TC07896

VAT – supplies of hot food and coffee – exemption within Group 6 of Schedule 9 - whether Appellant eligible institution making principal supplies of education or vocational training – whether supplies of hot food and coffee closely related to such principal supplies – appeals dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2017/02174
TC/2018/00289

BETWEEN

UNIVERSITY OF SOUTHAMPTON STUDENTS' UNION **Appellant**

-and-

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

TRIBUNAL: JUDGE JEANETTE ZAMAN

The Tribunal determined the appeal on 6 and 7 October 2020 without a hearing with the consent of both parties under the provisions of Rule 29 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. A hearing was not held because of ongoing restrictions related to the coronavirus pandemic. The documents to which I was referred are described in the decision notice.

DECISION

INTRODUCTION

1. The University of Southampton Student' Union ("USSU") appealed against two decisions of HMRC rejecting its claims made under s80 of the Value Added Tax Act 1994 ("VATA 1994") in respect of the periods 08/11 to 04/15:

   (1) the claim under appeal reference TC/2017/02174 relates to output tax accounted for on hot food sales from USSU's shop that USSU contends should be exempt from VAT – the "Hot Food Claim". The amount of the claim is £114,888.00; and

   (2) the claim under appeal reference TC/2018/00289 relates to output tax accounted for on coffee sales from USSU's shop that USSU contends should be exempt from VAT – the "Coffee Claim". The amount of the claim is £43,285.00.

2. USSU argues that both the supply of hot food and coffee by the USSU shop are exempt from VAT as supplies made by an eligible body which makes principal supplies of vocational training, and which are closely related to a principal supply of education (by the University of Southampton) or vocational training (by USSU). (The grounds of appeal are set out further in under "Background", and this brief statement of USSU's position is based on the amended grounds of appeal submitted in May 2019.)

3. The parties agreed that the appeals in respect of both the Hot Food Claim and the Coffee Claim should be heard together and that they should be stayed behind an appeal being made by Loughborough Students' Union ("LSU"). The decision of the Upper Tribunal in *Loughborough Students' Union v HMRC* [2018] UKUT 343 (TCC) was released on 31 October 2018.

4. Following the release of that decision, USSU amended its grounds of appeal and HMRC produced amended Statements of Case on 29 January 2020 in respect of each appeal (the "January 2020 SOCs"). Following a direction from the Tribunal, HMRC submitted another Statement of Case on 24 July 2020 (the "July 2020 SOC").

5. USSU submits that between January 2020 and July 2020 HMRC has effectively amended its position (in a way which is not justified by the emergence of new facts or new law) without having applied to the Tribunal to do so. USSU argues that permission for such an amendment should be refused as to allow it would cause USSU significant prejudice. I have treated the submission of the July 2020 Statement of Case as an application by HMRC to amend. I consider this application, and USSU's submissions in relation thereto, under the heading of "Issues" further below.

6. In this decision notice I have set out (under "Background") a summary of the correspondence between the parties, both before HMRC made the decisions which are under appeal and subsequently, as this chronology, whilst not in dispute between the parties, is relevant to the objections made by USSU to the position taken by HMRC in its July 2020 SOC. I then set out the relevant legislation, my findings of fact and then the issues between the parties. The Discussion sets out my consideration and analysis of the issues, in the light of the submissions and evidence before me.

7. For the reasons set out in the Discussion, USSU's claims for repayment of output tax are dismissed.

BACKGROUND

8. On 19 June 2015 a claim was made by VATangles VAT Consultancy ("VATangles") on behalf of USSU for recovery of output tax that it was contended had been accounted for in error on sales made in USSU's shop during the period from 1 August 2011 to 30 April 2015.

Further information was requested and provided, and in a letter of 14 September 2015 VATangles stated that the coffee part of the claim would be replied to separately. At this time the claims were split – into the Hot Food Claim and the Coffee Claim - and the parties dealt with them separately in correspondence until March 2019.

9. On 5 August 2016 HMRC notified USSU that the Hot Food Claim was refused. This refusal was on the basis of HMRC's consideration of the criteria for standard-rating for hot food items in Group 1 of Schedule 8. On 20 September 2016 USSU requested that HMRC review their decision, and on 5 December 2016 HMRC confirmed that, having completed their review, the decision was upheld.

10. There was then further correspondence as to the basis on which the review had been conducted, with USSU asking that HMRC conduct a second review considering whether the supplies were exempt due to being closely related to education. HMRC stated they could not do this. USSU then submitted a Notice of Appeal to the Tribunal on 2 March 2017. That appeal was made on two alternative grounds:

> (1) Ground 1 – USSU is an eligible body within Note 1(e), albeit not that which is the provider of the principal supply of education and/or vocational training. It is entitled to exemption for provision of catering where that is closely related to the principal supply of education and/or vocational training; or
>
> (2) Ground 2 – USSU is not an eligible body, but is closely connected with the University of Southampton, which is such an eligible body. Its entitlement to the exemptions for matters closely related to supplies of education and/or vocational training by a third party are by concession, and are within HMRC's conditions for concession set out at paragraph 5.6 of VAT leaflet 709/1.

11. On 19 June 2017 HMRC submitted its Statement of Case. On 25 September 2017, USSU submitted a witness statement to HMRC, and a copy of the Memorandum and Articles of Association. On 26 October 2017 USSU confirmed their intention to request that the appeal be stood behind the appeal of LSU, and on 9 January 2018 HMRC submitted an application to the Tribunal to stand the appeal behind that case. The appeal was then stayed.

12. The Upper Tribunal's decision in *University of Loughborough Students Union v HMRC* was released on 31 October 2018 and on 27 March 2019 the Tribunal wrote to USSU requesting that they provide amended grounds of appeal in light of that decision.

