Neutral Citation: **[2024] UKUT 397 (TCC)**

Case Number: UT/2024/00063

UPPER TRIBUNAL
(Tax and Chancery Chamber)

By remote video hearing

VAT - whether provision of free education/vocational training to students where funding provided by government agencies was supply of services for consideration – yes - HMRC choosing not to argue before the UT that earlier UT decision (which held against it on issue of whether materially similar funding of education and training constituted supplies for consideration) was incorrect – HMRC accepted that meant their appeal should be dismissed but reserving right to argue the point on any higher appeal – HMRC's appeal dismissed

Heard on: 26 November 2024
Judgment date: 4 December 2024

Before

JUDGE SWAMI RAGHAVAN

Between

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Appellants

and

COLCHESTER INSTITUTE CORPORATION

Respondent

Representation:

For the Appellants: Peter Mantle, Counsel, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

For the Respondent: Michael Firth KC, Counsel, instructed by VATangles VAT Consultancy Limited

DECISION

INTRODUCTION

1. Colchester Institute Corporation ("**CIC**") is a further education corporation providing further and higher education and vocational training programmes to students. This decision concerns HMRC's appeal against a decision of the First-tier Tribunal (Tax Chamber) ("**FTT**") published as *Colchester Institute Corporation v HMRC* [2024] UKFTT 00191 ("**the FTT Decision**"). That concerned whether certain grants CIC received from government funded agencies constituted "a supply of services for consideration" (the services being the education and/or vocational training provided free of charge by the college to students) ("**the consideration issue**"). The Upper Tribunal ("**UT**") in *Colchester Institute Corporation v HMRC* [2020] UKUT 368 (TCC) ("***CIC UT 2020***") had previously decided the consideration issue in CIC's favour, in relation to materially similar grant-funded provision of education and training (but in relation to earlier VAT periods). As that UT decision was binding on the FTT, and the consideration issue was determinative of the appeal, the FTT allowed CIC's appeal.

2. With the permission of the FTT, HMRC appeal on the basis that *CIC UT 2020* was wrongly decided. Unlike the FTT, the UT is not bound by previous decisions of the UT[1] but as a matter of judicial comity, the later UT would normally follow an earlier UT decision of co-ordinate jurisdiction unless satisfied the earlier decision was wrong[2]. As regards the current appeal, HMRC do not seek to persuade the UT that *CIC UT 2020* was wrong, but reserve their right to argue the point in any onward appeal to the Court of Appeal, which as a higher court, is not bound to follow the UT decision and may, HMRC submit, consider the matter afresh. HMRC accept their position means the current appeal before the UT should be dismissed. I decided at the conclusion of the half day hearing which took place that the appeal should be dismissed. This decision notice explains my reasons.

THE LEGAL BACKGROUND AND FTT DECISION

3. Article 2(1) of the Principal VAT Directive (2006/112/EC) ("**PVD**") includes the requirement that for a supply of services to be subject to VAT it must be "for consideration". As explained by reference to authority in *CIC UT 2020* that requires "a direct link between the service provided and the consideration received" ([45]), and can include third party consideration i.e. paid by a person who is not the recipient of the supply ([46]). The third party consideration can be in the form of public subsidy so long as the subsidy bears a direct link with the services at issue ([47]).

4. The FTT Decision set out the facts as drawn from the parties' Statement of Agreed Facts. These included the background to CIC, the nature of the courses it provided and the qualifications they led to, the details of the government agency funding received including, as of particular relevance to the appeal, from the Skills Funding Agency ("**SFA**") and the Education Funding Agency ("**EFA**"). The facts go on to detail the agreements CIC had with those two bodies, the funding formulae contained there, and the content of receipt documents provided to students. (These facts appear in the annex to this decision.)

