[2017] UKFTT 715 (TC)

TC06129

Appeal number: TC/2013/02708

APPLICATION TO STAY -

FIRST-TIER TRIBUNAL
TAX CHAMBER

LONDON SCHOOL OF MARKETING LIMITED **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE JENNIFER DEAN

Sitting in public at the Royal Courts of Justice on 3 April 2017

Mr M. Reason, Counsel for the Appellant

Mr R. Hill, Counsel for the Respondents

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DECISION

Introduction and application

5 1. By Notice of Appeal dated 11 April 2013 the Appellant appealed against the decision of HMRC dated 14 March 2013 that it was not an "eligible body" within the meaning of Item 1(1) and Note (1)(b) of Group 6, Schedule 9, VATA 1994 because the Appellant provides other courses outside of an agreement between it and the Anglia Ruskin University ("ARU").

10 2. The Appellant submits that by reason of its August 2009 agreement with ARU it qualifies as a "college of ARU" and consequently all of its supplies are exempted from the section 1 VATA 1994 requirement otherwise to be made subject to VAT. In the alternative the Appellant submits that the principle of fiscal neutrality is breached and, in any event, apportionment is required to be applied to its supplies.

15 3. HMRC contends that the Appellant's approach is misconceived because: a) for the Appellant's actual supplies to qualify as exempt from the general principle that all of a taxable person's supplies be subject to VAT, the Appellant must first itself qualify as an "eligible body" within the meaning of Item I(a), Group 6, Schedule 9, VATA 1994, as properly construed within the meaning of Articles 131, 132(I)(i) and 134 of 20 Directive 2006/112/EC. That qualification is premised on the type of supplier and is binary. Only subsequent to such (subsisting) qualification may that body's actual provision of education qualify as exempt from VAT; b) such approach accords with: i) the principle of fiscal neutrality which Directive 2006/112/EC reflects in Article 132(1) and to adopt LSM's approach would itself breach that principle; ii) Article 25 132(1)(i) and 134 such that to require apportionment of the Appellant's ARU supplies would re-write the terms of Directive 2006/112/EC Article1 and also Item I(a) and Note (l)(b).

4. By application dated 27 March 2017 the Appellant seeks to stay proceedings until the decision of the Court of Appeal in *Revenue and Customs Commissioners v* 30 *SAE Education Ltd* [2016] UKUT 193 (TCC) *("SAE")*. The Appellant notes that proceedings have been stayed since the Respondent's application of 21st June 2013 which has been lifted following the Court of Appeal's judgment in *Finance and Business Training ("FBT")* [2016] EWCA Civ 7.

5. The Appellant submits that the key issue in the *SAE* appeal is whether it is to be 35 treated as an 'eligible body' within the meaning of Note 1(b) to Item 1 of Group 6 of Schedule 9 to the Value Added Tax Act 1994. More specifically, the appeal concerns the issue of whether the college is a college 'of' Middlesex University. Therefore, the *SAE* appeal will give rise to a binding decision on this Tribunal as to which is the correct legal approach in relation to the issue of whether a college is considered to be 40 a college 'of' the university. The principle derived from consideration of these issues will be fundamental to the way in which this Tribunal will need to approach the facts of this appeal.

Authorities

6. In *Peel Investments and others* [2013] UKFTT 404, ("*Peel*") the Tribunal set out a two-stage test for when a tribunal may stay a case following *HMRC v RBS Deutschland Holdings GmbH* [2006] CSIH 10 [2007] STC 814 and *Coast Telecom Limited v HMRC* [2012] UKFTT 307 (TC).

7. It was said in *Peel* at [9] that a tribunal may stay a tribunal case if:

(a) a decision in another court would be of material assistance and

(b) it is expedient to do so.

8. When considering expedience a tribunal should make a practical assessment of the evidence to be considered and balance the prejudice of delaying witness evidence against the possible cost saving and benefit to the tribunal of being in a position to determine facts against clearly established legal principle.

9. In *Mynt Ltd and others v HMRC* (PTA/140/2011) the UT held that it would be inappropriate to refuse a stand over and require the appellants to argue their cases on the basis of a judgment in the Court of Appeal when the CJEU was determining a number of references which the judge was satisfied may provide answers of relevance to the outcome of the appeals.

10. In *Coast Telecom* [2012] UKFTT 307 (TC) Judge Berner's decision stated at [21] & [22]:

"The question is not whether the determination of another court might provide assistance, but whether it will provide material assistance…

Where issues of law alone remain in dispute it can be seen that the imminent consideration of the position under EU law could justify a stay of the appeal proceedings."