13. On 10 May 2019 USSU provided amended grounds of appeal as follows:

> "The Appellant is an eligible body for the provision of education and/or vocational training under the parameters of note 1(e) of Group 6 of Schedule 9 to the VATA 1994.
>
> The Appellant is a registered charity and is precluded from distributing profits, it therefore satisfies both (i) ands (ii) of Note 1(e).
>
> In accordance with Item 4(a) of Group 6 of Schedule 9 to the VATA 1994 as properly construed in line with the Principle VAT Directive, the Appellant must exempt supplies closely related to education and/or vocational training.
>
> The supplies in this appeal are supplies in the course of catering to students. Such supplies have already been found to be closely related to education and consequently exempt from VAT (Pilgrims Language Courses Ltd – EWCA Civ 1939).
>
> The Appellant is not the provider of university education; however, it does provide its own principle supplies of education and/or vocational training.

…

> The Appellant fulfils these criteria [ie definition of vocational training] and therefore makes principle supplies of vocational training and thereby satisfies the necessary requirements in Item 4 of group 6 of Schedule 9 to the VATA 1994 to exempt supplies closely related to education."

14. On 2 July 2019 HMRC requested that USSU provide further and better particulars. The information requested concerned:

(1) the precise nature of the principal supplies of education and/or vocational training USSU makes, with associated evidence; and

(2) further details of whether profits made from these principal supplies are fully reinvested into vocational training, and not into the USSU's wider activities in general.

15. On 16 November 2019, after various delays including making of unless order, USSU provided the further and better particulars. In that response, USSU stated:

(1) USSU makes a number of different principal supplies of education/vocational training including (but not limited to) academic representatives training, clubs/societies committee training, preparation for candidates for elected positions, training on using LinkedIn, a safety/welfare programme (Look After You Mate), food safety and hygiene training and safety bus driver training. The only charge that is mentioned is that of £25 for the safety bus driver training course.

(2) They referred to USSU's powers in its Memorandum and Articles, stating that the union was acting accordance with its powers in carrying out the education/vocational training.

(3) USSU was in the process of putting together all its evidence on this matter including session slides used in training, calendar notes and witness statements of staff and students involved.

16. On 14 January 2020 HMRC provided their Amended Statements of Case - these were dated 10 January 2020, and HMRC provided one for each appeal. Later that month, on 29 January 2020, HMRC filed further Amended Statements of Case. These are what I have defined as the January 2020 SOCs. In providing these new versions, Mark Hyde of HMRC stated "the Respondents have amended their Statement of Case in order to remove one of the points on which they are defending the appeal". (They retained the approach of providing separate (but very duplicative) Statements of Case for each appeal.)

17. On 12 June 2020, the Tribunal issued Directions to the parties, directing HMRC to provide a Statement of Case within 42 days, together with further directions dealing with any reply and provision of the bundle ahead of the appeals being decided on the papers without a hearing.

18. On 24 July 2020 HMRC filed the July 2020 SOC. That Statement of Case was consolidated, addressing both the Hot Food Claim and the Coffee Claim.

19. As is apparent from the chronology above, the Coffee Claim, the decision in relation to which was appealed to the Tribunal in December 2017, has "caught up" with the Hot Food Claim. Having stated that it would provide information to HMRC in respect of the supplies of coffee separately, on 16 September 2015 USSU wrote to HMRC, contending that the coffee sales made by USSU's shop should have been exempt as they are goods closely related to education, and as such VAT had been overpaid on these sales. HMRC rejected this argument, stating that the sale of coffee was not closely related to education, and as such was properly taxable.

20. Further correspondence ensued, in particular in relation to HMRC's position that USSU was not an eligible body. Following a question from HMRC as to whether USSU's profits are reinvested in its own supplies of education, on 16 March 2016 USSU replied confirming there is no ring fencing of the profits (maintaining that this is not required by the legislation).

21. There was then further correspondence, and on 6 December 2016 HMRC wrote to USSU confirming its stance that sales of coffee from its shop cannot be exempt. On 13 December 2016 USSU replied confirming that they were awaiting the decision in the appeal of LSU.

22. On 29 November 2017 HMRC wrote to USSU rejecting their claim for over-declared VAT in respect of shop sales of coffee. In that letter HMRC referred to the decision of Judge Kempster in *University of Loughborough Students' Union v HMRC* and to that of the CJEU in *Horizon College*, stating that HMRC did not accept that a students' union has the provision of education as its aim. These supplies are thus excluded from Item 4 as the students' union does not in fact make the principal supply. This is the case irrespective of the fact that the union is a non-profit-making body.

23. On 8 December 2017 USSU submitted a Notice of Appeal to the Tribunal. The (alternative) grounds of appeal were the same as those initially set out in the Hot Food Claim. The parties agreed that this appeal should be joined with the appeal in respect of the Hot Food Claim and heard together, and that they should stand behind the appeal of LSU. The correspondence from 27 March 2019 onwards (described above) related to both appeals, and the amended grounds of appeal provided in May 2019 apply to both the Coffee Claim and the Hot Food Claim.

RELEVANT LEGISLATION

24. Article 2 of the Principal VAT Directive (Council Directive 2006/112/EC) sets out the transactions which are subject to VAT:

> "Article 2
>
> 1. The following transactions shall be subject to VAT:
>
> (a) the supply of goods for consideration within the territory of a Member State by a taxable person acting as such;
>
> …
>
> (c) the supply of services for consideration within the territory of a Member State by a taxable person acting as such;"

25. So far as material, Article 9 defines "taxable persons" for these purposes as follows:

> "TAXABLE PERSONS
>
> Article 9
>
> 1. 'Taxable person' shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.
>
> Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as 'economic activity'. The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity."