5. The reasoning in the FTT Decision allowing CIC's appeal noted the consideration issue, (in view of the other common positions the parties had adopted) was determinative of the output tax assessment under appeal, and that the parties accepted the consideration issue had been

[1] *HMRC v Raftopoulou* [2018] EWCA Civ 818 at [24]
[2] *Leeds City Council v HMRC* [2014] UKUT 0350 (TCC) at [12]

determined against HMRC by *CIC UT 2020*. Because *CIC UT 2020* was binding on the FTT it followed that CIC succeeded on the consideration issue and therefore in respect of the output tax appeal.[3]

CIC UT 2020

6. To put HMRC's grounds before the UT in context it is helpful first to summarise the essential elements of *CIC UT 2020*. That was an appeal by CIC against the FTT's decision in *Colchester Institute Corporation v HMRC* [2018] UKFTT 479 (TC) ("**CIC FTT 2018**") relating to over-declared output VAT in periods 04/10 to 01/14 and which decided the consideration issue in HMRC's favour.

7. The UT summarised the facts surrounding the activities of CIC and their funding at [13] to [30] including details of the SFA and EFA funding agreements and formulae contained within them. (Although the facts of *CIC UT 2020* and the current FTT Decision under appeal concern grant-funded supplies of education in different periods and different versions of the SFA and EFA funding agreements were in place, there is no suggestion these differences are material.)

8. The UT's reasoning identified (at [66]) the issue at the heart of the appeal as being between whether the payments made were a form of funding on conditions as HMRC's position entailed or payments made pursuant to a reciprocal arrangement of services.

9. CIC's case relied on analogy with a CJEU case *Le Rayon d'Or SARL v Ministre de l'Économie et des Finances* (Case C-151/13), a case where a residential care home was paid a "healthcare lump sum" by the French sickness insurance fund which the CJEU held was consideration for the care provided by the home to its residents. HMRC sought to distinguish that case saying it was about a supply of access to service (a so-called *Kennemer*[4] supply). It was common ground here the supply in CIC's case was not of that nature. The UT rejected that distinction analysing *Rayon d'Or* as a case where services were supplied to individual residents ([70]). The UT considered the case was analogous on its facts and that it had to follow the CJEU decision saying that was sufficient to dispose of the consideration issue ([74]). The UT disagreed with the analysis of the EFA and SFA agreements in *CIC FTT 2018* holding instead that rather than being neutral they did indicate the direct link between the grants and the courses provided ([76] to [81]). The UT also went on to explain why it disagreed with the *CIC FTT 2018's* error in looking for a link which was so direct that the payments could be matched to individual supplies or costs or to individual students ([86]).

[3] As explained in more detail in the FTT Decision ([2] and [3](18) –(25)) the output tax amount of £98,965.88 was sought by an HMRC assessment of 23 March 2017, upheld following statutory review on 13 July 2017, in respect of deemed output tax for periods from 1/11/15 to 31/1/16 under the *Lennartz* mechanism (explained in *CIC UT 2020– see* [5] to [6]). Mr Mantle's skeleton explained it is common ground that if the relevant supplies of education and/or vocational training were for consideration, they were 'economic activity' within the meaning of Art 9(1) PVD (so 'in the course or furtherance of a business carried on' by CIC within the meaning of s 4(1) Value Added Tax Act ("**VATA**")). Where the relevant provision of services is supplies for consideration and economic activity, and those supplies are exempt, HMRC accept that there cannot be a deemed supply leading to output tax liability under paragraph 5(4) of Schedule 4 VATA. Accordingly, there was, applying *CIC UT 2020* on the consideration issue, no basis for the assessment of output tax as part of the relevant assessment.

[4] *Kennemer Golf & Country Club v Staatssecretaris van Financiën* (Case C-174/00)

10. Although HMRC failed on the consideration issue it ultimately won the appeal on an alternative argument (that even if the supplies were for consideration the UT agreed HMRC were entitled to set-off input tax so as to extinguish CIC's repayment claim under s81(3) VATA). As the successful party in the appeal, HMRC could not appeal against the UT's decision in respect of the consideration issue.

GROUNDS OF APPEAL

11. HMRC's overall ground of appeal in the UT, further detailed by extensive particulars, is that the provision of education or training was not for consideration; the grants paid to CIC by EFA and SFA were not directly linked to the provision of education or training and that CIC UT 2020 had wrongly decided the consideration point. *Rayon d'Or*, contrary to the UT's analysis, was distinguishable on its facts which included, HMRC say, that *Rayon d'Or* concerned *Kennemer* supplies.

