TC03024

Appeal number: LON/2008/00940

FIRST-TIER TRIBUNAL
TAX CHAMBER

After-school sports clubs – whether fees exempt or standard-rated – whether taxpayer a 'state-regulated institution' – whether sports clubs 'welfare services' – VATA 1994 Sch 9, Grp 7 Notes 6 & 8 – appeal dismissed

PLANET SPORT (HOLDINGS) LIMITED

Appellant

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS

Respondents

TRIBUNAL: JUDGE MALACHY CORNWELL-KELLY
MR JOHN ROBINSON

Sitting in public at 45 Bedford Square, London, on 19 September 2013

Mr David R S West, of Booker Associates, for the taxpayer

Mr David Manknell, instructed by the Solicitor and General Counsel of HM Revenue and Customs, for the Crown

DECISION

1. This appeal is against a decision of the commissioners dated 17 March 2008 refusing the voluntary disclosure made by Planet Sport (Holdings) Limited ('Planet Sport') in which they claimed a refund of overpaid value added tax of £83,489.35 in respect of the periods from 1 October 2004 to 30 September 2007. The claim was based on the proposition that the Planet Sport's outputs were exempt by virtue of Group 7, item 9, of Schedule 9 to the Value Added Tax Act 1994, but had been wrongly treated at the time as taxable. There is no dispute as to the figures.

2. In addition to documentary evidence, we received oral evidence from Mr Christopher Vertannes, the Managing Director of Planet Sport, and Ms Patricia Yates, the officer who dealt with the case.

3. The legislation in point is as follows:-

Value Added Tax Act 1994
Schedule 9, Group 7, Item 9

> 9 The supply by-
> (*a*) a charity,
> (*b*) a state-regulated private welfare institution or agency, or
> (*c*) a public body,
> of welfare services and of goods supplied in connection with those welfare services.

Note 6

> (6) In item 9 "welfare services" means services which are directly connected with-
> (*a*) the provision of care, treatment or instruction designed to promote the physical or mental welfare of elderly, sick, distressed or disabled persons,
> (*b*) the care or protection of children and young persons, or
> (*c*) the provision of spiritual welfare by a religious institution as part of a course of instruction or a retreat, not being a course or a retreat designed primarily to provide recreation or a holiday,
> and, in the case of services supplied by a state-regulated private welfare institution, includes only those services in respect of which the institution is so regulated.

Note 8

> (8) In this Group "state-regulated" means approved, licensed, registered or exempted from registration by any Minister or other authority pursuant to a provision of a public general Act, other than a provision that is capable of being brought into effect at different times in relation to different local authority areas.

Directive 2006/112

> 132(1)(h) the supply of services and goods closely linked to the protection of children and young persons by bodies governed by public law or by other bodies recognised by the Member State concerned as being devoted to social wellbeing.

Education Act 2002

175 Duties of LEAs and governing bodies in relation to welfare of children

(1) A local education authority shall make arrangements for ensuring that the functions conferred on them in their capacity as a local education authority are exercised with a view to safeguarding and promoting the welfare of children.

(2) The governing body of a maintained school shall make arrangements for ensuring that their functions relating to the conduct of the school are exercised with a view to safeguarding and promoting the welfare of children who are pupils at the school.

Education Act 2005

5 Duty to inspect certain schools at prescribed intervals

(1) It is the duty of the Chief Inspector—

(a) to inspect under this section every school in England to which this section applies, at such intervals as may be prescribed, and

(b) when the inspection has been completed, to make a report of the inspection in writing.

(2) Subject to subsection (3), the schools to which this section applies are—

(a) community, foundation and voluntary schools,

(b) community and foundation special schools,

(c) maintained nursery schools,

(d) Academies,

(e) city technology colleges,

(f) city colleges for the technology of the arts, and

(g) special schools which are not community or foundation special schools but are for the time being approved by the Secretary of State under section 342 of the Education Act 1996 (c. 56) (approval of special schools).