26. Title IX of the Principal VAT Directive provides for exemptions from VAT in respect of supplies of certain goods and services. Chapter 2 of Title IX makes provision for exemption of activities in the public interest. Articles 132 to 134 provide (so far as relevant):

> "Article 132
>
> 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;
>
> …
>
> Article 133
>
> 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:
>
> (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
>
> …
>
> Article 134
>
> The supply of goods or services shall not be granted exemption, as provided for in points (b), (g), (h), (i), (l), (m) and (n) of Article 132(1), in the following cases:
>
> (a) where the supply is not essential to the transactions exempted;
>
> (b) where the basic purpose of the supply is to obtain additional income for the body in question through transactions which are in direct competition with those of commercial enterprises subject to VAT…"

27. Section 2 VATA 1994 implements Article 2. It states:

> "2. Value added tax
>
> (1) Value added tax shall be charged, in accordance with the provisions of this Act –
>
> (a) on the supply of goods or services in the United Kingdom (including anything treated as such a supply)…"

28. Section 4 VATA 1994 sets out the scope of taxable supplies and s5 sets out the meaning of supply:

> "4. Scope of VAT on taxable supplies
>
> (1) VAT shall be charged on any supply of goods or services made in the United Kingdom, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him.
>
> (2) A taxable supply is a supply of goods or services made in the United Kingdom other than an exempt supply.
>
> …

5. Meaning of supply: alteration by Treasury order.

(1) Schedule 4 shall apply for determining what is, or is to be treated as, a supply of goods or a supply of services.

(2) Subject to any provision made by that Schedule and to Treasury orders under subsections (3) to (6) below—

(a) "supply" in this Act includes all forms of supply, but not anything done otherwise than for a consideration;

(b) anything which is not a supply of goods but is done for a consideration (including, if so done, the granting, assignment or surrender of any right) is a supply of services.

…"

29. Exemption is provided for by s31(1) VATA 1994:

"A supply of goods or services is an exempt supply if it is of a description for the time being specified in Schedule 9 and an acquisition of goods from another member State is an exempt acquisition if the goods are acquired in pursuance of an exempt supply."

30. Schedule 9 provides (so far as relevant):

"Group 6 – Education

Item No

1. The provision by an eligible body of –

(a) education;

…or

(c) vocational training.

…

4. The supply of any goods or services (other than examination services) which are closely related to a supply of a description falling within item 1 (the principal supply) by or to the eligible body making the principal supply provided –

(a) the goods or services are for the direct use of the pupil, student or trainee (as the case may be) receiving the principal supply; and

(b) where the supply is to the eligible body making the principal supply, it is made by another eligible body.

…

NOTES

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

…

(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.

…

(3) “Vocational training” means –

Training, re-training or the provision of work experience for –

(a) any trade, profession or employment; or

(b) any voluntary work connected with –

(i) education, health, safety, or welfare; or

(ii) the carrying out of activities of a charitable nature.”

FINDINGS OF FACT

31. USSU is a company limited by guarantee and registered in England and Wales, and is a UK-registered charity

32. USSU’s objects, powers and restrictions governing the use of its income and property are set out in articles 3, 4 and 5 of its Articles of Association as follows:

“**3. OBJECTS**

3.1 The Union's objects (the "Objects") are the advancement of education of students at the University of Southampton for the public benefit by:

3.1.1 promoting the interests and welfare of members at the University of Southampton (the "University") during their course of study and representing, supporting and advising members;

3.1.2 being the recognised representative channel between members and the University and any other external bodies;

3.1.3 providing social, cultural, sporting and recreational activities and forums for discussions and debate for the personal development of its members;

3.1.4 promoting and facilitating students' involvement in their wider community; and

3.1.5 raising funds for other charitable organisations.

3.2 The Objects are to be carried out in complete independence of all religious and political groups and in such a manner as not to discriminate unreasonably between members.

4. POWERS

4.1 The Union has power to do anything which is calculated to further its Object(s) or is conducive or incidental to doing so. In particular, the Union has power:-

4.1.1 to provide services and facilities (including licensed facilities) for its members;

4.1.2 to establish, support, promote and operate a network of student activities for its members;

4.1.3 to alone or with other organisations:

(a) carry out campaigning activities in relation to the development and implementation of appropriate policies;

(b) seek to influence public opinion; and

(c) make representations to and seek to influence governmental and other bodies and institutions;

provided that all such activities are conducted on the basis of well- founded, reasoned argument and shall be confined to those which an English charity may properly undertake and provided that the Union complies with the Education Act 1994 and any guidance published by the Commission;

4.1.4 to write, make, commission, print, publish or distribute materials, or assist in these activities;

4.1.5 to promote, initiate, develop and carry out education and training and arrange provide or assist with exhibitions, lectures, meetings, seminars, displays or classes;

4.1.6 to promote, encourage, carry out or commission research, surveys, studies or other work and publish the useful results;

4.1.7 to provide or appoint others to provide guidance, representation and advocacy;

4.1.8 to raise funds. In doing so, the Union must not undertake any taxable permanent trading activity and must comply with any relevant statutory regulations;

4.1.9 to buy, take on lease or in exchange, hire or otherwise acquire any property and to maintain and equip it for use;

4.1.10 to sell, lease or otherwise dispose of all or any part of the property belonging to the Union. In exercising this power, the Union must comply as appropriate with sections 117 to 123 of the Charities Act 2011;

4.1.11 to borrow money and to charge the whole or any part of the property belonging to the Union as security for repayment of the money borrowed or as security for a grant or the discharge of an obligation. The Union must comply as appropriate with sections 124 to 126 of the Charities Act 2011, if it wishes to mortgage land;

4.1.12 to lend money and give credit to, take security for such loans or credit and guarantee or give security for the performance of contracts by any person or company;