Parties' submissions

11. On behalf of the Appellant it was submitted that the Court of Appeal's guidance on the multi-step mutual recognition test established in *SAE* and the criticism of the term "Associate College" will provide material assistance to the Tribunal hearing the Appellants evidence.

12. The points being litigated in these proceedings include those which are also being litigated in *SAE*. The parallel between the issues arising in *SAE* and this appeal have been spelt out by the Appellant in correspondence; the term Associate College was used in the ARU academic agreements with the Appellant; there is therefore a direct parallel between the *SAE* decision and what the Appellant will have to prove. Granting a stay pending the judgment in *SAE* will enable the Tribunal to reach a more informed decision.

13. In *SAE* the UT established a "multi-step evaluation" test of the relationship between the college and the university (at [109] and [110]):

"In our view it is necessary to adopt a multi-step evaluation of the relationship between the two bodies. The first step is to ascertain whether the university and the college had a common understanding of it. If they did not, the enquiry is likely to end there. Second, the common understanding must be that they are in a relationship of university and college, and not some different relationship, such as partnership. As Judge Bishopp said in LCC, it is difficult if not impossible to see how an institution could properly be considered a college of a university which does not recognise it as such. The same would, of course, be true of a college which does not consider itself to be part of a university. The third step is that one must examine whether the relationship is sufficiently close that the college is a college 'of' the university--this was the question in SFM and it is only at this point that most, though not all, of the SFM factors become relevant: the evidence in that case showed that the university and the college had a common understanding, but that understanding alone did not answer the question whether the statutory test was satisfied.

The last step is to consider whether the college satisfies the requirement that it supplies education; this step is reflected in the ninth of the SFM factors, which is derived from the art 132(1)(i) requirement that the college must have 'similar objects' to those of the university; absent similar objects it would not satisfy the supply test (which is why the union failed in University of Leicester). Whether, as has been said in other cases, the 'similar objects' requirement is met only if the 'fundamental purpose' of the college is to supply university-level education is not an issue we need to decide in this case since it is accepted that SEL does satisfy this part of the test, however it is articulated. We merely add that if it is right, as Arden LJ said in FBT ([2016] 4 WLR 47 at [33]), that an institution may be a college of a university without making exclusively exempt supplies 'fundamental purpose' may overstate what must be shown."

14. At [101] in *SAE*, the UT quoted Arden LJ's decision in *FBT* [20] & [21]:

"The respondent ... does not dispute the application of the EU law principles that FBT relies on but contends that in this context they lead to a different result. Fiscal neutrality means not just that the service provided (university education) is the same but also that the suppliers have similar objects for the purposes of article 132.1(i). As to that, the PVD gives member states power to determine whether a body is similar to a body governed by public law having the objects required by article 132.1(i). The UK has exercised that power in an EU law-compliant manner.

In my judgment, for the detailed reasons given below, the jurisprudence of the CJEU supports HMRC's argument. Even though it is supplying educational services, FBT fails to meet the EU law-compliant supplier condition for the education exemption. FBT has fundamentally misunderstood the statutory scheme which in brief is that, in the case of university education, the UK has exercised a member state option to recognise non-public law bodies carrying on qualifying educational activities to a

small group consisting of college and halls of universities which are integrated into the university's activities. This appeal must therefore be dismissed."

15. *SAE's* appeal is due to be heard on 27 or 28 June 2017. The Appellant submits that following the Court of Appeal's judgment it is likely that the Mutual Recognition test will be found to be non-compliant with Article 132 (1)(i). In such circumstances a stay of these proceedings will provide material assistance to the Tribunal hearing this appeal.

16. The Appellant also submits that it would be expedient to stay proceedings to avoid incurring unnecessary costs and to avoid wasting court time and resources as the Court of Appeal may render any decision of this Court superfluous. A stay of proceedings would not be for an undue length of time given the proximity of the Court of Appeal hearing. The Appellant's case does not hinge on oral evidence and therefore the risk to witness evidence and consequential prejudice is minimal.

17. HMRC submit that the Tribunal should not stay the present appeal. Assuming that at least some of the issues in *SAE* would be of material assistance in determining whether the taxpayer is an eligible body, a stay should not be granted where (a) the case is at an early stage of preparation; (b) the facts remain to be established; (c) most of the factual material required will be the same whatever the Court of Appeal decides on those parts of the *SAE* case which are possibly relevant to this case; (d) there is no likelihood that the present appeal will be heard before the *SAE* judgment is published by the Court of Appeal and (e) the parties can usefully complete the initial stages of preparation for the eventual Tribunal hearing, while waiting for the *SAE* judgment, so as to avoid any unnecessary delay.