(5) It is the general duty of the Chief Inspector, when conducting an inspection under this section, to report on—

(a) the quality of the education provided in the school,

(b) how far the education provided in the school meets the needs of the range of pupils at the school,

(c) the educational standards achieved in the school,

(d) the quality of the leadership in and management of the school, including whether the financial resources made available to the school are managed effectively,

(e) the spiritual, moral, social and cultural development of the pupils at the school,

(f) the contribution made by the school to the well-being of those pupils.

4. The basis of Planet Sport's services was that the company supplied trained and qualified sports coaches to organise and run after-school 'clubs' on school premises to occupy pupils who for one reason or another were not ready to go home, typically because their parents were still at work and could not collect them as soon as school

was finished. The activities were called 'clubs', but the name was simply a convenient term for the organised games and sports which took place and there was no club in the sense of a members' association or the like. In the case of Planet Sport's clubs, the activities were essentially the playing of a sport, very often football or cricket. Occasionally, the activities included such things as birthday parties, but the essence of the service was sport coaching in the context of the care and protection of the pupils.

5. The age range of pupils offered these clubs was wide, from four or five year-olds to 11 year-olds, though older pupils were also catered for. Planet Sport thus approached schools and in conjunction with them the company estimated the kind of coaching, and in which sports, would be likely to be attractive to the school and the parents. There were occasions when a school chose to employ a Planet Sport coach to give PE lessons in the school as part of the curriculum, but we are concerned in this appeal with after school activities which were not part of the school's core responsibility to provide. Planet Sport's staff were therefore in charge of proceedings, but there was always a member of the school's staff on the premises - though it could also happen that the clubs would be run at leisure centres and community centres if the school had nowhere suitable.

6. A school had to be willing for Planet Sport to run an after-school club before matters went any further. Since those who paid for after school clubs were the parents of the pupils taking part in them, Planet Sport therefore advertised on the school premises, and on its website, seeking the parents' business. Parents who wished their offspring to join a club completed a booking form in which the location, time, dates, nature and cost of the activities provided was given and detailed terms and were conditions stated. We were shown a sample form from after the period of this claim, but we were satisfied that it accurately reflected the practice at the time. The form indicated that in the event of bad weather the club might be cancelled, but normally Planet Sport would continue the club in a suitable location indoors. At the same time, an agreement was made between Planet Sport and the school indicating similar information, with the prices to be charged to the parents, and again with detailed terms and conditions.

7. If there was no after school club in a school, or if a particular pupil did not belong to one, the pupil would remain in the classroom until a parent or guardian arrived for collection. Mr Vertannes pointed out in his evidence that, depending on the temperament of the pupil, this could lead to the pupil becoming bored or unhappy especially after having sat in class all day studying; in consequence, therefore, the opportunity to do something active was usually positive for the pupil's health and welfare. Inevitably, in these circumstances, Planet Sport would then assume the first line responsibility for the care and protection of the children or young persons in their club. Apart from the pupils who formed part of a Planet Sport club, the school was obliged make its own arrangements for out of hours care until the pupils were collected, which might mean the school running its own after school clubs.

8. As noted, Planet Sport staff could also be supplied to schools to carry out core school functions where the school was unable to make provision for its own staff to do so, an example being during the two hour down-time during school hours in which teachers were required to spend planning classes. For these services, Planet Sport would invoice the school directly, while for after-school clubs generally it was the parents who paid. Effectively, therefore, Planet Sport was working with schools to

relieve them of some of the burden of the 'wrap-around' care they were expected to provide from morning to evening and the school, once it had accepted Planet Sport as a suitable provider, had an interest in encouraging parents to support the clubs. The evidence was that all the schools Planet Sport operated in were state schools coming under the local education authority's control.

9. The extent to which Planet Sport's activities were regulated by OFSTED emerged as a matter of lively controversy. Our finding is that OFSTED did when inspecting a school have regard to what Planet Sport was doing in its after school clubs but that it did so in the context of the school being itself responsible for what was taking place. OFSTED's interest would range from concern about formal matters such as CRB checks, insurance cover and each coach's qualifications (the coaches had to have the recognition of the governing body of their sport), to the actual conduct of the club on the day. Thus, if the club was seen to be well run it would reflect well in terms of the school's grading, and vice-versa. Consequently, schools would take an active interest in how Planet Sport was conducting clubs since ultimately they faced the consequences if matters were found to be amiss.

