82. Mr Simpson asked me to find that Mr Smith was a wholly reliable and credible witness whereas Mr Thomson argued that he had been evasive.

83. I accept that Mr Smith is absolutely passionate about winter and mountain sports and the promotion of access to and enjoyment of that. I think that it would be fair to say that he is dedicated to that not only in the context of his own companies but in terms of Scotland generally.

84. I also accept that due to the elapse of time his recollection of certain matters is less than precise and that that accounted for a number of the inconsistencies in his evidence.

85. However, the burden of proof lies with the appellants in this appeal and there were a number of areas where there was an unfortunate and distinct lack of clarity. In my view in some instances it amounted to significant obfuscation.

86. In my decision in *Snow Factor Limited v HMRC*³, which is published and therefore in the public domain, I found at paragraphs 58 and 59 as follows:

“Lessons

“58. ... The appellant employs some 49 full time instructors. The lessons are tailored to and for different age groups, capabilities and differing levels of experience.

³ 2018 UKFTT 28 (TC)

Instructors

59. It is widely stated on the website, in the Terms and Conditions and on material in reception that only Snow Factor's instructors can teach or coach on the slopes. In fact, DSUK provide lessons and, by negotiation, if a customer or group of customers has an instructor who meets the appellant's standards (and the appellant runs training courses for instructors) then that individual will be permitted to teach or coach."

87. When it was put to him that there was very little evidence of visibility of SFTL, and that that was an example, Mr Smith confirmed that he had been unaware that he needed to make explicit the fact that SFTL should be separately identified and he believed that other organisations with similar structures did not do so.

88. To put it mildly, given the findings in fact above, in popular parlance, SLFT was so far below the radar screen that it was virtually invisible to anyone other than Mr Smith and the companies which he controlled.

89. That is another contentious issue. I unequivocally accept Mr Mciver's statement that Mr Smith had the largest shareholding in IFIL at 39.25%. As long ago as November 2016, paragraph 46 of the Decision narrated that. By contrast Mr Smith's witness statement stated that:

"The company at that time had multiple stakeholders and 30 separate shareholders. The largest shareholders were Scottish Enterprise and HVC who acted in combination to control the board."

90. In his oral evidence Mr Smith explained that HVC was shorthand for Highland Venture Capital which was a business angel syndicate of approximately 30 investors. It was his view that because they voted together HVC and Scottish Enterprise controlled IFIL until Mr Smith bought those shareholdings in February 2017.

91. There was no evidence whatsoever that any matter ever went to a vote.

92. Indeed the evidence about what the Board knew, or did not know, was remarkably sparse. Mr Smith explained that the intention from the outset was to recreate the same structure as was used at IFL and AMT. He stated that he and Mr Todd had put a paper to the Board making that recommendation and that that paper had identified the four main advantages being

- (a) Insurance,
- (b) NDRR,
- (c) Ability to apply for grants and charitable donations, and
- (d) VAT savings.

In addition there would be the capacity to borrow funds. There has been no application for any borrowings.

93. That paper has not been produced and nor have any Board minutes.

94. On being asked what emphasis had been placed on those four elements by the Board Mr Smith stated that he could not recall. Although his witness statement indicated that the VAT savings would be "much less" than the quantum of items (b) and (c) his oral evidence was that although there would be variables all four would have roughly the same impact. There have never been any charitable donations or grants or any NDRR. The VAT savings were in excess of £400,000 in two years.

95. He quantified the insurance saving at approximately £100,000.

The four advantages

Insurance

96. It was extremely difficult to identify what savings, if any, had been achieved by the creation of SFTL. In his witness statement Mr Smith stated that the premiums for the Snow Dome were reduced from £80,000 to £12,000 per annum. In cross examination he conceded that that might have been a mistake and that he could not recall from whence that figure was derived.

97. It transpired that SFL had paid the premiums for both companies. SFL's Notes for the statutory accounts for the year ended 30 November 2013 showed the comparative figures for insurance for 2012 and 2013 to be £68,715 and £18,216 respectively.

98. In the additional Bundle the graphs that were produced purported to show the combined insurance costs for both companies.

