



Appeal number: FTC/36/2013

VAT – whether supplies of catering and entertainment services to members of the public are exempt as supplies closely related to the provision of education – Sixth VAT Directive, Article 13A(1)(m); Principal VAT Directive, Article 132(1)(i) – VATA 1994, Sch 9, Group 6, Item 4

**UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER**

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

- and -

BROCKENHURST COLLEGE Respondent

**TRIBUNAL: JUDGE ROGER BERNER
 JUDGE JUDITH POWELL**

Sitting in public at 45 Bedford Square, London WC1 on 14 January 2014

Michael Jones, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellants

Laura Poots, instructed by VATangles LLP, for the Respondent

DECISION

1. Brockenhurst College (“the College”) carries on the business of providing
5 education to its students, including the teaching of courses in (a) catering and
hospitality, and (b) performing arts.

2. For the purpose of enabling the students enrolled in the course related to
catering and hospitality to learn skills in a practical context, the College runs a
restaurant which is now called “MJ’s”, after a former principal of the College. The
10 catering functions of the restaurant are all undertaken by students of the College,
under the supervision of their tutors, and members of the public attend the restaurant
and pay for their meal, the charge being around 80% of the cost of the meal.

3. Similarly, for the performing arts course, to give practical experience to those
students enrolled on those courses, the College – again through those students – stages
15 concerts and performances for paying members of the public.

4. The issue in this appeal, which is brought with permission of the First-tier
Tribunal (“FTT”), is whether the supplies the College makes of restaurant and
entertainment services (that is to say the supplies that are made by the College to
those members of the public dining in the restaurant or attending the performances)
20 are, as the College claims, exempt for VAT purposes or, as HMRC maintain, are
standard-rated. The FTT held that they are exempt.

The facts

5. Save in one particular respect, which we shall refer to later, there was no dispute
on the facts. Very little by way of amplification is required to the brief introductory
25 summary above. However, it is helpful if we just refer to the following findings of
the FTT:

(1) The training restaurant is required to meet the educational needs of the
students taking catering and hospitality courses. The restaurant is tantamount to
a classroom for such students.

30 (2) The training restaurant is not open to the public as such. The College
operates a database of local groups and individuals who may wish to attend the
restaurant. They are informed of events at the College through a newsletter
created by the hospitality department.

(3) In relation to the training restaurant, the College requires there to be a full
35 restaurant (serving between 30 and 40 people) for two sittings on the same day
and two different groups of students to obtain maximum benefit for the students.
If not, the meal is cancelled.

(4) The performance of concerts and plays within the performing arts courses
performs, for those students on those courses, a similar function to that of the
40 training restaurant.

(5) Likewise, for the performances, the audience is captive in the sense that they are usually friends and family of the students or from an established database of people registered with the College.

6. There was no argument that there was any difference in treatment as between the restaurant services and the entertainment services. The argument was on the proper application to each of the provisions regarding exempt supplies in the area of education under EU and domestic law.

The law

7. The issue in this appeal arises from a voluntary disclosure made by the College on 5 January 2010, which included a claim for repayment of output tax on the ground that the supplies relevant to this appeal were exempt. The voluntary disclosure related to other matters as well, and related to VAT periods 01/06 to 10/09. The output tax claim related to periods 04/06 to 10/09.

8. We mention this background only to make the point that the period in question thus spanned the application of both the Sixth VAT Directive (77/388/EEC) and its successor the Principal VAT Directive (2006/112/EC), which came into force on 1 January 2007. The parties were agreed that nothing turned on this change, and accordingly, and in common with the way the arguments were presented to us, we shall refer, when considering the EU law position, only to the Principal VAT Directive.

9. Chapter 2 of Title IX of the Principal VAT Directive contains exemptions for certain activities in the public interest. Among those exemptions is that contained in Article 132(1)(i) (formerly Article 13A(i) of the Sixth VAT Directive):

1. Member States shall exempt the following transactions:

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...