10. In this framework, Planet Sport was itself neither required to be or was in fact registered with OFSTED but, as a practical matter, Planet Sport thought of themselves as being subject to OFSTED's requirements and oversight because in reality they had to comply with them in order to retain the support of schools, without which their business could not function. Planet Sport as a company did not however receive OFSTED's ratings or its formal approvals.

Submissions – the appellant

11. The first issue for the appellant is whether the facts disclose that Planet Sport is 'state-regulated' for the purposes of the legislation. As will be seen, this phrase is defined in Note 8 to Group 7 as meaning "approved, licensed, registered or exempted from registration by any Minister or other authority pursuant to a provision of a public general Act".

12. Mr West submitted that we should look at this test realistically and note that in practice Planet Sport needed OFSTED's approval because if OFSTED was dissatisfied with the conduct of the after school clubs Planet Sport would lose its contracts with the schools, and as a result its payments from the parents. Planet Sport therefore had to satisfy OFSTED's requirements; it was clearly an authority envisaged by Note 8, and in the ordinary use of language it would be correct to say that the company was therefore "approved". The evidence showed that Planet Sport was in effect doing the school's job for it in relation to after school care, so that if the school was required to be approved by OFSTED, as it was, then that requirement applied equally to any organisation which, with the school's authority, carried out any of its functions.

13. Mr West cited, as of relevance to this issue, the decision of Sir Stephen Oliver in Ulster Independent Clinic v CEC [2004] UKVAT V18517. In that case, the issue was whether waste disposal services provided to the clinic were standard rated or exempt; to be exempt, they had to fall within Item 4 of Group 7 as:-

> The provision of care and medical or surgical treatment and, in connection with it, the supply of any goods in any hospital or state-regulated institution.

The expression "state-regulated" was subject to the definition in Note 8, as in this case. Giving the decision of the tribunal, Sir Stephen said, at [42] – [43]:-

> 42. The clinical waste disposal supplies of STI (which is licensed under the Pollution Control and Local Government (NI) Order) are, say the Clinic, supplies of a state regulated institution. The UK, with the discretion given to it by Article 13A.1(b), has duly recognized such institutions by bringing them within the class of state regulated institutions found in Note (8). Moreover STI must be classed as an "institution" despite its ordinary corporate status; exemption from tax of an activity is not to be dependent on the legal form in which a taxable person carries on that activity (see the *Gregg* decision of the Court of Justice at paragraph 20). The Commissioners' response is that STI's licence permitting "clinical waste storage and treatment" is directed as waste disposal and has nothing to do with either hospital and medical care (Article 13A.1(b)) or to the provision of care or medical or surgical treatment (item 4). I agree with the Commissioners. Note (A) to Group 7 defines state regulated institutions. The institution (irrespective of its legal status) must be one in which care or medical or surgical treatment is provided under a licence. That is the limited way by which the United Kingdom has transposed the expression "duly recognized establishment of a similar nature" in article 13A.1(b). STI's licence is to dispose of clinical waste and that is an activity which on no possible construction of the words "care or medical or surgical treatment" has to do with those forms of treatment.
>
> 43. Regarding the non-clinical waste disposal by Wilson Waste the Clinic points to its licence under the Waste and Contaminated Land (NI) Order. On that basis, it is said for the Clinic, Wilson Waste's qualifies as a state regulated institution irrespective of its legal status. For essentially the same reasons apply to STI's clinical waste disposal services, I do not think that Wilson Waste qualifies as a state regulated institution. Its registration relates to waste disposal and not to care or medical or surgical treatment.

14. In the Ulster case therefore the third party suppliers were furnishing something different in kind from the clinic, namely the disposal of waste as distinct from the provision of care or medical or surgical treatment. In the present case, Planet Sport were providing services of the same kind as the schools themselves as their surrogates, namely care and protection; the schools being undoubtedly state-regulated institutions, it is right that Planet Sport should thus be regarded as falling under the same category since the company was acting on the school's behalf in doing what the school could otherwise be doing itself.