99. There are a number of problems. Mr Smith had not compiled the graph. As Mr Thomson pointed out we did not have the figures underpinning that graph. All that we had was a statement from Mr Smith that the figures had been extracted by the Finance Director from the statutory accounts at Companies House. The graph included the figures from 2006-2011 thereby including the predecessor company. The figure for 2011 is therefore of no use since part of that year includes a figure that is attributable to the vendor and it had not been broken down. It shows a figure of £77,332 for 2012, £38,662 for 2013 rising to £43,909 in 2014. It fell again in 2015 but went up to in excess of £40,000 in 2016 and subsequent years.

100. As can be seen the 2013 figure does not match the figure of £18,216 in the Notes for the statutory accounts and I can find no figure of £38,662 in the statutory accounts for SFL for 2013. I find that the graph is of no assistance.

101. Obviously there will have been other insurance costs. Mr Smith confirmed that there were "numerous" other insurance costs and speculated that that might be under "Other establishment expenses" in the accounts since that had risen by approximately £26,000. However, he ultimately had to concede that he simply did not know.

102. At best the accounts indicate that there was a reduction in insurance costs of approximately £39,000 although whether that can be attributed to PLI, let alone to the introduction of SFTL, or in whole or in part, is a matter of conjecture.

103. For completeness I record that further on in his witness statement, Mr Smith produced an analysis of detailed overhead costs for SFTL for the years 2012 to 2017. In 2012 (which was from May to December only) the total insurance cost (and that presumably covers aspects other than simply PLI) was £8,706. That dropped to just under £6,000 in each of the following two years falling to just under £5,000 in 2015 but rising significantly to £8,270 in 2016 and £15,102 in 2017. However, those figures in themselves shed no light on what savings might have been achieved.

104. The other complicating factor is that Mr Smith conceded that two of his key performance indicators were to reduce the premium for PLI and to reduce the number of claims. In that regard he had purchased helmets which were provided to every client and it was compulsory for them to wear them. Rhino padding was also installed in order to reduce the number of claims. He conceded that their insurers had recognised that Snow Factor had identified risks and mitigated the premiums accordingly.

105. It was impossible for Mr Smith, and certainly impossible for me, to identify what, if any, savings had been achieved by decanting the tuition services into SFTL rather than having been achieved by good practice.

106. It certainly was not £100,000 or anything near that figure. There is no persuasive evidence that it was even as much as £39,000.

NDRR

107. This was a particularly difficult area. It transpired that SFL had not made an application to the Local Authority for mitigation of non-domestic rates. Mr Smith's explanation was that they had not done so because they were aware of the dispute with HMRC and, that being the case, there would have had to have been a contingency provision in the accounts which might have proven difficult.

108. Whilst I understand that argument, it does not sit well with the facts for a number of reasons. SFTL was incorporated in May 2012 and commenced trading at that stage. I would have expected a company that was anxious to minimise their costs to have immediately applied for a reduction in domestic rates, if that was potentially available. Mr Smith argued that they could not do so for the year 2012 because that year had already commenced. Even if that were true, I would have expected that an application would have been made so that any area of negotiation would have been concluded before the following rating year commenced.

109. There was no dispute with HMRC in 2012. It was only on 9 April 2013 that HMRC were even approached about this matter. In any event, my understanding is that one can make an application at any stage in any year and I made that point to Mr Smith but there was no response.

110. In the additional Bundle there was another graph which had not been produced by Mr Smith and which purported to show the potential savings in rates in the years 2012 to 2018. That varied between £107,192 and £81,748. That had apparently been calculated by the Finance Director having read guidance on a website. The assumptions underpinning the calculations have not been produced.

111. Furthermore it is all predicated, as was Mr Smith's oral evidence, on an 80% rate of relief. His witness statement said that 80% could be achieved, often with a further 20% of discretionary relief. His oral evidence was that 80% would be achieved immediately.

112. In my view, having reviewed the totality of the evidence, that is disingenuous to say the least. The 2017 Sport England "Leisure Management Options Guidance" that he produced at No. 6 in the additional Bundle and to which he was referred in re-examination makes the position clear at page 14 at 3.11.

113. As opposed to charities which do attract the mandatory 80% relief, even a "Hybrid" Non Profit Distributing Organisation which is defined as being a "management model which is a legal vehicle with charitable objectives" has the ability to access only the discretionary 20% relief. Even if SFTL were to be such a Hybrid, on the basis that it is not able to distribute profits or surpluses to shareholders⁴, the most it could access would be 20% and, by definition, that would be by no means guaranteed since it is discretionary.