12. In support HMRC rely on the narrow interpretation of scope of *Rayon d'Or* they say the CJEU later took in the case, *Balgarska natsionalna televizia* (Case C-21/20). In HMRC's submission *Balgarska* clarified *Rayon d'Or* was focussed on the particular relationship between the sickness fund and its insured. *Balgarska* concerned the question of whether a public national TV provider supplying audiovisual media services to viewers, financed by State subsidy, and where no fees were payable by viewers, constituted consideration for Article 2 PVD purposes.

13. HMRC also say *CIC UT 2020* erred, in a number of respects, in its analysis that the funding agreements supported a conclusion the supplies were for consideration, and that it wrongly identified the degree of specificity required by the requirement that there be a "direct link".

CIC'S RULE 24 RESPONSE

14. CIC had not filed a formal response under Rule 24 of the UT Rules, nevertheless its skeleton argument indicated it sought to, if it became necessary, uphold the FTT decision for additional reasons that were not in the FTT Decision (Rule 24B(1)(a) requires the Respondent to file a response in such circumstances). I should record that I agreed, further to a proposal HMRC helpfully made in advance of the hearing, to paragraphs [8] - [11] in CIC's skeleton argument being treated as CIC's Rule 24 Response in the appeal before the UT. In those paragraphs CIC explained that in the FTT, it reserved its position on the so-called "single business" issue (an argument to the effect that in the alternative scenario, where some supplies of education were for consideration and others were not, the overall activity was nevertheless an economic activity). That issue did not arise for decision in the FTT. It also does not arise in these proceedings (given HMRC's acceptance that their appeal should be dismissed on the consideration issue). However, CIC reserves its right to argue these points on the single business issue further on appeal should it become necessary.

DISCUSSION

15. As already mentioned, HMRC seek to reserve their arguments on the consideration issue to raise on any further appeal. That means they do not seek to convince or satisfy this UT that *CIC UT 2020* was wrong on the consideration issue. HMRC accept *CIC UT 2020* determines the consideration issue and that the consideration issue determines their appeal. They accept the position they take means their appeal before this UT should be dismissed.

16. At the hearing I raised with the parties whether there was any difficulty of, on the one hand HMRC having an appeal on foot that rested on the sole question of consideration but then maintaining on the other that it was not pursuing that question before the UT. What was the subject matter of the appeal if the only question upon which permission had been granted was not advanced before the UT? Neither party was able to refer me to an example where all of the matters in the appeal were subject to reservation but I accepted there were certainly instances where a party had accepted a UT decision stood against them on a certain issue which then disposed of that issue but still left other issues to be argued in full before UT and determined in the normal way. Mr Mantle, who appeared for HMRC, emphasised however the rationale for the practice of reserving an argument on appeal was of conserving court and judicial resource. From that point of view, I agree with his submission, it should not make a difference, as a matter of principle if the reservation is in respect of the entirety of the parties' ground of appeal as opposed to part of it[5]. Mr Firth KC, who appeared for CIC, confirmed CIC did not take issue with HMRC reserving its arguments. As he pointed out, in view of the reservation there still remained a point of law for the purposes of enabling the UT's appellate jurisdiction under s11 Tribunal Courts and Enforcement Act 2007.

17. Reserving matters in this way is not of course without risk for the party concerned and also has wider implications. If the UT refuses any permission to appeal application and the Court of Appeal does too there will be no onward appeal and HMRC will have lost the opportunity to try to persuade the UT with the benefit of full argument on the issues to depart from the earlier UT decision. It should also be noted the procedural framework does not provide a leapfrog procedure from the FTT to the Court of Appeal. The normal course is for appeals to proceed from the FTT to the UT and if allowed onwards after a full hearing in the UT. The stance taken here means that if the matter proceeded to the Court of Appeal that court would not have the benefit of the UT's analysis in response to the detailed arguments that would otherwise have been rehearsed before it on whether the earlier UT decision was wrong. Against that is the risk of two conflicting UT decisions and the uncertainty that creates if the UT were to agree with HMRC and no appeal was made against the later decision and also the saving of judicial, administrative and party resource.