15. Mr West sought to distinguish the decision of Hart J in RCC v K&L Childcare Service Limited [2006] STC 18, which concerned the hiring of staff by the taxpayer to nurseries and schools, the staff being at all times under the control of the schools. Two issues arose (i) whether the taxpayer supplied 'welfare services', and (ii) whether the taxpayer was 'state-regulated'. On the first issue, Hart J said, at [8] – [10]:-

[8] . . . It was submitted by Mr Puzey on behalf of Customs that the tribunal had failed to give any weight to the fact (which was uncontested) that the respondent itself was not involved in any way in the management or running of the institutions to whom it hired staff, and that the staff so hired were subject to the direction and control of the hiring institution. Accordingly, Mr Puzey submitted, the services supplied by the respondent were only indirectly connected with the care of children. Moreover, the tribunal's reference, in the second indent of para 18 of its decision, to the system of state control of carers was erroneous because the system of state control described by the tribunal was a system of control exercised over the hiring institutions, rather than over the respondent or its staff.

[9] Those criticisms seem to me to be well founded. That there is a distinction between the nature of the service supplied by the respondent (i e the supply of staff) and the service provided by the recipient of that supply seems to be clear both as a matter of principle and authority. So far as principle is concerned the distinction is itself drawn, or at least recognised, in the provisions of art 13A(1)(g) and (k) of EC Council Directive 77/388 (the Sixth Directive) which does not envisage external supplies of staff as being equivalent to the direct provision of welfare services save in the one very specific circumstance expressly provided for by sub-para (k) of that article. So far as authority is concerned the distinction is well illustrated by the decision of Laws J (as he then was) in *Customs and Excise Comrs v Reed Personnel Services Ltd* [1995] STC 588.

[10] The fact that the institutions to whom the services of staff are supplied are themselves regulated by the state, and that such regulation includes the imposition of duties on those institutions in relation to the suitability of the personnel used by them in the delivery of welfare services, cannot in my judgment provide a basis for saying that the respondent is itself making supplies of welfare services.

16. On the second issue the learned judge found, at [11] – [14]:-

[11] On the second issue of whether the respondent was 'state-regulated' as defined in note (8), the tribunal reasoned as follows:

> '32. It can be seen from the definition of “state-regulated” in note (8) to group 7 what underlies the thinking in including (b) as well as (a) and (c) in item 9. The UK's interpretation of Article 13A(1)(g) is that it should suffice for the purposes of exemption that a private welfare institution or agency should be approved, licensed, registered or exempted from registration by any Minister or other authority pursuant to a provision of *inter alia* a public general Act of Parliament.
>
> 33. What is behind this definition? It is, as we see it, the concept of control. “Approved, licensed, registered or exempted from registration” is a long way of stating “controlled”. But, as it seems to us, the use of several words where one might have done goes to explain the manner of the control envisaged—the control may be more or less direct, as Parliament may have decided.

> 34. We have come to the conclusion that there exists such control over the Appellant as the definition of "state-regulated" requires. If, as appears, charities and public bodies are expressly exempted under (a) and (c) respectively of item 9, what is the criterion for satisfying (b)? It is, we believe, that Parliament shall have put in place a scheme of regulation, whereby, directly or indirectly, the welfare service supplies of the institution or agency are governed by the state.'

[12] That reasoning is criticised by Customs on the ground that it ignores the clear finding of the tribunal (at para 13) (which was not in any way contentious) that the respondent:

> 'is not itself regulated for the purposes of its business—indeed there is nothing to indicate that, in the immediate future, it might become so regulated, or apply to become so regulated …

[13] Accordingly, Mr Puzey submitted, the only basis upon which the reasoning in the decision could be defended would be if it were possible to read the definition of 'state-regulated' as extending to the *indirect* form of regulation identified by the tribunal, namely the fact that the institutions to whom the respondents supplied services were themselves regulated, and that that regulation included regulation as to the qualifications and quality of the staff deployed by the regulated institution in the provisions of its services.