114. Further I do not find that SFTL has charitable objectives. The fact that it was designed not to create or distribute a profit and that it provides education does not in itself make it charitable.

115. There is not a shred of evidence that even 20% could have been achieved.

⁴ Page 17 of the document at 3.31

116. There is currently no NDRR for the part of the Snow Dome that is occupied by Disability Snowsport UK which is a charity.

117. There was no mention of NDRR in the Background Note prepared for HMRC giving the rationale for the creation of either IF(K)L or SFTL.

118. When Johnston Carmichael corresponded with HMRC although they mentioned insurance as a driver for the creation of SFTL there was no mention of NDRR.

119. In summary there does not seem to have been much of a focus on NDRR and more importantly, it is not known whether and or to what extent it might have been granted. Objectively considered, I cannot accept Mr Smith's assertion that NDRR was an important factor.

Grants

120. At some stage, the Kinlochleven site was awarded £200,000 from Sport Scotland.

121. There is no evidence that there has been any application for any grant or charitable donation for SFTL.

VAT

122. As can be seen from the Assessments the VAT savings were in excess of £400,000 for the periods 11/14 to 11/16.

Summary of the findings on the four advantages

123. I simply do not accept that the four purported advantages were of roughly equal weight, let alone Mr Smith's assertion that the NDRR and the capacity for attracting charitable donations or grants were more valuable than VAT savings. As can be seen the savings in insurance premiums, such as they might have been, were very small as opposed to the VAT savings. Charitable donations and grants never featured and there is not even any evidence of research or business planning involving these. NDRR was not even attempted.

124. Mr Smith's assertion that the accounts supported his view that all four advantages were equal is simply inaccurate. It is unsupported by the evidence.

Professional Advice on VAT

125. Mr Smith repeatedly stressed to HMRC that professional advice had been sought and received by the appellants. He used words such as "specialist counsel". Both in the course of the enquiry and since, HMRC have asked for sight of that advice. Very little was forthcoming although in his oral evidence Mr Smith stated that advice had been received from Hammond & Co, Ernst & Young, Ritsons, Baker Tilly, RSM Tenon, Sharles (accountants), Murray Beith Murray, CMS McKenna (previously Dundas & Wilson), Burness Paull and Johnston Carmichael.

126. I am aware that Baker Tilly bought RSM Tenon in 2013 and of course they were the auditors although the merged firm was subsequently rebranded as RSM Tenon. Neither their advice, nor RSM Tenon's advice on disclosure has been produced.

127. It transpired that Burness Paull had advised Scottish Enterprise so that would not be advice to the appellants.

128. The only advice that was produced to HMRC or to the Tribunal, was an email from Mr Hammond dated 5 May 2010 ("the 2010 email") and advice from Johnston Carmichael dated November 2013 and 18 June 2015.

The 2010 email

129. The 2010 email stated:

- “1. AMT sales are for education & training and are therefore exempt for VAT purposes.
 2. A separate company was set up purely to deal with this exempt income, and was not registered for VAT. It has its own specialist employees (instructors), its own employee accommodation, its own credit card terminal and its own bank account. Surplus funds are paid from AMT as a donation for insurance, rates, rent, heat & light etc, as the company is a non profit making company. Sales in IPL are for the other aspects of the centre (i.e. climbing sessions, rope course, shop and café). There is therefore no double accounting for sales.
 3. There is an AMT bank account.
 4. Advice was taken from Ernst & Young by my firm on a verbal basis and no VAT inspection has ever taken place. It was my firm’s recommendation and if there is any come back from HMRC it will be covered by my professional indemnity insurance.
- I trust this is sufficient for your purposes”.

130. Firstly, in that regard, in the course of the hearing it became clear that Mr Hammond had been Mr Smith’s co-director in IFL which perhaps accounts for the fact that that email was sent from a Hotmail account rather than from his firm’s account.

131. Secondly, as I indicate at paragraph 24 above the advice from “Ernst & Young” was a chat between friends. There is no evidence as to the information furnished to Ernst & Young or the tenor of the advice. It is not even clear whether the friend was an indirect tax specialist. In fact, given that this is a specialist Tribunal and I am well aware of the governance arrangements in firms such as Ernst & Young, I very much doubt that Ernst & Young provided advice. On the balance of probability, in the absence of any evidence to the contrary, it simply amounted to an informal chat.

