



TC06343

Appeal number: TC/2016/04160

VAT – provision of educational course – whether single supply or separate supplies of education and books

VAT – education – item 1 Group 6 Schedule 9 Value Added Tax Act 1994 – meaning of “university” in Note (1)(b) to Group 6 – whether UK law properly implements Article 132(1)(i) Council Directive 2006/112/EC

VAT – whether VAT legislation is in breach of UK obligations under United Nations Universal Declaration of Human Rights 1948 and the International Covenant on Economic Social and Cultural Rights 1966

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ESSEX INTERNATIONAL COLLEGE LIMITED Appellant

- and -

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

TRIBUNAL: JUDGE ASHLEY GREENBANK

**Sitting in public at Taylor House, Rosebery Avenue, London on 7 September
2017**

John Vyse, of Pearl Lily & Co, for the Appellant

Sharon Spence, officer of HM Revenue & Customs, for the Respondents

DECISION

Introduction

1. The appellant, Essex International College Limited (the “College”) appeals
5 against an assessment for value added tax (“VAT”) issued by the respondents, the
Commissioners for Her Majesty’s Revenue and Customs (“HMRC”), for the VAT
periods 10/12 to 10/15.

2. The assessment was issued on 9 March 2016 in the amount of £301,131 plus
10 interest of £18,390.93. Part of the assessment has been agreed. The amount in
dispute is £275,273.

The hearing

3. By an email dated, 30 August 2017, the College sent to HMRC various
15 additional documents on which it wished to rely at the hearing. By a notice of
objection dated 30 August 2017, HMRC objected to the admission of those
documents to evidence.

4. At the hearing, HMRC withdrew its objections. The documents were
accordingly admitted into evidence.

5. In addition to those documents, HMRC provided a bundle of agreed documents
to the Tribunal.

The summary decision

6. Following the hearing, the Tribunal issued a decision notice on 24 October 2017
20 dismissing the College’s appeal. The decision notice included a summary of the
findings of fact and reasons for the decision pursuant to rule 35(3)(a) of the Tribunal
Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 (the “Tribunal Rules”).

7. By a letter dated 3 November 2017, Pearl Lily & Co (“Pearl Lily”), on behalf of
25 the College, made an application to the Tribunal for full written findings and reasons
pursuant to rule 35(4) of the Tribunal Rules. This is the full decision notice.

Findings of fact

8. I have set out my findings of fact in the following paragraphs.

9. The College was registered for VAT from 1 December 2009.

10. The College is a private limited company incorporated under English law. It has
30 adopted model articles and has relatively unrestricted objects. Its profits are
distributed to its members.

11. The College provided tertiary level education courses, most of which were designed to be the equivalent of the first two years of undergraduate courses at universities.
12. The College's courses led to accredited Edexcel qualifications which were recognized by various universities and colleges both in the UK and in other countries and gave credit for the qualifications against courses leading to degree level qualifications.
13. The College's courses were designated by the Secretary of State for Business Innovation and Skills under the relevant legislation (regulation 6(9) of the Education (Student Support) Regulations 2009) for the purposes of support for fees and maintenance for eligible students from the Higher Education Funding Council for England ("HEFCE") from 9 May 2011 to 31 July 2014.
14. The supplies made by the College to students included tuition, reference books and net books. Students paid fees for the courses as a single fee which covered all of these items.
15. In its invoicing and returns for VAT purposes, the College treated two-thirds of the fees charged to students as being attributable to standard rated services and one-third as attributable to zero rated supplies of books. This apportionment was adopted by the College. It was not formally agreed with HMRC, although, at least initially, HMRC did not challenge the apportionment.
16. Following enquiries, HMRC came to the view that the supplies made by the College constituted a single supply, which should be standard rated for VAT purposes. It issued an assessment for the VAT periods 10/12 to 10/15 in the amount of £301,131 together with interest of £18,390.93 on 9 March 2016. (These figures included potential liabilities on other matters which are not relevant to this appeal. The amounts in dispute are those set out in [2] above.)
17. The College requested a review of HMRC's decision. At least initially, the College argued that, if the supplies made by the College to students were not partly standard rated and partly zero rated, they were exempt supplies under item 1 of Group 6 Schedule 9 Value Added Tax Act 1994 ("VATA") on the grounds that the College was an "eligible body" within Note (1)(c)(i) to Group 6.
18. At this point, Pearl Lily were appointed as tax agents to the College.
19. In a letter dated 27 June 2016, Pearl Lily raised additional arguments in support of the College's claim for exemption. Those arguments included that the College was an eligible body within Note (1)(b) to Group 6 and/or that the supplies made by the College should be treated as exempt under Article 132(1)(i) of Council Directive 2006/112/EC (the "Principal VAT Directive"), which should be given direct effect in UK law.

