[2019] UKFTT 0678 (TC)

TC07453

VALUE ADDED TAX – exemption in Article 132(1)(h) of Council Directive 2006/112/EEC and item 9 of Group 7 of Schedule 9 to the Value Added Tax Act 1994 – whether services provided by the Appellant as operator of school holiday camps were "services… closely linked to the protection of children and young persons" and supplies of "welfare services" – held that those services amounted to a single composite supply of which the predominant element was childcare (as opposed to the provision of activities) and therefore that they fell within the scope of the above provisions and qualified for the exemption

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2017/08466

BETWEEN

RSR SPORTS LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE TONY BEARE

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 22 October 2019

Mr Tim Brown, instructed by Fusion Consulting Limited, for the Appellant

Ms Farah Chaumoo, Officer of HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. This decision relates to a decision by the Respondents on 21 August 2017 to refuse the Appellant's claim for the repayment of £229,388.00 of value added tax ("VAT") for which the Appellant had accounted in respect of its VAT accounting periods from and including its VAT accounting period ending 10/12 to and including its VAT accounting period ending 08/16.

2. The Appellant had made its claim under Section 80(1) of the Value Added Tax Act 1994 (the "VATA") on the basis that it considered the supplies to which the VAT related to be exempt under Section 31 of, and Group 7 of Schedule 9 to, the VATA and the Respondents refused the claim on the basis that they considered the supplies to fall outside the ambit of those provisions with the result that the Appellant's original treatment of the supplies as standard-rated was correct.

3. On 31 August 2017, the Appellant (through its representative, Fusion Consulting Limited) wrote to the Respondents to request a statutory review of the Respondents' decision.

4. On 6 October 2017, the Respondents wrote to the Appellant to say that the conclusion of their statutory review was to uphold their decision in full.

5. On 4 November 2017, the Appellant notified the First-tier Tribunal of its appeal against the Respondents' decision.

6. This is a very unusual case in that there is no dispute between the parties in relation to the proper construction of the relevant legislation or indeed the primary facts to which the relevant legislation is to be applied. Instead, the sole area of disagreement between the parties is in relation to whether, on a proper application of the relevant legislation to those primary facts, the supplies of services to which the Appellant's claim for repayment relates should have been exempt from VAT (as the Appellant asserts) or have correctly been treated as standard-rated taxable supplies (as the Respondents assert).

7. The Appellant trades under the name of Get Active Sports. In trading under that name, it provides various services including:

(1) the services of providing after-school clubs;

(2) the services of providing staff to schools to cover teachers and to assess pupils for schools. For convenience, in the rest of this decision I will refer to those services as "PPA Services";

(3) the services which are the subject of this decision – namely, the provision of school holiday camps. For convenience, in the rest of this decision I will refer to those services as "Holiday Camp Services"; and

(4) the services of childcare before and after school on each day of the school term time. For convenience, in the rest of this decision I will refer to those services as "Active Care Services".

8. As mentioned in paragraph 7 above, the supplies of services which are the subject of this decision are the supplies of Holiday Camp Services made by the Appellant during the VAT accounting periods in question. The Appellant considers that those supplies constituted supplies of "services…closely linked to the protection of children and young persons" (within the meaning of Article 132(1)(h) of Council Directive 2006/112/EEC (the "Directive") and supplies of "welfare services" (within the meaning of item 9 of Group 7 of Schedule 9 to the VATA, the provision whereby Article 132(1)(h) has been transposed into UK law). The

Respondents considers that those supplies did not fall within the relevant provisions and have therefore properly been treated as standard-rated taxable supplies for VAT purposes.

9. I should therefore start this decision by setting out briefly the relevant legislation.

THE RELEVANT LEGISLATION

10. Article 132(1)(h) of the Directive provides as follows:

"Member States shall exempt the following transactions…(h) the supply of services and of goods closely linked to the protection of children and young persons by bodies governed by public law or by other organisations recognised by the Member State concerned as being devoted to social wellbeing".

11. The UK has enacted the above provision in Section 31 of, and Group 7 of Schedule 9 to, the VATA.

12. Section 31, so far as it is relevant to this decision, provides as follows:

"31 Exempt supplies and acquisitions.

(1) A supply of goods or services is an exempt supply if it is of a description for the time being specified in Schedule 9…"

13. Group 7 of Schedule 9 to the VATA, so far as it is relevant to this decision, provides as follows:

"Group 7— Health and welfare

Item No.
…..
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.

Notes:…

(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…

(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.

Here "Act" means—

(a) an Act of Parliament;

(b) an Act of the Scottish Parliament;

(c) an Act of the Northern Ireland Assembly;

(d) an Order in Council under Schedule 1 to the Northern Ireland Act 1974; (e) a Measure of the Northern Ireland Assembly established under section 1 of the Northern Ireland Assembly Act 1973;

(f) an Order in Council under section 1(3) of the Northern Ireland (Temporary Provisions) Act 1972;

(g) an Act of the Parliament of Northern Ireland."

14. It is common ground that there is no meaningful difference in meaning between the language which is used in Article 132(1)(h) of the Directive – "the supply of services…closely linked to the protection of children and young persons" – and the language used in item 9 of Group 7 of Schedule 9 to the VATA – "welfare services" – as that term is elaborated upon in note (6) of Group 7 of Schedule 9 to the VATA.

THE EVIDENCE

15. At the hearing, I was provided with a number of documents which shed light on the nature of the Holiday Camp Services and, in particular, the nature of those services relative to the Active Care Services and the services involved in the after-school clubs. Most of these were contained in the documents bundle for the hearing (the "DB") but I was also provided with three certificates from The Office for Standards in Education, Children's Services and Skills ("OFSTED") which were added to the evidence shortly before the hearing. The following points arose from perusing those documents:

(1) in the description of the Appellant set out in the Job Description for a playworker providing Active Care Services which was included at page 35 of the DB, the Appellant described itself as "one of the biggest sports coaching companies in the South of England" and said that it "[specialised] in sports coaching during curriculum time, before school and after school clubs, and holiday camps";

(2) of the 5 "Key Areas" set out in the Job Description for a member of staff at the holiday camps which was included at page 37 of the DB, 2 of them – "Liaison with parents, children and staff" and "Supervision and Care of Children at all times" – touched on the childcare aspects of working at the holiday camps. The others – "Activity leading", "Direct Play and engagement with children" and "Leading Sports sessions" – were all directed at the activities associated with the holiday camps;

(3) both the Job Description for a playworker providing Active Care Services which was included at page 35 of the DB and the Job Description for a member of staff at the holiday camps which was included at page 37 of the DB stated that the main purpose of the relevant role was to assist the co-ordinator in providing a caring, secure environment, through individual attention and group activities and to organise an appropriate range of leisure activities for children between the ages of 4 and 11;

(4) the schedule of services included at page 45 of the DB stated that:

(a) in relation to Active Care Services, the daily fee was £3.50 to £6.00 if one snack was included, £6.00 to £8.00 if one main meal was included and £9.00 to £12.90 if both one snack and one main meal was included;

(b) in relation to Holiday Camp Services, the daily fee was £28.95 and the weekly fee was £130.00 if attendance was from 8am to 6pm and the daily fee was £19.95 and the weekly fee was £90.00 if attendance was from 9.30am to 3.30pm (in each case with a 10% sibling discount and a 10% early bird discount) and that it was possible to purchase a morning or afternoon boost supplement for £5.00 or £7.00; and