132. Lastly, I find that that email does not state what the advice given had been but rather it simply stated the *de facto* position.

133. Mr Smith’s evidence in regard to that email was contradictory in that initially he stated that the addressee of the email was the then new Finance Director, Mr Murray, who had sought clarification of the position but thereafter he stated that it had been produced as part of due diligence in respect of an injection of funds from Scottish Enterprise that was received five days later. Mr Smith was clear that the only advice sought in relation to AMT was in regard to VAT.

134. In his witness statement he stated that the structure had been reviewed by the Finance Director, a chartered accountant, who had instructed Ritsons who are Auditors and Accountants to conduct a detailed review of the structure of AMT. He stated:

“... they concluded the structure was correct and maintained that a Company Limited by Guarantee was the ideal structure as it would allow the Trust to borrow if required.”

135. The identical appeal in relation to IF(K)L and AMT is sisted behind this appeal.

136. That advice has never been produced.

Johnston Carmichael

137. The first and most obvious point to make is that given that the advice was dated November 2013 and June 2015 it was given after the event, after HMRC had instigated enquiries and with the benefit of hindsight.

2013 advice

138. The advice to the effect was that the arrangement between SFL and SFTL were not “... as well implemented as the arrangements at Kinlochleven”. Recommendations were made to rectify the position albeit it was noted that many of those changes had commenced prior to a meeting on 26 November 2013. That may be the case but it seems unlikely.

139. The first two bullet points were that SFTL should be the employer of the instructors and therefore should register for PAYE by the end of 2013 and all ski instructor employment contracts should be novated with effect from 1 December 2013. SFTL has never registered for PAYE. The Bundle contained a ski instructor contract of employment dated 27 August 2014 and it was jointly with SFL and SFTL although the reality was that the contract referred throughout to the “Company” and that was SFL. (In that regard see also paragraph 44 above.)

140. The next recommendation was that the website should refer to training being delivered by SFTL. As can be seen from paragraphs 79 and 80 above it would appear that that has not really been implemented until 2019.

141. There were other recommendations in regard to management accounts and I do not have detailed information in relation thereto. In particular it was recommended that SFTL’s management accounts should be re-stated to reflect the whole electricity bill and other costs for use of the training facilities.

142. The thrust of Johnston Carmichael’s advice was that in order to avoid the need to notify the scheme, SFTL would have to ensure that;

(1) They did not receive a “relevant supply” from a connected taxable person who is not an “eligible body”; and

(2) In any one prescribed accounting period, the value of all such relevant supplies is equal to or less than 20% of the cost of making the supplies as comprising the relevant business.

143. They observed that in the first six month period the costs billed by SFL had been less than 20% of SFTL’s total costs for that period. They made it clear in regard to point 2 above that provided the costs re-billed from SFL were less than 20% of SFTL’s total costs and those costs were billed or paid in equal instalments so that less than 20% came from SFL in each of SFL’s VAT return periods then no disclosure was necessary.

144. The relevant periods with which I am here concerned, are the periods 11/14 to 11/16 inclusive and I have been provided with no information in that regard.

145. Their conclusion was that:

(a) the tax avoidance disclosure should be retracted,

(b) revised management accounts should be prepared better reflecting the non-profit making status of SFTL by more accurately apportioning costs,

(c) SFTL should register as a charity, and

(d) the shortcomings in the then current arrangements should be resolved before the meeting with HMRC on 10 December 2013.

146. As I indicate above, SFTL has never been registered as a charity.

147. Lastly, I observe that Johnston Carmichael identified that the income from the tuition services in IF(K)L accounted for 90% of core income whereas in SFTL it accounted for 50% of core income. That conflicts with Mr Smith’s repeated statement that it was 30%.

2015 advice

148. Johnston Carmichael stated that, on the basis that SFTL was a non-profit making organisation which is prohibited by its own company formation documents from distributing any surplus income to stakeholders, it was an eligible body.

149. They reiterated the advice set out in paragraph 142 above and made the same observations on the first six months accounting period. There is no comment on subsequent periods.

150. Lastly, having observed that there was a link between SFL and SFTL they opined that because SFTL relied on SFL for support and not the other way around it could not be a tax avoidance scheme. They offered an opinion that it would be commercially sensible to have all personal injury claims arise in the company with minimal assets. That is simply an opinion.