20. HMRC's decision was confirmed following a review in a letter dated 5 July 2016. The reviewing officer, Mrs Di Champion, dismissed the arguments for exemption under item 1 of Group 6 Schedule 9 VATA 1994 on the grounds that the College was not an "eligible body" within Note (1)(c)(i) to Group 6 because, although the College was capable of being designated by Secretary of State under the relevant legislation (section 129 of the Education Reform Act 1988), it had not in fact been so designated. Mrs Champion also dismissed the College's arguments for its supplies to be treated as partly zero rated supplies of books and standard rated supplies of services on the grounds that the provision of books to students was part of a single standard rated supply of education.

21. Mrs Champion did not address the additional arguments raised by Pearl Lily in their letter dated 27 March 2016.

22. The College appealed to the Tribunal.

Grounds of appeal

23. In its Notice of Appeal dated 1 August 2016, the College set out various grounds of appeal. Those grounds were based on the arguments set out in Pearl Lily's letter of 27 June 2016. The College did not pursue its argument that the supplies made by the College to students were exempt supplies under item 1 of Group 6 Schedule 9 VATA 1994 on the grounds that the College was an "eligible body" within Note (1)(c)(i) to Group 6.

24. In a letter dated 12 May 2017, Pearl Lily sought to extend the grounds of appeal to include arguments that the UK was prevented by its obligations under the United Nations Universal Declaration of Human Rights 1948 ("UDHR") and the International Covenant on Economic Social and Cultural Rights 1966 ("ICESCR") from raising taxes, such as VAT, on the provision of higher education.

25. At the hearing, the College put forward three grounds of appeal.

(1) The first ground of appeal was that the College made separate supplies of educational services and books. The supplies of educational services should be standard rated. However, the supplies of books should be zero rated under item 1 Group 3 Schedule 8 VATA.

(2) The second ground of appeal was that, if the supplies made by the College constituted a single supply, that supply was a supply of exempt educational services either on the basis that the supplies fell within item 1(a) Group 6 Schedule 9 VATA on the grounds that the College was an "eligible body" within Note (1)(b) to Group 6; or, if not, on the basis that the supplies fell within Article 132(1)(i) of the Principal VAT Directive, which should be given direct effect because of the UK's failure properly to implement that provision in its domestic laws.

(3) The third ground of appeal was that the UK had failed in its domestic laws to give effect to its obligations to provide free education under Article 26(1) of UDHR and Article 13(2)(c) of ICESCR. These obligations prevented the UK from imposing additional taxes, such as VAT, on providers of education.

5 26. I will deal with each of these grounds in turn.

Ground 1: separate supplies

27. The first ground of appeal was that the College made separate supplies of educational services and books to students and accordingly that it had properly accounted for VAT in the VAT periods 10/12 to 10/15.

10 *The relevant legislation*

28. Section 30(2) VATA provides that a supply of goods or services is zero-rated if the goods or services are “of a description for the time being specified in Schedule 8 [VATA]”.