18. In the particular circumstances of this case, noting CIC raise no objection to HMRC's reservation, (and that HMRC if pursuing an appeal would still need to persuade the UT, amongst other matters, that they have a real prospect of success in arguing *CIC UT 2020* was wrong, and that the UT will therefore inevitably need to express its view to some degree on the underlying merits of any onward appeal), I am content to recognise HMRC's position before the UT and their reservation.

19. HMRC's position means they do not rely, before the UT at least, on points regarding the *Balgarska* decision that was issued after *CIC UT 2020.* Although some of the hearing before me was taken up, at my direction, with argument on the relevance of that case (for the purpose of putting me in a better position to deal with any analysis of the case on any subsequent permission to appeal application), I will not, given HMRC do not press that case in their UT appeal, express my views on the case's relevance. I simply note that the parties take opposing views on the light it sheds on the scope of the CJEU's reasoning in *Rayon D'Or*, that CIC considers the case helpful to their defence of the appeal, and that both parties accept it is not (as a post IP Completion Day case) binding on the UK courts.

[5]In fact the UT's decision in *HFFX LLP and others v HMRC* [2023] UKUT 0073 (TC) I mentioned at the hearing as a partial reservation could be said on closer examination to be an example of a reservation applying in relation to all of a party's appeal (in that case HMRC's cross-appeal) - see [17].

20. Consistent with the conservation of judicial resource rationale underlying HMRC's position and reservation, and having already explained the necessary background above, my reasoning for dismissing this appeal before the UT can be expressed briefly. *CIC UT 2020* dealt with the same consideration issue in respect of the same material facts. The reasoning in that decision, which held in CIC's favour on the consideration issue, applies equally to the materially similar facts of this appeal. The FTT was accordingly correct to find CIC succeeded on the consideration issue and to allow CIC's appeal.

21. HMRC's appeal against the FTT Decision is dismissed.

JUDGE SWAMI RAGHAVAN

Release date: 04 December 2024

Annex

FTT findings on background of Colchester Institute Corporation

(1) Colchester Institute Corporation ('CIC') is a body corporate incorporated as a further education corporation under the Further and Higher Education Act 1992, registered for VAT under registration number 623 3157 66. Its main campus is in Colchester, Essex, but it has satellite facilities in Braintree and Clacton. The College is an "eligible body" for the purposes of Item 1, Group 6 of Schedule 9, VATA.

(2) The College's courses are "vocational", with the aim of providing its students with technical knowledge and skills. Many of the College's courses lead to accredited qualifications. However, the College also provides non-accredited full cost and commercial vocational courses to meet the needs of local employers. Each of the courses provided by CIC which are the subject of this appeal are within the meaning of "education" or "vocational training", in Item 1 of Group 6 of Schedule 9 VATA.

(3) This appeal relates to CIC's VAT prescribed accounting period from 1 November 2015 to 31 January 2016 ('the Period'). In the academic year 2015/2016 (as with preceding years) CIC was funded primarily by three government agencies: the Skills Funding Agency ("SFA"), the Education Funding Agency ("EFA") and the Higher Education Funding Council for England ("HEFCE""). This appeal relates to courses funded by the EFA and SFA (the "Funding Agencies").

(4) The EFA funded the provision of education and vocational training for students aged 19 and under, certain categories of students aged over 19, and students with learning difficulties aged between 19 and 25. For the year 2015-16 EFA funding amounted to approximately £18.5m.

(5) The SFA funded all or part of the provision of education and vocational training for students aged 18 and over who have not achieved a specified level of academic qualification, or who are entitled to free education or training due to their personal circumstances and for courses related to areas of the economy that are treated as priority areas for learning. CIC's income in respect of such students amounted to approximately £4.2m per annum.

(6) CIC receives tuition fees for other students who are not eligible for EFA, SFA or HEFCE funding. CIC also generates income from the rental of studio and other space in the evenings, weekends and in the holidays and other income from MoT testing and motor vehicle repairs.