[14] I agree with Mr Puzey's submission that there is simply no warrant in the language of the statute for so reading the definition. Even if it be correct to regard the hired staff as themselves being subject to a system of regulation (which seems to me to be far from established by the facts found by the tribunal), it does not follow that the respondent itself can be described as 'state-regulated'. It is in my judgment unnecessary for this conclusion to have resort to the principle that exemptions are to be construed strictly (compare *Sweden v Stockholm Lindöpark AB* (Case C-150/99) [2001] STC 103, [2001] ECR I-493, para 25), but that principle plainly reinforces that conclusion.

17. In this case, it was submitted, it could not be said in respect of the after schools clubs that Planet Sport "was not involved in any way in the management or running of the institutions to whom it hired staff, and that the staff so hired were subject to the direction and control of the hiring institution"; on the contrary, Planet Sport was (subject only to the ultimate possibility of intervention by the school) very much managing and running the clubs itself. On the question of regulation, the issue depended on the findings of fact in any particular instance: in K&L Childcare the tribunal had found that the taxpayer was not regulated, but in this case it would be proper for the tribunal to find that Planet Sport was regulated. In addition, it was clear on the evidence that Planet Sport's clubs involved "the care or protection of children and young persons, referred to in Note 6.

18. The case for that conclusion was reinforced by the education statutes applicable. Thus, the obligations imposed on local education authorities and governing bodies by section 175 of the Education Act 2002 clearly required that safeguarding and promoting the welfare of children was to be central to the "arrangements" made by those institutions and such objectives were central to the activity of Planet Sport and

to its being approved by individual schools. In the same way, the duty of inspection imposed by section 5 of the 2005 Education Act could not be fulfilled unless the activity of the after school clubs was included in the inspectors' remit. It followed that if the inspectors were required to inspect what Planet Sport was doing in after school clubs, then Planet Sport was being inspected; and if Planet Sport was being inspected by state inspectors, it was unreal to say that it was not state-regulated.

19. This reasoning, it was submitted, was supported by the approach taken by the European Court of Justice in Card Protection Plan v CEC [1999] STC 270 which endorsed the principle of regarding the reality of what was taking place in a taxable transaction. An issue in that case had been whether a distinction should be made for tax purposes between regulated and unregulated insurance transactions. The court held, at [33] – [36] :-

> 33. If the national court holds that CPP is to be regarded as acting as an insurer who assumed the risk insured and thus performed transactions regarded by national law as unlawful, it must be borne in mind that the Sixth Directive is based on the principle of fiscal neutrality. As regards VAT, that principle, as the court has already held, precludes, other than in cases not relevant here, lawful and unlawful transactions being treated differently (see *Fischer v Finanzamt Donaueschingen* (Case C-283/95) [1998] STC 708 at 722–723, para 22).
>
> 34. The United Kingdom government submits, however, that restricting the exemption to transactions of authorised insurers was justified in view of the introductory sentence of art 13B of the Sixth Directive.
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> 35. It must be observed that that provision, in accordance with the principle of fiscal neutrality, makes no distinction, as regards the exemption for insurance transactions it provides for, between lawful and unlawful transactions in national law. It follows that those two categories of transaction must be treated in the same fashion.
>
> 36. The answer to Question 4 must therefore be that art 13B(a) of the Sixth Directive is to be interpreted as meaning that a member state may not restrict the scope of the exemption for insurance transactions exclusively to supplies by insurers who are authorised by national law to pursue the activity of insurer.

20. It therefore followed that, even if Planet Sport was not formally regulated in national law, it should nonetheless be treated as if it were so regulated because that was the reality.

21. Mr West sought to rely on OFSTED guidance published in 2013 to explain further the way in which they saw their functions having effect, but we do not see material published so long after the period under appeal as relevant to the situation we have to consider and we have not taken it into account. Similarly, we have not taken into account references to the commissioners' public notices, since public notices (save for those which, exceptionally, contain the exercise of a statutory power) are outside the tribunal's jurisdiction to consider.