15 29. Item 1 Group 3 to Schedule 8 VATA includes “Books, booklets, brochures, pamphlets and leaflets”. The Notes to Group 3 provide for various exceptions, but they are not relevant in this case.

The parties’ submissions

20 30. For the College, Mr Vyse made a simple submission that the supplies made by the College were a mixture of standard rated supplies of services and zero rated supplies of books.

31. For HMRC, Mrs Spence made the following points:

25 (1) The College had presented no evidence to show that reference books and other materials were provided to students. Even if reference books were provided, there was no evidence to show that there was a separate supply of books to which a monetary value was attached. Students were charged a single fee for the supply of an educational course by the College. The supply of books, if any, was an integral part of that supply. There was no opportunity for the student to receive one part of the supply and not another.

30 (2) The supply was a single supply from an economic point of view and should not be split artificially (see the decision of the Court of Justice of the European Union (“CJEU”) in *Card Protection Plan Ltd. v. Customs and Excise Commissioners* (Case C-349/96) [1999] STC 270 (“*Card Protection Plan*”) at [29]).

Discussion

35 32. I have not been shown any evidence of the supplies made the College or the manner in which they were marketed to potential students.

33. The agreed facts are that students were charged a single fee in respect of the supply of an educational course provided by the College which may have included the supply of certain reference books and net books. There was no opportunity for the student to receive one part of the supply and not another.

5 34. The question of whether supplies are a single supply or multiple supplies should be determined by reference to an economic reality test. The question is whether the supplies are so closely linked as to form a single economic supply which it would be artificial to split (*Card Protection Plan* at [29], *Levob Verzekeringen BV v Staatssecretaris van Financiën* (Case C-41/04) [2006] STC 766 at [22]). The basic
10 facts are sufficient to support HMRC's submission that the College made a single supply from an economic point of view to students.

15 35. That having been said, there is insufficient evidence before the Tribunal in this case to reach a firm conclusion on this point. The College has presented no evidence to support its contention that the supplies should be treated as separate supplies of education and books. The College has also presented no evidence to support the apportionment of the fees for which it contends between standard rated and zero rated supplies. The burden of proof on these issues is on the College. The College has not discharged that burden.

36. On that basis, I dismiss the first ground of appeal.

20 **Ground 2: the supplies made by the College are exempt supplies**

37. Having determined that the supplies made by the College should be treated as a single supply, the next question is the nature of that supply. This leads to the College's second ground of appeal, which is that the supplies made by the College are exempt supplies of educational services.

25 38. This argument falls into two parts.

(1) First, the College argues that its supplies to students are exempt supplies within item 1(a) Group 6 Schedule 9 VATA on the grounds that the College is an "eligible body" within Note (1)(b) to Group 6 ("Ground 2(i)").

30 (2) Second, if its supplies do not fall within item 1(a) Group 6 Schedule 9 VATA, the College argues that the UK has failed properly to implement the requirements of Article 132(1)(i) of the Principal VAT Directive and that it should be entitled to rely upon the direct effect of the Principal VAT Directive in UK law ("Ground 2(ii)").

35 Mr Vyse's submissions ranged across both of these points. In the discussion below, I have separated them between the two issues.

The relevant legislation

39. It is helpful first to set out the relevant legislation.

40. The relevant provisions of the Principal VAT Directive are found in Articles 132 and 133.

41. Article 132 provides, so far as relevant:

“Article 132

5 1. Member States shall exempt the following transactions: ...

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

42. Article 133 provides:

“Article 133

15 Member States may make the granting to bodies other than those governed by public law of each exemption provided for in points (b), (g), (h), (i), (l), (m) and (n) of Article 132(1) subject in each individual case to one or more of the following conditions:

20 (a) the bodies in question must not systematically aim to make a profit, and any surpluses nevertheless arising must not be distributed, but must be assigned to the continuance or improvement of the services supplied;

(b) those bodies must be managed and administered on an essentially voluntary basis by persons who have no direct or indirect interest, either themselves or through intermediaries, in the results of the activities concerned;

25 (c) those bodies must charge prices which are approved by the public authorities or which do not exceed such approved prices or, in respect of those services not subject to approval, prices lower than those charged for similar services by commercial enterprises subject to VAT;

30 (d) the exemptions must not be likely to cause distortion of competition to the disadvantage of commercial enterprises subject to VAT.”

