



[2020] UKFTT 0001 (TC)

**TC07509**

*VALUE ADDED TAX – private tuition exemption – whether teaching kickboxing is “tuition...covering school ...education” – no, because kickboxing is not an activity which is commonly taught at schools or universities in the European Union – however, if it had been, kickboxing would not have been prevented from qualifying for the private tuition exemption by reason of being “purely recreational” – whether the scope of Item 2 of Group 6 to Schedule 9 of the Value Added Tax Act 1994 is consistent with the scope of the private tuition exemption in Article 132(1)(j) of Council Directive 2006/112/EC - yes*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**Appeal number: TC/2017/08170**

**BETWEEN**

**PREMIER FAMILY MARTIAL ARTS LLP**

**Appellant**

**-and-**

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

**Respondents**

**TRIBUNAL: JUDGE TONY BEARE  
MRS SHAMEEM AKHTAR**

**Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 26, 27 and 28 November 2019**

**Mr Dario Garcia of Mishcon de Reya LLP, for the Appellant**

**Mr John Brinsmead-Stockham, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

## DECISION

### INTRODUCTION

1. This decision relates to the treatment for value added tax (“VAT”) purposes of supplies of kickboxing classes by the Appellant. More particularly, the question addressed by this decision is whether those supplies should properly be treated as being exempt from VAT pursuant to Article 132(1)(j) of Council Directive 2006/112/EC (the “Directive”) and Section 31 of, and Item 2 of Group 6 of Schedule 9 to, the Value Added Tax Act 1994 (the “VATA”) or should instead properly be treated as being standard-rated for VAT purposes.

### BACKGROUND

2. The background to the appeal to which this decision relates is as follows:

(1) on 7 April 2017, the Respondents began a VAT enquiry into the Appellant’s business;

(2) as a result of that enquiry, on 11 August 2017, the Respondents issued a decision which concluded that:

(a) the supplies of kickboxing classes by the Appellant were not exempt from VAT and were instead standard-rated;

(b) as a result, the Appellant was liable to be registered for VAT with effect from 1 August 2011; and

(c) consequently, the Appellant was liable to account for VAT output tax in respect of its supplies of kickboxing classes for the period from 1 August 2011 onwards, amounting to £411,497.00;

(3) on 8 September 2017, the Appellant requested a statutory review of the Respondents’ decision;

(4) on 19 October 2017, the Respondents wrote to the Appellant to say that the conclusion of that review was that the Respondents’ original decision should be upheld, save only that the date of registration for VAT purposes should be 1 September 2011 instead of 1 August 2011, and that a consequent adjustment would be made to the VAT output tax assessment referred to in paragraph 2(2)(c) above;

(5) following the statutory review process, the parties entered into the alternative dispute resolution (“ADR”) process and, as recorded in a letter of 5 March 2018 from the Respondents to Mr Christopher Foran (a member of, and founder of, the Appellant), the result of the ADR process was that:

(a) the original VAT output tax assessment was cancelled; and

(b) the date of registration for VAT purposes was amended to 1 April 2018;

3. As a result of the process referred to above, the decision by the Respondents against which the Appellant is appealing is to the effect that:

(1) the kickboxing classes supplied by the Appellant were standard-rated for VAT purposes; and

(2) the Appellant was liable to register for VAT with effect from 1 April 2018.

4. The appeal in relation to the first of the above conclusions has been brought under Section 83(1)(b) of the VATA and the appeal in relation to the second of the above conclusions has been brought under Section 83(1)(a) of the VATA.

5. However, the arguments at the hearing related only to the first of the above conclusions. The Appellant accepts that, if the Respondents are correct in their conclusion that the kickboxing classes supplied by the Appellant were standard-rated for VAT purposes, then the Appellant was liable to register for VAT with effect from 1 April 2018.

#### **THE RELEVANT LEGISLATION**

6. Article 132(1)(j) of the Directive provides as follows:

“Member States shall exempt the following transactions...

(j) tuition given privately by teachers and covering school or university education”.

7. The UK has enacted the above provision in Section 31 of, and Group 6 of Schedule 9 to, the VATA.

8. Section 31, so far as it is relevant to this decision, provides as follows:

“31 Exempt supplies and acquisitions.

(1) A supply of goods or services is an exempt supply if it is of a description for the time being specified in Schedule 9...”

9. Item 2 of Group 6 to Schedule 9 of the VATA provides as follows:

“The supply of private tuition, in a subject ordinarily taught in a school or university, by an individual teacher acting independently of an employer”.

10. In relation to the above legislation, the parties do not agree on whether the provision of UK domestic law set out in paragraph 9 above – Item 2 of Group 6 to Schedule 9 to the VATA – properly reflects the terms of the relevant provision of the Directive set out in paragraph 6 above – Article 132(1)(j) of the Directive. The Respondents submit that, once the case law of the Court of Justice of the European Union (the “CJEU”) in relation to Article 132(1)(j) of the Directive is taken into account, the two are entirely congruent, whilst the Appellant submits that Article 132(1)(j) of the Directive has not been correctly transposed in Item 2 of Group 6 to Schedule 9 of the VATA because:

(1) the latter provision is limited to the tuition of “subjects” whereas no such limitation is contained within the former provision; and

(2) the latter provision is limited to subjects which are “ordinarily” taught in a school or university, whereas the former provision contains no such hurdle.

11. In the interests of completeness, we will address the disagreements described in paragraph 10 above at the end of this decision.

12. Having said that, ultimately, it is not necessary to resolve the disagreement in paragraph 10 above in order to determine the matter which is central to this appeal because the Respondents accept that Article 132(1)(j) of the Directive has direct effect in UK law and therefore the Appellant is entitled to rely on the terms of that provision in any event. In the

first instance, therefore, we will proceed below solely by addressing the question of whether the supplies of kickboxing classes by the Appellant as at 11 August 2017 (when the decision to which the appeal relates was made by the Respondents) properly fell within the ambit of Article 132(1)(j) of the Directive and we will not, initially at least, address the question of whether those supplies also fell within the ambit of Item 2 of Group 6 to Schedule 9 to the VATA.

13. The provisions concerning the requirements for VAT registration are set out in Schedule 1 to the VATA. However, as we have noted in paragraph 5 above, the manner in which those provisions apply is not in dispute in this case. Both parties accept that whether or not the Appellant was required to register for VAT with effect from 1 April 2018 is entirely dependent on whether or not the Appellant's supplies of kickboxing services as at 11 August 2017 were properly to be treated for VAT purposes as exempt or standard-rated. We therefore do not propose to set out the relevant provisions in Schedule 1 to the VATA in this decision.

### **THE RELEVANT CASE LAW**

14. From the above, it will be seen that the question which is central to this decision is whether the Appellant's supplies of kickboxing classes properly fell within the exemption in Article 132(1)(j) of the Directive – namely, whether it was “tuition given privately by teachers and covering school or university education”.

15. There are two initial points which we should make in that regard.

16. First, the Respondents accept that the Appellant's classes involved the provision of “tuition” and that the Appellant's instructors provided their tuition in those classes “privately”.

17. Secondly, it is no part of the Appellant's case that kickboxing is taught at universities.

18. It follows from those two points that the only question which we need to determine is whether the tuition given in the Appellant's kickboxing classes was tuition “covering school ...education”.

#### Decisions of the CJEU

19. There are three decisions of the CJEU which provide meaningful guidance on the scope of the exemption in Article 132(1)(j) of the Directive. These are, chronologically, *Haderer v Finanzamt Wilmersdorf* (Case C-445/05) (“*Haderer*”), *Ingenieurbüro Eulitz GbR v Finanzamt Dresden I* (Case C-473/08) (“*Eulitz*”) and *A&G Fahrschul-Akademie GmbH v Finanzamt Wolfenbüttel* (Case C-449/17) (“*A&G*”).

20. Before we summarise the principles which we consider emerge from those cases, we should make four preliminary points.

21. The first is that the first two of those cases – the decisions in *Haderer* and *Eulitz* – technically related to the provisions of the predecessor to Article 132(1)(j) of the Directive – that is to say, Article 13A(1)(j) of the Sixth Council Directive 77/388 of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (the “Sixth Directive”). However, it is common ground that there is no meaningful distinction between the relevant provision in the Sixth Directive and the relevant provision in the Directive and therefore, for the purposes of this decision, we will proceed on the basis that the guidance provided by the CJEU in relation to the earlier provision is valid also in relation to the latter provision. Indeed, the CJEU in *A&G* proceeded on that basis.

22. The second is that, as we have noted in paragraph 18 above, the matter which is at issue between the parties in the appeal is solely whether the Appellant's kickboxing classes at the time when the Respondents made their decision to which the appeal relates was tuition

“covering school ... education”. The Respondents accept that those classes involved “tuition” and that that “tuition” was being given “privately”. In *Haderer*, although the CJEU made various observations on the question which we need to address in this decision, the only question which it was specifically being asked to address by the referring national court in that case was whether the teacher in question was providing tuition privately, given that the teacher did not supply his services directly to the pupils themselves but did so instead to the body with whom he had his contractual relationship. Similarly, in both *Eulitz* and *A&G*, the referring national courts again asked the CJEU to express its views on the requirements which needed to be satisfied in order for there to be “tuition given privately” although, unlike *Haderer*, the referring national courts in those cases also asked the CJEU for its views on the question which is pertinent to the appeal of whether the tuition in question in each case could be said to be “covering school or university education”.

23. The third is that, in each of the above cases, the exemption in what is now Article 132(1)(j) of the Directive was being addressed in conjunction with the exemption in what is now Article 132(1)(i) of the Directive (and Item 1 of Group 6 to Schedule 9 of the VATA) and, because of that and the fact that both parties in this case made submissions in relation to how the ambit of that provision should affect the construction of Article 132(1)(j) of the Directive, we set out that provision in full below:

“(i) the provision of children's or young people's education, school or university education, vocational training or retraining, including the supply of services and of goods closely related thereto, by bodies governed by public law having such as their aim or by other organisations recognised by the Member State concerned as having similar objects”.

24. The fourth is that it will be seen that, for the most part, the CJEU in its decisions refers to the tuition of “activities” as opposed to the tuition of “subjects”. However, it is clear from the language used in paragraphs [26] and [29] in *A&G* that, in this context, the CJEU is treating those two words as synonymous and not making any distinction between the two. We allude to this in paragraph 170 below when we address the question of whether the UK legislation is compatible with the Directive but, for present purposes, it suffices to note that, for the sake of simplicity, we will refer hereafter in the body of this decision to “activities” and not to “subjects” or to “activities or subjects”.

25. Having made those preliminary points, we now turn to address the manner in which the three decisions set out above approached the question which is central to our determination.

26. As it is necessary in the course of this decision to refer in some detail to the opinions of the Advocate Generals in *Haderer* and *A&G* and the CJEU decisions in all three cases, we have, in the Appendix to this decision, for ease of reference, set out in full the pertinent extracts from those opinions and decisions. We will therefore confine ourselves in this section of the decision to a brief description of the cases and their conclusions in relation to the scope of the exemption in Article 132(1)(j) of the Directive.

27. We start by noting that, as was pointed out by the CJEU at paragraph [22] in *Haderer*, paragraph [28] in *Eulitz* and paragraph [20] in *A&G*, Article 132(1)(j) of the Directive does not include any definition of the concept of “tuition ... covering school or university education” within the meaning of that provision. However, the CJEU has expressed its views on the ambit of that concept, starting with the opinion of Advocate General Sharpston in relation to the question raised by the referring national court in *Haderer* – see *Stichting Regionaal Opleidingen Centrum Noord-Kennemerland/West Friesland (Horizon College) v Staatssecretaris van Financiën* (Case C-434/05 [2007] ECR I-4793).

*Haderer*

28. *Haderer* related to supplies by a man who, in a freelance capacity, provided assistance with schoolwork at one adult education institute and ran ceramics and pottery courses at another adult education institute and at a parents' centre.

29. In the pertinent part of her opinion in relation to *Haderer* (paragraphs [86] to [90]), the Advocate General said that:

(1) instruction in making ceramic or pottery articles was very common in schools throughout Europe and, although not the most academic of subjects, provided development in manual and artistic skills of a kind which was commonly pursued in school education;

(2) the concept of school or university education within the meaning of the exemption had to be given an EU definition and that definition should be relatively broad;

(3) although there needed to be a defining line between exempt tuition and “purely recreational activities of no educational value”, any subject or activity in which instruction was commonly given in schools or universities had in her view to fall within the scope of the exemption, regardless of whether it followed a strictly-defined programme or curriculum; and

(4) it seemed essential and inevitable that the term “school or university education” had to have the same definition in Article 132(1)(j) of the Directive as it did in Article 132(1)(i) of the Directive.

30. Echoing the views set out in paragraphs [88] and [89] of the opinion of the Advocate General in *Haderer*, in its decision in *Haderer*, the CJEU noted that “[while] it is unnecessary to produce a precise definition in this judgment of the Community concept of “school or university education” for the purposes of the VAT system, it is sufficient, in this case, to observe that that concept is not limited only to education which leads to examinations for the purpose of obtaining qualifications or which provides training for the purpose of carrying out a professional or trade activity, but includes other activities which are taught in schools or universities in order to develop pupils' or students' knowledge and skills, provided that those activities are not purely recreational” (see paragraph [26] in *Haderer*).

31. In relation to the proposition which had been made by the Commission in that case that, given that, had the tuition in question been provided at school, it would have fallen within what is now Article 132(1)(i) of the Directive, to refuse to allow the subject matter of the tuition to fall within the exemption in what is now Article 132(1)(j) of the Directive “would create a lacuna in the system established by those two provisions”, the CJEU noted, in paragraph [37] of its decision, that the mere fact that the two categories of exemption in Articles 132(1)(i) and 132(1)(j) of the Directive sought, *inter alia*, to promote “school or university education” as an activity which was in the public interest could not support the proposition that, together, those two provisions created a system capable of exempting from VAT activities which did not satisfy the conditions of one or other of them, the terms of which were to be interpreted strictly and covered only the activities which were listed, and described in detail, in those provisions.

32. In *Haderer*, the CJEU held that, although it was not necessary for the teacher to be supplying his tuition directly to the pupils themselves in order to avail himself of the exemption, he was entitled to the exemption only where such tuition was being given by him on his own account and at his own risk. It instructed the referring national court to decide the question of whether the teacher was doing so and also the question which is pertinent to this decision – and in relation to which the referring national court had not expressed any doubt – of whether the tuition in question “covered school or university education”.