4.1.13 to incorporate wholly owned subsidiary companies to carry on any taxable trade;

4.1.14 to co-operate with other charities, voluntary bodies and statutory authorities and to exchange information and advice with them;

4.1.15 to establish or support any charitable trusts, associations or institutions formed for any of the charitable purposes included in the Objects;

4.1.16 to acquire, merge with or to enter into any partnership or joint venture arrangement with any other charity;

4.1.17 subject to the prior approval of the University transfer all the Union's assets and liabilities to a charitable incorporated organisation;

4.1.18 to set aside income as a reserve against future expenditure but only in accordance with a written policy about reserves;

4.1.19 to:-

(a) deposit or invest funds;

(b) employ a professional fund-manager; and

(c) arrange for the investments or other property of the Union to be held

in the name of a nominee;

in the same manner and subject to the same conditions as the trustees of a trust are permitted to do by the Trustee Act 2000;

4.1.20 to employ and remunerate such staff as are necessary for carrying out the work of the Union. The Union may employ or remunerate a Trustee only to the extent it is permitted to do so by Articles 5 and 6 and provided it complies with the conditions in that Article;

4.1.21 to provide indemnity insurance for the Trustees in accordance with, and subject to the conditions in, section 189 of the Charities Act 2011;

4.1.22 to pay out of the funds of the Union the costs of forming and registering the Union both as a company and as a charity.

5. APPLICATION OF INCOME AND PROPERTY

5.1 The income and property of the Union shall be applied solely towards the promotion of the Objects.

5.2

5.2.1 A Trustee is entitled to be reimbursed from the property of the Union or may pay out of such property reasonable expenses properly incurred by him or her when acting on behalf of the Union.

5.2.2 A Trustee may benefit from trustee indemnity insurance cover purchased at the Union's expense in accordance with, and subject to the conditions in, section 189 of the Charities Act 2011.

5.2.3 A Trustee may receive an indemnity from the Union in the circumstances specified in Article 32.

5.2.4 A Trustee may not receive any other benefit or payment unless it is authorised by Article 6.

5.3 Subject to Article 6, none of the income or property of the Union may be paid or transferred directly or indirectly by way of dividend bonus or otherwise by way of profit to any member of the Union. This does not prevent a member receiving:-

5.3.1 a benefit from the Union in the capacity of a beneficiary of the Union;

5.3.2 reasonable and proper remuneration for any goods or services supplied to the Union provided that if such member is a Trustee, Article 6 shall apply."

33. The hot food and coffee which are the subject-matter of the Hot Food Claim and the Coffee Claim are sold by USSU from The Shop, Southampton University Students' Union, Southampton, SO17 1BJ. The shop is situated on the campus of the University of Southampton. The substantial majority of people using the facilities on campus (including the shop) are students of the University of Southampton. Others using the facilities are in practice be limited to University and USSU staff, contractors and people having business on the University's campus.

34. USSU is not permitted to distribute any profits arising from its activities, and nor does it do so.

35. Whilst the income and property of USSU are required to be applied solely towards its Objects, there is no segregation or ring-fencing of amounts of surplus income or profit arising from particular activities towards particular objects. Accordingly, USSU does not re-apply any profits it makes from supplies of hot food or coffee from USSU's shop to the

continuation or improvement of its own supplies of education or vocational training (if any) or any other particular object.

EVIDENCE

36. I was provided with a bundle in pdf format, totalling 422 pages (this page-count being that of the pdf file itself rather than referencing the pagination), which included the Notices of Appeal to the Tribunal, various Statements of Case prepared by HMRC, copies of the correspondence between the parties, the Memorandum and Articles of Association of USSU, lists of the items which are the subject-matter of these appeals, legislation and authorities, as well as an extract from HMRC's VAT Notice 701/30

37. The evidence before me included a witness statement from Anthony Addison dated 27 September 2017. He is (or, at least, was at that time) the Director of Union Services at USSU.

ISSUES

38. USSU is claiming exemption for the supplies of hot food and coffee under Item 4 of Group 6, on the basis that it itself is an eligible body providing vocational training, and that the supplies of hot food and coffee are "closely related" to the provision of principal supplies of education or vocational training for the purposes of Item 4.

Summary of criteria for exemption under Item 4

39. The burden of proof is on USSU to establish, on the balance of probabilities, that the supplies qualify for exemption. The constituent parts of this are:

(1) whether USSU made principal supplies of education or vocational training for the purposes of Group 6,

(2) whether the supplies of hot food and coffee from USSU's shop were "closely related" supplies for the purposes of exemption under Item 4, and

(3) whether USSU meets the definition of an "eligible body" as set out in Note (1)(e).

40. There were points of agreement between the parties on some elements of these limbs, which are referred to at relevant points in the Discussion.

41. In its Skeleton Argument USSU also argued that the requirements of Item 4 and Note 1(e) go beyond the provisions of the Principal VAT Directive and that I should construe Item 4 and Note 1(e) such that they accord with EU law (following Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentation SA* [1990] ECR I-4135). I address this argument in the context of whether the supplies of hot food and café are "closely related" supplies for the purposes of exemption under Item 4 and the meaning and application of Note (1)(e)(ii).

Challenge by HMRC to whether USSU supplies vocational training within Item 1

42. USSU submits that HMRC have changed their position on whether or not USSU was a provider of vocational training, have not applied to amend their Statement of Case and that this point should not be allowed to be raised now because to do so would heavily prejudice USSU. In their Skeleton Argument (filed on 4 September 2020) USSU state as follows:

> "87. The Respondents previously accepted at [49] of their amended Statement of Case (dated 29 January 2020 - TC/2017/02174) that the Appellant was a provider of education/vocational training having received and considered the Appellant's further and better particulars in relation to this.