43. Group 6 Schedule 9 VATA was enacted in pursuance of the UK's obligations under these provisions. Supplies within Schedule 9 are exempt from VAT by virtue of section 31 VATA.

44. Item 1 of Group 6 Schedule 9 specifies the following supplies:

35 **“Item No.**

1. The provision by an eligible body of -

(a) education; or ...

(c) vocational training.”

45. Note (1) defines an “eligible body”. It provides:

“(1) For the purposes of this Group an “eligible body” is -

- 5 (a) a school within the meaning of the Education Act 1996, the Education (Scotland) Act 1980, the Education and Libraries (Northern Ireland) Order 1986 or the Education Reform (Northern Ireland) Order 1989, which is—
- (i) provisionally or finally registered or deemed to be registered as a school within the meaning of the aforesaid legislation in a register of independent schools; or
- 10 (ii) a school in respect of which grants are made by the Secretary of State to the proprietor or managers; or
- (iii) a community, foundation or voluntary school within the meaning of the School Standards and Framework Act 1998, a special school within the meaning of section 337 of the Education Act 1996 or a maintained school within the meaning of the Education and Libraries (Northern Ireland) Order 1986; or
- 15 (iv) a public school within the meaning of section 135(1) of the Education (Scotland) Act 1980; or
- (viii) a grant-maintained integrated school within the meaning of Article 65 of the Education Reform (Northern Ireland) Order 1989;
- 20 (b) a United Kingdom university, and any college, institution, school or hall of such a university;
- (c) an institution -
- (i) falling within section 91(3)(a), (b) or (c) or section 91(5)(b) or (c) of the Further and Higher Education Act 1992; or
- 25 (ii) which is a designated institution as defined in section 44(2) of the Further and Higher Education (Scotland) Act 1992; or
- (iii) managed by a board of management as defined in section 36(1) of the Further and Higher Education (Scotland) Act 1992; or
- 30 (iv) to which grants are paid by the Department of Education for Northern Ireland under Article 66(2) of the Education and Libraries (Northern Ireland) Order 1986; or
- (v) managed by a governing body established under the Further Education (Northern Ireland) Order 1997;
- (d) a public body of a description in Note (5) to Group 7 below;
- 35 (e) a body which—
- (i) is precluded from distributing and does not distribute any profit it makes; and
- (ii) applies any profits made from supplies of a description within this Group to the continuance or improvement of such supplies;
- 40 (f) a body not falling within paragraphs (a) to (e) above which provides the teaching of English as a foreign language.”

Ground 2(i): the supplies are exempt under domestic legislation (item 1(a) of Group 6 Schedule 9 VATA)

46. Supplies of education only fall within item 1(a) Group 6 Schedule 9 VATA if they are made by an “eligible body”.

- 5 47. The definition of an “eligible body” is set out in Note (1) to Group 6 Schedule 9 VATA. Note (1)(b) provides that an eligible body includes “a United Kingdom university and any college, institution, school or hall of such a university”. The College argues that it is an “eligible body” within the terms of Note (1)(b).

The parties’ submissions

- 10 48. Mr Vyse, for the College, makes the following points.

(1) The College should be treated as an eligible body within Note (1)(b) Group 6 Schedule 9 VATA on the grounds that it is a “university” for the purposes of Note (1)(b). The College provides university level education. Its courses are approved for the purpose of student loans and finance.