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(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;

10. There are a number of restrictions on the application of the exemption. Those applicable to the nature of the supply are contained in Article 134, which provides:

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The supply of goods or services shall not be granted exemption, as provided for in points ... (i) ... of Article 132(1), in the following cases:

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(a) where the supply is not essential to the transactions exempted;

(b) where the basic purpose of the supply is to obtain additional income for the body in question through

transactions which are in direct competition with those of commercial enterprises subject to VAT.

11. The exemptions now found in Article 132 have been implemented into UK law by s 31 of the Value Added Tax Act 1994 (“VATA”), which provides that a supply of services is an exempt supply if it is of a description for the time being specified in Schedule 9 VATA. Items 1 and 4 in Group 6 of Part II of that Schedule relevantly provide:

GROUP 6 — EDUCATION

Item No

- 10 1. The provision by an eligible body of—
- (a) education;
 - ...
 - (c) vocational training.
 - ...
- 15 4. The supply of any goods or services (other than examination services) which are closely related to a supply of a description falling within item 1 (the principal supply) by or to the eligible body making the principal supply provided—
- (a) the goods or services are for the direct use of the pupil, student or trainee (as the case may be) receiving the principal supply; and
 - (b) where the supply is to the eligible body making the principal supply, it is made by another eligible body.
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12. In this case there is no dispute that the College is an eligible body. Nor, although this was an issue before the FTT, is there any argument that the relevant supplies are exempt under Item 1. The only issue is whether they are exempt under Article 132(1)(i) and/or Item 4 as “closely related” to the provision of education or vocational training by the College.

The parties’ positions in outline

30 13. The FTT found that the catering and entertainment services were both integral to and essential to the main supply of education. The FTT held that the students benefited from those supplies, and that they were the true beneficiaries, even though the supplies themselves were made by the College to third parties. On that basis the FTT concluded that the supplies of catering and entertainment services were closely related to the supply of education and/or vocational training, and were thus exempt.

14. HMRC say that this was an error of law on the part of the FTT. They submit that the supplies in question are not “closely related” to the principal supplies of education that the College makes to its students who are involved in the restaurant and the concerts and performances, nor are they “for the direct use” of those students, as required by Item 4. Rather, it is the third party customers who eat at the restaurant or

who enjoy the performances that are the direct users and consumers of the services in question. This requirement, along with the rest of Item 4, is submitted to be a proper implementation of the Directive. The benefit obtained by the students is the benefit of participating in the making of the supplies, not a benefit from the subject matter of the supplies, which is enjoyed by the third party consumers of those supplies.

15. The College says that, on the basis of the FTT's findings, the restaurant and entertainment supplies are exempt as being closely related to the supplies of education. It submits that there is no restriction in EU law on the identity of the recipient of the supplies in question. The students directly benefited from the supplies.

16. The College argues that the domestic requirement in Item 4 that the goods or services must be for the direct use of the students do not limit the application of the exemption. It is submitted that "direct use" simply requires that the services are for the direct benefit of the students, as found by the FTT. However, in the event that is not found to be the case, the College argues in the alternative that a limitation as to the identity of the recipient is not permitted by the Directive.

Discussion

17. The scope of the exemption is defined by the Directive. It is to the proper meaning of Article 132(1)(i), in its context, that we turn first. In doing so we remind ourselves that as an exemption is an exception to the ordinary rule that supplies by a taxable person in the course of economic activities are subject to VAT, and as such that an exemption should be construed strictly, but not restrictively. That principle is a trite one, consistently applied by the Court of Justice ("ECJ"), and has recently been conveniently summarised in *Skatteverket v PFC Clinic AB* (Case C-91/12) [2013] STC 1253, at para 23:

"... the terms used to specify the exemptions in art 132 of the VAT Directive are to be interpreted strictly, since they constitute exceptions to the general principle that VAT is to be levied on all goods and services supplied for consideration by a taxable person. Nevertheless, the interpretation of those terms must be consistent with the objectives pursued by those exemptions and comply with the requirements of the principle of fiscal neutrality. Thus, the requirement of strict interpretation does not mean that the terms used to specify the exemptions referred to in art 132 should be construed in such a way as to deprive the exemptions of their intended effect (see by analogy, in particular, *Future Health Technologies Ltd v Revenue and Customs Comrs* (Case C-86/09) [2010] STC 1836, [2010] ECR I-5215, para 30 and the case law cited)."

18. The exemption must, accordingly, be construed so as to be consistent with its objective and so as to ensure it retains its intended effect.

19. In *EC Commission v Federal Republic of Germany* (Case C-287/00) [2002] STC 982, infraction proceedings were brought by the EC Commission against Germany in relation to the latter's exemption of the research activities of public sector

higher education establishments carried out for consideration. It was held that such activities were outside the scope of the exemption for education, and in particular were not supplies closely related to university education.

5 20. In his Opinion, the Advocate General (Jacobs) referred, at para 33, to what the ECJ had said in the context of a different exemption, that for hospital and medical care, and closely related activities, in *EC Commission v France* [2001] ECR I-249, para 23. There the Court had stated that the concept of activities “closely related” to hospital and medical care did not call for an especially narrow interpretation since the exemption for such activities is designed to ensure that the benefits flowing from such care are not hindered by the increased costs of providing that would follow if it, or closely related activities, were subject to VAT.

15 21. That, the Advocate-General considered, followed closely the suggestion of the Advocate General in *EC Commission v France* (Opinion, para 23) that all activities which are directly and intimately related to the provision of hospital and medical care should, regardless of their form, be regarded as covered by the exemption.

20 22. In *EC Commission v Federal Republic of Germany*, Advocate General Jacobs went on, at para 34, to emphasise the weight given by the Court to the purpose of the activities alleged to be closely related to the exempt activities. He stated, referring to *EC Commission v France*, at paras 24 and 27, that it must be ascertained whether the service at issue constitutes an aim in itself or a means of better enjoying the principal service supplied.

23. Applying those principles, the Advocate General took the view that the research activities in question were outside the scope of the exemption.

25 24. The Court, in its judgment, adopted a similar approach. It concluded, first, having agreed with the Advocate General that an especially narrow interpretation of the exemption was not appropriate, that if the undertaking by state universities of research projects were made subject to VAT, that would not have the effect of increasing the cost of university education (para 47). Secondly, rejecting the arguments of the German government, the Court held that, although the undertaking of such projects might be regarded as of great assistance to university education, it is not essential to attain its objective, that is, in particular, the teaching of students to enable them to pursue a professional activity. The Court reasoned that many universities achieve that aim without carrying out research projects for consideration and that there were other ways to ensure a link between university education and professional life (para 48).

40 25. The scope of a supply of services “closely related” to education was examined further by the ECJ in *Stichting Regionaal Opleidingen Centrum Noord-Kennemerland/West-Friesland (Horizon College) v Staatssecretaris van Financiën* (Case C-434/05) [2008] STC 2145 (“*Horizon College*”). In that case, one educational establishment, Horizon College, made some of its teachers available to other such establishments (“host establishments”), each of which assumed responsibility for the

teachers working there. Horizon College continued to pay the teachers, and the host establishments reimbursed those costs with no profit uplift.