Conclusion on professional advice in relation to tax

151. I note Mr Smith's complaint that he paid large amounts for professional advice. That may be the case but apart from the 2010 email which establishes only that some advice was given by Mr Hammond's firm in relation to AMT, there is no evidence of any advice, let alone specialist advice, being sought or delivered prior to the incorporation of SFTL.

152. I find that, on the balance of probability, having attended the meeting in 2005 (see paragraph 22 above), Mr Smith formed the view that it was industry practice to have a "Trust" which might be a company limited by guarantee, but in any event would be a non-profit making entity, into which all income and costs from tuition services were decanted and that that could achieve significant VAT savings.

153. There is no evidence that formal VAT advice was ever sought. The structure was put into place at AMT and when SFL came into being the same structure, in the shape of SFTL, was simply adopted without further advice.

154. I have little doubt that, whether rightly or wrongly, Mr Smith remained, and remains, of the view that others in the industry utilised a corporate vehicle to ring fence educational activity and that there was no need to publicise the existence of what he persistently referred to as a "Trust". He did so in the belief firstly, that it was VAT efficient and, secondly, that there would be a saving in insurance premiums.

The contracts involving SFL and SFTL

155. There is no evidence of any advice given in relation to the agreements referred to at paragraphs 42-44 above. HMRC have argued that the BTA transferring SFL's training and tuition business is part of an abusive arrangement between the parties but the contract itself is relatively uncontroversial in its terms.

156. That certainly cannot be said of the TSA.

157. No doubt the professional advisor (unidentified) was requested to draft an agreement which would ensure that SFTL was non-profit making. However, the only possible income was the income relating to tuition services and 100% of that had to be paid to SFL in terms of clause 5. That meant that SFTL would only ever be able to trade not only at a loss but in general whilst insolvent unless support were to be provided from elsewhere.

158. I understand why, when he was asked to explain that clause, Mr Smith described the provisions of the TSA as being "nonsense". However, he instructed it and he signed it.

159. Mr Simpson argued that it made no sense and that clause should be ignored. Mr Thomson quite properly argued that the Tribunal could not ignore that clause of the TSA.

160. I find that clause 5 does make sense. The language is plain. It is quite clear that the parties' intention was that all profits arising in SFTL would be paid to SFL.

161. However, the simple fact of the matter is that there was no implementation of the clause. SFL collected all of the income from tuition services and remitted it to SFTL. If the clause had been honoured then SFL should have simply retained all of that income.

162. It points to the almost complete lack of arm's length commerciality in this matter. I take the view that it was mere window dressing.

163. There is no explanation as to why the instructor staff were allegedly employed by both companies if all of the training was to be provided by SFTL in terms of the BTA. Looking at the findings in fact at paragraph 45 above, to all intents and purposes, I find that SFL was and is the employer.

164. The sole mention of SFTL in the preamble, the lack of signature to the contracts by SFTL, references throughout to "the Company" and the fact that SFL operated PAYE all support that finding.

Conclusion on the contractual framework

165. In summary, I find that the two companies are under common control. They decided to instruct solicitors to draft the two agreements and they decided to sign them. They decided to hive off the tuition services to SFTL for the sum of £1 and provide that the entire income of SFTL, which had been the income of SFL, would be paid to SFL plus the costs incurred. That amounted to the diversion of an income stream. The bonus was that because SFTL charged no VAT to customers, the tuition was more attractively priced for the customers. Furthermore the overall return to the two companies was therefore greater as was the return to IFIL to whom substantial management fees were paid by SFL.

166. The fact that the same net result (ie nil profit in SFTL and all monies going to SFL in the first instance and some part thereafter ultimately to IFIL) was achieved by not complying with the provisions of clause 5 of the TSA but rather by extracting monies via costs and management charges does not affect the position. The reason for that was undoubtedly because SFTL could not trade whilst insolvent but the underlying objective remains the same.

167. Someone drafted the contract of employment which has the "window dressing" of the addition of the words Snow Factor Training Limited in the third line and is not even signed for or on its behalf. As I indicate above, the reality is that SFTL was a mere cipher in that contract, if even that.

Discussion on the application of the law to the facts as found

Abuse of Rights

168. There was no dispute between the parties that the leading case is, of course, *Halifax plc v HMRC*⁵ ("Halifax") and most readers of this decision will be conversant with the detail of that case.