> 88. It has only recently come to light that the Respondent's have U-turned on this position without any application to amend their SoC. The submission of the new SoC dated 24 July 2020 appears to be a result of the Tribunal Directions dated 12 June 2020 requiring the Respondents to provide a SoC. It is unclear as to why this Direction was ever issued given that the Respondents had already issued amended SoCs for each of the appeals (see email of 29 January 2020 from Mark Hyde). It may be that the Tribunal were seeking a consolidated SoC, but that, the Appellant submits, does not enable to the Respondents to change their legal arguments already submitted, especially in light of the present circumstances where there is no new evidence of fact or law to justify this change.
>
> 89. Furthermore, due to the length of time that this appeal has been outstanding, various employees of the Union have moved on and are no longer available to give evidence on this point. In particular, Scott McCarthy, the previous CEO of the Union moved jobs in February 2020. The Appellant is therefore heavily prejudiced if this point is allowed to be raised now when it was previously accepted by the Respondents back in January 2020."

43. I have considered whether (and if so how) HMRC have changed their position in relation to the matters in dispute and the arguments made by USSU as to the prejudice this would cause them if HMRC were to be allowed to proceed on the basis of its July 2020 SOC.

44. I have set out above in Background the progression of correspondence between the parties. It is clear that arguments have evolved over time – there had been lengthy debate in the correspondence as to whether the supplies of hot food should be zero-rated, and consideration of the applicability of HMRC's extra-statutory concession. The parties had debated the meaning of an "eligible body" extensively, and referred to the argument (based on *Horizon College*) that the supply of education could be made by someone other than the appellant. Nevertheless, in their letter of 6 April 2016 VATangles asserted that not only was it clear that the University of Southampton provided university education, but it was also clear that USSU was a provider of vocational training (referring to the definition in Note (3) to Group 6 and inviting HMRC to let them know if they needed any further information about this). In HMRC's letter of 6 December 2016 (on sales of coffee) it is stated that HMRC does not accept that a student union has the provision of education as its aim, and USSU does not in fact make the principal supply (of education).

45. Rule 25(2) of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Tribunal Rules") requires that a statement of case must set out HMRC's position in relation to the case. Just as an appellant's grounds of appeal enable HMRC to know the basis on which its decision is being challenged, the statement of case helps to ensure that an appellant is aware of the challenge(s) which it has to meet, whether by way of evidence of fact or submissions as to the legal analysis. This can be particularly important where, as here, there has already been a wide-ranging debate covering various factual and legal issues.

46. USSU had amended their grounds of appeal in May 2019 following the decision of the Upper Tribunal in *Loughborough*. The amended grounds made it clear that USSU was now relying on exemption under Item 4 for both the Hot Food Claim and the Coffee Claim. HMRC then filed two versions of each Statement of Case in January 2020, with the second (that which I have defined as the January 2020 SOC) being served by HMRC with the note that they were removing one area of dispute between the parties. The area in question was not specified, but having looked at the different (January) versions it appeared to me that the difference was that in the January 2020 SOCs HMRC accepted that the requirements of Note 1(e)(i) were satisfied.

47. In the January 2020 SOC for the Hot Food Claim, under the heading "HMRC's Contentions", HMRC set out their position as follows (and this is repeated for the Coffee Claim, but with different paragraph numbering):

> "42. The Respondent contends that the claim was properly rejected, as the supplies of food were correctly standard rated, and not exempt from VAT. The supplies of food were made in the Student Union shop.
>
> 43. Under the VAT Act 1994 Schedule 9 Group 6 Item 4, the supply of goods and services "closely related" to supplies in Item 1 of the same group are exempt.
>
> 44. Item 1 of the VAT Act 1994 Schedule 9 Group 6 exempts the supply of education and vocational training by an eligible body. For the Appellant's claim to be allowed, they must therefore demonstrate that the supplies of education and vocational training they make are exempt, and as such much meet the requirements to be an 'eligible body'. In addition, they must demonstrate that the supplies of food being made are to students who they are also supplying education or vocational training to.
>
> 45. Note 1 of the same Group defines what an 'eligible body' is for the purposes of this Group.
>
> 46. The Respondents contend that the Appellant is not an eligible body.
>
> 47. The Appellant contends that it is an eligible body as it satisfies Note 1(e). The Respondent understands that the Appellant is not claiming that they are exempt under any of the other categories (i.e. Note 1 (a) to (d), or (f)).
>
> 48. Under Note 1(e), an eligible body is 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.
>
> 49. The Appellant confirmed that they provide a number of types of education and vocational training in their further and better particulars submitted on 15 November 2019.
>
> 50. The Appellant also confirmed that they are a registered charity, and as such are precluded from distributing profits. Any surpluses are re-invested into the Union as a whole to further its objects.
>
> 51. The Respondents contend that Note 1(e)(ii) requires them to apply any profits from the exempt supplies to be wholly reinvested into the same supplies. The Appellant has not evidenced that the profits from vocational and other educational training, and supplies closely associated, are wholly reinvested for the continuance of the same supplies, and not to some extent reinvested into other aspects of the Students Union's operations.
>
> 52. As such, the Appellant not demonstrated that they fulfil the criteria to be an 'eligible body' in respect of their supplies of Vocational training and other educational supplies to exempt these supplies under item 1, Group 6, Sch 9, VATA94. Thus the supplies of food sales in the Student Union shop have also not been demonstrated to be exempt from VAT under Item 4 of Group 6 to Schedule 9 of the VAT Act 1994.
>
> 53. Even if the Appellant can evidence that it is an eligible body, the Respondent also contends that the supplies of food are made by the Student Union shop, which is accessible for all students at the University, not only

> those who receive vocational or other educational supplies from the Appellant, the Student Union, itself. As such, the supplies are not "closely related" to the education and vocational training provided by the actual Appellant, in full.
>
> 54. The Respondent contends that if the Appellant is entitled to exempt some supplies of food sold in the shop, it should only be a proportion of such sales, made to Students who receive the supplies of Vocational training and other educational supplies from the appellant (the Student Union itself).
>
> 55. It is considered many of the sales of food from the shop will be made to students at the University who are receiving education from only the University, and not from the Student Union. The proportion of exempt supplies should therefore be based on an estimate of the proportion of sales made to students receiving vocational training and education from the Student Union, in comparison to the University as a whole. As such, even if the Appellant was found to be an 'eligible body', an apportionment would be required in order to determine a fair and reasonable percentage of food sales to be allowable as "closely related" to supplies of education made by the Appellant.
>
> 56. The supplies were therefore correctly standard rated, and the claim was rightly refused."