Submissions – the Crown

22. Mr Manknell for the commissioners submitted that notwithstanding the taxpayer's arguments about the reality of Planet Sport's position, the legislation was clear that it was the institutions or bodies performing tasks which were either regulated in respect of their activities or not, and that the regulation of the activity apart from those bodies was not envisaged.

23. In particular, section 175 of the 2002 Education Act imposed a duty on the bodies it mentioned, but it was not a power authorising or approving bodies. The same could be said of section 5 of the 2005 Act where the duty to inspect was a duty to inspect the bodies listed; it would be irrelevant that any of the activities of those bodies had been delegated to third parties since the bodies in question would continue to be responsible for how they were carried out. The indirect consequence of OFSTED disapproval, that Planet Sport would be prejudiced commercially, did not prove the contrary.

24. The decision in K&L Childcare was a very close parallel to this case. Hart J had specifically agreed with the proposition that the system of state control described by the tribunal was a system of control exercised over the hiring institutions, rather than over the taxpayer in that case or its staff. The staff used by Planet Sport to run after school clubs were therefore on that basis not 'state-regulated', though they were hired to a school which was so regulated. The appeal must fail for that reason alone.

25. The Ulster case had been decided before K&L Childcare and it had been decided on the basis that there was no link between the waste disposal services provided by the taxpayers and the medical services offered by the clinic; it should not be inferred that, had there been such a link, the taxpayer's activities would have fallen within the scope of the clinic's regulation. Mr Manknell relied further on the well-established principle that exemptions were to be construed strictly in support of that conclusion.

26. The decision in Card Protection Plan also dealt with identifying the elements of a supply where there was more than one. In this case, although the 'care and protection' of children could be seen as part of the supply of services by Planet Sport, it was very subsidiary to the main purpose of the supply which was sports coaching. This understanding of Card Protection Plan was helpfully explained by the House of Lords in College of Estate Management v CEC [2005] STC 1597 by Lord Walker at [29] – [30]:-

> **[29]** In *Card Protection Plan* Lord Slynn, in paragraphs which I have already quoted ([2001] STC 174 at [22] and [25], [2002] 1 AC 202 at [22] and [25]) emphasised the need to take an overall view, without 'over-zealous dissection', and to look for the essential purpose (objectively assessed) of a transaction. In *Customs and Excise Comrs v British Telecommunications plc* [1999] STC 758 at 766, [1999] 1 WLR 1376 at 1384 he referred to the need to look at the commercial reality. In the same case Lord Hope of Craighead said ([1999] STC 758 at 768, [1999] 1 WLR 1376 at 1386) that a supply which comprises a single service from an economic point of view should not be artificially split. In *Beynon* [2005] STC 55 at [20], [2005] 1 WLR 86 at [20] Lord Hoffmann explained:
>
> > The Court of Justice observed ([1999] STC 270, [1999] 2 AC 601, paras 27–29), that the diversity of commercial operations made it impossible to give exhaustive guidance as to how to approach the problem correctly in all cases. Regard should always be had to the circumstances in which the transaction

> took place. Every supply of "a service" is by definition distinct and independent but a supply which "from an economic point of view" comprises a *single* service should not be artificially split into separate "services". What matters is "the essential features of the transaction".

Lord Hoffmann then went on to quote para 30 of the ECJ's judgment in *Card Protection Plan*:

> There is a single supply in particular in cases where one or more elements are to be regarded as constituting the principal service, whilst one or more elements are to be regarded, by contrast, as ancillary services which share the tax treatment of the principal service. A service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied (see *Customs and Excise Comrs v Madgett and Baldwin* (*trading as Howden Court Hotel*) (Joined cases C-308/96 and C-94/97) [1998] STC 1189 at 1206, para 24).