- 15 (2) The term “university” in Note (1)(b) should be given a broad meaning to encompass all providers of education at that level. This would be consistent with the purpose of the exemption which is the provision of education in the public interest. Such an interpretation would be consistent with the the broader interpretation which is given to the term “university education” in Article
20 132(1)(i) and Article 132(1)(j) of the Principal VAT Directive.

49. Mrs Spence, for HMRC, agreed that the College provided university level education and that its courses were approved for the purpose of access by students to student loans and finance. However, she says that the College is not an eligible body within Note (1)(b) to Group 6 Schedule 9 VATA. The College is not a “university”
25 as that term is understood for the purposes of the VAT legislation. An entity is not a university just because it provides education to the same academic level as a university.

Discussion

50. I agree with HMRC.

- 30 51. There is no definition of the term “university” in the VAT legislation.

52. As a matter of domestic law, the term has a relatively settled meaning. For an entity to be a “university”, inter alia, it will typically (although not exclusively) be incorporated by Royal Charter or Act of Parliament and it will have power to award degrees for its taught courses granted by Royal Decree or Act of Parliament (see, for
35 example, *St David’s College, Lampeter v. Minister of Education* [1951] 1 All ER 559).

53. The use of the term “university” in the name of a body which is providing education is also regulated as a matter of English law. The Further and Higher Education Act 1992 provides (in section 77(1)) for the use of the term in the name of an institution with the consent of the Privy Council and for a body which is called a “university” under that provision to be treated as a university for all purposes (section 77(4)). It is unlawful for an institution to use the term in its name unless it is appropriately authorized (section 39 Teaching and Higher Education Act 1998).

54. I did not understand Mr Vyse to suggest that the College was a “university” either by reference to any of the domestic case law authorities or under any of the provisions to which I have just referred. Rather he argued that the reference to “university” in Note (1)(b) of Group 6 should have a specific meaning for VAT purposes; that meaning should be a broad one and should be informed by the meaning of the term “university education” which appears in Article 132(1)(i) and (j) of the Principal VAT Directive.

55. The term “university education” in Article 132(1)(i) and Article 132(1)(j) of the Principal VAT Directive has a specific meaning in EU law. In its decision in *Haderer v Finanzamt Wilmersdorf* (Case C-445/05) [2008] STC 2171 (“*Haderer*”), the CJEU stated (at [24] and [25]):

“24 In that regard, although the terms used to specify the exemption envisaged under Art.13A(1)(j) of the Sixth Directive are, admittedly, to be interpreted strictly, a particularly narrow interpretation of “school or university education” would risk creating divergences in the application of the VAT system from one Member State to another, as the Member States' respective education systems are organised according to different rules. Such divergences would be incompatible with the requirements of the case law referred to in para [17] of this judgment.

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25 Furthermore, insofar as the Finanzamt's arguments on that point are based on a particular interpretation of “school” or “university” in terms of the German education system, it should be noted that whether a specific transaction is subject to or exempt from VAT cannot depend on its classification in national law (see *Kingscrest Associates and Montecello* at [25]).”

56. The decision in *Haderer* concerns the meaning of “university education” in Article 13A(1)(j) of the Sixth Directive, which is the predecessor of Article 132(1)(j) of the Principal VAT Directive. It is clear from the decision that “university education” in the Principal VAT Directive is to be given a broad meaning which is not dependent on national law.

57. Article 132(1)(i) also contains the term “university education”; however, there is no reference to “university education” in item 1 of Group 6 or in the definition of “eligible body” in Note (1) to Group 6. Mr Vyse suggests that, given that item 1 of Group 6 is intended to implement Article 132(1)(i), the terminology used in item 1 and Note (1) - in particular, the term “university” in Note(1)(b) - should be interpreted to give a similar broad meaning and should not be constrained by the concepts of English case law or provisions of UK legislation.