48. In the July 2020 SOC HMRC's contentions refer to Item 4 and state as follows:

> "59. The Respondents submit that the starting point in considering a supply under Item 4 is to establish the principal supply which bears the close relationship. This is because under the terms of Item 4, only the eligible body making the principal supply is entitled to the exemption (whether on supplies made by it or supplied to it).
>
> 60. The Respondents submit that the result is that Appellant therefore must be able to demonstrate that it makes a principal supply of education or vocational training in order for the catering supplies to fall within Group 6 (and be capable in principle of exemption)."

49. Under the sub-heading "Does the Appellant make Principal Supplies under Item 1?" HMRC then set out their position as to why they consider it does not – referring to the further and better particulars from 15 November 2019, the evidence from Mr Addison, and whether consideration must be provided for the training. It is clear from this section that HMRC do not accept that USSU makes a supply of vocational training within Item 1.

50. USSU stated in their Skeleton Argument that HMRC had previously accepted at [49] of the January 2020 SOC that USSU was a provider of education/vocational training. The paragraph cited does not constitute such an acceptance – HMRC are merely referring to USSU's contentions in their provision of further and better particulars. This is in the context of HMRC's position that USSU are not an eligible body. However, reading [52] to [54] together with the earlier paragraphs does indicate that HMRC was not challenging the provision of vocational training by USSU.

51. I therefore agree with USSU's contention that HMRC have changed their position on this issue between January 2020 and July 2020.

52. In assessing whether allow HMRC to challenge this issue, I remind myself that the overriding objective in rule 2 of the Tribunal Rules is to deal with cases fairly and justly.

53. USSU state in their Skeleton Argument that, due to the length of time that this appeal has been outstanding, various employees have moved on, and in particular Scott McCarthy,

the previous CEO, moved jobs in February 2020. However, it is important to note that the amended grounds of appeal were only provided in May 2019 and it was in November 2019 that USSU provided the information which HMRC now seek to challenge. I note that in the letter of 16 November 2019 USSU had stated that it was in the process of putting together all its evidence on this matter including session slides used in training, calendar notes and witness statements of staff and students involved. In fact, USSU have only produced one witness statement, a relatively short (two page) statement from Mr Addison from September 2017.

54. HMRC have not explained why the challenge they make in July 2020 was not made in January 2020. The delay is unfortunate. Similarly unfortunate is the failure to point out, when filing the July 2020 SOC, the change which had been made (whether by providing a blackline or a one-sentence explanation in the cover e-mail identifying the key amended paragraphs).

55. Nevertheless, USSU have had since July 2020 to consider the legal submissions they wish to make in response to HMRC's position, and any factual evidence they wish to adduce. Furthermore, the appeals were not listed to be determined until October 2020, and there has been no explanation as to why evidence could not be sought on behalf of USSU from former employees.

56. Having regard to the overriding objective, I have decided to allow HMRC to rely on the July 2020 SOC and the challenge made therein as to whether USSU makes principal supplies within Item 1.

DISCUSSION

57. I have set out above the Issues which require determination. USSU needs to prevail on all of these issues in order to establish that the supplies qualify for exemption.

Whether USSU made principal supplies of education or vocational training for the purposes of Group 6

58. In the further and better particulars of 6 November 2019 it was stated that USSU makes a number of different principal supplies of education/vocational training including (but not limited to) academic representatives training, clubs/societies committee training, preparation for candidates for elected positions, training on using LinkedIn, a safety/welfare programme (Look After You Mate), food safety and hygiene training and safety bus driver training. The only charge that is mentioned is that of £25 for the safety bus driver training course, where the description is as follows:

> "7. Safety Bus Driver Training – A student must have a valid licence, be over 21, and take this course and receive the certificate to be able to sign out one of our 5 minibuses. We charge £25 for this course and we are planning to train 300 students this academic year. This has proved popular and most clubs will have 3-5 of their members trained to drive them. The training focuses on transporting people (safety wise) and driving a longer than normal vehicle."

59. In his witness statement Mr Addison states:

> "14. Students are involved in every aspect of the Union's operations and we provide vocational training for a wide range of activities and skills that may be of use to our member once they leave University. This may include journalism, disc jockeying, welfare and advice, housing officers and many others. Within my own responsibility we also provide training in bar, catering and retail operations and management."

60. USSU submit that they do make exempt supplies of education or vocational training:

(1) they refer to the information above as to the range of training courses/education provided by USSU;

(2) they state it is not necessary that these courses are supplies within the meaning of s5(2) VATA 1994 (ie carried out for consideration) – Item 1 uses the word "provision" and not supply, which is consistent with Article 132(1)(i), and the definition of "vocational training" in Note (3) contemplates non-paid training;

(3) HMRC accept at [64] of the July 2020 SOC "that the Appellant is regularly engaged in the process of training students in various matters, including elections or to work in the Union in their commercial activities" - this falls squarely within the terms of Note 3; and

(4) if it is a requirement for there to be a "supply" and therefore "consideration", then the safety bus driver training courses satisfy that requirement. The student pays for this training and once qualified is then able to be employed by USSU to drive the safety bus. This constitutes training for employment.