(c) in relation to the after-school clubs, the hourly rate was £4.00 to £7.00;

(5) the table included at page 46 of the DB stated that staff pay was as follows:

(a) for staff providing Active Care Services - £7.00 to £9.00 per hour;

(b) for staff providing Holiday Camp Services - £6.00 to £9.00 per hour; and

(c) for staff working in after-school clubs - £10.00 to £30.00 per hour;

(6) the flyer in relation to Active Care Services at Grazeley Parochial Primary School ("Grazeley") which was included at page 53 of the DB referred to "a specific sport being taught each day of the week" and to help being provided to children "with their homework and reading". (In the list of venues included at page 57 of the DB, Grazeley was not cited as a venue for the provision of Holiday Camp Services;)

(7) the table included at page 56 of the DB set out the intended outcome of each of the services provided by the Appellant and was provided to schools to explain the Appellant's offering. In relation to the Holiday Camp Services, that table stated that the holiday camps were a cost effective, reliable form of childcare, offered a wide range of sport and art activities to keep children fully entertained throughout the day, were inclusive, made various educational links and improved confidence and social skills. In relation to the Active Care Services, the table stated that the relevant services involved almost identical characteristics – it referred to affordable childcare before and after school every day of the term, keeping children healthy, the provision of sports, arts and crafts and educational activities and the development of children's confidence, social skills, learning, literacy and numeracy. In contrast, in relation to the services at the after-school clubs, the table mentioned the teaching of sports specific skills and life skills such as teamwork, leadership and confidence;

(8) the survey included at page 60 of the DB indicated that childcare was a reason for using the Holiday Camp Services for 69% of the parents who responded to the survey, whilst sports or arts and crafts were a reason for using the Holiday Camp Services for 52% of those parents (sports for 37% and arts and crafts for 15%). In contrast, childcare was a reason for using the after-school clubs for 17.86% of the parents who responded to the survey, whilst sports were a reason for using the after-school clubs for 67% of those parents;

(9) the survey included at pages 61 to 63 of the DB indicated that childcare was a reason for using the Holiday Camp Services for 93.24% of the parents who responded to the survey and had used the Holiday Camp Services (69 parents out of the 74 respondents who had used the Holiday Camp Services) and a reason for using the Active Care Services for 76.92% of the parents who responded to the survey and had used the Active Care Services (20 parents out of the 26 respondents who had used the Active Care Services). In contrast, 37.5% of the parents who responded to the survey and had used

the after-school clubs (6 parents out of the 16 respondents who had used the after-school clubs) cited childcare as a reason for using the after-school clubs; and

(10) the three OFSTED reports in relation to Gems Didcot Primary Academy on 16 August 2019, Radstock Primary School ("Radstock") on 12 June 2019 and Prestwood Junior School ("Prestwood") on 7 August 2019 were focused on the Appellant's compliance with its obligations under the Childcare Act 2006. As such, the reports all dealt in detail with the childcare aspects of the services whilst also covering the nature of the activities offered. However, the report on the services provided at Radstock expressly stated that the majority of the staff providing the "clubs" were teachers working in the school, and that "[club] staff include qualified teachers as well as specialist sports teachers". Although that report refers to "clubs", Radstock is not listed on pages 57 and 58 of the DB as a school at which the Appellant offers after-school clubs and the other terms of the report suggest that the references in the report to "clubs" are to the Active Care Services and not to the after-school clubs.

16. At the hearing, in addition to the documents mentioned above, I was provided with witness statements from 4 witnesses – Mr Rob Sherwood, a director of the Appellant, Miss Georgia Gallon and Ms Hayley Goodwin, both of whom are workers in the Appellant's holiday camps and Mr Darren Goswell, a sports coach in the Appellant's after-school clubs.

17. Neither Ms Goodwin nor Mr Goswell were required by the Respondents to attend the hearing to be cross-examined.

18. In his witness statement, Mr Goswell testified that:

(1) he had an MSc in Sport and Exercise Physiology and an FA Level 2 Coaching Certificate;

(2) he had spent a year coaching children in the US before joining the Appellant; and

(3) his work for the Appellant involved coaching children in football skills at the after-school clubs and acting as a substitute teacher in schools as part of the Appellant's PPA Services. Mr Goswell said that both jobs "put an onus on me to help develop the children and to make sure that these children enjoy being active and the art is trying to find a balance between the two".

19. In her witness statement, Ms Goodwin testified that:

(1) her work for the Appellant was confined to the holiday camps;

(2) her role at the holiday camps involved a focus on childcare and following the arts and crafts activities and sporting timetables provided to her;

(3) her role also included the provision of first aid to those in need of it and the notification of any accident to the relevant parent at the time of collection;

(4) no coaching or teaching was provided to the children at the holiday camps; and

(5) the children brought their own packed lunches and breaktime snacks to the holiday camps.

20. In her witness statement, Miss Gallon testified that:

(1) she ran those of the Active Care Services which were provided at St Francis primary school in Ascot and she had also worked at a variety of holiday camps;

(2) the Active Care Services entailed the provision of a wide range of activities so that the children had a choice as to what they did and the appropriate adjustments could be made for the weather;

(3) the various sporting activities provided in the course of the Active Care Services merely involved the children playing the relevant game – there was no coaching or teaching; and

(4) her work at the holiday camps was exactly the same as her work in providing the Active Care Services. The holiday camps were no more than an extended version of the Active Care Services.

21. In cross-examination, Miss Gallon confirmed that:

(1) her work in providing Active Care Services took place between 3pm and 6pm on school days and that her work in providing Holiday Camp Services took place between one of 8am to 6pm, 9am to 4pm and 8am to 4pm; and

(2) more activities were offered in the course of providing the Holiday Camp Services than in the course of providing the Active Care Services as the children were at the holiday camps for longer and therefore needed more options to be kept busy.

22. In his witness statement and in his examination-in-chief, Mr Sherwood testified that:

(1) the Appellant had been formed in summer 2012 for the dual purpose of improving PE teaching in primary schools and supplying parents with high-quality childcare during the school holidays;

(2) initially, the Appellant offered:

(a) after-school clubs;

(b) the PPA Services; and

(c) the Holiday Camp Services;

(3) the staff that provided the after-school clubs and the PPA Services were required to have an FA Level 2 Coaching Certificate or above and the staff that provided the PPA Services were, in addition, required to have at least one year's experience in teaching or coaching children;

(4) the staff that provided the Holiday Camp Services were not required to have any teaching or coaching qualifications or experience and were not aiming to meet any required external standard in supervising the activities. Instead, they just needed to ensure that the children were kept busy with a variety of activities and were kept safe. The only qualifications which were needed by a member of staff providing Holiday Camp Services were that he or she had to have the appropriate Disclosure and Barring Service ("DBS") checks required by OFSTED, a child safeguarding certificate from the NSPCC and a first aid certificate;

(5) the Appellant added Active Care Services to its offering in September 2016;

(6) the Active Care Services sessions were a shortened version of the Holiday Camp Services Sessions – the latter ran from 8am to 6pm whereas the former ran for an hour before school and then from the end of the school day until 6pm;