[30] In the course of this appeal there has been much discussion of para 30 of the ECJ's judgment. In my opinion it is clear that this paragraph (which uses the introductory words 'in particular') is dealing with a particular case exemplified by *Madgett and Baldwin*. It is not asserting that every distinct element of a supply must be a separate supply for VAT purposes unless it is 'ancillary'. 'Ancillary' means (as Ward LJ rightly observed ([2004] STC 1471 at [39]) subservient, subordinate and ministering to something else. It was an entirely apposite term in the discussion in *British Telecommunications* (where the delivery of the car was subordinate to its sale) and in *Card Protection Plan* itself (where some peripheral parts of a package of services, and some goods of trivial value such as labels, key tabs and a medical card, were subordinate to the main package of insurance services). But there are other cases (including *Faaborg*, *Beynon* and the present case) in which it is inappropriate to analyse the transaction in terms of what is 'principal' and 'ancillary', and it is unhelpful to strain the natural meaning of 'ancillary' in an attempt to do so. Food is not ancillary to restaurant services; it is of central and indispensable importance to them; nevertheless there is a single supply of services (*Faaborg*). Pharmaceuticals are not ancillary to medical care which requires the use of medication; again, they are of central and indispensable importance; nevertheless there is a single supply of services (*Beynon*).

27. The proper analysis of the evidence in this appeal is accordingly that the main and dominant purpose of the supply by Planet Sport to the pupils' parents, as sanctioned by the schools, was sports coaching to which care and protection were natural and intrinsic aspects of it, and were not separable. The emphasis placed by Planet Sport on their coaches being qualified as such demonstrated this, as did the presence of a member of the school staff on the premises while the clubs were functioning. The after school clubs were not principally a care and protection service at all.

Conclusions

28. We have found that Planet Sport was not, as a matter of fact, regulated by OFSTED or by any authority within the meaning of Note 8, and we accept Mr Manknell's submission that the statutes in question, namely the various Education

Acts, regulate the bodies they specify in relation to their activities, but do not regulate the activities in the abstract. Any other conclusion would, aside from departing from the clear wording of the Acts, produce the unworkable result that almost any entity providing services to a school related to its functions would become 'regulated' without there being any mechanism for the regulation to take place, to register approvals, or to withdraw them. As the Ulster case illustrates, it may also be difficult to draw the line between what is part and parcel of the school's core functions and what is supplemental to the performance of them.

29. No argument was put to us that the national legislation failed properly to implement the EU Directive, and we can see no basis for giving the words 'state-regulated' any other than their obvious meaning – that is, 'actually and formally regulated by an authority established by public law'. If we were disposed to conclude otherwise, we would in any event be bound by the findings of Hart J in K&L Childcare that, even if it had been correct to regard the hired staff in that case as themselves the subject of a system of regulation, it did not follow that the supplier of them could be described as 'state-regulated'.

30. On the issue of welfare services, although it is true that Planet Sport contributed to the welfare of the pupils in its after school clubs, it is also true that it did so as the by-product of its essential service which was sports coaching. Planet Sport staff were not acting as child minders, and the discharge of their care and protection responsibilities for the pupils in their clubs was the condition upon which they were allowed by the schools to run the clubs; it was not the essence of what Planet Sport provided. Again, we are bound in any event by Hart J's finding at [10] of his judgement to this effect, and nothing in Card Protection Plan as interpreted by College of Estate Management detracts from that conclusion.

31. Nor in our view is there any force in the attempt by the taxpayer to draw an analogy between the applicability in Card Protection Plan, by reason of fiscal neutrality, of the Sixth Directive's provisions on exemption to both lawful and unlawful insurance business and the existence or otherwise of state regulation bearing upon the players in a particular sector. The two examples are not on all fours with each other: the criterion specified in article 132 of Directive 2006/112 is that the supply of services and goods closely linked to the protection of children and young persons should be by bodies governed by public law, or by other bodies recognised by the Member State concerned as being devoted to social wellbeing. Planet Sport is neither. For all these reasons, the appeal cannot succeed.

32. This document contains the full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply in writing 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 the tribunal no later than 56 days after this decision is sent to that party.

33. 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.

MALACHY CORNWELL_KELLY
TRIBUNAL JUDGE

RELEASE DATE: 29 October 2013