*Eulitz*

33. *Eulitz* related to supplies made by a partner in a civil engineering firm in relation to the tuition of preventive fire protection. He gave lectures on that subject at an institute and he conducted examinations as a member of examination boards. In addition to his teaching and examination work, he had overall technical and organisational responsibility for some of the courses at the institute in the course of which he had to consult with the other lecturers as regards the content and dates of their courses and was the central point of contact for the participants on matters relating to those courses in general. The admission requirement for participants on all those courses was at least a university or higher technical college qualification as an architect or an engineer or proof of two years' professional practice in the field of fire protection planning, or, where appropriate, in the construction sector. Successful completion of the authorised expert course led, upon application, to the appointment of the graduate as an authorised expert in preventive fire protection by the relevant regulatory body.

34. As was the case in *Haderer*, the referring national court asked the CJEU to express its views on the issue of whether the teacher in that case was giving tuition “privately”. That was the second question which the CJEU was required to address. However, unlike *Haderer*, the referring national court also asked the CJEU for its views on the issue which is pertinent to this decision of whether the teaching and examination work which was being carried out by Mr Eulitz could be said to be “covering school or university education”.

35. In that regard, the CJEU said that:

(1) as had been noted in *Haderer*, the phrase “covering school or university education” was not limited only to education which led to examinations for the purpose of obtaining qualifications or which provided training for the purpose of carrying out a professional or trade activity, but also included other activities which were taught in schools or universities in order to develop pupils' or students' knowledge and skills, provided that those activities were not purely recreational;

(2) the word “tuition” in this context had to be understood as encompassing, essentially, the transfer of knowledge and skills between a teacher and pupils or students;

(3) it followed that the teaching which was one of the activities of Mr Eulitz could fall within the exemption as long as it included, essentially, the transfer of knowledge and skills between a teacher and pupils or students in the context of training for the purpose of carrying out a professional or trade activity;

(4) in that regard, no distinction should be made between teaching provided to pupils or students who were receiving initial school or university training and teaching provided to those already holding school or university qualifications who, on the basis of those qualifications, continued their professional training;

(5) although the terms used to specify the exemption in Article 132(1)(j) of the Directive had to be interpreted strictly, a particularly narrow interpretation of the term “school or university education” would risk creating divergences in the application of the VAT system from one Member State to another, as the Member States' respective education systems were organised according to different rules;

(6) divergences in the application of the VAT system from one Member State to another would be incompatible with the requirements of CJEU case-law; and

(7) it followed that the teaching carried out by Mr Eulitz could constitute “tuition...covering school or university education” and the activities of Mr Eulitz other than teaching – that is to say, his role as an examiner and his responsibilities in relation to the

devising of courses – could also constitute “tuition...covering school or university education” as long as they were also being carried out, essentially, in the context of the transfer of knowledge and skills between a teacher and pupils or students. It was for the referring national court to determine whether all of the activities of Mr Eulitz which were at issue in the proceedings fell within the term “tuition...covering school or university education”.

#### *A&G*

36. In *A&G*, the taxpayer was a limited liability company which operated a driving school. One of the questions which the referring national court asked the CJEU to address in that case was whether the concept of “school or university education” in Articles 132(1)(i) and 132(1)(j) of the Directive covered driving school tuition. In relation to that question, the Advocate General in *A&G* (Advocate General Szpunar) observed that:

(1) the exemption in Article 132(1)(j) of the Directive was a supplement to the exemption in Article 132(1)(i) of the Directive. It was intended to cover tuition occurring outside schools and universities, such as private tuition for students who did not attend school;

(2) this meant that the term “school or university education”, as used in Article 132(1)(j) of the Directive had to be interpreted in exactly the same way as the same term when used in Article 132(1)(i) of the Directive; and

(3) as driving tuition was not an element of the general education system in Germany or, so far as he was aware, elsewhere in the EU, driving tuition did not “form part of the school system of the individual Member States” and therefore driving tuition provided privately could not fall within the scope of the exemption in Article 132(1)(j) of the Directive (see paragraphs [16], [17] and [51] of the Advocate General’s opinion in *A&G*).

37. In turn, in its decision, the CJEU held that:

(1) in accordance with its decision in *Eulitz*, the term “school or university education” in the context of Article 132(1)(j) of the Directive was not limited solely to education which led to examinations for the purpose of obtaining qualifications or which provided training for the purpose of carrying out a professional or trade activity, but included other activities which were taught in schools or universities in order to develop pupils’ or students’ knowledge and skills, provided that those activities were not purely recreational;

(2) as the Advocate General had noted in his opinion in *A&G*, activities which were not purely recreational were likely to be covered by the concept of “school or university education” as long as the tuition was provided in schools or universities;

(3) although the driving tuition which was the subject of the decision covered a range of practical and theoretical knowledge, it nevertheless remained “specialised tuition which does not amount, in itself, to the transfer of knowledge and skills covering a wide and diversified set of subjects or to their furthering and development which is characteristic of school or university education”; and

(4) therefore, the driving tuition in question did not fall within the scope of the exemption in Article 132(1)(j) of the Directive.

38. We set out in the section headed “DISCUSSION” below our view on the manner in which the Advocate Generals’ opinions and the CJEU decisions in the above cases should properly be interpreted. It suffices to note at this stage that:



(1) although there is no definition of the phrase “covering school or university education” in the Directive, we are bound by the manner in which the CJEU has interpreted that phrase; and

(2) the CJEU decision in *A&G* is the most recent relevant decision and therefore, insofar as there might be any inconsistency between that decision and the decisions in *Haderer* and/or *Eulitz*, the decision in *A&G* should be preferred.

#### Decisions of the First-tier Tribunal (the “FTT”)

39. There are five relevant decisions of the FTT in which the principles set out in the CJEU cases described in paragraphs 19 to 38 above have been considered – *Cheruvier v The Commissioners for Her Majesty’s Revenue and Customs* [2014] UKFTT 007 (TC) (“*Cheruvier*”), *Hocking v The Commissioners for Her Majesty’s Revenue and Customs* [2014] UKFTT 1034 (TC) (“*Hocking*”), *Newell v The Commissioners for Her Majesty’s Revenue and Customs* [2015] UKFTT 0535 (TC) 0535 (“*Newell*”), *Tranter v The Commissioners for Her Majesty’s Revenue and Customs* [2015] SFTD 230 (“*Tranter*”), and *Cook v The Commissioners for Her Majesty’s Revenue and Customs* [2019] UKFTT 321 (TC) (“*Cook*”).

40. Those decisions are not binding on us but, insofar as they address issues and arguments which are relevant to this decision, they are of course of great relevance and we will refer to them in our analysis below. We would add that, at the hearing, we were referred by Mr Garcia to two other first-instance decisions in the UK which related to the application of the UK domestic legislation in this area – *Allied Dancing Association Limited v The Commissioners of Customs and Excise* [1993] VATTR 405 and *C Clarke Deceased and E Clarke A Clarke and H Clarke v The Commissioners of Customs and Excise* (Decision Number 15201 [1997] Lexis citation 886) – but, as those decisions both pre-dated the CJEU decision in *Haderer*, we have not accorded any weight to those decisions in reaching our conclusions, in common with the approach of the FTT in *Hocking* (see paragraph [57] in *Hocking*).

#### **FINDINGS OF FACT**

41. During the course of the hearing, we were presented with evidence from three witnesses – Mr Foran, who, as noted in paragraph 2(5) above, is a member of, and founder of, the Appellant, Mr Richard McDermott, a tax manager at Dennis and Turnbull Limited, a firm of chartered accountants and business advisers (“D&T”) who has provided VAT advice to the Appellant and other martial arts clients of D&T, and Mr Gerard Turvey, the managing director of NEST Management Limited, a company offering business, consulting and other support services predominantly to martial arts academies across the UK (“NEST”). In addition, we were provided with evidence in the form of various documents relating to kickboxing and the manner in which the Appellant conducted its kickboxing classes.

42. None of the evidence was disputed by either party and we should record that we found each of the witnesses to be credible and helpful and have no reason to doubt any of the matters of fact to which they testified.

43. Based on that evidence, we have made the following relevant findings of fact:

##### *The status of kickboxing*

(1) kickboxing has no single governing or supervisory body in the UK, unlike various other martial arts such as judo and taekwondo. Instead, there are various associations of academies but none of these is recognised as representing kickboxing as a whole in the UK;

(2) similarly, although negotiations to that effect with Sport England have commenced, kickboxing is not recognised as a sport by Sport England;

(3) martial arts as a whole can be divided into the “grappling” martial arts - such as judo and jiu jitsu - and the “striking” martial arts - such as karate and taekwondo. Kickboxing is a “striking” martial art. In terms of its physical attributes, kickboxing involves a mixture of boxing, karate and taekwondo and therefore includes all elements of the “striking” martial arts. However, in most “striking” martial arts, a participant is limited to using either his or her hands and feet, whereas a kickboxer is able to use his or her hands, feet, elbows and knees;

(4) notwithstanding the differences mentioned above between the “grappling” martial arts and the “striking” martial arts and between kickboxing and the other “striking” martial arts, all martial arts involve common physical attributes such as co-ordination and balance. Perhaps more significantly, all martial arts emphasise, in addition to the physical aspects of the various forms of martial arts, aspects of personal development such as self-discipline, respect for others, confidence, manners, teamwork and focus. In his evidence, Mr Foran explained that the significance of these features in the martial arts, including kickboxing, is somewhat greater than the significance of these features in other sports because it is part of the very essence of the teaching of the activity. For example, a child who is being coached in football might learn the value of self-discipline and teamwork by observation in the course of his or her participation in the relevant sport but a child who is being coached in a martial art would, if the coaching is being carried out properly, be taught expressly and overtly the importance of self-discipline and teamwork as desirable skills in their own right;

(5) in this regard, we were presented at the hearing with various articles which described the mental and social benefits of the practice of martial arts and a letter from a Mr Paul Smith, the deputy head of Brandles School, attesting to the benefits which the practice of martial arts in his school had had on the character development and behaviour of the pupils there. In addition, Mr Turvey in his evidence referred to the improvements which the practice of martial arts had had on the ability of autistic children to interact socially with others;

(6) in the opinion of Mr Turvey, who was not formally presented by the Appellant as an expert witness but who has been running NEST for almost 20 years and therefore has considerable knowledge of the martial arts world, “there is more to make the various forms of martial arts equal than not equal”;

*The Appellant and its activities*

(7) the Appellant was established by Mr Foran and his wife in 2000. It provides kickboxing classes across a range of age groups from children as young as 3 (little dragons) to adults who are in middle age;

(8) Mr and Mrs Foran also own a company called Mixed Martial Arts Limited which teaches certain martial arts other than kickboxing, such as thai boxing and jiu jitsu. As explained by Mr McDermott, all of the activities of the Forans which are considered to be standard-rated for VAT purposes, such as sales of merchandise and the teaching of those martial arts which are considered to be standard-rated for VAT purposes, are carried on by the company, whilst the activity which is considered to be exempt for VAT purposes (the teaching of kickboxing) is carried on by the Appellant. This is simply a matter of administrative convenience and does not change the aggregate VAT position of the businesses;

(9) at the time of the decision by the Respondents which is the subject of the appeal, on 11 August 2017, the Appellant had four instructors, including Mr Foran, spread over three full time locations and some 1600 students;

(10) in addition to his qualifications and trophies in kickboxing, Mr Foran has qualifications in, and has competed in championships relating to, an impressive number of other martial arts such as taekwondo, hapkido, arnis de mano, kenpo karate, Brazilian jiu jitsu and catch wrestling. Indeed, Mr Foran started his teaching career by teaching taekwondo;

(11) there is no formal qualification or external accreditation requirement to become a kickboxing teacher. For example, the instructors who work under Mr Foran are simply people whom Mr Foran considers to be sufficiently proficient in kickboxing to be able to teach it. However:

- (a) teaching materials are available for purchase from the Martial Arts Industry Association (“MAIA”) in the US;
- (b) Mr Foran, and, on occasion, some of his instructors, have attended courses run by a Mr David Kovar, who is a renowned martial arts instructor, which focus on how to teach martial arts;
- (c) Mr Foran has attended seminars given by motivational speakers such as Brian Tracey and Anthony Robbins;
- (d) the instructors attend short instructor training courses from time to time; and
- (e) although each instructor tailors his or her own lesson plans, the instructors, including Mr Foran, meet weekly to discuss teaching content and styles;

(12) just as there is no external accreditation for teachers, there is no formal external validation of the qualifications achieved by children who attend the Appellant’s classes and no codified general standard for those qualifications. The progression of pupils is measured by a system of grading or belts. Each age group is divided into classes for beginners, intermediates and advanced – each of which has five grades or belts - and classes for black belts. In relation to promotion to most of the belt levels, the children are assessed by Mr Foran alone. In relation to promotion to the various levels of black belt, Mr Foran asks instructors from other academies to assist him with the relevant assessments. However, in the case of each belt level, including the various levels of black belt, there is no formally-codified general standard which underlies the assessment. Instead, the process is essentially subjective although Mr Foran said that instructors tended to know broadly what standard was required to be met in order to obtain each level of belt. In other words, there is a broad coalescence of views across kickboxing as a whole in relation to the standards which need to be met in order to progress to each new level;

(13) for each group of children, there are 8-week teaching phases and, in the case of the younger children, there are weekly lesson plans and homework. Whilst attendance at the Appellant’s classes is voluntary, and occurs outside school hours, Mr Foran explained that a child would make no progress if he or she regularly failed to turn up for the classes which were appropriate for his or her age group and level of skill. Accordingly, Mr Foran said that children were encouraged to attend their designated classes at least twice a week and generally were happy to comply because they enjoyed it;

#### *The surveys*

(14) D&T, who act for a considerable number of martial arts academies, asked its clients to complete a survey in connection with the present proceedings. That survey asked the recipients, inter alia, whether they had taught martial arts at any schools within the past 12 months and, if so, the names of the schools and the martial arts that had been taught

there, whether the teaching was extra-curricular (for example at lunchtime or after school) or as part of the school day, whether the teaching was towards an exam or qualification or was just for the purpose of general fitness and whether the content had been set by the relevant martial arts academy or the relevant school;