58. I disagree. As I have mentioned below in my discussion of Ground 2(ii) (at [65] to [72]), a discretion is given to member states to determine the suppliers to which the exemption for educational services applies. The UK has exercised that discretion by listing the bodies that can qualify for exemption in Note (1) to Group 6. That discretion must be exercised within the constraints of Article 132(1)(i) and EU law and so there is a question as to whether, in adopting that approach, the UK has properly implemented the requirements of Article 132(1)(i) and EU law in the provisions of Group 6 Schedule 9 VATA. I have addressed those issues in the context of the discussion of Ground 2(ii). However, in my view, it follows that, except to the extent that the terms of Article 132(1)(i) might inform the boundaries of any exemption provided by item 1 of Group 6, in the form in which it is implemented in UK legislation, the terms of Note (1)(b) to Group 6 are not to be understood by reference to the terms of Article 132(1)(i) but by reference to domestic law.

59. For these reasons, the reference to “university” in Note (1)(b) should take its domestic law meaning. The College is not a “university” within that meaning and so its appeal on Ground 2(i) must fail. (This is of course subject to the arguments that Group 6 Schedule 9 VATA does not properly implement the relevant provisions of the Principal VAT Directive, which I discuss below in the context of Ground 2(ii)).

60. For completeness, I should mention that in its skeleton argument, the College referred to the possibility that it might be treated as an “eligible body” within Note (1)(b) on the grounds that it is a “college... of a university”. That argument was not advanced at the hearing. The College did not produce evidence to show that it was an eligible body within that part of the definition in Note (1)(b). Although the College may provide university level education, it did not provide any evidence that it was sufficiently integrated within a university in order to be treated as a “college... of a university” (see the judgment of Burton J in *Customs and Excise Commissioners v. School of Finance and Management (London) Limited* [2001] STC 1690 (“*SFM*”).

Ground 2(ii): the supplies should be treated as exempt under the relevant provisions of the Principal VAT Directive (Article 132(1)(i))

61. The College argues that, if the College is not an eligible body within item 1(a) Group 6 Schedule 9 VATA as currently enacted (and so its supplies to students are not exempt under the UK’s domestic legislation), its supplies should be treated as exempt under Article 132(1)(i) of the Principal VAT Directive, which should be given direct effect in UK law.

The parties’ submissions

62. For the College, Mr Vyse makes the following points.

(1) The College meets all of the requirements of Article 132(1)(i): it provides university education; it has similar objects to providers of education that are governed by public law (namely the provision of university level education); and it is recognized by the UK as having such objects (given that its courses are approved for the purposes of the provision of student finance).

(2) If the College's supplies are not exempt under UK domestic law, the UK's implementation of Article 132(1)(i) is contrary to EU law and the College should be entitled to rely upon the direct effect of Article 132(1)(i) in order to treat its supplies as exempt.

5 (3) The only material difference between the College and a public body with the same objects is that the College distributes its profits to members. That difference is irrelevant for the purposes of the exemption in an Article 132(1)(i) because the UK has not taken advantage of Article 133(a) of the Principal VAT Directive which allows member states to limit the exemption in Article
10 132(1)(i) to non-profit making bodies, if they wish to do so.

63. Mr Vyse also notes that Note (1)(b) to Group 6 refers to a "UK university". This he says demonstrates that the UK's implementation of the Principal VAT Directive must be contrary to EU law as the drafting should permit institutions based in other EU member states to benefit from the exemption.

15 64. For HMRC, Mrs Spence makes the following points.

(1) The College is not a public body.

(2) Article 132(1)(i) allows member states a discretion to determine the conditions under which the exemption will apply to bodies which are not governed by public law.

20 (3) That discretion must be exercised within the constraints of EU law, but the limitations placed on the exemption in UK legislation are compatible with EU law. She cites in support of this submission the decision of the Court of Appeal in *Finance and Business Training Limited v. Revenue and Customs Commissioners* [2016] EWCA Civ 7, [2016] STC 2190 ("FBT").