18. HMRC contends that guidance given by the Court of Appeal on the application of Note 1(b) in *FBT* emphasised that, in order to determine whether the education exemption applied, it was necessary to "examine all the circumstances" (see [32]). Arden LJ agreed with the FTT that *"FBT had in essence to show that it was an integrated part of the University"* (see [14] and [55]); it failed to do so because the FTT found that "*the relationship was not close enough*" (see [15]). In deciding that question, she agreed with the FTT that it was relevant to take into account the fifteen indicators considered by Burton J in the *School of Finance and Management* case ("the SFM factors"): *"Those factors are applied to determine the degree of integration between a college of a university and the university in question for the purposes of Note 1(b)"* (see [61]).

19. It is clear from Arden LJ's judgment in *FBT* that the question whether an education provider is an eligible body is largely a fact specific one. That is relevant to considering whether to grant a stay, since the issues in the present case are therefore mainly factual and the disagreement about the legal test to apply only affects a very limited aspect of those facts.

20. *SAE*'s appeal to the Court of Appeal challenges the UT's decision to apply the first two stages of its analysis, which *SAE* says amounts to a new test which is either

not part of the statutory test in UK law or, in the alternative is contrary to the EU law principles of legal certainty, fiscal neutrality and proportionality.

21. The *SAE* appeal does not threaten the basic approach taken in *SFM* and *FBT,* which is to ascertain whether the taxpayer in question has a sufficiently close degree of integration into the relevant University. Therefore, even if the taxpayer succeeds in its appeal in *SAE,* the majority of the evidence which will need to be prepared in this case will still be required.

22. HMRC submit that the majority of grounds in *SAE* are fact specific. The one legal issue which may be relevant is whether it is necessary to ascertain whether the University and the taxpayer had a common understanding of the agreement between them and whether the common understanding was that they were in a relationship of University and college (the first two stages identified by the UT in *SAE*). HMRC submit that is not clear whether those first two stages are relevant on the present facts; assuming that they are, it is submitted that it would not be expedient to stay the appeal given that findings of fact fall to be made, most of which relate to the third stage identified by the UT in *SAE* (whether the relationship is sufficiently close that the college is a college 'of' the university), which is not in issue in the *SAE* appeal.

23. The relevant primary facts and the relevant documents, including agreements between the Appellant and Anglia Ruskin University, are unlikely to change whatever the outcome in *SAE* because *SAE* does not challenge the need to determine the degree of integration between the Appellant and the University, or the application of the *SFM* factors in making that determination. The parties can continue to prepare the early stages of this appeal in respect of material relevant to the first two stages in the test used by the UT in *SAE*. For those reasons the application should be refused.

<u>Discussion and decision</u>

24. The power to stay proceedings is found in rule 5(3)(j) of the FTT Rules 2009. In considering this application I have borne in mind the overriding objective in rule 2 "*to deal with cases fairly and justly*", which includes "*avoiding delay, so far as compatible with proper consideration of the issues*" and *"dealing with the case in ways which are proportionate to the importance of the case"*.

25. The authorities make clear that a stay may be appropriate where the Tribunal considers that a decision in another court would be of material assistance, though not necessarily determinative in resolving the issues and that it is expedient to do so. In *Coast* (see [10] above) Judge Berner stated that it was not enough that another court:

"…may provide answers of relevance to the appeals in question. This seems to me … to put the test … a little too low. The question is not whether the determination of another court might provide assistance, but whether it will provide material assistance."

26. I did not understand HMRC to challenge to any significant degree the submission that the Court of Appeal's judgment in *SAE* may be of material assistance. The essence of HMRCs objection to the application lies in the fact that there will

remain, irrespective of the *SAE* judgment, findings of fact specific to the Appellant that will require determination and, given the early stages of this appeal, the parties can usefully continue to progress matters as the hearing of this appeal is unlikely to take place prior to the Court of Appeal's judgment. Once the judgment is handed down the parties can consider any impact on this appeal.

27. Whilst I agree that HMRC's proposed approach is a sensible one I have concluded, on balance, to grant the stay. The delay that will be incurred is minimal as the Court of Appeal is due to hear *SAE* imminently. I have balanced against that delay the potentially unnecessary costs and time of preparation in respect of disclosure in circumstances which the parties (and ultimately the Tribunal) will in due course be materially assisted by the Court of Appeal's judgment in clarifying and potentially narrowing the issues legal in dispute. In my view expediency is achieved and the overriding objective is met by enabling the parties to await the judgment and thereby give proper consideration to the issues.

28. The application to stay is granted. This appeal is stayed until 60 days after the Court of Appeal judgment in *Revenue and Customs Commissioners v SAE Education Ltd* [2016] UKUT 193 (TCC).

29. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JENNIFER DEAN
TRIBUNAL JUDGE

RELEASE DATE: 15 MAY 2017