(7) consistent with that similarity, the staff that provided the Active Care Services were also not required to have any teaching or coaching qualifications or experience and were not aiming to meet any required external standard in supervising the activities. Instead, they just needed to ensure that the children were kept busy with a variety of activities and were kept safe. The only qualifications which were needed by a member of staff providing Active Care Services were that he or she had to have the appropriate DBS checks required by OFSTED, a child safeguarding certificate from the NSPCC and a first

aid certificate. However, in certain cases, a member of staff providing Active Care Services was, in addition, required to have "At least Level 2 Award in Play Work" (see the Job Description for a playworker providing Active Care Services and included at page 35 of the DB;)

(8) as regards the fact that the flyer in relation to Active Care Services at Grazeley which was included at page 53 of the DB made reference to the teaching of sport and to help being provided to children "with their homework and reading" (see paragraph 15(4) above), Mr Sherwood said that Grazeley was unique in that regard and that it was the only school where teaching and coaching was provided in the course of the Active Care Services;

(9) in terms of pricing, whereas parents were charged between £4 and £7 per child per hour for after-school clubs, they were charged only £2.50 to £4.00 per child per hour for Active Care Services sessions. The charge out rate for a day at a holiday camp started at £17.90 per child per day;

(10) a similar differential could be found in the salaries of the Appellant's staff. The staff who provided the after-school clubs and the PPA Services were paid between £15 and £40 per hour, whereas the staff who provided the Holiday Camp Services and the Active Care Services were paid between £6.00 and £8.00 per hour. In Mr Sherwood's view, "the staff who run PPA and After School Clubs will not work Holiday Camps or Active Care, to be honest it's a little beneath them, they are qualified coaches/instructors so they do not want to be watching children just play";

(11) the key aspect of the holiday camps was that the children were offered a wide variety of activities including sport, dance, arts and board games and simply played. They were not coached or taught. This contrasted with the key aspect of the after-school clubs and the PPA Services, where the staff providing the relevant services were coaches and teachers;

(12) the Active Care Services involved the provision of food by the Appellant – a snack during the pre-school session and a snack and a meal during the after-school session – whereas no food was provided by the Appellant as part of the Holiday Camp Services. Instead, the children were required to bring their own snacks and a meal; and

(13) the Appellant was currently working in just over 60 schools through more than 50 employees. The Appellant ran between 10 to 15 holiday camps every school holiday serving around 1,500 children per week.

23. In cross-examination, Mr Sherwood conceded that:

(1) the flyer for the holiday camp which was included at page 54 of the DB did not contain any reference to childcare apart from the reference to Childcare Vouchers as an acceptable form of payment. This contrasted with the flyer for the Active Care Services at page 53 of the DB, which referred to "after school care" near the beginning. Mr Sherwood attributed this to the fact that, in order to attract parents to use the Holiday Camp Services, the Appellant needed to place an emphasis on the variety of the activities offered; and

(2) there were approximately 13 to 14 weeks of holiday camps each year. On the basis of the 1,500 children per week mentioned in his witness statement, this equated to the provision of Holiday Camp Services to approximately 19,500 to 21,000 children each year although:

(a) in many cases the same child would attend more than one holiday camp;

(b) the same parent might book 2 or more children onto one or more holiday camps; and

(c) some holiday weeks – such as the one immediately before Christmas – were less busy than others.

Nevertheless, Mr Sherwood conceded that the 100 parents included in the survey described in paragraph 15(9) above were only a small portion of the aggregate number of parents who used the Holiday Camp Services. In addition, the survey didn't reveal where the relevant respondent parents were located or which holiday camps their children had attended.

THE RELEVANT CASE LAW

24. As this decision relates to whether or not a specified exemption from VAT set out in Article 132 of the Directive applies in the present circumstances, it is helpful to bear in mind the principles which need to be applied in relation to the application of those exemptions. These are helpfully set out in the decision of the Court of Justice of the European Union (the "CJEU") in the case of *Město Žamberk v Finanční reditelstvi v Hradci Králové* [2014] STC 1703 ("*Králové*") and may be summarised as follows:

(1) the exemptions in Article 132 of the Directive "are intended to encourage certain activities in the public interest" (paragraph [18] in *Králové*);

(2) however, not every activity which is performed in the public interest falls within the ambit of the provision – only those which are actually listed in the article do so (paragraph [18] in *Králové*);

(3) "the terms used to specify those exemptions are to be interpreted strictly, since the exemptions constitute exceptions to the general principle that VAT is to be levied on all services supplied for a consideration by a taxable person" (paragraph [19] in *Králové*);

(4) however, "that requirement of strict interpretation does not mean that the terms used to specify the exemptions referred to in art 132 should be construed in such a way as to deprive them of their intended effect" (paragraph [19] in *Králové*);

(5) accordingly, "those terms must be interpreted in the light of the context in which they are used and of the aims and the scheme of the VAT Directive, having particular regard to the underlying purpose of the exemption in question" (paragraph [20] in *Králové*);

(6) "where a transaction comprises a bundle of elements and acts, regard must be had to all the circumstances in which the transaction in question takes place in order to determine, firstly, if there are two or more distinct supplies or one single supply and, secondly, whether, in the latter case, that single supply falls within the exemption in question" (paragraph [27] in *Králové*);

(7) "[there] is a single supply where two or more elements or acts supplied by the taxable person to the customer are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split…There is also a single supply where one or more elements are to be regarded as constituting the principal supply, while other elements are to be regarded, by contrast, as one or more ancillary supplies which share the tax treatment of the principal supply" (paragraph 28] in *Králové*);

(8) "[in] order to determine whether a single complex supply must be categorised as a supply closely linked to [the relevant specified exempt activity] although that supply also includes elements not having such a link, all the circumstances in which the transaction takes place must be taken into account in order to ascertain its characteristic elements and its predominant elements must be identified" (paragraph [29] in *Králové*);

(9) "the predominant element must be determined from the point of view of the typical consumer…and having regard, in an overall assessment, to the qualitative and not merely quantitative importance of the elements falling within the exemption …in relation to those not falling within [the] exemption" (paragraph [30] in *Královė*); and

(10) in looking at the point of view of the typical consumer, it is not appropriate to take into account the intentions of each consumer individually because that would be contrary to the objectives of the VAT system of ensuring legal certainty and a correct and straightforward application of the exemptions. Instead, save in exceptional cases, regard must be had to "the objective character of the transaction in question" (paragraph [36] in *Královė*).

25. As regards the specific exemption in Article 132(1)(h) of the Directive itself, I was referred by the parties to only two decision, both of which were at first instance and therefore are not binding on me.

26. The first was the decision of the First-tier Tribunal in *Planet Sport (Holdings) Limited v The Commissioners for Her Majesty's Revenue and Customs* [2013] UKFTT 639 (TC) ("*Planet Sport*") and the second was the decision of the First-tier Tribunal in *Sport Academies Limited v The Commissioners for Her Majesty's Revenue and Customs* [2016] UKFTT 417 (TC) ("*Sport Academies*").

27. The decision in *Planet Sport* is of less relevance to this decision than the decision in *Sport Academies*.

28. In *Planet Sport*, the appellant supplied trained and qualified sports coaches to organise and run after-school clubs on school premises to occupy pupils who were not ready to go home. As the First-tier Tribunal in that case put it, "the essence of the service was sport coaching in the context of the care and protection of pupils" (paragraph [4] in *Planet Sport*). The matter which was at issue in the case was whether the appellant was "state-regulated" for the purposes of Group 7 of Schedule 9 to the VATA. The First-tier Tribunal concluded that that was not the case and it therefore followed that the supplies made by the appellant did not fall within the exemption. However, in paragraph [30] of its decision, the First-tier Tribunal touched on the question which is at the heart of this case and said the following:

"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."