169. In *Halifax*, the Grand Chamber of the ECJ set out the general principles that apply to the treatment of VAT avoidance arrangements:

"69. The application of Community legislation cannot be extended to cover abusive practices by economic operators, that is to say transactions carried out not in the context of normal commercial operations, but solely for the purpose of wrongfully obtaining advantages provided for by Community

⁵ Case C-255/02

law (see, to that effect, *Firma Peter Cremer v Bundesanstalt für Landwirtschaftliche Marktordnung* (Case 125/76) [1977] ECR 1593, para 21...

73. Moreover, it is clear from the case law that a trader's choice between exempt transactions and taxable transactions may be based on a range of factors, including tax considerations relating to the VAT system (see, in particular, *BLP Group* [1995] STC 424, [1996] 1 WLR 174, para 26, and *Customs and Excise Comrs v Cantor Fitzgerald International* (Case C-108/99) [2001] STC 1453, [2002] QB 546, para 33). Where the taxable person chooses one of two transactions, the Sixth Directive does not require him to choose the one which involves paying the highest amount of VAT. On the contrary, as the Advocate General observed in para 85 of his opinion, taxpayers may choose to structure their business so as to limit their tax liability.

74. In view of the foregoing considerations, it would appear that, in the sphere of VAT, an abusive practice can be found to exist only if, first, the transactions concerned, notwithstanding formal application of the conditions laid down by the relevant provisions of the Sixth Directive and the national legislation transposing it, result in the accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions.

75. Second, it must also be apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain a tax advantage. As the Advocate General observed in para 89 of his opinion, the prohibition of abuse is not relevant where the economic activity carried out may have some explanation other than the mere attainment of tax advantages.

81 ... it is the responsibility of the national court to determine the real substance and significance of the transactions concerned. In so doing, it may take account of the purely artificial nature of those transactions and the links of a legal, economic and/or personal nature between the operators involved in the scheme for the reduction of the tax burden ...

94 It follows that transactions involved in an abusive practice must be redefined so as to re-establish the situation that would have prevailed in the absence of the transactions constituting that abusive practice."

170. More recently, Lord Sumption cited these paragraphs in *HMRC v Pendragon*⁶ ("Pendragon") and at paragraphs 12 and 13 went on to state:-

"12. ... This conclusion seems to me to do no more than make explicit something which is implicit in the Halifax tests. Identifying the 'essential aim' in a case of concurrent fiscal and commercial purposes depends on an objective analysis of the method used to achieve the commercial purpose. As Advocate General Maduro observed in a passage from (para 89) of his opinion which was in terms approved by the court (para 75), the taxpayer's choices must be 'at least to some extent, accounted for by ordinary business aims'. The question is therefore whether the commercial objective is enough to explain the particular features of the contractual arrangements which produce the tax advantage.

13. These considerations effectively answer a question which is likely to arise in most cases involving prearranged sequences of transactions. Is the relevant 'aim' that of the scheme as a whole or of its component parts? The answer is that it may be either or both. Because the principle of abuse of law is, in this context, directed mainly to the method by which a commercial purpose is achieved, it is necessary to analyse each transaction by which it is achieved. Because the purpose of each step will generally be to contribute to the working of the whole scheme, the effect of the whole scheme also has to be considered. In *WHA Ltd v Customs and Excise Comrs* [2007] STC 1695, para 22, Lord Neuberger of Abbotsbury, delivering the leading judgment in the Court of Appeal, rejected the submission that the court was confined to considering the artificiality or purpose of each individual step, since these will commonly be individually unassailable but designed to produce the tax advantage in combination. I agree with this observation."

171. As can be seen, Lord Sumption referred to the "Halifax tests" which he articulated as:

- (a) "The first Halifax test: contrary to the purpose of the legislation", and
- (b) "The second Halifax test: transactions with the essential aim of obtaining a tax advantage".

The purpose of the legislation

172. It is not in dispute that the purpose of the legislation is to exempt the supply of education (including sport and physical education) by "eligible bodies" that are non-profit making, and

⁶ [2015] UKSC 37

on terms which require that any profit generated is re-invested in the business on the same basis.

Eligible Body

173. Mr Smith argued that SFTL was just the same as other eligible bodies which were widely used in the leisure sector.

174. Whilst I do not doubt that there are many charitable trusts, charities and legal models that qualify as eligible bodies, what I must consider is SFTL and its relationship with SFL. Who then provided the tuition services?