25 *Discussion*

65. Once again, I agree with HMRC.

66. The relevant decision of the CJEU on the interpretation of Article 132(1)(i) is *Minister Finansow v. MDDP sp z oo Akademia Biznesu, sp komandytowa* (Case C-319/12) [2014] STC 699 ("MDDP").

30 67. In that case, the Court decided that a Polish law which provided a general exemption from VAT for all supplies of education (whether or not they were made by a profit making body) was not compatible with Article 132(1)(i) of the Principal VAT Directive.

35 68. The key principles that I take from the judgment of the CJEU in *MDDP* for the purposes of this decision are as follows.

(1) Member states have the option (provided by Article 133 of the Principal VAT Directive) of excluding profit-making entities from any exemption from VAT for educational services which is implemented pursuant to Article 132(1)(i). However, profit-making bodies are not automatically excluded from

the benefit of any exemption from VAT for educational services which meets the conditions for the exemption in Article 132(1)(i). (*MDDP*: [27] - [31]).

5 (2) That having been said, the exemption under Article 132(1)(i) is limited to the provision of education by bodies governed by public law or recognized by the member state as a body having “similar objects” to those of a body governed by public law having the provision of education as its aim. So, in the case of supplies made by a body which is not governed by public law, Article 132(1)(i) does not permit member state to give a general exemption for all supplies of educational services without regard to the objects pursued by that entity
10 (*MDDP*: [35],[39]).

(3) A member state can and should set the conditions that bodies, which are not governed by public law, must meet to qualify for the exemption from VAT for educational services to the extent that the conditions are not specified in Article 132(1)(i). Within those constraints and within the constraints of general
15 EU law principles (including the principle of fiscal neutrality), member states have a discretion as to what those conditions should be (*MDDP*: [37]).

(4) It is for national courts to determine whether the relevant national law imposes EU law-compliant conditions (*MDDP*: [38]). The national courts have to compare the activities of the person whose entitlement to the exemption is in
20 issue with those of bodies who (1) are of the member state, (2) are governed by its public law and (3) provide educational services (*MDDP*: [54]).

69. Parliament therefore had a discretion to set the conditions which a supplier must meet to qualify for the exemption when it implemented Article 132(1)(i). It chose to exercise that discretion by listing the bodies which it regarded as appropriate to
25 qualify in Note (1) to Group 6 Schedule 9 VATA.

70. The manner in which a member state exercises its discretion to set those conditions is constrained by Article 132(1)(i) and by EU law. However, the Court of Appeal decided in *FBT* that the manner in which Parliament had chosen to exercise that discretion was compatible with EU law and, in particular, the manner of its
30 implementation of Article 132(1)(i) in Note (1) to Group 6 Schedule 9 VATA met the EU law requirements of legal certainty and fiscal neutrality.

71. Arden LJ said (at [53] – [58]):

35 “**53** All Ms Hall's [counsel for FBT] submissions proceed on the basis that Parliament has not set conditions for the education exemption in compliance with EU law. It is now clear from *MDDP* that a member state can and should set the conditions for bodies which are not governed by public law which are to be entitled to the education exemption (“non-public bodies”). How it sets those conditions is a matter for national law.

40 **54** No one has suggested that Parliament had to use any particular form of words to set these conditions. In my judgment, it was therefore open to Parliament to exercise the UK’s option by deciding which non-public bodies were to qualify and then including a list of them in the relevant legislation. That is what Parliament has done in Note 1(b).

55 Parliament is obviously constrained by Article 132(1)(i) as to what bodies it can include. In those circumstances, it has taken the view that the body must be one which provides education in like manner to a body governed by public law, that is, there must be a public interest element in its work. It has decided to draw the line, in the case of universities to those colleges, halls and schools which are integrated into universities and which are therefore imbued with its objects.

56 For FBT to show that its exclusion from this group is a breach of the fiscal neutrality principle would require it to say that it belongs to the same class as those institutions which meet the integration test in Note 1(b). Neither of the Tribunals made any findings that would support that conclusion and this Court is hearing an appeal only on a point of law.