29. In *Sport Academies*, the appellant had established sports day camps which operated during the school holidays on the premises of schools with which it had made arrangements to that effect. The following were the features of those camps:

(1) the camps were open to children aged between 3 and 17 and there was no entrance requirement;

(2) attendees were offered a wide range of activities, including coaching, and the daily charge was discounted if parents booked for a whole week. Initially, the amount charged differed depending on what activities a particular child carried on at the camp but, by the time of the hearing, the pricing policy had been changed so that the activities chosen did not affect the amount charged;

(3) the appellant did not provide food or drink and parents were instructed to send their children to the camp with a packed lunch and snacks for break times and a refillable water bottle;

(4) the appellant's website stated that "throughout their time at the Academies your child will be under the care and supervision of our excellent coaches. We have high staff to child ratios, to make sure every child receives quality teaching and coaching" (paragraph [18] in *Sport Academies*). It went on to say that all staff had the appropriate DBS checks which were required by OFSTED to be held by childcare providers;

(5) on its website, the appellant highlighted 5 aspects of the camps, 3 of which related to the activities offered - "unleashing potential", "fantastic venues" and "inspirational coaches" – and 2 of which related to the care offered to attendees – "safety standards" and "childcare solutions". However, both of the latter referred to the activities in that:

(a) the text attached to "safety standards" emphasised that the care and supervision of the children would be provided by "our excellent coaches" and that the high staff to child ratio meant that "every child receives quality teaching and coaching"; and

(b) the text attached to "childcare solutions" emphasised the fact that the activities at the camps were childcare solutions for parents which children would love because of the activities (paragraph [44] to [48] in *Sport Academies*);

(6) each camp was run by a camp manager who was responsible for managing a team of coaches. Applicants to be appointed as coaches were required "to have a passion for working with children and the ability to deliver activities from session plans and resources". In addition, the appellant's website stated that "experience in sports coaching would be desirable" and that applicants for a coaching position "must be over 18 years of age and ideally studying a sports, teaching, childcare qualification and have an interest in sports and/or arts" (paragraph [22] in *Sport Academies*);

(7) children between 3 and 5 were admitted to a "Tiny Tots" programme which concentrated on activities related to OFSTED's "Early Years Foundation Stage" and applicants for a coaching position at such camps were expected to be "passionate about all things early years and delivering inspiring and fun activities to young children" (paragraph [23] in *Sport Academies*);

(8) the sporting activities at the camps were not provided to any accredited standard – for example, the tennis courses did not follow any Lawn Tennis Association programme; and

(9) parents were allowed to pay for the services supplied by the appellant with Childcare Vouchers. (Such vouchers can be used by parents to pay for childcare provided by persons registered with OFSTED.)

30. The appellant submitted that the activities which it provided at the camps were incidental to the supplies of childcare which it was making. In effect, it submitted that the wide range of activities which it offered were commercially necessary in the provision of modern-day childcare, where parents expect their children to be stimulated and/or educated whilst being cared for in a safe and secure environment.

31. In contrast, the Respondents argued that, with the exception of the provision by the appellant of the "Tiny Tots" programme (which they accepted might constitute an exempt supply), the primary aim of the appellant in running the camps was to offer sports and activities to the attendees and that the childcare was simply a by-product of the activity-based courses. In support of their view, the Respondents pointed to the activities-based price differential which had originally existed in the appellant's charging structure and to the emphasis placed by the appellant, in recruiting its coaches, on the ability of the coaches to deliver the sports or other activities, as opposed to their childcare credentials.

32. The First-tier Tribunal in *Sport Academies* held, first, that the appellant made, in each case, a single composite supply of services, as opposed to multiple supplies of services, and therefore went on to consider "whether, objectively, the recipients of …that service (typically parents of children attending the camps, who would pay [the appellant] for the services it provided) would regard the nature of the camps as arrangements for the care or protection of children or young persons rather than something else, for example arrangements for the provision of activity-based courses" (paragraph [43] in *Sport Academies*).

33. It ultimately concluded, on balance, that, with the exception of the service supplied by the appellant in providing its "Tiny Tots" programme – which, it said, might well be exempt - the essential nature of the single composite supply made by the appellant was "the provision of the activities made available, rather than the care or protection of children or young people" (paragraph 54] in *Sport Academies*).

34. In reaching that conclusion, the First-tier Tribunal relied mainly on the 5 aspects of the camps which were highlighted on the appellant's website, noting that 3 out of the 5 related to activities offered as opposed to care and protection and that even the 2 which related to care and protection referred in their texts to the activities offered (see paragraphs [44] to [48] in *Sport Academies*). However, it also relied on the fact that:

> (1) the qualities sought by the appellant in recruiting its coaches – the ability "to deliver structured sport, art and fun activities to groups of children…with an emphasis on development, enjoyment and fun" were focused on the activities which the coaches could supervise, as opposed to care and protection (paragraph [49] in *Sport Academies*); and
>
> (2) the appellant had originally concluded that it would be making supplies of activities-based sports club services and that therefore the appellant had not considered that care and protection was of the essence of the services it provided (paragraph [51] in *Sport Academies*).

35. In addition, the First-tier Tribunal noted that the fact that the appellant had originally included an activities-based price differential in its charging structure was an indication that the essential nature of the service supplied by the appellant was the provision of activities although the First-tier Tribunal did not regard that fact as being determinative (paragraph [52] in *Sport Academies*).

36. In the course of its decision, the First-tier Tribunal held that the fact that the appellant was registered with OFSTED as a childcare provider and that parents could use Childcare Vouchers to pay for the services which the appellant was providing had no fundamental significance to the determination of the question which the First-tier Tribunal was answering. It noted that registration with OFSTED simply governed the context in which childcare could be provided; it did not mean that the essence of the services provided by an entity which was registered with OFSTED was necessarily the care and protection of children or young persons. Similarly, in its view, the fact that Childcare Vouchers could be used to pay for the services simply reflected the fact that the appellant was registered with OFSTED; it did not mean that the essence of the services provided by the appellant was childcare (paragraph [50] in *Sport Academies*).

37. I have summarised the decision in *Sport Academies* in some detail because the facts in that case were very similar to those in this case and both parties focused on the case in making their submissions.

COMMON GROUND

38. Before summarising the arguments of the parties in relation to the question on which they do not agree, I should record that, in the course of making their respective submissions, the parties agreed that:

(1) the Appellant was registered with OFSTED as a private welfare institution or agency. It was therefore an "organisation… recognised by the [UK] as being devoted to social wellbeing" for the purposes of construing and applying Article 132(1)(h) of the Directive and a "state-regulated private welfare institution or agency" for the purposes of construing and applying item 9 of Group 7 of Schedule 9 to the VATA, pursuant to note (8) in that group;

(2) the provision by the Appellant of the services described in paragraphs 7(1) and 7(2) above – ie the after-school clubs and the PPA Services - did not fall within the terms of item 9 of Group 7 of Schedule 9 to the VATA – or indeed within the terms of any other item of Group 7 of Schedule 9 to the VATA or any other Group of Schedule 9 to the VATA – and was therefore standard-rated for VAT purposes;

(3) the provision by the Appellant of the services described in paragraph 7(4) above – ie the Active Care Services - fell within the terms of item 9 of Group 7 of Schedule 9 to the VATA and was therefore exempt from VAT;