(7) The College provides courses to students from age 16 upwards. Students of all ages are educated or trained together, and there is no separation between them on grounds of age.

(8) Funding by the Funding Agencies was provided pursuant to s 14 Education Act 2002. CIC entered into separate agreements with the EFA and the SFA each year in relation to the funding that those agencies provided for the next academic year. The agreements were in standard form, and were not negotiable. The agreement with the EFA is described as the "Conditions of Funding Agreement". The agreement with the SFA is described as a "Financial Memorandum". The agreements are lengthy, and refer to (and incorporate by reference) a series of other documents (some of which are in electronic form and are published on the internet). Taken together, these agreements and the other associated documents set out the basis on which the funding agencies would fund CIC, and the obligations placed on CIC to deliver education and vocational training, and to provide information to the funding agencies.

(9) Neither the SFA nor the EFA agreements set out the courses that CIC must provide. But CIC is only funded by these agencies for the provision of courses leading to qualifications that have been approved by the Government and which are listed on a website maintained by the Government. Theoretically, CIC could have provided courses leading to qualifications that have not been approved – but it would not have been funded by either the EFA or the SFA to provide such courses – and it therefore did not do so.

(10) The amount paid by the EFA to CIC for any year is calculated on the basis of a national funding formula that incorporates various factors including student numbers in prior years, student retention, provision of higher cost subjects, disadvantaged students, and area costs. This is supplemented by additional funding for high needs students, bursaries and other financial support awarded to individual students.

(11) The basic funding allocation was determined by the following funding formula:

(Student numbers) x (National funding rate per student) x (Retention factor) x (Programme cost weighting)] + (Disadvantage funding) + (Large programme funding)

This amount is then multiplied by the area cost allowance.

(12) The funding received by CIC from the EFA is determined by the national funding formula, and was not a negotiated amount. The only scope for negotiation related to student numbers in the event that CIC were to open a new campus for the College, for example. In such a case, the lagged student number formula would not reflect fairly the likely additional students, and in such circumstances the EFA might be prepared to increase the number of students for the purposes of the formula. The terms of the EFA's funding agreement prohibits CIC from charging fees to students for the courses that it funds.

(13) The amount paid by the SFA is based upon a monetary funding allocation calculated before the start of the year, but subject to a claw-back for under-delivery against allocation, which is reconciled at the end of the year (and repayable in the following January). No additional payments are made for over-delivery.

(14) The SFA's Financial Memorandum provides at clause 6.2 that:

> "The College is free to spend its funding as it sees fit providing it fulfils the conditions of funding imposed by the SFA."

(15) Students who are accepted by the College are issued with a document headed

> "Receipt". This sets out the courses on which the student is enrolled. In relation to students whose costs are not met in full by one of the funding agencies, the Receipt will set out the fees payable for those courses, the amount paid on enrolment by the student, and any amount that remains outstanding. In the case of a student whose costs are met in full by one of the funding agencies, the Receipt sets out a "fee" for the course (and any associated examinations), but also states that the student is entitled to a "waiver" and that the outstanding balance is nil. In relation to students whose costs are not met in full by one of the funding agencies, the Receipt will set out the fees payable for those courses, the amount paid on enrolment by the student, and any amount that remains outstanding. For students who are fully funded by the EFA or the SFA, the "fee" set out on the "Receipt" does not accurately mirror the funding actually received by CIC for that particular student – but will be the baseline funding amount per student for that course. However, the actual amount paid for that student by the funding agencies will depend on their respective funding formulae.

(16) For the EFA, for example, this will reflect the number of students in the prior year, the College's retention rates, and disadvantage funding. So, the actual funding received from the EFA by CIC to deliver its courses could be more or less than the aggregate of the amount stated on the Receipts issued for EFA funded courses.

(17) Similar kinds of issues arise in respect of SFA funded students – such that the amount actually received by CIC from the SFA (together with any fees charged to the student) in any year would not exactly match the aggregate shown on the Receipts issued in respect of SFA funded courses.