(15) only 15 of the recipients responded to the survey in any detail and the key features of those responses are as follows:

(a) first, four of the respondents – Masters of Martial Arts LLP, Castle Blackbelt Academy, Shogun Karate LLP and Taekwondo NI – did not stipulate which of the martial arts they had taught at schools, and the names of the latter two of those academies strongly suggests that they were not teaching kickboxing;

(b) secondly, although Mr McDermott claimed that the survey responses showed that the respondents were teaching kickboxing at 51 schools in aggregate, both Mr Brinsmead-Stockham’s review of the relevant material and our review of the relevant material revealed that the respondents were teaching kickboxing at only 27 schools in aggregate; and

(c) thirdly, and perhaps most significantly, the survey responses indicated only that kickboxing had been taught on the premises of the specified schools. It was unclear how many of those schools featured kickboxing classes as part of the school day and, if so, whether kickboxing was part of the curriculum at the relevant school;

(16) NEST also sent a survey to its members in relation to the teaching of martial arts. That survey asked the recipients whether they had taught martial arts at any schools or universities within the past 12 months and, if so, the types of school or university, the time and frequency of the teaching, whether the teaching was extra-curricular and whether the recipient was involved in martial arts examinations for a school or university;

(17) only 21 of the 735 recipients responded to the effect that they had taught martial arts at a school within the school day and as part of the curriculum, of which only 6 – SESMA, Sean Connley, Matt Winsper, David Pawson, Wayne and Sue Baker and Philip Higgins - mentioned kickboxing and without making any reference to the number of schools or universities at which each of them taught it;

*The UK’s national curriculum*

(18) kickboxing did not form part of the UK’s national curriculum at the time of the decision to which the appeal relates. We were presented with the UK’s national curriculum in relation to PE from September 2013. It made no mention of kickboxing, even though other sports – such as badminton, basketball, cricket, football, hockey, netball, rounders, rugby and tennis - were mentioned specifically (see pages 22N et seq. of the documents bundle for the hearing (the “DB”) and page 22R of the DB specifically);

(19) similarly, lists of specific sports which were considered to be suitable for assessing students’ skills at PE GCSE and AS/A level respectively were set out on pages 22AK et seq. and 22AR et seq. of the DB and kickboxing did not appear on either of those lists; and

(20) we were presented with a report published in September 2019 by the Department of Education (the “DOE”) in relation to its review of the sports in which PE students could be assessed as part of the PE GCSE and AS/A level courses (see pages 22AW et seq. of the DB).

In the report, the DOE noted that, in order to be an accepted sport, the relevant sport had to be recognised by Sport England (see page 22AY of the DB).

Furthermore, on the same page, the DOE set out five criteria which needed to be met before a sport could be included in the list of accepted activities. The fifth of those criteria was that “it must be possible for the level of performance in activities to be realistically assessed by PE practitioners (teachers and moderators)” (see page 22AY of the DB).

The report then noted in relation to that fifth criterion that “[some] activities were found to have too many variations which would make it too difficult for teachers and moderators to reliably assess. Examples of such activities include the martial arts, such as judo, ju jitsu, karate, and taekwondo, as well as other activities such as fencing and wrestling” (see page 22BE of the DB).

Finally, the report included a list of certain activities which had been proposed in the course of the review for inclusion in the list of recognised sports, including those that had been rejected and the reason for the rejection (see pages 22BS to 22BW of the DB). Kickboxing was one of the sports that had been proposed but rejected on the basis that it was not recognised by Sport England, whilst four martial arts which were so recognised – judo, ju jitsu, karate and taekwondo – were rejected on the basis that they failed to meet the fifth criterion mentioned above.

## **DISCUSSION**

44. As noted in paragraph 3(1) above, the question which needs to be addressed in this decision is whether, as at 11 August 2017 (when the Respondents issued their decision to which this appeal relates), the Appellant’s kickboxing classes properly fell within the exemption in Article 132(1)(j) of the Directive – namely, did those classes amount to “tuition given privately by teachers and covering school or university education”.

### Common ground

45. Before setting out the issues which we believe the above question requires us to address in this decision, we think that it is necessary to state certain overarching principles which are both relevant in addressing those issues and common ground between the parties. These are as follows:

- (1) the burden of proof in this appeal is on the Appellant. In other words, the onus is on the Appellant to demonstrate, on the balance of probabilities, that, at the time when the Respondents issued their decision to which to this appeal relates, the Appellant’s kickboxing classes amounted to “tuition given privately by teachers and covering school or university education”;
- (2) there are some core principles by reference to which the exemption in Article 132(1)(j) of the Directive should be construed. These are as follows:
  - (a) the exemptions in Article 132 of the Directive are intended to encourage certain activities in the public interest. However, not every activity which is performed in the public interest falls within the ambit of the article – only those which are actually listed in the article do so (see paragraph [16] in *Haderer*, paragraph [26] in *Eulitz* and paragraph [17] in *A&G*);
  - (b) the exemptions in Article 132(1) of the Directive constitute independent concepts of EU law whose purpose is to avoid divergences in the application of the VAT system from one Member State to another (see paragraph [17] in *Haderer*, paragraph [25] in *Eulitz* and paragraph [18] in *A&G*); and

- (c) the terms used to specify those exemptions are to be interpreted strictly, since the exemptions constitute exceptions to the general principle that VAT is to be levied on all services supplied for a consideration by a taxable person. However, that requirement of strict interpretation does not mean that the terms used to specify the exemptions referred to in Article 132(1) of the Directive should be construed in such a way as to deprive them of their intended effect. Accordingly, those terms must be interpreted in the light of the context in which they are used and of the aims and the scheme of the Directive, having particular regard to the underlying purpose of the exemption in question (see paragraphs [18] and [37] in *Haderer*, paragraph [27] in *Eulitz* and paragraph [19] in *A&G*);
- (3) the nature of the supplies in this case should not be determined by reference to the subjective views of the recipients of the tuition of that which they were receiving but rather by an objective analysis of that which the average reasonable recipient of the tuition was receiving (see paragraph [68] in *Cook*);
- (4) there is no definition, either within Article 132(1)(j) of the Directive or more generally in the Directive, of the phrase “school or university education” (see paragraph [22] in *Haderer* and paragraph [20] in *A&G*);
- (5) however, the phrase should not be given a “particularly narrow interpretation” as this would give rise to the risk of creating divergences in the application of the VAT system from one Member State to another, as different Member States’ respective education systems differ (see paragraph [24] in *Haderer* and paragraph [36] in *Eulitz*);
- (6) similarly, the application of the exemption cannot depend on the interpretation of “school” or “university” in any particular Member State as the application of the exemption cannot depend on the meaning of those terms under any specific national domestic law (see paragraph [25] in *Haderer*);
- (7) thus, the phrase needs to be applied by reference to the EU as a whole and not by reference to any particular Member State. In other words, as noted by the CJEU in *A&G*, in enacting the exemption in Article 132(1)(j) of the Directive, “the EU legislature intended to refer to a certain type of education system which is common to all the Member States, irrespective of the characteristics particular to each national system...Consequently, the concept of 'school or university education' for the purposes of the VAT system refers generally to an integrated system for the transfer of knowledge and skills covering a wide and diversified set of subjects, and to the furthering and development of that knowledge and those skills by the pupils and students in the course of their progress and their specialisation in the various constituent stages of that system” (see paragraphs [25] and [26] in *A&G*);
- (8) activities which happen to take place at school premises but which take place outside school hours or at lunchtime and are therefore extra-curricular fall outside the scope of the exemption; and
- (9) the words “school... education” are to be taken as encompassing both:
- (a) education leading to examinations for the purpose of obtaining qualifications and education providing training for the purpose of carrying out a professional or trade activity; and
  - (b) “other activities which are taught in schools or universities in order to develop pupils’ or students’ knowledge and skills provided that those activities are not purely recreational” (see paragraph [26] in *Haderer*).

46. Based on the submissions which were made by the parties at the hearing, we think that we are required to address the following four questions:

(1) in reaching a view on whether or not the Appellant’s kickboxing classes “[covered] school or university education”, should we merely consider the existence, or prevalence, at schools in the EU, at the time of the Respondents’ decision to which the appeal relates, of kickboxing specifically or should we instead take into account the existence, or prevalence, at schools in the EU, at that time, of martial arts as a whole (“Question 1”)?

(2) subject to the answer to the question posed in paragraph 46(1) above, in order to conclude that tuition in kickboxing or martial arts as a whole “[covered] school...education”:

(a) is it merely necessary for kickboxing or martial arts as a whole to have been taught at a single school in the EU or is it instead necessary for kickboxing or martial arts as a whole to have been taught “commonly” at schools in the EU (“Question 2”)?

(b) subject to the answer to the question posed in paragraph 46(2)(a) above, has the Appellant established, on the balance of probabilities, that, at the time of the Respondents’ decision to which the appeal relates, kickboxing or martial arts as a whole were being taught at a single school in the EU or were being taught “commonly” at schools in the EU (“Question 3”); and

(c) is kickboxing or martial arts as a whole “purely recreational” (“Question 4”)?

47. We examine each of those questions in the paragraphs which follow.

### **Question 1 - kickboxing or martial arts as a whole?**

#### **The arguments of the parties in relation to Question 1**

48. Mr Garcia submitted that it would be overly restrictive to address the questions which are set out in paragraphs 46(2)(a) to 46(2)(c) above by reference solely to kickboxing, as opposed to martial arts as a whole. In support of his position, he pointed to the many similarities which existed between kickboxing and various other forms of martial arts.

49. For example, the evidence of Mr Foran was that:

(1) kickboxing involved the same underlying skills and techniques, including balance and co-ordination, as many other forms of “striking” martial arts;

(2) a significant part of kickboxing was the development of character in areas such as self-discipline, respect for others, manners, teamwork and focus and the same was true of many other forms of martial arts;

(3) there was a belt system for grading participants;

(4) although there were distinct competitions in relation to the various forms of martial arts, the same practitioners tended to compete in those distinct competitions so that there was a high degree of overlap between the various martial arts; and

(5) similarly, the same practitioners often taught more than one of the martial arts,

whilst Mr Turvey expressed the view that, as regards the relationship between kickboxing and other forms of martial arts, “there is more to make them equal than not equal”.

50. Mr Garcia said that, as was noted by the Respondents’ own earlier guidance from 2011, all that was necessary for an activity to be equated to other forms of activity was that it had to be “of a similar nature and level”. It did not need to be identical to those other forms. In this case, the difference between kickboxing and the other forms of martial arts should be equated to the difference between indoor cycling and outdoor cycling. They were essentially very similar but had slight differences.

51. In response, Mr Brinsmead-Stockham pointed out that there were significant differences between kickboxing and other forms of martial arts as was shown by the fact that:

- (1) some martial arts - such as judo and jiu jitsu - involved grappling with, as opposed to striking, an opponent;
- (2) even in relation to the other forms of “striking” martial arts, those generally were limited to the use of either hands and feet whereas kickboxers were able to use hands, feet, elbows and knees;
- (3) there were separate governing bodies for certain other forms of martial arts but kickboxing as yet had no governing body;
- (4) certain other forms of martial arts – such as ju jitsu, karate and taekwondo - were specifically recognised by Sport England whereas kickboxing was not so recognised; and
- (5) the grading and competition system for kickboxing was unique to kickboxing, as was shown by the fact that, in addition to his kickboxing black belt, Mr Foran had black belts in taekwondo, hapkido and kenpo karate and had competed in competitions relating to other martial arts such as the Taekwondo British Championships and the World Amateur Mixed Martial Arts Championship.

52. Moreover, the fact that Mr Foran taught only kickboxing through the medium of the Appellant and that the other forms of martial arts which Mr Foran taught were taught through the medium of a separate body corporate demonstrated that there was a clear distinction between kickboxing and other forms of martial arts.

53. In Mr Brinsmead-Stockham’s view, kickboxing was no more linked to other forms of martial arts than real tennis or squash was to tennis.

#### Our conclusion in relation to Question 1

54. The issue of how to define the activity to which the questions which are set out in paragraphs 46(2)(a) to 46(2)(c) above should be directed has been addressed in a number of cases before the FTT.

55. In *Cheruvier*, the FTT concluded that belly-dancing was not a sub-set of dancing for the purposes of defining the activity to which the relevant tests needed to be applied because:

- (1) whereas dancing as taught in schools and universities was taught to a published curriculum and was examined and assessed by reference to external standards, belly dancing was taught to a syllabus devised by the appellant and without reference to any external standard of assessment; and
- (2) belly dancing was not a component part of dancing as it was taught at schools and universities “other than in the very general sense that matters of body poise, posture and movement, certain techniques, and the response of the body to music are features of all dance performance”,

see paragraphs [53] and [54] in *Cheruvier*.

56. Similarly, in *Newell*, the FTT rejected the proposition by the appellant that motocross should be equated to mountain biking and bike motocross (or BMX), or even to cycling more generally, for this purpose (see paragraph [74] in *Newell*). Motocross necessarily related to motorcycles whereas, even if it were established that mountain biking and BMX were taught at schools, those activities related to unpowered bicycles.

57. In contrast, in *Cook*, the FTT held that “Ceroc is a methodology or an approach to teaching dance” and that therefore “teaching Ceroc should be considered as being the same as teaching dance



in a school or university” (see paragraphs [65] and [66] in *Cook*). In other words, the FTT in *Cook* held that Ceroc was “of sufficiently broad application to be regarded as the teaching of dance as a generic subject” (see paragraph [57] in *Cook*).

58. We do not find those earlier decisions to be of significant assistance in answering Question 1 in this decision because each case depends entirely on its own specific facts and the identification of the relevant activity in each case is very largely a matter of subjective impression.

59. However, for completeness, we should observe that we consider this question to be different from the question which was addressed by the FTT in paragraph [53] in *Hocking* and to which reference was made in paragraph [73] in *Newell*. In those passages of the earlier decisions, the question which was being considered was whether the private tuition in respect of which the exemption was being claimed needed to be “of a comparable standard, or of a similar nature or level” to the tuition which was being provided at schools and/or universities (see paragraph [53] in *Hocking*). In other words, in each of those two cases, the relevant FTT was making the valid point that it would involve an unwarranted gloss on the legislation to require the standard or level at which the private tuition in respect of which the exemption was being claimed to mirror that at which tuition in the same activity was being provided at schools and/or universities. In contrast, we are here dealing with the identification of the activity in respect of which the tests set out in paragraphs 46(2)(a) to 46(2)(c) above are to be applied. The FTT in *Newell* made exactly this point in paragraph [73] of its decision.