(4) in relation to the provision by the Appellant of the services described in paragraph 7(3) above – ie the Holiday Camp Services - applying the principles summarised in the CJEU decision in *Královské*:

(a) in determining the scope of an exemption from VAT, the relevant provision was to be construed strictly, since an exemption is an exception to the general principle that VAT is to be levied on all supplies of goods and services for a consideration;

(b) however, that requirement of strict interpretation did not mean that the terms used to specify the relevant exemption should be construed in such a way as to deprive those terms of their intended effect;

(c) accordingly, those terms had to be interpreted in the light of the context in which they were used and of the aims and the scheme of the Directive, having particular regard to the underlying purpose of the exemption in question; and

(d) the supplies made by the Appellant in the course of providing the Holiday Camp Services comprised a bundle of elements and acts and therefore it was necessary to have regard to all the circumstances in which those supplies took place in order to determine, first, whether they amounted to two or more distinct supplies or to one single composite supply and, secondly, whether, in the latter case, that single composite supply fell within the exemption in question;

(5) in relation to the first question, the supplies made by the Appellant in the course of providing the Holiday Camp Services amounted to a single composite supply of services and not multiple supplies of services because the goods and services supplied in the course of providing the Holiday Camp Services were so closely linked that they formed objectively, from an economic point of view, a single supply which it would be artificial to separate into its constituent elements for the purposes of applying VAT law;

(6) in relation to the second question, the starting point was that there was no meaningful distinction between the scope of Article 132(1)(h) of the Directive and the scope of item 9 of Group 7 of Schedule 9 to the VATA;

(7) applying the principles summarised in the CJEU decision in *Králové*:

(a) in order to determine whether the single composite supply of providing Holiday Camp Services fell within the scope of both provisions, it was necessary to identify the predominant element of the supply;

(b) the predominant element had to be determined from the point of view of the typical consumer and having regard to the qualitative and not merely quantitative importance of the elements falling within the exemption in comparison to those not falling within the exemption; and

(c) in looking at the point of view of the typical consumer, it was not appropriate to take into account the intentions of each consumer individually because that would be contrary to the objectives of the VAT system of ensuring legal certainty and a correct and straightforward application of the exemptions. Instead, regard had to be had to the objective character of the supply; and

(8) it followed that the Holiday Camp Services would fall within the ambit of both the exemption in Article 132(1)(h) of the Directive and the exemption in item 9 of Group 7 of Schedule 9 to the VATA only if the predominant element of the composite supply comprising those services was the provision of childcare and not the provision of activities.

THE ARGUMENTS OF THE PARTIES

39. The Appellant submitted that the predominant element of the single composite supply comprising the supply of Holiday Camp Services was the provision of childcare. This was because, weighing up objectively, from the position of the parents whose children attended the holiday camps, the importance to those parents of the childcare aspects of the holiday camps in comparison to the importance to them of the various activities which were made available at the holiday camps, the former outweighed the latter.

40. Conversely, the Respondents submitted that the predominant element of that single composite supply was the provision of activities because, weighing up objectively, from the position of the parents whose children attended the holiday camps, the importance to those parents of the childcare aspects of the holiday camps in comparison to the importance to them of the various activities which were made available at the holiday camps, the latter outweighed the former.

41. In support of its position, the Appellant started by noting that, although there was no definition of "care" or "childcare" in the VATA, the Oxford English Dictionary defined "childcare" as:

"The care of children, especially by a crèche, nursery, or childminder while parents are working".

In the view of the Appellant, that was exactly what occurred at the various holiday camps notwithstanding the fact that the Appellant offered various activities to the children in order to encourage parents to choose its childcare arrangements over other, more passive, childcare arrangements.

42. In response, the Respondents submitted that the activities which were being offered by the Appellant were a much more significant element of the single composite supply than any childcare, as was demonstrated by the fact that the Appellant's website during the VAT accounting periods which were the subject of the appeal emphasised those activities. For example, it described the holiday camps as follows:

"Running every holiday, our camps promise fun and imaginative sports sessions combined with challenging games, activities and themed arts and crafts for less than £3 per hour".

It could be seen that no reference was made to the childcare aspects of the holiday camps. Instead, the emphasis was placed on the activities which were being offered.

43. In addition, the flyer for the holiday camps included at page 54 of the DB made no mention of the word childcare apart from in the reference to the fact that Childcare Vouchers were an acceptable form of payment. It followed that the typical consumer of the Holiday Camp Services must have had in mind in choosing to acquire the relevant services the fact that his or her child would be active, engaged and socially stimulated while at the holiday camp, rather than that his or her child would be cared for. Putting it another way, the fact that the Appellant by its own admission had placed an emphasis on the range of activities offered at the holiday camps in order to attract parents to send their children to those holiday camps showed that, had the Appellant not done that, the take-up by parents would have been lower and therefore it was the activities, as opposed to the childcare, which had attracted the parents.

44. The Appellant submitted that the significance of the childcare element of the composite supply could be seen in the fact that:

(1) the surveys included at pages 60 to 63 of the DB demonstrated that the provision of childcare was a reason why a significant majority of the parents using the Holiday Camp Services elected to do so; and

(2) the OFSTED reports all stressed the childcare and pastoral aspects of the Holiday Camp Services, as opposed to the activities element of the relevant services. For example, the OFSTED report in relation to Prestwood referred in the very first bullet point of the summary to the fact that the Holiday Camp Services were "holiday childcare".

45. The Respondents observed that no significance could be attached to either of the above features in answering the question which was at issue in the appeal.

46. As regards the surveys at pages 60 to 63 of the DB, they said that those were wholly unrepresentative and therefore of no evidential value. They merely showed what the particular respondents to the surveys had taken into account when choosing to avail themselves of the Holiday Camp Services. But, as the number of parents responding to the surveys was only a tiny fraction of the aggregate number of parents who used the relevant services, it did not establish what the vast majority of parents were thinking when choosing to do so.

47. As regards the OFSTED reports, they said that OFSTED's concern as the regulator was solely in relation to the childcare element of the Appellant's offering. OFSTED had no interest in the quality of the activities which the Appellant was providing as part of the Holiday Camp Services. It was therefore wholly unsurprising that the OFSTED reports had the childcare and pastoral elements of the relevant services as their focus.

48. The Appellant submitted that the relative insignificance of the activities element of the Holiday Camp Services could be seen in the limited qualification requirements of the staff providing the Holiday Camp Services, relative to the staff providing the after-school clubs. That difference was reflected in the remuneration paid to the staff providing the Holiday Camp Services, relative to the staff providing the after-school clubs, and also in the price paid by parents for the children attending the holiday camps, relative to the price paid by parents for the children attending the after-school clubs. In the view of the Appellant, all of these showed that the emphasis in the Holiday Camp Services was on childcare and simply engaging the children for the time that they were at the holiday camps, and not on tuition or coaching.

49. In response, the Respondents pointed out that, as noted in paragraph 15(2) above - of the 5 "Key Areas" set out in the Job Description for a member of staff at the holiday camps and included at page 37 of the DB, only 2 of them touched on the childcare aspects of working at the holiday camps. The others were all directed at the activities associated with the holiday camps, thereby demonstrating the importance of the activities, relative to the childcare.