26. In her Opinion, the Advocate General (Sharpston) construed “closely related” by reference to ancillary services, such a service being one which, according to cases such as *Diagnostiko & Therapeftiko Kentro Athinon-Ygeia AE v Ipourgos Ikonomikon* (Joined cases C-394/04 and C-395/04) [2006] STC 1349, at para 19, constitutes not an end in itself but a means of enhancing the enjoyment or benefit of the principal service supplied by the provider. The Advocate General rejected, however, arguments restricting this concept by reference to cases such as *Card Protection Plan Ltd v Customs & Excise Commissioners* (Case C-349/96) [1999] STC 270 to services supplied to the same recipients. As she pointed out, at para 74, the Court in *EC Commission v Federal Republic of Germany* had not based its reasoning on the fact that the supplies of university education were to the students whereas the supplies of research were to third parties, but on the fact that the research activities were in no way necessary in order to provide the education.

27. In its judgment the ECJ adopted the same approach. It drew a distinction, at paras 27 and 28, between cases where the supply was of goods or services “unrelated to ... education” and the supply of goods or services “actually supplied as services ancillary to the education which constitutes the principal service”. The Court then referred, at para 29, to its case law to the effect that a service may be regarded as ancillary to a principal service if it does not constitute an end in itself, but a means for better enjoying the principal service.

28. On this basis the Court found, at para 30, that the supply of a teacher by one educational establishment to another in order for the teacher temporarily to carry out teaching duties under the responsibility of the host establishment is an activity which can, in principle, be described as a supply of services closely related to education. Where there is a temporary shortage of teachers in some educational establishments, the making available of qualified teachers to those experiencing the shortage will enable students to better enjoy the education provided by the host establishments.

29. The Court was not deflected from that conclusion by the fact that there was no direct relationship between Horizon College and the students of the host establishments, nor by the fact that the supply of teachers was an activity that was separate from the teaching provided by Horizon College on its own account (para 31). The Court said (at para 32):

“In fact, in order for students of the host establishment better to enjoy the education provided by those establishments, it is not necessary for services closely related to that education to be supplied directly to those students. Furthermore, any lack of a close connection between the principal activity of the establishment making teachers available and its secondary activity – the supply of services closely related to education – is, in principle, irrelevant.”

30. The Court went on to consider the further conditions that the Article required to be satisfied in order for a supply to be exempt, including the requirement, now to be

found in Article 134(a), that the supply be essential to the transactions exempted. The Court construed that provision, at para 39, in the following way:

5 “In order to be described in those terms, the temporary supply of teachers, such as that in issue in the main proceedings, should be of a nature and quality such that, without recourse to such a service, there could be no assurance that the education provided by the host establishments and, consequently, the education from which the students benefit, would have an equivalent value ...”

10 31. The case of *Canterbury Hockey Club and another v Revenue and Customs Commissioners* (Case C-253/07) [2008] STC 3351 addressed the scope of the exemption, within Article 13A(1)(m) of the Sixth Directive (now Article 132(1)(m) of the Principal VAT Directive), for the supply of certain services closely linked to sport or physical education by non-profit-making organisations to persons taking part in sport or physical education. In *Canterbury Hockey Club*, the club was an
15 unincorporated association which received supplies of certain services from an organisation, England Hockey, to which it paid affiliation fees. The question was whether such services, supplied as they were not directly to persons taking part in sport, fell within the exemption.

20 32. The Court gave its judgment without an opinion of the Advocate General. It decided that, in the context of persons taking part in sport, the exemption includes services supplied to corporate persons and to unincorporated associations, provided that – which it is for the national court to establish – those services are closely linked and essential to sport, that they are supplied by non-profit-making organisations and that their true beneficiaries are persons taking part in sport.

25 33. The Court rejected an argument, based on the literal wording of the requirement in Article 13A(1)(m) that the services be to persons taking part in sport or physical education, that only services supplied directly to such persons may be exempted. Having regard to the intended scope of the exemption, and the specific conditions to which the exemption was subject, the Court held, at para 31, that the identity of the
30 material recipients of those services and the legal form under which they benefit from them are irrelevant. The essential requirement was that the services must be supplied by a non-profit-making organisation and that they must be closely linked to sport, since the true beneficiaries of those services are the persons taking part in sport.