60. In considering this question, we have taken into account the opinion which was expressed by Mr Turvey in giving his oral evidence to the effect that, as regards the relationship between kickboxing and other forms of martial arts, “there is more to make them equal than not equal”. However, we do not think that this is determinative of the matter in question. Leaving aside the fact that Mr Turvey was not put forward by the Appellant as an expert witness, we think that the question should be answered not by identifying the similarities and differences between kickboxing and the other martial arts and then considering whether the similarities outweigh the differences, or vice versa, but rather by considering whether the differences between kickboxing and the other martial arts are substantial enough that kickboxing should be regarded as an independent activity in its own right. And, after adopting that approach, we have concluded that the differences in this case are so significant that it would be inappropriate to treat kickboxing as a sub-set of martial arts as a whole for this purpose.

61. Starting with the most obvious difference, it is in our view impossible to say that kickboxing should be regarded as a sub-set of martial arts as a whole when the “grappling” martial arts are so different from the “striking” ones. To demonstrate this, we asked Mr Garcia at the hearing whether his position was that, even if neither kickboxing nor any other form of “striking” martial art was taught at a single school or university in the EU, as long as judo was commonly taught at schools in the EU, kickboxing should fall within the scope of the exemption. He frankly conceded that that was the logical conclusion to be drawn from his position and we do not think that that conclusion can possibly be correct.

62. Moreover, even if one were to limit the generic category in question to the “striking” martial arts (as opposed to martial arts as a whole) and to suggest that kickboxing should be seen as a sub-set of those for this purpose, we consider that there are still meaningful differences between kickboxing and those other forms of “striking” martial arts. Those differences can be seen at the physical level in the fact that kickboxers are able to use hands, feet, elbows and knees and not just their hands and feet, but it extends to the fact that:

- (1) whereas kickboxing has no governing body, many of the other martial arts do have their own governing bodies;

(2) whereas kickboxing is not recognised by Sport England, several other martial arts are so recognised; and

(3) championships are held in each of the martial arts independently and the grading system in each of the martial arts is distinct.

63. We accept that a practitioner in one of the “striking” martial arts might prove sufficiently adept at another form of those arts to compete in the championships which are solely applicable to that other form or to teach that other form as well. However, we think that this is no different from saying that a person who is skilful at one racket sport such as tennis might well, with equal facility, be able to compete in and teach another racket sport such as squash or real tennis. The fact that there are certain common skills between two or more different sports does not mean that they should be regarded as part of a single set for this purpose.

64. Accordingly, we agree with the arguments made by Mr Brinsmead-Stockham on this subject. We agree with his view that the differences between kickboxing and the other forms of martial arts (or even just the “striking” martial arts) are sufficiently great that it would be wrong to treat kickboxing as a sub-set of martial arts as a whole or even of just the “striking” martial arts as a whole. In our view, kickboxing is no more to be equated with, say, taekwondo or karate than real tennis or squash is to tennis. This is very far from the example given by Mr Garcia of indoor and outdoor cycling. Both of those activities are, fundamentally, cycling and the differences between them are much less substantial than the differences between kickboxing and the other forms of martial arts.

65. Accordingly, we consider that the questions which are set out in paragraphs 46(2)(a) to 46(2)(c) above need to be addressed by reference to kickboxing specifically and not to martial arts as a whole, or even to the “striking” martial arts as a whole.

## **Question 2 - taught at a single school or taught “commonly”?**

### The arguments of the parties in relation to Question 2

#### *Introduction*

66. Mr Garcia submitted that the language used in Article 132(1)(j) of the Directive should not be construed as requiring the relevant activity to be taught at more than one school in the EU in order to qualify for the exemption. In his view, there was no “quantitative” hurdle in the language of the legislation and there was no basis in the relevant CJEU decisions for reading in any such hurdle.

67. In reply, Mr Brinsmead-Stockham conceded that there was nothing express in the language of the legislation to suggest that the relevant activity needed to be widely taught at schools and/or universities before the exemption could apply. However, he said that the phrase “covering school or university education” was most naturally construed as applying only to activities which were generally or commonly taught at schools and/or universities in the EU and not to activities which were taught at only a single school or university in the EU. He added that it was clear from the way in which the Advocate Generals in *Haderer* and *A&G* and the CJEU in those cases and in *Eulitz* had approached this question that that hurdle did need to be surmounted as a pre-condition to the exemption’s applying.

#### *Legal certainty*

68. In support of his position, Mr Garcia pointed out that including a “quantitative” hurdle in the test gave rise to uncertainty and placed an unreasonable burden on both the taxpayers who had to apply the test themselves in accounting for their VAT appropriately and the tax authorities who had to administer the tax.

69. First, if no-one knew the absolute number of schools and/or universities at which it was necessary for a particular activity to be taught before it could be said that that activity was within the scope of the exemption, then the threshold between standard-rating and exemption would necessarily be uncertain. Mr Garcia made the point that, whereas the Respondents had in the past accepted that tuition of an activity at at least 6 schools or universities was sufficient for the activity to fall within the private tuition exemption, the Respondents had changed their policy in that regard. It was therefore impossible for a taxpayer or indeed a tax authority to know how prevalent the tuition at schools and/or universities of a particular activity would need to be before the private tuition exemption could apply to the private tuition of that activity.

70. Secondly, even if there were to be an absolute number as the threshold for the private tuition exemption to apply, it would be impossible for a taxpayer to ascertain how many schools or universities in the EU were teaching the particular activity and even the tax authorities would find it difficult to know the position. In this case, for instance, where the question tended to be addressed within the Respondents at a local level and without referring every situation to a central point, there was bound to be a lack of information about the position in the UK as a whole, let alone the EU at large, in order to apply a “quantitative” hurdle with any certainty.

71. Mr Garcia submitted that that uncertainty would inevitably give rise to inconsistency both within each Member State and across the EU as a whole. He pointed out that Article 131 of the Directive - which introduced, inter alia, the exemptions in Article 132 of the Directive - expressly stated that the application of the exemptions within the Member States was to be “correct and straightforward” and that this could not be the case in relation to the application of the exemption in Article 132(1)(j) of the Directive to any particular activity if that were to be dependent on whether or not the relevant activity was “commonly” taught at schools and/or universities in the EU.

72. In reply, Mr Brinsmead-Stockham said that the response to this point could be seen in paragraphs [66] and [67] in *Hocking*. As was noted by the FTT in that case, “[a] requirement that a subject or activity must be commonly taught in schools and universities may lack the precision of a percentage threshold, but it is not unclear or imprecise so as to offend the principle of legal certainty”.

73. Mr Brinsmead-Stockham submitted that, as had been noted in paragraph [69] in *Tranter*, it was unnecessary for either a taxpayer or a tax authority to have to survey every school and university in the EU before being able to conclude that a particular activity was commonly taught. Instead, whilst there would be some difficult cases, in the vast majority of cases it would be clear which side of the line a particular activity fell. And, in those cases where an uncertainty existed, the matter could be determined by the courts in the relevant Member State.

74. Moreover, in many cases where private tuition in a highly-specialised activity was being provided, a clear answer might well be available in identifying that that highly-specialised activity was no more than a sub-set of a much wider commonly-taught activity. For example, private tuition in a highly-specialised branch of astrophysics which was not itself commonly taught at schools and/or universities in the EU could fall to be regarded as a sub-set of physics, the private tuition of which was obviously within the scope of the exemption. The answer in each case would be highly fact-specific and would depend on the degree to which the highly-specialised activity differed from other similar activities.

75. Finally, Mr Brinsmead-Stockham said that there was no CJEU case which stipulated that the scope of any exemption needed to be determined by reference to administrative efficiency.

*Relationship to Article 132(1)(i) of the Directive*

76. Mr Garcia submitted that Article 132(1)(j) of the Directive was intended to form part of an integrated package in relation to educational supplies with the paragraph preceding it, Article 132(1)(i) of the Directive, and should be construed with that in mind.

77. He went on to say that:

(1) Article 132(1)(i) of the Directive was covering tuition at schools whilst Article 132(1)(j) of the Directive was covering private tuition. The fact that the two paragraphs were intended to operate in tandem could be seen in:

(a) the reasoning of Advocate General Sharpston in paragraph [90] in *Haderer*, when she noted that it was essential and inevitable that the phrase “school or university education” must mean the same in both paragraphs; and

(b) the explanation in paragraph [49] of the opinion of Advocate General Szpunar in *A&G*, of how the two paragraphs in question were intended to operate together and the conclusion which he drew from that in paragraph [51] of his opinion, to the same effect as Advocate General Sharpston’s opinion mentioned above;

(2) Article 132(1)(i) of the Directive contained no “quantitative” hurdle. As a result, the teaching, at a school in the EU, of any activity qualified for exemption under that article even if the relevant activity was not being taught at any other school or university in the EU; and

(3) it followed that, as Article 132(1)(j) of the Directive was intended to mirror, in the sphere of private tuition, the scope of Article 132(1)(i) of the Directive, no “quantitative” hurdle should be imputed into Article 132(1)(j) of the Directive. Otherwise, it would be possible for an activity to be exempt when it was taught at a school or university in the EU but standard-rated when taught privately in the EU. This would distort the education market and would offend the principle of fiscal neutrality between similar supplies. It would thus be contrary to fiscal policy.

78. In response, Mr Brinsmead-Stockham said that there was no reason why the mere fact that the tuition of an activity at a single school in the EU qualified for the exemption meant that the same had to be true in relation to the private tuition of that activity in the EU. The two articles were dealing with different types of supplies. Article 132(1)(i) of the Directive was concerned with education at certain specified institutions. As such, it encompassed the provision of children or young people’s education, school or university education and vocational training and retraining, in each case by certain specified bodies. Moreover, it included both supplies of services and supplies of goods closely relating to those supplies of services. In contrast, Article 132(1)(j) of the Directive was concerned with private tuition, there was no need for the supplies in question to be made by one of the specified bodies and supplies of goods were not included.

79. In relation to both articles, it was necessary to read the relevant article strictly and to treat as falling within the relevant article only those supplies which were described in the article. This point had been made expressly by the CJEU in paragraphs [36] to [38] in *Haderer* and the differences between the two articles had been highlighted by the CJEU in paragraphs [32] and [33] in *Eulitz*.

80. Finally, Mr Brinsmead-Stockham pointed out that the principle of fiscal neutrality between similar supplies was not infringed by applying different criteria to determine the scope of the two articles. The VAT treatment of supplies of tuition at schools and universities was determined by reference to the criteria laid down by the terms of Article 132(1)(i) of the Directive whilst the VAT treatment of supplies of private tuition was determined by reference

to the criteria laid down by the terms of Article 132(1)(j) of the Directive. The two sets of supplies were conceptually different and the fact that each set was subject to its own rules was entirely compatible with the principle of fiscal neutrality.

#### *Innovation in education*

81. Mr Garcia submitted that imputing a “quantitative” hurdle into Article 132(1)(j) of the Directive would impose what he called a “fiscal drag” on the private tuition of new activities - because the private tuition exemption would be confined to established activities - and would therefore lag behind the exemptions which were accorded at schools and universities to more advanced or experimental activities. This would restrict diversity and prevent innovation and would therefore be contrary to educational and social policy.

82. In response, Mr Brinsmead-Stockham submitted that the encouragement of innovation in education was not a relevant principle or policy underlying the exemptions in Articles 132(1)(i) and 132(1)(j) of the Directive.

#### *The relevant case law*

83. Mr Garcia submitted that there was nothing in the existing CJEU decisions which made qualification for the private tuition exemption conditional on the teaching of the relevant activity at a wide range of schools in the EU as opposed to just one such school. He said that the Respondents’ position to the contrary was based on a misreading of the relevant decisions. The origins of this erroneous view were to be found in paragraphs [88] and [89] of Advocate General Sharpston’s opinion in *Haderer*.

84. In Mr Garcia’s view, all that the Advocate General was saying in those paragraphs was that instruction in making ceramic and pottery articles was very common at schools throughout the EU and any activity in which instruction was commonly given at schools and/or universities in the EU must necessarily fall within the scope of the exemption. The Advocate General was not saying that it was a necessary pre-condition to qualifying for the exemption that tuition in the relevant activity must commonly be given at schools and/or universities in the EU. She was merely saying that an activity which was commonly taught at schools and/or universities in the EU would necessarily qualify for the exemption.

85. In response, Mr Brinsmead-Stockham said that, although he recognised that Mr Garcia’s interpretation of the language used by Advocate General Sharpston in those paragraphs of her opinion was tenable, the better interpretation of those paragraphs was that she was saying that it was necessary, and not merely sufficient, for an activity to be commonly taught at schools and/or universities in the EU for the exemption to apply.

86. Mr Garcia said that the fact that there was no reference in the CJEU decision in *Haderer* to the requirement that instruction in the relevant activity must be commonly given at schools and/or universities in the EU demonstrated that his interpretation of those paragraphs was correct. The relevant paragraph of the CJEU decision in *Haderer* (paragraph [26]) merely referred to activities which “are taught at schools or universities”. Similarly, no mention was made in the CJEU decision in *Eulitz* of the requirement that instruction in the relevant activity must commonly be given at schools and/or universities in the EU. Instead, the CJEU merely referred back to the relevant paragraph of its decision in *Haderer*.

87. In response, Mr Brinsmead-Stockham submitted that, although the CJEU decisions in *Haderer* and *Eulitz* did not contain an express reference to the phrase “commonly taught”, the only proper construction of those decisions was that the CJEU was saying that the relevant activity needed to be commonly taught at schools and/or universities in the EU in order to qualify for the exemption. The CJEU’s use of the plural – “schools” and “universities” – in the relevant passages of the two decisions was indicative that that was the case.