50. The Appellants pointed out that it was clear from the various features of the Holiday Camp Services noted above that the Holiday Camp Services were generically no different from the Active Care Services, which the Respondents had already agreed to be exempt under the provisions mentioned above. In both cases, the emphasis was on engaging the children for the time when they were receiving the relevant services; it was not to coach the children so as to produce the next generation of international athletes.

51. The Respondents countered by observing that there were significant differences between the Holiday Camp Services and the Active Care Services which supported the Respondents' position in distinguishing between the two. For example:

(1) unlike Active Care, which had the word "Care" in its title, the holiday camps were marketed under the term "Get Active", which stressed the importance of the activities element ahead of the care element;

(2) the Active Care Services were of a relatively brief duration in comparison to the Holiday Camp Services, which went on for most of the day, which meant that the Appellant necessarily had to provide more activities in the case of the Holiday Camp Services than in the case of the Active Care Services;

(3) Active Care Services were provided before and after school and were essentially merely an extension of the care which was provided at school whereas, in order to attend holiday camps, the children had to be dropped off there for the day; and

(4) the fact that the care element was predominant in the Active Care Services could be seen in the fact that the children were provided with food and drink in the course of the provision of those services, in contrast to the provision of the Holiday Camp Services.

52. In relation to the second of these points, the Appellant submitted that the length of time during which services were supplied could not alter the fundamental nature of those services.

53. In relation to the third and fourth of these points, the Appellant pointed out that the mere fact that children had to be dropped off at the holiday camps and did not receive food or drink there were irrelevant as both of those were often features of passive childminding services which clearly fell within the exemption.

54. The Appellant added that, furthermore, it would be strange if simply by offering activities to the children – as opposed to sitting them down in front of a television for the entire time that the holiday camps continued or allowing them to entertain themselves - the Appellant were to deprive itself of the ability to bring the Holiday Camp Services within the scope of the exemption. The mere fact that the Appellant was encouraging parents to choose active childcare arrangements over more passive ones should not cause the relevant services to fall outside the exemption. This was particularly the case given the current climate in which the UK government was trying to reduce obesity and increase activity amongst children.

55. The Respondents said that, far from tending to support the Appellant's position, the current focus on obesity in children served only to show how important the activity element involved in the Holiday Camp Services must have predominated in the mind of the typical consumer of the relevant services.

56. Finally, in relation to the cases referred to above, the Appellant submitted that the decision in *Planet Sport* was not binding and in any event:

(1) it pertained to the question of the supplier's authorisation, as opposed to the nature of the services being offered by the supplier, so that the statement in paragraph [30] in *Planet Sport* was obiter; and

(2) its facts differed from the facts in this case in that the appellant in *Planet Sport* was providing coaching and the First-tier Tribunal held that, although it was "[contributing] 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". So, on the facts as found in that case, childcare was not the predominant element of the services that the Appellant was providing; instead, childcare was just a condition which needed to be satisfied before the schools would allow the appellant to run the after-school clubs.

57. The Respondents said that, whilst they accepted that the decision in *Planet Sport* was not binding and was not focused primarily on the issue which was the subject of the present appeal, it did inform the correct answer in the present appeal because, at paragraph [30], the First-tier Tribunal in that case recognised the possibility that the mere fact that a supply of activities made a contribution to the welfare of the children who were attending the supplier's camps would not make the relevant service exempt if that contribution to the welfare of the children was just a by-product of the supplier's essential service of providing those activities. In the Respondents' view, that was the position in this case.

58. As for the decision in *Sport Academies,* the Appellant submitted that this was also not binding and, in any event, its facts also differed from the facts in this case in that the appellant in *Sport Academies* was providing coaching. The website of the appellant in that case emphasised that the care and supervision of the children was provided by "our excellent coaches" and that it had high staff to child ratios "to make sure that every child receives quality teaching and coaching". In addition, on its website, it emphasised the quality of the coaches that it hired. Finally, the appellant in *Sport Academies* had originally included an activities-based price differential in its charging structure – which the First-tier Tribunal in that case noted was an indication that the essential nature of the service supplied by the appellant was the provision of activities – and no such differential had ever existed in this case.

59. In response, the Respondents submitted that the decision in *Sport Academies*, whilst not binding, should be persuasive in reaching a conclusion in this case because the facts in that case were virtually identical to this one. In particular:

(1) both cases involved a holiday camp with an element of childcare and an element of activities;

(2) the camps in both cases were day camps with a price incentive to parents for booking for longer periods;

(3) the camps in both cases did not make food or drink available and parents had to ensure that their children bought their own;

(4) the camps in both cases had a manager;

(5) the camps in both cases did not provide their activities to an accredited standard; and

(6) the camps in both cases were provided by OFSTED-registered suppliers who accepted Childcare Vouchers in payment for the relevant services.

Thus, in the Respondents' view, it followed that the same reasoning as was set out in paragraphs [53] and [54] in *Sport Academies* applied in this case and that "the essential nature of the service

which was being offered in this case was the provision of the activities made available, rather than the care or protection of children or young people".

FINDINGS OF FACT

60. Based on the evidence summarised in paragraphs 15 to 23 above, I make the following findings of fact (in each case setting out the basis for the finding immediately after the relevant finding):

(1) FINDING: the Holiday Camp Services involved the provision of activities in the course of caring for children during the school holidays. In other words, the Holiday Camp Services included both an activities element and a childcare element.

BASIS FOR THE FINDING:

(a) it is clear from the witness evidence of Ms Goodwin, Miss Gallon and Mr Sherwood that the Holiday Camp Services involved both the provision of activities and the provision of childcare;

(b) the fact that the provision of childcare was an element of the Holiday Camp Services is supported by the fact that:

(i) the staff providing the services had to have the appropriate DBS checks required by OFSTED, a child safeguarding certificate from the NSPCC and a first aid certificate;

(ii) the holiday camps were supervised by OFSTED to ensure compliance by the Appellant with the Childcare Act 2006;

(iii) the table provided by the Appellant to explain its offering to schools described the Holiday Camp Services as a cost-effective, reliable form of "childcare";

(iv) the provision of childcare was a feature of certain of the 5 Key Areas set out in the Job Description for a member of staff at the holiday camps which was included at page 37 of the DB; and

(v) finally, although of limited evidential value because of the paucity of respondents to them relative to the pool of consumers as a whole, the surveys provided at pages 60 to 63 of the DB indicated that the childcare offered by the Appellant was a reason why a significant majority of the respondents to the surveys had elected to use the Holiday Camp Services; and

(c) the fact that the provision of activities was an element of the Holiday Camp Services is supported by the fact that:

(i) the promotional material for the holiday camps emphasised the fact that the children attending the holiday camps were kept active;

(ii) the table provided by the Appellant to explain its offering to schools described the Holiday Camp Services as offering a wide range of sport and art activities to keep children entertained throughout the day;

(iii) the provision of activities was a feature of certain of the 5 Key Areas set out in the Job Description for a member of staff at the holiday camps which was included at page 37 of the DB; and

(iv) finally, although of limited evidential value because of the paucity of respondents to it relative to the pool of consumers as a whole, the survey provided at page 60 of the DB indicated that the activities offered by the

Appellant was a reason why 52% of the respondents to the survey had elected to use the Holiday Camp Services;

(2) FINDING: in order to make the Holiday Camp Services attractive to potential consumers of those services, the Appellant was anxious to emphasise to those potential consumers the activities element of the relevant services.