61. HMRC submit that:

(1) Mr Addison's evidence does not resolve the question of whether USSU makes principal supplies of vocational training because he only refers to the fact that training is undertaken by USSU in various forms;

(2) HMRC accept that USSU is regularly engaged in the process of training students in various matters, including elections or to work in the students' union in their commercial activities. However, for those activities to constitute a supply of vocational training, there must be consideration for that supply as set out in s5(2) VATA 1994;

(3) the only course of which evidence has been adduced for which consideration is paid is the safety bus training course, and there is insufficient evidence about this course to explain how it fits within the definition of vocational training, whether that be in relation to training or work experience for a trade, profession or vocation, or in relation to charitable or other welfare work as set out in Note (3). USSU has provided no evidence to demonstrate when this course was first run, how many students have taken the course and what surpluses (if any) arose from the supplies made. To the extent that the course is limited to additional instruction in safely driving the minivans operated by USSU to further the social activities of the clubs and societies associated with it, HMRC contend that this course is unlikely to fall within the definition of vocational training but rather is recreational in character; and

(4) in the alternative, insufficient evidence is available to prove on the balance of probabilities that the course (which appears to be the only activity done for a consideration which could constitute vocational training) meets the necessary definition in Note (3) - USSU has failed to demonstrate how the course acts as training, re-training or work experience for a trade, profession or vocation, or the further purposes outlined in relation to voluntary work.

62. I address further below whether there is a requirement that education or vocational training must be provided for consideration, and consider first the range of activities provided by USSU (using activities and provided as neutral terms).

63. I accept the evidence of Mr Addison as to the role of students in USSU's activities. However, the activities he describes do not satisfy the definition of vocational training in Note (3), as they are either "on-the-job training" which was rejected by Rose J at [22] of

Loughborough as amounting to a principal supply within Group 6, or are recreational activities which, as Mr Addison notes, "may be of use" once students leave university.

64. The description set out by way of further and better particulars was not, as HMRC point out in their submissions, evidenced by Mr Addison or anyone else on behalf of USSU. However, the broad description of the range of activities set out therein is what I would expect to see being provided by a students' union such as USSU and I accept this description of the range of activities offered or provided by USSU. The difficulty faced by USSU is that many of the activities identified – eg as to how best to use LinkedIn, safety/welfare programmes – are no doubt useful as "life skills" but fall short of meeting the definition of vocational training. Similarly, the preparation given to candidates for elected roles, and to officers of USSU, is again a form of "on-the-job" training which has been rejected as constituting vocational training by the Upper Tribunal.

65. Both parties drew particular attention to the safety bus driver training course, as it is the only course which USSU states is provided for consideration (and that aspect is considered below). However, I note that the description on 6 November 2019 identifies that students who complete the course can then "sign out" USSU's minibus and clubs have three to five of their members trained to drive them. In their Skeleton Argument USSU state that, once qualified, students can be employed by USSU to drive the safety bus. These explanations are different, and the former is much more closely aligned to a recreational activity rather than training within Note (3). HMRC have drawn attention (correctly) to the lack of evidence as to how long this course has been offered (ie was it available and taken up by students in 2011) and the number of students who completed the course. There is also no evidence as to whether students were then employed (by USSU or anyone else) to drive the safety bus.

66. Having considered all of the evidence and submissions, I have concluded that there is insufficient evidence provided by USSU as to how these courses and activities constitute training, re-training or work experience for any trade, profession or employment or any voluntary work connected with the activities specified in Note (3).

67. Furthermore, I agree with HMRC that the "provision…of (a) education...or (c) vocational training" referred to in Item 1 must be done for a consideration, ie the education or vocational training must be a supply in its own right. The items set out in Group 6 of Schedule 9 do not sit in isolation – they gain their status as exemptions from s31(1) VATA 1994, which states that a "supply of goods or services is an exempt supply if it is of a description for the time being specified in Schedule 9" – so something must first be a supply (which requires that it is provided for consideration) before it can then be an exempt supply within (in this instance) Item 1 of Group 6. I do not accept USSU's submission that Note (3) contemplates "non-paid" training – rather, it contemplates training for non-paid work. In addition, the need for the provision of education or vocational training to be a supply for present purposes is clear from the language of Item 4, which applies where the ancillary supply (in this case of hot food and coffee) is closely related to "a supply of a description falling within item 1".

68. For the reasons set out above, USSU has not established that it makes a supply of education or vocational training within Item 1, and accordingly it does not make a principal supply for the purposes of Item 4. These conclusions are sufficient to dismiss USSU's appeals. I have nevertheless proceeded to consider the parties' submissions in relation to the remaining issues.

Whether the supplies of hot food and coffee from USSU's shop were "closely related" supplies for the purposes of exemption under Item 4

69. Item 4 exempts the supply of goods which are "closely related" to a supply of a description falling within Item 1 (the principal supply) by or to the eligible body making the principal supply provided the goods are for the direct use of the pupil, student or trainee receiving the principal supply.

70. It was common ground that hot food and coffee fall within the definition of catering which is otherwise taxable at the standard rate. HMRC also accepted that "in principle, where an eligible body makes a supply of catering to the pupils receiving a supply of education or vocational training from it then that supply of catering is closely related for the purposes of Item 4", stating that this was following *Pilgrims Language Courses*.