88. Finally, Mr Garcia said that the reference in paragraph [29] of the CJEU decision in *A&G*, to the effect that driving tuition “[remained] specialised tuition which does not amount, in itself, to the transfer of knowledge and skills covering a wide and diversified set of subjects or to their furthering and development which is characteristic of school or university education” should not be read as imposing any “quantitative” hurdle as a pre-condition to the exemption. Instead, the phrase “which is characteristic of school or university education” should be construed as qualifying the words “the transfer” and the words “their furthering and development”, with the result that the CJEU in that paragraph was doing no more than saying that the transfer of knowledge and skills covering a wide and diversified set of subjects and the furthering and development of those knowledge and skills was “characteristic” of the education system in each Member State.

89. In response, Mr Brinsmead-Stockham said that the CJEU’s decision in *A&G* was consistent with his interpretation of the earlier two CJEU decisions. First, in its decision in *A&G*, the CJEU had again referred to “schools” and “universities” in the plural - see paragraphs [22] and [23] in *A&G*. In addition, the word “characteristic” in paragraph [29] in the decision was synonymous with the word “commonly”. In other words, in that part of its decision, the CJEU was describing activities which were characteristically, or commonly, taught at schools or universities and distinguishing those activities from driving tuition (which, as specialised tuition, was not commonly taught at schools or universities).

#### Our conclusion in relation to Question 2

90. We would start this section of our decision by saying that we are not persuaded by Mr Garcia’s submission to the effect that, just because:

- (a) Articles 132(1)(i) and 132(1)(j) of the Directive are to be construed together and form a single package in relation to teaching; and
- (b) the teaching of an activity at a single school in the EU falls within the former article regardless of whether or not the same activity is taught at any other school or university in the EU,

it must follow that the exemption in the latter article should be available for the private teaching of an activity which is taught at one school or university in the EU.

91. It seems to us that the fact that the two articles are clearly linked is merely authority for the proposition that there cannot be a different definition of “school” or “university” in the articles in question. That is all that Advocate General Sharpston was saying in paragraph [90] of her opinion in *Haderer* and Advocate General Szpunar was saying in paragraph [51] of his opinion in *A&G*.

92. Instead, we agree with Mr Brinsmead-Stockham that there is no reason why the application of the two provisions should not be capable of giving rise to a different outcome in the case of the private tuition of an activity which is taught at only a single school or university in the EU from the outcome which arises in the case of the teaching of that activity at the single school or university in the EU itself. In our view, that is exactly what the CJEU was saying in paragraphs [36] and [37] of its decision in *Haderer*. It is necessary to interpret each article strictly such that it includes only the activities which are described in the relevant article and the language used in Article 132(1)(i) of the Directive is very different from the language used in Article 132(1)(j) of the Directive.

93. In particular, it is noteworthy that, whereas Article 132(1)(i) of the Directive refers broadly to the provision of education for children or young people, school or university education and vocational training or retraining and includes certain supplies of goods but is limited to supplies by certain bodies, Article 132(1)(j) of the Directive is limited to supplies

“covering school or university education”, does not include supplies of goods and is not limited to supplies by certain bodies.

94. It is therefore perfectly feasible – and does not contravene the coherence of the two provisions as a whole or the principle of fiscal neutrality – that there might well be a different VAT treatment as between:

- (1) the tuition at school of an activity where that activity is not commonly taught at schools and/or universities; and
- (2) the private tuition of the same activity.

95. We also note that the term “covering school or university education” which is used in Article 132(1)(j) of the Directive seems to us to be more naturally construed as referring to the tuition of an activity which is taught generally or commonly (or, one might say, ordinarily) at schools or universities in the EU, and not to an activity which may be taught at a single school or university in the EU but which is not taught by others.

96. We are also not persuaded by Mr Garcia’s submissions in relation to legal certainty or the need to encourage innovation in education.

97. In relation to legal certainty, we agree with the FTT in *Hocking* when it said in paragraphs [66] and [67] that the requirement that the relevant activity be commonly taught is not sufficiently unclear or imprecise as to offend the principle of legal certainty. Of course there will be a small number of cases at the margins where the answer to the question of whether or not the exemption applies may be difficult to ascertain but that is not unknown in other areas of VAT law and, in the main, we believe that it will be obvious as to whether a particular activity is or is not commonly taught at schools and/or universities in the EU. Those cases where the application of the exemption is uncertain can be resolved by the courts in each Member State.

98. In relation to innovation in education, we were not presented with any evidence that this was a policy underlying the relevant legislation or why it would be considered desirable for the private tuition exemption to encompass marginal subjects which do not form part of the mainstream curricula at schools and/or universities in the EU. In this respect, we recognise, as did the FTT in paragraph [89] in *Newell*, that limiting the scope of the private tuition exemption to activities which are commonly taught at school penalises the private tutor who is an “early adopter” but we can find no principle or policy which gainsays this outcome.

99. Turning then to the relevant EU case law, although we agree that there is no express reference to “commonly taught” in the CJEU decisions in either *Haderer* or *Eulitz*, we do not think that either of those decisions can be read as saying that the teaching of the relevant activity at a single school or university in the EU can suffice to justify an exemption for the private tuition of that activity.

100. In the first place, it is worth observing that, in neither of those decisions was the CJEU addressing the issue of whether the exemption in question depended on the extent to which the activity which was the subject of the decisions was taught at schools or universities in the EU. Instead:

- (1) in *Haderer*, insofar as the CJEU was applying itself to the interpretation of the phrase “covering school or university education” – and, in *Haderer*, the sole question which had been referred to the CJEU was the meaning of the phrase “tuition given privately” – the focus of the CJEU was whether the activity which was the subject of the relevant decision involved leisure or recreation and therefore fell outside the word “education” – see paragraphs [23] and [26] in *Haderer*; and

(2) in *Eulitz*, insofar as the CJEU was applying itself to the interpretation of the phrase “covering school or university education” (the first question addressed to the CJEU in that case) and not the meaning of the phrase “tuition given privately” (the second question addressed to the CJEU in that case), the focus of the CJEU was whether the fact that the tuition which was the subject of the relevant decision was being provided to those who already had a university or higher technical college qualification meant that it could not fall within the phrase “covering school or university education” – see paragraphs [29] to [35] in *Eulitz*.

101. Against that background, it is not surprising that the CJEU merely referred in the two decisions to activities which were taught at schools or universities in the EU without expressly using the word “commonly”. We believe that, although the word “commonly” was not expressly used in those decisions as a qualification of the word “taught”, it was implicit in the decisions that the CJEU was referring to activities which were commonly or generally taught at schools or universities in the EU and not to activities the teaching of which was confined to one such school or university. The CJEU’s use of the plural – “schools” and “universities” – in the relevant passages tends to support that interpretation of what it was saying.

102. Similarly, although we agree that Mr Garcia’s interpretation of the language used by Advocate General Sharpston in paragraphs [88] and [89] of her opinion in *Haderer* is tenable, we do not think that that interpretation is to be preferred. Instead, we think that it is implicit in the relevant language – as it is, in our view, in the language used by the CJEU in its decisions in *Haderer* and *Eulitz* – that it is not merely the case that the private tuition of an activity which is generally or commonly taught at schools and/or universities in the EU qualifies for the exemption but also that there is a requirement for an activity to be generally or commonly taught at schools and/or universities in the EU before the private tuition of that activity can so qualify. We believe that the Advocate General was saying that the fact that an activity was commonly taught at schools and/or universities in the EU was a necessary condition to the availability of the exemption and not merely a sufficient condition to the availability of the exemption.

103. We consider that the CJEU’s decision in *A&G* supports this construction of the relevant provision.

104. The starting point is the statements which were made in paragraphs [35] to [38] of the opinion of Advocate General Szpunar in that case to the need to interpret Article 132(1)(j) of the Directive as “relating to the system of general education at primary, secondary and university level” and to his repeated references to the need for the relevant tuition to take place within that education system. In those passages, the Advocate General referred back to his description in paragraphs [13] to [17] of his opinion of the general education system within each Member State. It is apparent from those paragraphs that the Advocate General was referring in those passages to activities which were sufficiently common at schools and/or universities in the EU as to form part of the system at those schools and/or universities and not simply to activities which happened to be taught at a single school or university in the EU.

105. The CJEU in its decision in *A&G* also referred to “schools” and “universities” in the plural - see paragraphs [22] and [23] in the CJEU decision. In our view, if the CJEU had intended the private tuition exemption to extend to an activity which was taught at only a single school or university in the EU it would have said so in the paragraphs of its decision in which it was addressing this subject – paragraphs [20] to [30]. In addition, if the CJEU had had that intention, it would surely have instructed the referring national court to ascertain whether driving tuition was taught at at least one school or university in the EU before any conclusion could be reached in relation to the supplies of driving tuition in question. Instead, the CJEU did not refer any matter back to the referring national court – as it had done in *Haderer* (see paragraphs [27] and



[38] in *Haderer*) and in relation to the first question in *Eulitz* (see paragraph [38] in *Eulitz*). It simply concluded that supplies of driving tuition fell outside the scope of the exemption (see paragraph [30]).

106. Whilst we therefore believe it to be clear that the CJEU in *A&G* considered that the private tuition exemption depended on the satisfaction of the “quantitative” hurdle which is the subject of this Question 2, we confess that we do not find paragraph [29] of the CJEU decision to be at all enlightening in this context. This is because that paragraph is so difficult to construe. Taken at face value, the more natural construction is to read the paragraph in the manner favoured by Mr Garcia – which is to say that the phrase “which is characteristic of school or university education” is doing no more than describing the nature of the education systems within the Member States and saying that those systems involve transfers of knowledge and skills in a wide and diversified set of subjects and the furthering and development of those knowledge and skills. However, in our view, that cannot have been the meaning which the CJEU were intending to convey in that paragraph. Reading the paragraph in that way would involve giving insufficient weight to the reference to “specialised tuition” which appears in the middle of the paragraph in question and would mean that there was no explanation within the decision of why driving tuition should be treated as falling outside the exemption when it clearly does involve a transfer of knowledge and skills. This suggests to us that the CJEU in this paragraph was trying to say that driving tuition was not tuition of an activity which was typical of those education systems – that is to say that driving tuition was not commonly given within the education systems of the Member States. If the paragraph in question had referred to “a transfer of knowledge and skills” instead of “the transfer of knowledge and skills” that might have been clearer.

107. Nevertheless, for the reasons set out in paragraphs 103 to 105 above, even if paragraph [29] of the decision in *A&G* should be construed in the manner favoured by Mr Garcia, we think that the CJEU’s decision in *A&G*, taken as a whole, should be read in the manner advanced by Mr Brinsmead-Stockham.

108. In consequence, in our view, after considering the CJEU’s decision in *A&G* together with the earlier Advocate Generals’ opinions in that case and in *Haderer*, and the earlier CJEU decisions in *Haderer* and *Eulitz*, the answer to Question 2 is that the private tuition of an activity should be regarded as falling within Article 132(1)(j) of the Directive only if the relevant activity is commonly taught at schools and/or universities in the EU.

109. Finally, during the course of the hearing, Mr Garcia sought to persuade us that, regardless of our conclusion in relation to the language used in the Directive and the CJEU case law, since the UK legislation referred to “a subject ordinarily taught in a school or university” (our emphasis), the use of the singular before “school or university” in the relevant provision meant that an activity could still qualify for exemption under the UK legislation as long as it was taught at a single school or university in the EU. In Mr Garcia’s submission, the word “ordinarily” when it was used in that context meant no more than “regularly”, as opposed to “commonly”. We do not agree with Mr Garcia’s interpretation of the relevant language. Instead, we think that the phrase as whole is more naturally construed as requiring the relevant activity to be taught at a wide number of schools or universities in the EU and to be saying nothing about the frequency with which it is taught there. The use of the singular is entirely consistent with our preferred construction and our preferred construction is entirely consistent with our analysis of the language in the Directive, as interpreted by the CJEU.

### **Question 3 - is kickboxing taught commonly at schools in the EU?**

## The arguments of the parties in relation to Question 3

### *Introduction*

110. Mr Garcia submitted that, even if we were to conclude that:

- (1) the issue between the parties should be addressed by reference to the existence, or prevalence, at schools in the EU, of kickboxing alone, as opposed to martial arts as a whole; and
  - (2) it was necessary for the Appellant to establish, on the balance of probabilities, that kickboxing was “commonly” taught at schools in the EU,
- the Appellant had provided sufficient evidence to discharge that burden.

### *The relevance of the UK’s national curriculum*

111. Mr Garcia started by pointing out that the relevant question in this context was whether kickboxing was commonly taught at schools in the EU in practice and not whether kickboxing formed part of the national curricula of the education systems of the Member States. In Mr Garcia’s view, just as he accepted that the presence of a sport on the national curricula of the Member States was not a sufficient condition to qualify for the exemption, so too was it the case that the absence of that sport from the national curricula of the Member States did not of itself mean that that sport was not commonly taught at schools in the EU. Thus, the presence or absence of a sport from the national curricula of the Member States was not, in and of itself, legally determinative. This was the position adopted by the First-tier Tribunal in *Newell* (see paragraph [70] in *Newell*).

112. Mr Brinsmead-Stockham accepted that the crucial question in this context was not whether the relevant sport was included in the national curricula of the Member States but rather whether the relevant sport was commonly taught at schools in the EU in practice. However, he submitted that the fact that a sport was not part of the national curricula of the Member States would be strong prima facie evidence that the relevant sport was not commonly taught at schools in the EU.

113. In this context, Mr Brinsmead-Stockham referred to the material which is described in paragraphs 43(18) to 43(20) above as demonstrating that kickboxing had never been an accepted sport for the purposes of the UK’s national curriculum and had in addition been rejected for that purpose despite being proposed in the course of the recent review by the DOE. He submitted that the fact that kickboxing was not part of the UK’s national curriculum was strong evidence that kickboxing was not commonly taught at schools in the UK. And, as no evidence had been adduced by the Appellant to the effect that kickboxing was commonly taught at schools in Member States other than the UK, the inevitable conclusion must be that kickboxing was not commonly taught at schools in the EU.

### *The surveys*

114. In relation to whether kickboxing was commonly taught at schools in the UK, Mr Garcia relied on the results of the surveys which had been conducted by D&T and NEST.

115. As regards the D&T survey, Mr Garcia noted that:

- (1) 15 respondents to the survey taught one or more forms of martial arts at schools; and
- (2) those respondents together taught kickboxing at 27 of those schools.