BASIS FOR THE FINDING:

(a) it is clear from the witness evidence of Mr Sherwood that, in order to attract potential consumers to use the Holiday Camp Services, the Appellant sought to emphasise the variety of the activities which were offered at the holiday camps;

(b) the flyer for the holiday camp which was included at page 54 of the DB emphasised the activities element of the Holiday Camp Services; and

(c) the provision of activities was a feature of 3 of the 5 Key Areas set out in the Job Description for a member of staff at the holiday camps which was included at page 37 of the DB;

(3) FINDING: the activities at the holiday camps were supervised by the Appellant's staff but there was no coaching or teaching of the relevant skills and the staff in question were not required to have any coaching or teaching qualifications or experience. In addition, there was no external standard to which the activities were being provided. Consistent with their role as activity supervisors and not coaches or teachers, the only qualifications which needed to be held by those of the Appellant's staff who provided the Holiday Camp Services were the appropriate DBS checks required by OFSTED, a child safeguarding certificate from the NSPCC and a first aid certificate.

BASIS FOR THE FINDING:

(a) it is clear from the evidence of Ms Goodwin, Miss Gallon and Mr Sherwood that:

(i) the staff providing the Holiday Camp Services were not required to have any coaching or teaching skills or experience and required only the childcare qualifications mentioned above; and

(ii) the activities were not provided to any external standard;

(b) the remuneration paid to the staff providing the Holiday Camp Services was materially lower than the remuneration paid to staff providing coaching and teaching, such as those working in the after-school clubs. In this regard, while there were slight discrepancies between, on the one hand, the figures set out in the table which was included at page 46 of the DB and, on the other hand, the figures provided by Mr Sherwood in his testimony - see paragraphs 15(5) and 22(10) – the relative position between the two types of remuneration is clear; and

(c) the fees paid by parents using the Holiday Camp Services were at a level which was consistent with the fees paid by parents using the Active Care Services and were lower than those which were paid by parents using the after-school clubs. In this regard, while there were slight discrepancies between, on the one hand, the figures set out in the table which was included at page 45 of the DB and, on the other hand, the figures provided by Mr Sherwood in his testimony - see paragraphs 15(4) and 22(9) – the relative position between the two types of fees is clear; and

(4) FINDING: the Holiday Camp Services as described above were, for the most part, identical to the Active Care Services except for the fact that:

(a) the Holiday Camp Services were provided for longer each day – 8am to 6pm, instead of just an hour before school and the period from the end of the school day to 6pm;

(b) parents using the Holiday Camp Services dropped off their children at the relevant school for the purposes of taking up the services whereas there was no need for parents using the Active Care Services to take steps to drop off their children specifically for the purposes of taking up the services because the children were required to attend school in any event; and

(c) the Appellant did not provide food or drink to children attending the holiday camps whereas it did do so in the course of providing the Active Care Services.

Such differences as there were between the two types of services suggested that a slightly greater degree of staff qualification and the provision of some coaching and teaching was occasionally a feature of the Active Care Services in comparison to the Holiday Camp Services – see paragraphs 15(6), 22(7) and 22(8) above. In contrast to the Holiday Camp Services and the Active Care Services, the after-school clubs and the PPA Services involved a much greater degree of staff qualification and the provision of coaching and teaching.

BASIS FOR THE FINDING:

(a) it is clear from the evidence of Mr Goswell, Ms Goodwin, Miss Gallon and Mr Sherwood that the nature of the Holiday Camp Services and the nature of the Active Care Services were, to all intents and purposes, the same (apart from the differences noted in paragraphs 60(4)(a) to (c) above) and that they were to be distinguished from the nature of the after-school clubs and the nature of the PPA Services, where coaching and teaching were emphasised;

(b) the Job Description for a playworker providing Active Care Services which was included at page 35 of the DB suggested that a member of staff providing Active Care Services might require a "Level 2 Award in Play Work" or above whereas the evidence did not suggest that any such requirement was required for a member of staff providing Holiday Camp Services; and

(c) the flyer in relation to the Active Care Services at Grazeley which was included at page 53 of the DB made reference to the teaching of sport and to the provision of help to children "with their homework and reading" whereas the evidence did not suggest that any such coaching or teaching occurred during the provision of the Holiday Camp Services.

61. The findings of fact set out in paragraph 60 above inform the discussion below.

DISCUSSION

62. I should start this part of the decision by observing that I agree with both parties and the First-tier Tribunal in *Sport Academy* that:

(1) the supplies by the Appellant in the course of providing the Holiday Camp Services amounted to a single composite supply and did not involve multiple supplies;

(2) the categorisation of that single composite supply as exempt or standard-rated is to be determined by reference to the predominant element of the supply, as determined from the point of view of the typical consumer and having regard to the qualitative and not merely quantitative importance of the elements falling within the exemption in comparison to those not falling within the exemption; and

(3) that involves determining whether the predominant element of the Holiday Camp Services was childcare (and therefore "the protection of young children and young persons by …[an organisation] recognised by the [UK] as being devoted to social wellbeing" (for the purposes of Article 132(1)(h) of the Directive) and "welfare services" (for the purposes of item 9 of Group 7 of Schedule 9 to the VATA)).

63. In reaching my determination on that point, I have concluded that, although the answer in this case may fairly be said to be finely-balanced, the submissions of the Appellant on the point are to be preferred to the submissions of the Respondents.

64. I should start by saying that, in my view, on the basis of the evidence and findings of fact set out above, it would be hard for anyone to conclude that a typical parent who availed himself or herself of the Holiday Camp Services did not have childcare in mind as at least some element of the service which was being offered by the Appellant in providing the Holiday Camp Services. After all:

(1) the children attending the holiday camps were being cared for during the school holidays by people who had the appropriate childcare qualifications;

(2) the Appellant was registered with OFSTED and the holiday camps were supervised by OFSTED to ensure compliance by the Appellant with the Childcare Act 2006;

(3) the table provided by the Appellant to explain its offering to schools which was included at page 56 of the DB described the Holiday Camp Services as a cost-effective, reliable form of "childcare"; and

(4) the provision of childcare was a feature of certain of the 5 Key Areas set out in the Job Description for a member of staff at the holiday camps which was included at page 37 of the DB.

65. Thus, even if one were to discount the results of the surveys which were set out at pages 60 to 63 of the DB on the ground that they were insufficiently representative to demonstrate very much, it is difficult to conclude that the provision of childcare was not at least an element of the Holiday Camp Services, even if were not to be the predominant element.

66. In any event, the Respondents are not saying that childcare was not an element of the Holiday Camp Services. Their position, as I understand it, is not that childcare was not an element of the Holiday Camp Services but rather that that childcare element was merely a by-product of, and subservient to, the activities element of the relevant services because it was superseded in importance by the activities which were being offered in the course of those services. The same approach may be found in the analysis set out in *Sport Academies*, where both the Respondents and the First-tier Tribunal in that case accepted that the supplies which were the subject of that case involved an element of childcare but that the activities element of those supplies predominated.

67. Given the conclusion in paragraphs 64 to 66 above to the effect that childcare was an element of the Holiday Camp Services, that provision will have been the predominant element of those services unless there was another element of those services which could properly be said to have been a more significant or predominant element than the provision of childcare.

68. In that regard, whilst I agree with the Respondents that one element of the Holiday Camp Services was the provision of activities, I do not agree with the Respondents' proposition to the effect that just because the provision of activities was an element of the Holiday Camp Services and that the Appellant emphasised the importance of that element to the parents whose custom it was hoping to attract, that inevitably means that the provision of those activities, as

opposed to the provision of childcare, was the predominant element of its supply of Holiday Camp Services.