57 FBT contends that Parliament has not met the requirements of the EU law principle of legal certainty by setting out criteria which are to apply to determine when non-public bodies seek to enjoy the education exemption. The criteria have to be “neutral, abstract and defined in advance”. In my judgment, this is achieved by the combination of Note 1(b) and the SFM factors [i.e. the factors set out by Burton J in his judgment in *SFM*]. These factors are neutral, they are abstract and defined in advance. By applying them, it is possible to know what supplies and which suppliers qualify for exemption.

58 Moreover Note 1(b) and the SFM factors apply equally to profit-making and not-for-profit entities. This disposes of FBT’s Ground 2. Furthermore, it is clear that the Tribunals did not rule against FBT because it was a profit-making enterprise.”

72. I am bound by that decision.

73. In particular, if the College is to show that the conditions breach the principle of fiscal neutrality, it would need to show that it belongs to the same class of taxpayer as those which benefit from the exemption and which are not bodies governed by public law. In the context of Note (1)(b), the College would need to show that it is objectively in the same position as institutions that can meet the requirements to be treated a “university” or as a “college etc. ... of a university”. That requires evidence that goes beyond demonstrating that the College meets the basic requirements of Article 132(1)(i).

74. As I have mentioned at [59] and [60], the College is not a “UK university” and it has not sought before the Tribunal to pursue the argument that it is “a college... of a university” within Note (1)(b). It has not produced evidence to show that it is in the same position as a “UK university” beyond the assertion that it provides university level education (and so meets the basic requirement of Article 132(1)(i)).

75. For this reason, I dismiss the appeal on the basis of Ground 2(ii).

76. As I have mentioned at [63], Mr Vyse pointed to the use of the phrase “a UK university” in Note (1)(b) to demonstrate that the UK’s implementation of Article 132(1)(i) is not compatible with EU law. He put forward various examples of institutions based in other EU member states which would not fall within the exemption if they were to make supplies in the UK which were within the scope of UK VAT. This is a general point. The College has not sought to argue that it is in the

same position as a university based in another EU member state. Indeed, there is no evidence that it had any establishment outside the UK. For the purposes of this decision, I do not therefore need to decide whether the limitation of Note (1)(b) to UK universities is or is not compatible with EU law and I do not do so.

5 **Ground 3: the failure of the UK to implement its international obligations**

77. The third ground of appeal was that, by failing to exempt the provision of education from VAT, the UK had failed in its domestic laws to give effect to its obligations to provide free education under Article 26(1) UDHR and Article 13(2)(c) ICESCR.

10 *The treaty provisions*

78. Article 26(1) UDHR provides:

(1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

79. Article 13(2)(c) ICESCR provides:

2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

- (a) ...
- 20 (b) ...
- (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education; ...

The parties submissions

25 80. Mr Vyse, for the College, says that:

- (1) the UK is under an obligation under its international treaties to provide free education;
- (2) the introduction of VAT in 1972 and its imposition on the provision of education was a breach of those obligations.

30 81. Mrs Spence, for HMRC, says that:

- (1) unlike the European Convention on Human Rights, which is given effect in UK law by the Human Rights Act 1998, the UDHR is not given direct effect in UK law. In any event, the undertaking given by the UK in Article 26(1) UDHR to provide free education only extends to elementary and fundamental education. There is such a right under UK law;
- 35 (2) the ICESCR is not directly enforceable in UK courts.

Discussion

82. I agree with HMRC.

83. The UDHR and ICESCR are not incorporated into UK law and are not directly enforceable in the Tribunal.

5 84. While the courts and tribunals may at times seek to interpret domestic legislation in manner that is consistent with the UK's international obligations, that cannot extend to negating a charge to tax that has been imposed by Parliament.

Decision

85. I dismiss this appeal.

10 **Rights of appeal**

86. 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.

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**ASHLEY GREENBANK
TRIBUNAL JUDGE**

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