116. In response, Mr Brinsmead-Stockham pointed out that:

- (1) the survey had been sent to 120 academies of which only 19 had responded. Since:
  - (a) the reason for the survey was to collect evidence that kickboxing was commonly taught at schools in the UK (and, by inference, in the EU) and therefore qualified for exemption from VAT;
  - (b) the recipients of the survey knew that that was the case; and
  - (c) it was clearly in the recipients' interests to assist in the survey insofar as they could,

the obvious inference from the low rate of responses was that those recipients who had not responded did not teach kickboxing at schools in the UK; and

- (2) in any event, the figure of 27 schools had been provided in response to the question "have you taught in any schools or universities?" and not "have you taught in any schools or universities as part of the curriculum at that school?". In other words, it was solely a question which related to the location at which the relevant respondent had taught and therefore included the tuition of kickboxing after school hours and at break times. It did not identify the number of schools at which kickboxing was taught as part of the school's curriculum.

117. As regards the NEST survey, Mr Garcia said that 21 of the respondents had said that they taught some form of martial arts during the school day as part of the school curriculum.

118. In response, Mr Brinsmead-Stockham made the same point as that set out in paragraph 116(1) above – namely that 21 was an extremely low figure given that the survey had been sent to 735 of NEST's clients and that they would have been anxious to help in the process to the extent that they could. He added that, of the 21 respondents in question, only 6 of them had referred to kickboxing specifically (as opposed to martial arts in general or other specific martial arts) in their responses.

119. More generally, in relation to both surveys, Mr Brinsmead-Stockham pointed out that:

- (1) the surveys had not been sent to any schools and the schools themselves would have been a more reliable source of information. Instead, it had been addressed solely to the martial arts academies;
- (2) none of the respondents to the surveys had been asked to attend the hearing to give evidence directly and therefore the survey responses were hearsay, not provided under oath and unaccompanied by any statements of truth; and
- (3) no evidence from kickboxing academies or schools in other Member States had been provided;

120. In reply to these points, Mr Garcia said that he accepted that the surveys were not beyond criticism. However:

- (1) it was not realistic to expect the surveys to have been sent to the schools themselves because the likelihood that a school would have been prepared to complete a survey was minimal; and
- (2) in any event, he considered that there was enough information in the surveys to discharge the burden of establishing that kickboxing was taught at a significant number of schools in the UK despite the fact that it was not part of the UK national curriculum.

### Our conclusion in relation to Question 3

121. We would start our conclusion to this question by observing that we agree with both parties that the fact that kickboxing does not form part of the national curriculum in the UK (or, for that matter, any other Member State) is not determinative. The relevant question is not what the national curriculum says but what actually happens in practice and it is perfectly possible for schools in the UK commonly to teach kickboxing even if kickboxing is not part of the UK's national curriculum.

122. However, we also agree with Mr Brinsmead-Stockham that the fact that kickboxing does not form part of the national curriculum in the UK gives rise to the presumption – which is entirely rebuttable – that schools in the UK do not commonly teach kickboxing. And, as no evidence has been adduced about the teaching of kickboxing at schools in Member States other than the UK, we are necessarily confined in answering this question to a consideration of the evidence in relation to schools in the UK.

123. The second point which we should make is that we do not consider the teaching of kickboxing which merely happens to take place within the premises of a school to be relevant in this context. That is simply a matter of location and, as Mr Foran said in his oral evidence, it is not uncommon for school halls to be used by martial arts academies outside school hours for teaching their classes.

124. The third point is more nuanced and relates to kickboxing classes taking place at schools as an extra-curricular activity before or after school hours or at lunchtimes. It is clear from paragraph [26] in *Haderer* that, in order for private tuition in an activity to qualify for the exemption in Article 132(1)(j) of the Directive, it is not necessary for that activity to be taught at schools or universities for the purpose of examinations or for the purpose of obtaining professional qualifications. There is also a third category of activities which is relevant in this context – namely, “activities which are taught... in order to develop pupils’ or students’ knowledge and skills”. In our view, although this means that there is no need for kickboxing to be taught at a school as an examination subject, kickboxing does still need to be taught at the school as part of the school’s curriculum and not simply taught as an extra-curricular subject outside the hours of tuition.

125. Applying the above principles to the evidence with which we have been presented, including the D&T and NEST surveys, we have concluded that that evidence falls some way short of establishing that, on the balance of probabilities, kickboxing is commonly taught at schools in the UK, leaving aside any inference which would need to be drawn from that about the prevalence of kickboxing tuition at schools in other Member States.

126. In particular, as regards the surveys, the problem with the responses to both surveys from the Appellant’s perspective is that they relate to a wide variety of martial arts and not kickboxing specifically and, given our conclusion in relation to Question 1, it is only kickboxing which counts in this context.

127. In addition, the responses to the D&T survey do not distinguish between schools at whose premises the relevant form of martial arts has been taught and schools at which the relevant form of martial arts has been taught within the school day and as part of the school curriculum. Only the latter category of school is relevant in determining this question and it is wholly unclear from the responses to the D&T survey whether there are any schools in this category.

128. It follows that, even before taking into account:

- (1) the inference which Mr Brinsmead-Stockham asked us to draw in relation to the low response rates to the two surveys;
- (2) the absence of any survey responses from the schools themselves; and

(3) the fact that we did not hear direct oral evidence from any of the respondents to the surveys,

we consider the survey responses to be wholly inadequate in establishing that kickboxing is commonly taught at schools in the UK. Furthermore, as no evidence has been provided to us that kickboxing is commonly taught at schools in Member States other than the UK, our conclusion is that the Appellant has failed to discharge the burden which it is required to discharge in order to secure the exemption from VAT which is at the heart of this appeal.

129. For the reasons set out above, the Appellant’s appeal fails.

#### **Question 4 – purely recreational?**

##### The arguments of the parties in relation to Question 4

###### *Introduction*

130. The answers to the first three questions mean that, strictly speaking, it is unnecessary for us to address the question of whether, if kickboxing had commonly been taught at schools in the EU, the Appellant’s kickboxing classes would still not have fallen within the ambit of Article 132(1)(j) of the Directive on the ground that kickboxing was purely recreational.

131. However, as both parties made extensive submissions at the hearing in relation to that question, we will address it in this section of our decision.

132. Both parties agreed that this question should be addressed by reference to an objective view of the supplies which were being made and not by reference to the motivation of any individual pupil.

###### *Relationship between educational and recreational*

133. In that regard, Mr Garcia submitted that the phrase “purely recreational” should be construed in accordance with the opinion of Advocate General Sharpston in *Haderer* as meaning an activity which was wholly recreational and had “no educational value” (see paragraph [89]). Thus, an activity which was only partly recreational and had at least some educational value did not fall outside the scope of the exemption.

134. In response, Mr Brinsmead-Stockham submitted that the CJEU in *Haderer* and the cases which followed that case had specifically not adopted the “no educational value” language used by Advocate General Sharpston in her opinion in *Haderer*. Instead, they had simply used the words “purely recreational” without further qualification. Moreover, the language used by the CJEU in paragraph [26] in *Haderer* clearly showed that the CJEU was envisaging that there were circumstances in which an activity could be “taught in schools or universities in order to develop pupils’ or students’ knowledge and skills” – which the CJEU in *Eulitz* and *A&G* synonymised with “a transfer of knowledge and skills between a teacher and pupils or students” – a process which necessarily had some educational value, and yet still be precluded from the private tuition exemption because it was “purely recreational”.

###### *“Purely recreational”*

135. Mr Brinsmead-Stockham added that, in determining whether an activity was purely recreational, one had to look objectively at the nature of the activity in the context of how it was taught at schools or universities and by way of private tuition – as had been suggested by the FTT in *Hocking* at paragraph [60] – and not at how the activity was taught at schools or universities – as had been suggested by the FTT in *Cook* at paragraph [51]. The former was consistent with the formulation used in paragraph [23] in *A&G* whereas the latter was not.

136. In this regard, Mr Brinsmead-Stockham endorsed the definition of “recreational” which had been set out in paragraph [53] in *Tranter* as “something which is carried out for the enjoyment

and satisfaction of the participants (including their satisfaction through performance rather than for their intellectual development in terms expanding or deepening their knowledge)” but said that that formulation should be read as being subject to the fact that:

- (1) as noted above, this question needed to be addressed objectively and not by reference to the subjective mindset of the participants in any particular case;
- (2) there was no distinction in this context between education in a practical discipline and education at an intellectual level. Both were equally valid elements of an education and therefore capable of qualifying for the exemption in the appropriate circumstances (see paragraph [62] in *Hocking*); and
- (3) the mere fact that one carried on an activity or subject diligently did not preclude that activity or subject from being purely recreational because an activity which was recreational could be studied with as much diligence and care by those who wished to excel in it as an activity which was educational (see paragraph [50] in *Cheruvier*).

137. Mr Brinsmead-Stockham also endorsed the statement made by the FTT in *Hocking* at paragraph [51] to the effect that “the mere presence of an element of teaching, however, minimal, cannot shift an activity, which is otherwise purely recreational, from one side of the line to the other. It is a question of degree”. In his view, one needed to examine the specific circumstances in each case to determine whether the tuition in question was merely facilitating a recreational activity or was educational in nature and only in the latter case did the exemption apply. In this case, the Appellant’s kickboxing classes fell on the wrong side of the line and were merely facilitating a recreational activity.

138. Mr Brinsmead-Stockham submitted that the nature of kickboxing was that:

- (1) it was a hobby in which participants took part voluntarily and during their free time. Attendance at a kickboxing class was not with a view to a career or for any instrumental purpose and participants were free to choose not to attend any particular class if they chose to do so;
- (2) it was primarily a social activity in which participants engaged with friends;
- (3) there was no or very little academic content – it was primarily practical with very little written work; and
- (4) it did not involve a serious course of study, there was no externally-imposed syllabus and there were no externally-moderated examinations – instead, each academy set its own syllabus and graded its pupils itself.

139. In response, Mr Garcia submitted that the fact that:

- (1) participants attended kickboxing in their free time and voluntarily;
- (2) kickboxing was a social activity; and
- (3) there was no or a limited amount of academic content,

did not mean, in and of itself, that kickboxing was purely recreational. That was the nature of all sports and the Respondents accepted that many sports fell within the private tuition exemption. Moreover, the fact that learning an activity was fun or entertaining did not mean, in and of itself, that the activity was purely recreational because people learned more if they were enjoying themselves (see paragraph [69] in *Cook*).

140. In addition, it was not true to say that participants were free to attend kickboxing classes whenever they wanted. In the first place, they couldn’t just turn up at any time – they had to attend a specific class which was appropriate for their age and their level of ability and which

was set out in a timetable. And, in the second place, there was a moral compulsion to attend classes regularly. It was unnecessary for there to be a legal obligation to attend classes in order for the exemption to apply because, if there were, no private tuition would be capable of qualifying for the exemption.

141. Moreover, although it was true that each academy was responsible for its own syllabus and for grading its own pupils, there was a well-understood objective standard to which each academy was working when it graded its own pupils.

142. Finally, Mr Garcia submitted that the evidence in this case showed that the tuition of kickboxing did have educational value because of the emphasis placed on the personal development of the pupils in addition to the physical aspects of the sport. In this regard, Mr Garcia referred us to the evidence referred to in paragraphs 43(4) and 43(5) above which described the mental and social benefits of the practice of martial arts in general.

#### Our conclusion in relation to Question 4

143. The reason why purely recreational activities are considered to fall outside the exemption in Article 132(1)(j) of the Directive has its origins in paragraph [89] in the opinion of Advocate General Sharpston in *Haderer* to the effect that “purely recreational activities of no educational value” should fall outside the exemption, a concept that was adopted by the CJEU in paragraph [26] in its decision in *Haderer* and then repeated in paragraph [29] in the CJEU decision in *Eulitz* and paragraph [22] in the CJEU decision in *A&G*.

144. However, it is worth noting that, whereas the Advocate General in *Haderer* referred to “purely recreational activities of no educational value” (our emphasis), the underlined words do not appear in the CJEU decision in *Haderer* or any of the subsequent CJEU decisions. In *Haderer*, the CJEU merely held that “activities which are taught in schools or universities in order to develop pupils’ or students’ knowledge and skills” fell within the exemption “provided that those activities are not purely recreational”. In both *Eulitz* and *A&G*, the CJEU simply repeated the same language as it had used in *Haderer* (see paragraph [29] in *Eulitz* and paragraph [22] in *A&G*). (Both of the latter two decisions described the “[development] of pupils’ knowledge and skills” as “the transfer of knowledge and skills between a teacher and pupils or students” (see paragraphs [32] and [33] in *Eulitz* and paragraphs [21] and [26] in *A&G*)).

145. It is clear from the CJEU decisions that it is possible for the tuition of an activity in a school to involve “a transfer of knowledge and skills” from teacher to pupils and yet still fall outside the exemption in Article 132(1)(j) of the Directive because the activity in question is “purely recreational”. But this begs the question of how tuition which involves a transfer of knowledge and skills can nevertheless still be purely recreational. As Mr Garcia pointed out in his submissions, the phrase “purely recreational” appears to be describing an activity which is wholly recreational. It is not enough for the activity simply to be “overwhelmingly recreational”, as, for example, the practice of yoga was held to be in *Tranter*. And yet how can an activity be wholly recreational if it involves a transfer of knowledge and skills from teacher to pupils? An obvious example of how that can be the case is where the knowledge and skills which are being transferred are simply those which enable the pupils to know how to carry on the recreational activity itself (as was pointed out in paragraph [52] in *Tranter*). But could it be that that is the only case where a transfer of knowledge and skills falls to be excluded from the private tuition exemption on this ground?

146. It is a pity that the CJEU did not provide the answer to this question. Certainly, the terms of the CJEU decisions themselves do not shed any light on that answer.

147. In *Haderer*, the referring national court had not asked the CJEU whether the activity which was being taught by Mr Haderer “[covered] school or university education”. Instead, it had

asked the CJEU whether Mr Haderer's tuition was "private". However, reference was made in paragraph [23] of the CJEU's decision to the argument made by the German tax authority to the effect that the ceramic and pottery classes which were being taught by Mr Haderer were "intended purely for leisure purposes". In the course of its decision, the CJEU noted that it was for the referring national court to decide whether those classes fell within its description of the exemption in paragraph [26] of its judgment. It did not make any comment on whether the classes might be excluded from the exemption by virtue of being "purely recreational" (see paragraph [27]).