69. I can see how the latter conclusion might be reached in circumstances where the activities which were on offer involved highly-advanced coaching and teaching sessions performed by appropriately qualified coaches and teachers working to an approved external standard because, in such cases, it might be said that a typical potential consumer – ie a parent – would be likely to be so focused on the high level of coaching or teaching which was being provided in the course of the relevant services that the predominant element of the relevant supply was the coaching and teaching, as opposed to the childcare. That was the approach taken by the First-tier Tribunal in *Planet Sport*, when it held that, although the activities being offered were contributing to the welfare of the pupils in the after-school clubs, that contribution was no more than "the by-product of [the] essential service which was sports coaching".

70. But where, as is the case here, the members of staff were merely supervising activities and did not hold any coaching or teaching qualifications and there was no external standard to which the services were being provided, I believe that it would be wrong to regard the activities as having been sufficiently an end, in and of themselves, to have become the predominant element of the relevant supply. Instead, I would say that, to adopt the language used in *Planet Sport*, the activities were a by-product of, or, more accurately, an adjunct to, the essential service, which was childcare.

71. Putting this another way, parents looking for childcare for their children might be faced with the option of choosing between:

(1) a childcare provider offering a purely passive approach of sitting the relevant children in front of a television or allowing the relevant children to entertain themselves; and

(2) a childcare provider, such as the Appellant, offering a more active approach to childcare in the form of supervised activities.

72. In my opinion, the mere fact that a childcare provider falling within the latter category has chosen to provide a more active approach to childcare does not mean that it should therefore be disqualified from falling within the exemption. This is particularly the case when one considers:

(1) the underlying purpose of the exemptions in Article 132 of the Directive - which is that activities in the public interest should be regarded as falling within the scope of the exemptions; and

(2) the specific language used in Article 132(1)(h) of the Directive in relation to the protection of children and young persons,

as one is enjoined to do pursuant to the principles outlined in *Královè* – see paragraphs 24(1) to 24(5) above.

73. The provision of activities which keep the children stimulated and healthy while under the supervision of the childcare provider is surely no less a valid form of childcare (and therefore no less in the public interest or less deserving of falling within the childcare exemption) than simply allowing the relevant children to watch television or to entertain themselves. And, given the present focus on obesity in children, a childcare provider adopting that approach is surely doing more for the welfare of the children in its care than the passive childcare provider mentioned above and is therefore, if anything, more deserving of the exemption.

74. If that view is right, then it follows that the mere fact that activities are being made available during the provision of the childcare – and that the childcare provider is advertising its services by stressing the fact that the children in its care are getting the benefit of those activities as opposed to watching television or having to entertain themselves - does not prevent childcare from continuing to be the predominant element of the supply.

75. As I mentioned above, I can see how the balance could conceivably shift if, instead of simply providing activities for the children in its care, the relevant childcare provider were to advertise its services on the basis that the children in its care would be obtaining high level coaching or teaching from suitably-qualified staff working to an approved external standard. But those are not the facts in the present case.

76. There are two final points which I should make in this context.

77. The first is that I think that the conclusion set out above is entirely consistent with the conclusion that the Respondents have themselves drawn in relation to the Active Care Services, which the Respondents accept as being exempt.

78. In their submissions, the Respondents suggested four areas in which the Active Care Services could be distinguished from the Holiday Camp Services. These were that:

(1) unlike the term "Active Care Services", which included the word "Care" in the term, the holiday camps were marketed under the term "Get Active", which stressed the importance of the activities element ahead of the care element;

(2) the Active Care Services were of a relatively brief duration in comparison to the Holiday Camp Services, which went on for most of the day, and therefore more activities were necessarily provided in the course of the latter than in the course of the former;

(3) whereas parents using the Active Care Services did not need to drop off their children at the school specifically to make use of those services – because the services were provided on the school premises at the start and end of each day and therefore the children were already there – parents using the Holiday Camp Services needed to drop off their children at the school specifically to make use of those services; and

(4) the Appellant provided food and drink to the children in the course of the Active Care Services and did not do so in the course of the Holiday Camp Services.

79. In relation to the first area of distinction, I do not see how something as formalistic as the differing names chosen by the Appellant to market the respective services should take precedence over the similarities which exist, in substance, between the respective services. In both cases, the essential nature of the two supplies was essentially the same and, when it comes to determining the predominant element of each supply, it is that substance which should prevail over the names which the Appellant has chosen to use in order to market the respective services.

80. A similar point may be made in relation to the second area of distinction. In my view, the period of time over which the respective supplies took place could not, and did not, change the fundamental nature of each type of supply – which was the provision of activities in the course of providing childcare.

81. As regards the third area of distinction, whilst I agree that that is a difference between the two offerings, I do not see why that difference is meaningful in terms of determining the predominant element of the Holiday Camp Services. In that context, I agree with the Appellant that children are often dropped off with childminders and that the mere fact that a parent has to drop off his or her child at a holiday camp as opposed to leaving his or her child at school for

slightly longer than the duration of the school day is a matter of no relevance to whether or not the predominant element of the Holiday Camp Services amounted to childcare.

82. Finally, in relation to the fourth area of distinction, that is also a difference between the two offerings but one which I do not regard as being meaningful in terms of determining the predominant element of the Holiday Camp Services. In my view, a failure to provide food and drink cannot, in and of itself, preclude a supply from amounting to childcare. Otherwise every childminder who failed to provide food or drink for the children in his or her care would be precluded from relying on the exemption.

83. For the above reasons, I think that the Respondents should have reached the same conclusion in relation to the Holiday Camp Services as they did in relation to the Active Care Services.

84. Finally, in relation to the fact that my conclusion in relation to the Holiday Camp Services differs from the conclusion which was reached by the First-tier Tribunal in *Sport Academies* in relation to somewhat similar services, I am, of course, not required either to follow the latter decision or to identify a meaningful distinction between the facts in the two cases.

85. However, notwithstanding the long list of similarities between the facts in the two cases identified by the Respondents and set out in paragraph 59 above, I do think that a significant distinction in this context is that the appellant in *Sport Academies* was providing coaching. Its website emphasised that the care and supervision of the children was provided by "our excellent coaches" and that it had high staff to child ratios "to make sure that every child receives quality teaching and coaching". In addition, the appellant in *Sport Academies* had originally included an activities-based price differential in its charging structure – which the First-tier Tribunal in that case noted was an indication that the essential nature of the service supplied by the appellant was the provision of activities – and no such differential has ever existed in this case. It is therefore possible to identify significant differences between the facts in the two cases.

86. If, notwithstanding those distinctions, it could properly be said that the First-tier Tribunal in *Sport Academies* would have reached the same conclusion in relation to the present facts as it did in relation to the facts which it was considering in that case, I would respectfully disagree with that conclusion.

87. In summary, for the reasons set out above, I do not think that the Appellant should have been deprived of the exemption for the Holiday Camp Services merely because it provided activities in the course of providing the childcare which was a feature of the services - as opposed to adopting a more passive approach - and sought to attract prospective customers by stressing the availability of those activities.

CONCLUSION

88. For the reasons set out in detail in paragraphs 62 to 87 above, I hereby allow the appeal in this case.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

89. 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.

TONY BEARE
TRIBUNAL JUDGE

RELEASE DATE: 07 NOVEMBER 2019