Did SFTL provide the tuition services?

143. Mr Simpson argues that the contracts demonstrate that the tuition is provided by SFTL.

175. Like the Tribunal in *Hearn t/a Hennerton Golf Club v Commissioners for Her Majesty's Revenue & Customs*⁷ (“Hearn”) at paragraph 102, I follow the ECJ’s statements in [81] of *Halifax* and the approach in *HMRC v Paul Newey trading as Ocean Finance*⁸. I have had regard to the terms of the two agreements between the parties but I do not treat them as conclusive in determining the identity of the supplier of the tuition services. Contractual terms that do not reflect economic and commercial reality may be disregarded for this purpose.

176. Therefore, if I find that the agreements purportedly implemented with effect from 1 June 2012 were a wholly artificial arrangement that did not reflect the economic and commercial reality of the relationship between the SFL and SFTL, then I will disregard those agreements in determining who made the supplies unless there are some special features that mean that I should not do so.

177. Therefore the starting point is these contracts and the test is to see if they represented the substance and the reality. As can be seen from the discussion about clause 5 of the TSA it is clear that the TSA certainly did not reflect the economic or the commercial reality.

178. Although the BTA purported to transfer the tuition services to SFTL, the reality was that, with effect from 1 June 2012, apart from book keeping entries between the companies and the creation of a bank account for SFTL (which was part of a group banking facility) nothing very much really changed. Customers continued to be attracted to the Snow Dome by SFL’s website and publicity where there was no mention that SFTL provided the tuition services. Customers paid SFL and although the receipt showed the exempt supplies there was no mention of SFTL. Further as I indicate above, the instructors had every reason to consider SFL to be their employer. SFL provides all of the administrative support.

179. I therefore find that the contractual framework falls to be ignored as being wholly artificial.

180. As I indicate at paragraph 88 above SFTL had no real visibility other than to Mr Smith and the companies that he controlled.

181. Objectively considered, I find that the reality is that the tuition services were provided by SFL at all relevant times. As with the contracts of employment, SFTL was a mere cipher.

182. The consequence is that because SFL certainly never has qualified as an eligible body and its objective is to be profit making, VAT should be charged on the tuition services.

Was the interpolation of SFTL done with the essential aim of obtaining a tax advantage?

⁷ [2014] UKFTT 1115 (TC)

⁸ Case C-653/11

183. What commercial reason might there have been for the establishment of SFTL? The contractual framework certainly was not commercial since it could only trade whilst insolvent.

184. Mr Smith has consistently argued that he was only doing what was normal in that industry. That is his subjective opinion. I must consider the matter objectively. I have no doubt that he persuaded himself that it was indeed normal practice in his and other leisure industries just as he persuaded himself that there was a saving of £100,000 in insurance and that that was equal to the other savings on NDDR and VAT. For the reasons set out at length above I simply do not accept that.

185. Originally, Mr Smith argued that it was required in order to achieve savings on insurance premiums. As I indicate, I have been unable to identify specific savings that are attributable to the insertion of SFTL in the supply chain. By contrast, there are very large VAT savings which would dwarf any insurance savings.

186. I have addressed at some length the arguments on the four advantages that it was alleged had driven the restructure and have found that exemption from VAT was the only driver that had any substance. Indeed Mr Smith fairly conceded that they "...had needed SFTL in order to survive..." .

187. The pricing of the tuition services was set at a level to fit with SFL's business plan. The charges made to SFTL by SFL are clearly not what was contractually agreed, they have not been negotiated at arm's length and most pertinently seem to be levied on a fairly haphazard basis. All that is done is to strip out the totality of the income arising in SFTL.

188. I find that the primary driver at all times has been to achieve exemption from VAT on tuition services. That was the essential aim.

Decision on the abuse argument

189. As Judge Sinfield said at paragraphs 100 and 101 in *Hearn*:

"...Arrangements that would allow the exemption of supplies that are normally chargeable to VAT would be contrary to the principle of fiscal neutrality and, therefore, contrary to the purpose of the VAT Directive.

101 We must assess the essential aim of the arrangements objectively and not by reference to the actual intentions of the parties. If the arrangements may have some explanation other than obtaining a tax advantage then the principle prohibiting abusive practices does not apply to prohibit that result. In ascertaining the aim of the arrangements, we can take account of any artificiality and any links of a legal, economic or personal nature between the persons involved."