35 34. In our judgment, in relation to the exemption for supplies closely related to education, the following are the principles to be derived from the case law:

(1) As a general principle, the exemption must be construed so as to be consistent with its objective and so as to ensure its intended effect (see, for example, *PFC Clinic AB*, para 23).

40 (2) An especially narrow interpretation of the exception for activities closely related to a principal exempt supply of education is not appropriate, since the exemption is designed to ensure that the benefits of the principal supply are not hindered by the increased costs of providing it that would follow if the principal

supply, or the closely related activities, were subject to VAT (*EC Commission v Federal Republic of Germany*, para 47).

5 (3) To be closely related to a principal exempt supply, the service in question must be an ancillary supply, that is one that does not constitute an end in itself, but is a means for better enjoying the principal service supplied (*Horizon College*, paras 28 and 29).

10 (4) The closely related supply must be essential to attain the objective of the principal supply (Article 134(a)). In order to satisfy that requirement, the ancillary supply should be of a nature and quality such that, without it, there could be no assurance that the education from which the students benefit would have an equivalent value (*Horizon College*, para 39).

15 (5) There is no requirement that the closely related supply be made to the same recipients as the principal supply. To be services closely related to education it is not necessary for those services to be supplied directly to those students (*Horizon College*, para 32).

20 35. We have not found it necessary to derive any separate principle from *Canterbury Hockey Club*. That case was founded on a differently-worded provision to that with which we are here concerned. Although it requires a supply to be closely linked, that linkage is not with another, principal, supply, but simply with an activity, that of sport or physical education. The analysis to be found in the cases concerning the education exemption, which is founded on the principle of principal and ancillary supply, does not therefore operate in the same way.

25 36. Nor, in the exemption for supplies closely related to education, is there any express requirement in the Directive that the supplies be made to any particular person. The question in *Canterbury Hockey Club* was focused on the requirement that the services be supplied to persons taking part in sport or physical education. There was, as the Court noted at para 13, no issue between the parties that the services supplied by England Hockey were closely linked to sport. Although the use by the Court of the expression “true beneficiaries” to illustrate the need for the services to be
30 both closely linked and essential to sport, is consistent with the earlier cases, it does not in our view introduce any new principle.

35 37. We have referred to what the Court in *EC Commission v Federal Republic of Germany* had to say about the exemption for supplies closely related to education having been designed to ensure that the benefits of the principal supply are not hindered by increased costs. In that case the ECJ found that subjecting supplies of research services by state universities to VAT would not have the effect of increasing the cost of university education.

40 38. We heard argument from both Mr Jones and Ms Poots on whether or not the cost of the education provided by the College in this case would be increased. As we pointed out, however, that was not something on which the FTT had made any findings of fact. Were we to have considered it material for the determination of the question before us, we would have referred the case back to the FTT for it to make such findings. But we have concluded that it is not necessary to resolve that question.

39. Although the Court in *EC Commission v Federal Republic of Germany* made a finding, on the facts of the case before it, that there would be no increased cost of university education in the circumstances in issue, we do not consider that finding to have elevated the issue of increased cost to a condition or requirement for application of the exemption. It remains part of the underlying purpose of the exemption, and as the reason for the requirements imposed by the Directive; but it does not impose any additional requirement to examine, in an individual case, whether the costs of providing education would increase.

40. Although in the context of *EC Commission v Federal Republic of Germany*, which related to an exemption provided by the German state for a particular section of the education sector, namely turnover of public sector higher education establishments attributable to research activities, the Court was able to find, as a general matter across the sector as a whole, that the costs of providing the relevant university education would not be increased by subjecting the research activities to VAT, such an approach is not appropriate when dealing with an individual case. If such an approach were to be adopted in individual cases, the answer would depend on the individual facts and circumstances of each case. To determine exemption or taxability on the basis of such individual circumstances would not be consistent with the fundamental principles of fiscal neutrality or legal certainty.