148. In *Eulitz*, the relevant issues were whether the existing qualifications of the students precluded the exemption from applying to Mr Eulitz's teaching and whether Mr Eulitz's examining activity involved a "transfer of knowledge and skills" (see paragraphs [35] to [38]). The activity whose tuition and examination was at issue in *Eulitz* – fire prevention - was clearly in no way recreational.

149. In *A&G*, the CJEU alluded in its decision to the argument by the appellant that driving tuition was not purely recreational because it was directed at the acquisition of licenses and was therefore directed at the pupils' professional needs but the CJEU ultimately decided the case on the basis that driving tuition was specialised tuition which was not generally taught at schools or universities (see paragraphs [28] to [30]).

150. It follows that there is no binding authority from the CJEU which can guide us in identifying the point at which tuition involving a "transfer of knowledge and skills" should fall outside the private tuition exemption because it is "purely recreational".

151. We have considered whether the previous post-*Haderer* FTT decisions to which we were referred at the hearing shed any light on the answer to this question.

152. In *Cheruvier*, the FTT held that the belly-dancing tuition which was the subject of that decision, along with most other forms of dancing, was "inherently recreational" because it was "for the enjoyment and satisfaction of the participants...rather than for their intellectual development in terms of expanding and deepening their knowledge". It was therefore not educational in nature. However, the FTT noted that a form of dance "may move from the recreational to the educational where it is studied in the context of its history, cultural background and relevance, artistic aspirations and achievements, and critical appraisal" (see paragraph [50]). Thus, the FTT in *Cheruvier* distinguished between activities which were inherently recreational and activities which were inherently educational and held that an activity which was taught for the enjoyment or satisfaction of the participants fell within the former category and was therefore outside the scope of the exemption.

153. A similar distinction between the inherent nature of an activity as recreational or educational may be found in the FTT decision in *Newell*, where it was said by the FTT to be common ground that the tuition in motocross and motorcycle maintenance which was the subject of that case was educational and not recreational (see paragraph [48] in *Newell*).

154. The FTTs in *Hocking*, *Tranter* and *Cook* adopted a slightly different approach to this issue.

155. In *Hocking*, the FTT said that it did not consider it helpful to seek to label activities as inherently recreational or inherently educational. An activity which took place at school or university in respect of which there was no element of teaching fell outside the scope of the exemption. But, in addition, "the mere presence of an element of teaching, however minimal, cannot shift an activity, which is otherwise purely recreational, from one side of the line to the other. It is a question of degree." Thus, in the view of the FTT, it was necessary to determine whether, "having regard to the nature of the instruction, and the educational content or value of the activities, [the



relevant] activities as performed in the school or university are purely recreational” (see paragraph [51]).

156. On the facts of that case, the FTT held that the teaching of pilates which was the subject of that case was educational in character because the evidence showed that, in the case of certain schools, pilates formed part of the study, including to examination level, of physical education, that pilates was taught as a module of a university degree course and that Miss Hocking’s own tuition “[represented] more than the mere facilitation of a recreational activity, and that the transfer of knowledge and skills [was] of an educational character”. The FTT held further that it did not “consider that there [was] any principled distinction to be drawn between education in a practical discipline and education at an intellectual level. Both are equally valid elements of an education” (see paragraph [62]).

157. The same approach of considering the degree to which the tuition of a recreational activity could be said to be educational was adopted in both *Tranter* and *Cook*.

158. In *Tranter*, the FTT, after adopting the same definition of “recreational” as was set out in paragraph [50] in *Cheruvier*, held that:

- (1) the practice of yoga which was the subject of that case was “overwhelmingly recreational” but not “purely recreational” because it included the tuition of spiritual elements, knowledge of anatomy and physiology, how not to injure oneself and dietary considerations which complemented the practical tuition (see paragraphs [74] to [77]); but
- (2) nevertheless, it fell outside the private tuition exemption because the non-physical elements referred to in paragraph 158(1) above were “not of a degree that suggest that the yoga classes taught by the appellant are thereby educational” (see paragraphs [78] to [84]).

159. Thus, the FTT in *Tranter* recognised that it was possible for the tuition of an activity to be “recreational” but still educational and therefore within the scope of the exemption although the practice of yoga in that case was insufficiently educational to do so.

160. Similarly, in *Cook*, the FTT held that the Ceroc tuition which was the subject of that case had sufficient educational content that it was not “purely recreational”.

161. Each of the FTT cases referred to above attempted to locate the point at which activities involving a transfer of knowledge and skills fell outside the private tuition exemption by virtue of being purely recreational by reference to whether or not the activity which was the subject of the relevant appeal was educational. In *Cheruvier* and *Newell*, a distinction was drawn between activities which were inherently educational and activities which were inherently recreational. In contrast, in *Hocking*, *Tranter* and *Cook*, a slightly more nuanced approach was adopted in which the relevant FTT based its decision on whether the activity in question, although recreational, was sufficiently educational to qualify for the exemption.

162. We are not sure that seeking to identify the dividing line solely by reference to whether or not the relevant activity can be said to be “educational” is all that helpful because it is not entirely clear what “educational” means in this context. The Cambridge dictionary definition of “educational” is “providing education or relating to education” and the Cambridge dictionary definition of “education” is “the process of teaching or learning, especially in a school or college, or the knowledge that you get from this”. It seems to us to follow from those definitions that developing new knowledge and skills will always be educational, even if the knowledge and skills are in a practical discipline and not an academic discipline (as the FTT in *Hocking* pointed out in paragraph [62]). Thus, identifying the point at which the development of knowledge and skills becomes “purely recreational” solely by reference to whether or not the relevant activity is educational is not straightforward.

163. In *Tranter*, although the FTT applied the educational test referred to above, it added that relevant factors to consider in this regard were the degree of formality and structure in which the tuition occurred, whether the tuition was to standards which were externally set and examined and the environment in which the tuition took place.

164. We are inclined to agree that each of the factors to which reference is made in paragraph 163 above is relevant in determining whether a particular activity should be regarded as being “purely recreational”. In addition, picking up on Mr Garcia’s injunction that “purely recreational” should be confined to activities which are wholly recreational, we think that, if the tuition of an activity does more than provide enjoyment and satisfaction to its participants and in addition imparts to those participants some knowledge and skills which have a value beyond becoming better at the activity itself, then this too is a highly relevant factor. Ultimately, this is, in our view, a multi-factorial test and there is no clear dividing line for determining the answer. We believe that it is a matter of overall impression.

165. And, when one applies those various factors in the context of this appeal, kickboxing is a difficult case which could easily be regarded as falling on either side of the line.

166. On balance, we have reached the conclusion that the teaching of kickboxing is not “purely recreational”, even though it does have many recreational aspects. Our main reason for concluding that the teaching of kickboxing is not “purely recreational” is that, in common with the tuition of other forms of martial arts, the teaching of kickboxing actively and expressly promotes, in its participants, aspects of personal development such as self-discipline, respect for others, confidence, manners, teamwork and focus in addition to teaching various physical skills. We think that the fact that the teaching of kickboxing expressly includes the development of those skills means that it would be wrong to describe it as an activity which is purely recreational. We would add that the knowledge and skills which a participant derives from kickboxing would also be extremely helpful in terms of self-defence and that, viewed objectively, participants would be likely to place a value on that which extended beyond the enjoyment which they derived from attending classes.

167. In reaching this conclusion, we are cognizant of the fact that kickboxing has no single governing body and, correspondingly, that there is no externally-set syllabus and no externally-moderated grading system. The subjective nature of the grading system in certain martial arts was a factor in the DOE’s decision to exclude those martial arts from the UK’s national curriculum. Whilst we recognise that these features might tend to emphasise the recreational character of the sport, we have also noted that there is nevertheless a degree of formality to the process by which kickboxing is taught. Participants are divided into classes which reflect their respective abilities, there are specific course and lesson plans and participants progress up through the various levels of belt as they improve. Moreover, although there is some subjectivity in relation to promotion to the various levels, we accept Mr Foran’s evidence that there is a broad coalescence of views across the sport as a whole in relation to the standards which need to be met in order to progress to each new level. As a result of the above features, kickboxing is not an activity where a participant can simply “drop in” for a class as and when he or she feels like it. Instead, each participant is working towards being promoted to the next level and there is an element of moral compulsion in regular attendance at the right classes.

168. For the reasons set out above, if we had concluded in response to the first three questions that kickboxing was commonly taught at schools in the EU, then we would have upheld the Appellant’s appeal on the basis that the tuition of kickboxing should not fall to be precluded from qualifying for the exemption by virtue of being “purely recreational”.

169. Finally in relation to this question, whilst, strictly speaking, the Respondents’ practice is not relevant to the answer, we should note that, in their VAT Education Manual (which was

published on 19 March 2016 and updated on 28 January 2019), the Respondents stipulate that “[instruction] and coaching in sporting and recreational activities qualify as exempt private tuition, provided that the supply meets all the other necessary conditions”. Since the word “other” must be referring to each of the conditions which needs to be satisfied before the private tuition exemption can apply, other than the condition that the relevant activity must not be “purely recreational”, we find it difficult to reconcile this statement with the position which the Respondents have adopted in this appeal in relation to the “purely recreational” condition as it applies to kickboxing. Moreover, at the hearing, we were led to believe that there are a number of sports (for example, golf) in relation to which the Respondents accept that tuition qualifies for the private tuition exemption. We can see no basis for concluding that the recreational aspects of kickboxing are greater than any other sport. On the contrary, as we have said in paragraph 166 above, we think that kickboxing is less purely recreational than many other sports.

### **THE UK LEGISLATION**

170. Given that both parties were content for us to decide this appeal on the basis of the language used in Article 132(1)(j) of the Directive, there is no need for us to address the question of whether Item 2 of Group 6 to Schedule 9 of the VATA is compliant with that article. However, we believe that it is.

171. In our view, the word “subject” is capable of being construed widely in such a way as to include activities, such as sports and other largely recreational activities, which are not academic and so might otherwise be regarded as falling outside the meaning of the word if it were to be construed more narrowly. It is therefore apt to cover the same waterfront as the activities to which reference is made in the CJEU case law. In this regard, we agree with the observations made by the FTT in paragraph [62] in *Tranter*.

172. As for the word “ordinarily”, we agree with the conclusion set out in paragraph [56] in *Hocking* to the effect that that word is capable of being construed in such a way as to mean “commonly”. And, given that our conclusion in relation to Question 2 above was that the private tuition exemption in Article 132(1)(j) of the Directive is available only in relation to activities which are commonly taught at schools or universities in the EU, it follows that the two provisions are alike in that respect.

173. For the above reasons, we consider that there is no difference between the scope of the exemption in Article 132(1)(j) of the Directive and the scope of the exemption in Item 2 of Group 6 to Schedule 9 of the VATA.

### **CONCLUSION**

174. For the reasons set out above, we dismiss the Appellant’s appeal.

### **RIGHT TO APPLY FOR PERMISSION TO APPEAL**

175. 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.

**TONY BEARE**  
**TRIBUNAL JUDGE**

**RELEASE DATE: 3 JANUARY 2020**

## APPENDIX

### RELEVANT EXTRACTS FROM ADVOCATE GENERAL OPINIONS AND CJEU DECISIONS

#### *HADERER*

Advocate General Sharpston:

“[86] In its written observations to the Court, the defendant tax authority has put forward an objection of a specific kind to exemption in the case of Mr Haderer. His tuition in pottery, ceramics, and ‘help with schoolwork’, it contends, does not cover ‘school or university education’ as defined by various national provisions. In particular, it does not comply with the kind of predetermined programme that is a necessary feature of such education.

[87] I have already reached the view that Mr Haderer's tuition cannot qualify for exemption in any event. However, it seems to me important to make clear that it should not be excluded on the basis put forward by the tax authority.

[88] The referring court is itself satisfied that the areas covered by the teaching do indeed seem to constitute ‘school or university education’ and it is difficult to disagree with that assessment. On the one hand, ‘help with schoolwork’ must by definition fall within the category. On the other, instruction in making ceramic or pottery articles is very common in schools throughout Europe. Although not perhaps the most strictly academic activity, such training none the less provides development in manual and artistic skills of a kind which is commonly pursued in school education.

[89] The concept of school or university education within the meaning of the exemption must be given a Community definition. In my view, that definition should be relatively broad. If it were not, private tuition of many kinds designed to provide support for schoolchildren might find itself subject to VAT, contrary to the apparent intention of the exemption. There must of course be a defining line between exempt tuition and purely recreational activities of no educational value, but any subject or activity in which instruction is commonly given in schools or universities must in my view fall within the scope of the exemption, regardless of whether it follows a strictly defined programme or curriculum.

[90] Moreover, it seems essential and inevitable that the term ‘school or university education’ must have the same definition in subparagraphs (i) and (j). If one were to follow the tax authority's argument, certain kinds of education and training actually provided in public educational establishments would thus be excluded from the exemption in (i), with highly problematical results.”

The CJEU:

“[26] While it is unnecessary to produce a precise definition in this judgment of the Community concept of “school or university education” for the purposes of the VAT system, it is sufficient, in this case, to observe that that concept is not limited only to education which leads to examinations for the purpose of obtaining qualifications or which provides training for the purpose of carrying out a professional or trade activity, but includes other activities which are taught in schools or universities in order to develop pupils' or students' knowledge and skills, provided that those activities are not purely recreational...

[36] The Commission submits that to refuse to allow an exemption in situations such as that of the main proceedings is contrary to the common objective of the specific exemptions referred to in art [132](1)(i) and (j) of the [Directive], and would create a lacuna in the system established by the two provisions. According to the Commission, tuition given by private

teachers may indeed, in certain circumstances, be comparable to the education provided by the 'bodies' mentioned in art [132](1)(i).

[37] Nevertheless, the mere fact that the two categories of exemption in Article [132](1)(i) and (j) of the [Directive] seek, inter alia, to promote "school or university education" as an activity which is in the public interest cannot support the proposition that, together, those two provisions create a system capable of exempting from VAT activities which do not satisfy the conditions of one or other of them, the terms of which, as observed in paragraphs [16] to [19] of this judgment, are to be interpreted strictly and cover only the activities which are listed therein and described in detail."