I have adopted that approach.

190. I find that the essential aim or purpose of the creation and interposition of SFTL into the supply chain was to achieve a VAT advantage by securing categorisation of the charge within the VAT exemption and thus represented an abusive practice within the scope of the *Halifax* principle.

191. Accordingly, following *Halifax* at paragraph 94 the transactions "...must be redefined so as to re-establish the situation that would have prevailed in the absence of the transactions constituting that abusive practice."

192. The supplies of the tuition services accordingly fall to be redefined as supplies made by SFL. The preferred decision is upheld.

Is SFTL an eligible body and therefore exempt from VAT?

193. In the event that I am wrong on the abuse argument I must consider whether SFTL is an eligible body.

194. Group 6 in Schedule 9 VATA 94 exempts from VAT “The provision by an eligible body of ... education ... vocational training”. Note 1 provides *inter alia* that an “eligible body” is

- i a body which is precluded from distributing and does not distribute any profit it makes; and
- ii applies any profit made from supplies of a description within this Group to the continuance or improvement of such supplies”.

195. The first issue is that I find that it did not provide education so it cannot be an eligible body.

196. If I am wrong in that then I must consider the default position.

197. If the terms of the TSA had been implemented and SFTL did provide the tuition services then there is no doubt that SFTL would be an eligible body because

- (a) It provides education, and
- (b) Regardless of the terms of the Memorandum and Articles of Association prohibiting distributions it would never be in a position to do so because it would be totally incapable of making a profit.

However those terms were not implemented because the parties unilaterally varied them.

198. In *The Commissioners for Her Majesty’s Revenue & Customs v Stoke by Nayland Golf and Leisure*⁹ at paragraph 89, Judges Herrington and Poole state:-

“This judgment therefore confirms that the tribunal must undertake a multifactorial assessment of all of the surrounding circumstances so as to establish the aim of the company in question and that the subjective intention of those who establish and control the company are relevant but not conclusive factors in that context. If the tribunal finds that the company in question is part of a single integrated commercial organisation then that will be determinative of a finding that the company is not ‘non-profit-making’. The judgment also confirms that there are many different ways in which a distribution of profits can arise, but the fact that no profits are so distributed is not in itself conclusive of the question as to whether the organisation has the aim of enriching those who have a financial interest in it.”

199. I find that undoubtedly SFTL was incorporated with the sole intention of being an eligible body and that is why the Articles of Association prohibited it from paying or transferring its income or property to its members. However, Mr Smith is the only member of SFTL and as Lady Justice Arden, as she then was, indicated at paragraph 96 in *Messenger Leisure Developments Ltd*¹⁰ one possible contingency is that that prohibition could be removed at any time. Of course, that has not happened not least because Mr Smith knows that that would mean that SFTL would not then be an eligible body.

200. Although I understand Mr Simpson’s argument that it is SFL that subsidises SFTL because SFTL cannot afford to meet its full share of overheads, in my view that is simply because of the way that Mr Smith chooses to run both companies.

201. It is clear from the extensive findings in fact that Mr Smith controls both companies and is also the main shareholder in IFIL which owns SFL. SFTL’s primary *raison d’être* is to invoice for the tuition services without applying VAT, which SFL cannot do. By then remitting all of the gross income to SFL, SFL’s profits are maximised and it in turn pays significant management charges to IFIL.

202. For the reasons set out at length above, I find that the commercial and economic reality was that at all material times SFTL was part of a single integrated commercial organisation

⁹ [2018] UKUT 308 (TCC)

¹⁰ [2005] EWCA Civ 648

trading under the brand “Snow Factor”. SFTL had little or no visibility until 2019 which is long after the period with which this appeal is concerned. Nothing at all was at arm’s length.

203. I find that the fact that no profits are distributed is not a determining factor but rather that the aim was to enrich those with a financial interest, namely SFL, IFIL and Mr Smith.

Decision on whether SFTL is an eligible body

204. For all these reasons I find that SFTL was not an eligible body.

Decision

205. The appeal is dismissed and the Assessments upheld.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

206. 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.

ANNE SCOTT

TRIBUNAL JUDGE

RELEASE DATE: 31 OCTOBER 2019