41. Our view is, we consider, supported by the fact that, although *EC Commission v Federal Republic of Germany* was cited in *Horizon College* in support of a number of propositions, there was no reference to a requirement to show that the imposition of tax to the supplies in question would increase the direct cost of the education provided by the host establishment. That requirement is conspicuously absent from the summary given by the Court at para 46 of its judgment of the matters required to be verified by the national court.

42. Mr Jones submitted that the exemption required the students to have benefited from the subject matter of the supply, rather than, as in this case, from participating in the making of the supply. As a matter of general principle he argued that the proper focus should be on the subject matter of the supply, since the VAT treatment is governed by that subject matter, and not by the nature of its provision. He submitted that the supply should be regarded from the perspective of the actual recipient or consumer of the supply. Fundamentally, VAT is a tax on consumption. On that basis, for the members of the public who received the supplies of restaurant and entertainment services, those supplies would clearly have an end in themselves. This, he argued, would also be the perspective of the students who were the consumers of the education services, having regard to the subject matter of the supplies.

43. We do not accept those arguments. We do not consider that, in this context, there is any principled distinction to be drawn between the subject matter of the supply and the making of it. For the exemption to apply to a supply it must be closely related to education and satisfy certain other conditions. None of those requirements is dependent on the subject matter of the supply. It is the supply itself that must be found to be ancillary to the supply of education, in the sense that it is a means for better enjoying the principal service.

44. The recipient of the supply is not material, so it cannot be right to determine the question by reference to the view of the transaction from the perspective of the recipient. The recipients of the research services in *EC Commission v Federal Republic of Germany* would have had the perspective that the research had an end in itself, but that was not the reason why the ECJ found that the services were not exempt. The question whether the supply in question is an end in itself or is a means for the students to better enjoy the supplies of education to them is one that must be answered by reference to all the circumstances. It is not a narrow analysis of the subject matter of the supply itself, but encompasses a broader examination of the aims and effects of the supply.

45. The FTT found that the catering and entertainment services were essential to the principal supply of education made by the College (FTT decision, at [25]). It found that those supplies were integral to the main supply; they were not an end in themselves but a means of providing the students with a better education (FTT, [26]). The FTT further found that the students directly benefited from the supplies of catering and entertainment services even though the supplies in question were to third parties.

46. Having regard to the authorities on Article 132(1)(i), and the principles derived from them, we consider that the FTT was right to conclude, on the basis of its findings, that the restaurant and entertainment services are exempt as supplies of services and goods closely related to the provision of education by the College.

47. Nothing in the domestic legislation can interfere with that conclusion. Although Mr Jones emphasised the requirement under Item 4 of Group 6 of Schedule 9 VATA that the goods or services be for the direct use of the students, that was an argument based on the same requirement arising from the Directive. There is no requirement under EU law that the goods or services must be consumed by the student. Supplies may be closely related if they are a means whereby the students better enjoy the supply of education. We consider, agreeing in this respect with the submissions of Ms Poots, that the requirement for direct use denotes no more than a need for the goods or services to be for the direct benefit of the student.

48. On that analysis, it is not necessary for us to find that the requirement for direct use is incompatible with the Directive. We consider that the expression “direct use” can be construed in the way we have concluded it should be by reference to normal principles of construction. It has not been necessary for us to resort to the particular principle (the *Marleasing* principle) of conforming interpretation of EU legislation which infringes EU law recently reiterated by the Court of Appeal in *Wilkinson v Fitzgerald* [2012] EWCA Civ 1166. But were it to have been necessary for us to have done so, we consider that those principles would have enabled us to construe Item 4 consistently with what we have found to be the proper interpretation of the exemption in Article 132(1)(i).

Decision

49. For the reasons we have given, we dismiss HMRC’s appeal.

ROGER BERNER JUDITH POWELL
UPPER TRIBUNAL JUDGES

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RELEASE DATE: 30 January 2014