*EULITZ*

The CJEU:

“[29] As regards the phrase 'school or university education'..., the Court, whilst refraining expressly from providing a precise definition, pointed out in paragraph [26] of the abovementioned *Haderer* judgment, that the phrase is not limited only to education which leads to examinations for the purpose of obtaining qualifications or which provides training for the purpose of carrying out a professional or trade activity, but includes other activities which are taught in schools or universities in order to develop pupils' or students' knowledge and skills, provided that those activities are not purely recreational.

[30] As regards in particular the term 'education', it should be borne in mind that the Court has held, in essence, that although the transfer of knowledge and skills between a teacher and students is a particularly important element of educational activity referred to in Article [132](1)(i) of the [Directive], it remains the case that that activity consists of a combination of elements which include, along with those relating to the teacher-student relationship, also those which make up the organisational framework of the establishment concerned (see, to that effect, *Horizon College*, paragraphs 18 to 20).

[31] The same term should be understood in a similar manner in the context of Article [132](1)(j) of the [Directive].

[32] However, as stated in paragraph [21] of this judgment, the exemption specified in the latter provision is not, however, specifically directed at 'school or university education' but, in language versions other than the German language version, at a related concept expressed in English as 'tuition ... covering' such education. The word 'tuition' in this context must be understood as encompassing, essentially, the transfer of knowledge and skills between a teacher and pupils or students.

[33] It follows that although teaching work performed in an education institute is not necessarily, in the absence of any other evidence, 'school or university education' within the meaning of Article [132](1)(j) of the [Directive], such work could, however, fall under 'tuition given privately by teachers and covering school or university education' within the meaning of that provision, in so far as that work includes, essentially, the transfer of knowledge and skills between a teacher and pupils or students in the context of training for the purpose of carrying out a professional or trade activity.

[34] On this point, as the German Government maintains, it is irrelevant to the interpretation of Article [132](1)(j) of the [Directive] that the formulation of the exemption in that provision is narrower – both in the German version and in the other language versions – than that of the

exemption provided for in Article [132(1)(i)], in particular in that, unlike the latter, Article [132(1)(j)] does not, in addition to school or university education, specifically mention training.

[35] As suggested by the national court itself, no distinction should be made for VAT purposes between education provided to pupils or students who are receiving initial school or university training and that provided to those already holding school or university qualifications who, on the basis of those qualifications, continue their professional training. The same applies to tuition covering that education.

[36] Besides, as the Commission points out, such a distinction may prove to be strained with regard to the subjects taught. Although the terms used to specify the exemption envisaged under Article [132](1)(j) of the [Directive] are, admittedly, to be interpreted strictly, a particularly narrow interpretation of 'school or university education' would risk creating divergences in the application of the VAT system from one Member State to another, as the Member States' respective education systems are organised according to different rules. Such divergences would be incompatible with the requirements of the case-law referred to in paragraph [25] of this judgment (see *Haderer*, paragraph [24]).

[37] From that perspective, as regards the activities of Mr Eulitz other than teaching in the strict sense, such as that of examiner, as well as the other activities referred to in paragraph [11] of the present judgment, it should be noted that such activities may be considered to be covered by the term 'tuition', within the meaning of Article [132](1)(j) of the [Directive], only in so far as they can be regarded as being carried out, essentially, in the context of the transfer of knowledge and skills between a teacher and pupils or students. It is for the referring court, if need be, to ascertain whether that is the case as regards some of the activities at issue in the main proceedings.

[38] Therefore, the answer to the first question referred must be that Article [132](1)(j) of the [Directive] must be interpreted as meaning that teaching work which a graduate engineer performs at an education institute established as a private-law association for participants in advanced training courses – culminating in an examination – who already have at least a university or higher technical college qualification as an architect or an engineer or who have an equivalent education can constitute 'tuition ... covering school or university education' within the meaning of that provision. Activities other than teaching in the strict sense can also constitute such tuition, provided that they are carried out, essentially, in the context of the transfer of knowledge and skills between a teacher and pupils or students and cover school or university education. It is for the referring court, if need be, to ascertain whether all the activities at issue in the main proceedings are 'tuition' covering 'school or university education' within the meaning of that provision.”

*A&G*

Advocate General Szpunar:

“[13] It has to be acknowledged that the authors of the Polish-language version of Directive 2006/112 displayed a certain creativeness in using the phrase ‘kształcenie powszechnie lub wyższe’ (general or higher education) in Article 132(1)(i). The overwhelming majority of the other language versions of that provision use an expression that should be translated instead as ‘school or university education’: ‘enseignement scolaire ou universitaire’ in the French version, ‘school or university education’ in the English version, ‘Schul- und Hochschulunterricht’ in the German version, and so on. Paradoxically, however, this terminological deviation makes it easier to understand the intention of the EU legislature as regards the scope of the exemption

laid down in Article 132(1)(i) of the directive in question. It relates to education which is general, that is to say, accessible to — and at lower levels even compulsory for — everyone, and general, in the sense that it covers a very broad range of knowledge, provided as part of the school and university system which exists in every Member State. That system, which in some countries is referred to as ‘national education’ and divided into stages which can be broadly defined as primary, secondary and higher, provides the general public with a broad set of knowledge and skills which allow them to operate successfully in modern society in both the private and professional spheres.

[14] This system of general education is characterised by, *inter alia*, the fact that it is tightly and comprehensively regulated by the provisions of law. Those provisions set out the structure of the school system and the way in which schools operate, the curriculum, teachers’ qualifications and, finally, the rules on obtaining certificates.

[15] In most Member States this education system is based on State schools in which tuition is often free or partially free. Where tuition is free, the problem of VAT obviously does not arise. However, the system of State schools may be supplemented by private schools which provide educational services for consideration. In some cases certain educational services are also provided for consideration in State schools. In principle, those services should also be subjected to VAT. However, to avoid, on the one hand, increasing the cost of such services to the recipients and, on the other, distorting competition between State and private sector bodies, the EU legislature introduced the exemption set out in Article 132(1)(i) of Directive 2006/112 for activity defined as school or university education. Therefore, that provision must be construed as meaning that where, in the system of general (school) or higher (university) education operating in a Member State, certain services are provided for consideration, whether by State schools (‘bodies governed by public law’, according to the terminology of that provision), or private schools (‘other organisations recognised ... as having similar objects’), those services are exempt from VAT.

[16] However, as is clear from the information contained in the request for a preliminary ruling in the present case, driving tuition is not an element of the general education system in Germany. As far as I am aware, that is also the case in the other Member States. It is a service consisting in the transfer of certain specialist skills which make it possible to obtain a licence to drive motor vehicles on public roads. That service is provided for consideration by specialised bodies such as A & G Fahrschul-Akademie, which — even though colloquially referred to as schools in some languages (‘auto-école’, ‘Fahrschule’) — do not form part of the school system of the individual Member States.

[17] Therefore, the concept of school or university education in Article 132(1)(i) of Directive 2006/112 does not cover services which do not come within the scope of the system of schooling in operation in the individual Member States and which are provided by bodies which do not form part of the school system of those States, such as driving tuition provided by specialist schools...

[33] The abovementioned parties to the proceedings deduce from that finding that every activity transferring knowledge or skills is subject to the exemption laid down in the provision under consideration, provided that it is not purely recreational. Since driving tuition clearly is not purely recreational by nature or design, that exemption must, they argue, also cover the activity of driving schools.

[34] However, in my opinion this reasoning is based on a selective interpretation of a passage of the Court's judgment which has been taken out of context.

[35] First, that interpretation passes over the words 'in schools or universities' contained in the passage cited. These words refer directly to the wording of current Article 132(1)(i) and (j) of Directive 2006/112, under which, in the language versions other than Polish, school or university education is to be exempt. As I have noted in points 13 to 17 of this Opinion, that term must be interpreted as relating to the system of general education at primary, secondary and university level. Consequently, it cannot be deduced from the cited passage of the Court's judgment that an activity which is not carried out within that system can be exempt, provided that it is not purely recreational.

[36] Secondly, in the abovementioned cases the Court did not rule on whether specific institutions form part of that education system, but on whether a particular teaching subject can be covered by the exemption. In this regard, the Court concluded that that exemption can cover not only subjects which form part of a basic course of tuition according to the curriculum in place in a particular type of school, but also other activities, provided that they are not purely recreational. However, that is all on condition that the tuition takes place within the education system in schools and universities and not entirely outside that system.

[37] It is true that in *Haderer* the Court allowed, it would appear, the exemption to cover tuition at a particular type of institution, which in Germany is known as a 'Volkshochschule' (adult education institute). It should, however, be noted that in that case the Court answered questions from the referring court which were based on the assumption that this kind of institution formed part of the system of school and university education for the purposes of Article 132(1)(i) and (j) of Directive 2006/112. Furthermore, the Court left it to the referring court finally to dispel the uncertainty raised by the tax authority that was a party to the main proceedings. Therefore, whilst it is possible to question whether the activities of a Volkshochschule form part of school or university education for the purposes of the provision in question, in my view there is no doubt that the activities of driving schools do not form part of that system.

[38] Finally, it may be concluded from the case-law of the Court that the concept of school or university education for the purposes of Article 132(1)(i) and (j) of Directive 2006/112 should not be interpreted by reference to the education systems in the individual Member States since those systems may differ from one another, and this would result in differing application of the exemptions laid down in those provisions, contrary to the objective of the directive in question. However that rule cannot be regarded as absolute since Article 132(1)(i) of that directive itself inevitably refers to national education systems, stating that the exemption is to cover activities carried out 'by bodies governed by public law having such as their aim or by other organisations recognised by the Member State concerned as having similar objects'. In the context of the present case, that finding of the Court means, in my view, merely that the fact that driving schools bear the name 'school' in a particular language does not automatically mean that they are recognised as providing school or university tuition for the purposes of the provision in question...

[49] [Article 132(1)(j) of the Directive] constitutes a supplement to the exemption laid down in Article 132(1)(i) of that directive. School and university education is generally provided by institutions competent to do so, broadly speaking schools and higher education establishments. Sometimes, however, certain supplementary classes, although they concern the same topics, are provided individually to specific students by individual teachers outside the normal timetable at a particular school. Furthermore, some students do not, for health or other reasons,



receive tuition in the normal manner, that is to say at school, but rather individually, often at home. Such lessons would not be covered by the exemption laid down in Article 132(1)(i) of Directive 2006/112 as they are not provided by bodies governed by public law but by other organisations. Article 132(1)(j) of the directive in question serves to fill that gap.

[50] In my view, that gives rise to two conclusions.

[51] Firstly, the term ‘school or university education’ used in Article 132(1)(j) of Directive 2006/112 should be interpreted in exactly the same way as the term used in subparagraph (i) of that paragraph (1). Therefore, if, in accordance with my proposed answer to the first question referred for a preliminary ruling, the concept of school and university education does not cover driving school instruction, that applies both to Article 132(1)(i) and (j). That therefore means that schools providing such tuition cannot be covered by the exemption laid down in the latter provision, regardless of the other conditions contained therein...”

The CJEU:

“[20] It must be recalled that Article 132(1)(i) and (j) of that directive contains no definition of the concept of 'school or university education'.

[21] The Court has, however, first, taken the view that the transfer of knowledge and skills between a teacher and students is a particularly important element of educational activity (judgment of 14 June 2007, *Horizon College*, C-434/05, EU:C:2007:343, paragraph 18).

[22] Second, the Court has stated that the concept of 'school or university education', within the meaning of Directive 2006/112, is not limited solely to education which leads to examinations for the purpose of obtaining qualifications or which provides training for the purpose of carrying out a professional or trade activity, but includes other activities which are taught in schools or universities in order to develop pupils' or students' knowledge and skills, provided that those activities are not purely recreational (judgment of 28 January 2010, *Eulitz*, C-473/08, EU:C:2010:47, paragraph 29 and the case-law cited).

[23] In that regard, it must be noted, as the Advocate General observes in point 35 of his Opinion, that, in accordance with that settled case-law, activities which are not purely recreational are likely to be covered by the concept of 'school or university education' as long as the tuition is provided in schools or universities.

[24] Thus, the concept of 'school or university education' within the meaning of Article 132(1)(i) and (j) of Directive 2006/112 covers activities which are different both because of their specific nature and by reason of the framework in which they are carried out (see, to that effect, judgment of 14 June 2007, *Horizon College*, C-434/05, EU:C:2007:343, paragraph 20).

[25] It follows that, as the Advocate General observes in points 13 to 17 of his Opinion, by that concept, the EU legislature intended to refer to a certain type of education system which is common to all the Member States, irrespective of the characteristics particular to each national system.

[26] Consequently, the concept of 'school or university education' for the purposes of the VAT system refers generally to an integrated system for the transfer of knowledge and skills covering a wide and diversified set of subjects, and to the furthering and development of that knowledge and those skills by the pupils and students in the course of their progress and their specialisation in the various constituent stages of that system.

[27] It is in the light of those considerations that the Court must examine whether driving tuition provided by a driving school, such as that of the applicant in the main proceedings, for the purpose of acquiring driving licences for vehicles in categories B and C1 referred to in

Article 4(4) of Directive 2006/126 may be covered by the concept of 'school or university education' within the meaning of Article 132(1)(i) and (j) of Directive 2006/112.

[28] In the present case, the applicant in the main proceedings submits that the driving tuition which it provides covers the transfer of both the practical and theoretical knowledge necessary for the purpose of acquiring driving licences for vehicles in categories B and C1 and that the objective of such tuition is not purely recreational, since possession of such licences is liable to meet, inter alia, professional needs. Therefore, the tuition provided for that purpose is, it argues, covered by the concept of 'school or university education' referred to in Article 132(1)(i) and (j) of Directive 2006/112.

[29] It should be noted, however, that, even if it covers a range of practical and theoretical knowledge, driving tuition provided in a driving school, such as that at issue in the main proceedings, nevertheless remains specialised tuition which does not amount, in itself, to the transfer of knowledge and skills covering a wide and diversified set of subjects or to their furthering and development which is characteristic of school or university education.

[30] In the light of the foregoing, the answer to the first question is that the concept of 'school or university education', within the meaning of Article 132(1)(i) and (j) of Directive 2006/112, must be interpreted as not covering motor vehicle driving tuition provided by a driving school, such as that at issue in the main proceedings, for the purpose of acquiring driving licences for vehicles in categories B and C1 referred to in Article 4(4) of Directive 2006/126.”