71. The parties' submissions are most easily summarised by starting with the position taken by HMRC. HMRC submit that:

(1) it is not sufficient that the students who purchase the catering supplies receive a principal supply from the University in the form of higher education because Item 4 entitles only the eligible body making the principal supply to the exemption in supplies it makes or receives;

(2) USSU must be able to demonstrate that the supplies of catering which they wish to treat as exempt are supplied to students receiving a principal supply of vocational training from USSU directly – and this is particularly important given that so many of the students on campus who might purchase catering from the shop are likely to be on campus to further their university education; and

(3) USSU's claim is not supported by evidence to demonstrate to whom the supplies of catering are made and the close relationship between that supply of catering and any supplies of vocational training made by USSU.

72. USSU submit that:

(1) it does not matter who the recipient of the supply is, all that matters is that the supply is for the direct benefit of a student receiving a supply of education, citing *Horizon College* and *Brockenhurst College* (both of which decisions are considered in detail below);

(2) the wording of Article 132(1)(i) does not allow for the possibility of the restrictions HMRC suggest, accordingly, if the Tribunal requires, it should apply a *Marleasing* construction to read domestic legislation in line with the wording and purpose of the Principal VAT Directive;

(3) all student unions are granted a concession to exempt from VAT their supplies of catering to all students, but that concession does not apply to catering supplies made in a union shop. This demonstrates that HMRC have deemed it appropriate to allow student unions to exempt supplies which are closely related to the University's supply of education; and

(4) VAT Notice 701/30 sets out HMRC's policy to allow eligible bodies to exempt closely related supplies to the students of another eligible body.

73. USSU does not seek to rely on either the concession or the VAT Notice (accepting that this would be outside the jurisdiction of the Tribunal) but states that they highlight that the interpretation USSU seeks of Item 4 is consistent with those of senior policy makers within HMRC.

74. Whilst I accept that I need to consider the requirements of both Item 4 itself and the provisions of the Principal VAT Directive which it implements, the interpretation adopted within HMRC does not assist with this exercise.

75. In *HMRC v Pilgrims Language Courses Limited* [1999] EWCA Civ 1939 the Court of Appeal had considered the provision of meals and accommodation by a body which taught English as a foreign language to students, where such teaching took an all-encompassing approach requiring students to communicate only in English from the moment they were collected from the airport, and throughout the activities (be they sporting or entertainment) as well as in lessons. In that context, Schiemann LJ said, in a judgment with which the remainder of the court agreed:

> "I would allow Pilgrim's appeal against the Judge's decision that the provision of meals (in all fully residential courses) and the provision of accommodation in the children's, young adults' and teachers' course are not exempt…I am content to arrive at this conclusion by holding either (a) that this supply was closely related to the supply of teaching of English as a foreign language, falls within item 4 and that such a supply is not excluded from exemption by Note (2) or (b) that, applying the test in [*Card Protection Plan*], it is clear that neither the provision of food and nor the provision of accommodation constituted for the customers in the present case an aim it itself but was in each case a means of better enjoying the principal service supplied and that therefore the composite supply falls within item 1 to which note (2) has no application."

76. That decision concerned a straightforward fact pattern where the provision of meals was made by the same institution which was providing the education to those same students. Whilst it is important not to conflate the reasoning behind the two alternative grounds on which the Court of Appeal reached its decision, it was nevertheless apparent that the court appreciated that the approach being taken by Pilgrims to the teaching of English involved students being constantly in an environment where they had no option but to communicate with each other in English (by grouping students so that this was their only common language).

77. It was not argued between the parties, and so I reach no conclusion on this point, but I am not convinced that this decision would require me to conclude that the provision of catering by an eligible body to its own students would always constitute a "closely related" supply to its provision of education or vocational training.

78. In *Loughborough* LSU claimed repayment of output tax in respect of sales of stationery, art materials and other items from the shops which LSU operates on campus. The Upper Tribunal found that the supplies of goods and services made by LSU do not fit within Item 4. Noting that the evidential burden lies on LSU, Rose J concluded that the supplies are not closely related to the provision by an eligible body of education or vocational training. The food, newspapers, household goods are "ends in themselves" and not ancillary to education; the education provided by the University would be just as good if the students did not buy these items. There was no evidence about what the art materials are or how they relate to the course work that students may be undertaking.

79. I view the supply of hot food and coffee by USSU as just as much ends in themselves as the supply of stationery and other goods by LSU, and do not see why their being a form of catering elevates their status.

80. In any event, I consider that the supply of hot food and coffee by USSU from its shop falls outside the requirements set out in Item 4:

(1) Item 4 requires that the "closely related" supply is made by the eligible body making the principal supply of education or vocational training – I have found that USSU is not making a principal supply of education or vocational training, and therefore this requirement is not satisfied; and

(2) Item 4 requires that the "closely related" supply is for the "direct use" of the pupil, student or trainee receiving the principal supply – there is minimal evidence before me as to the recipients of the supply of hot food and coffee, save that it is accepted that USSU's shop is on the campus of the University but access thereto is not restricted to students of the University. Even therefore if the two supplies could be made by different eligible bodies, this condition would not be satisfied.

81. USSU argues that Item 4 is more restrictive than the relevant provisions of the Principal VAT Directive, and refers to the decision of the CJEU in Case C-434/05 *Stichting Regionaal Opleidingen Centrum Noord-Kennemerland/West-Friesland (Horizon College) v Staatssecretaris van Financien* [2007] ECR I-4793 as support for the proposition that a supply from one body can be closely related to a supply by another body.

82. In *Horizon College*, the CJEU was asked questions regarding Article 13A(1)(i) of the Sixth Directive (now Article 132(1)(i) of the Principal VAT Directive). The College was providing staff to other educational establishments (referred to as the host establishments) for a charge. One of the questions was whether this was a supply "closely related to education". USSU cited [30] to [32] of the decision:

> "30 As Horizon College and the Commission essentially submit, the supply of a teacher by one educational establishment to another in order for the teacher temporarily to carry out teaching duties under the responsibility of the latter establishment is an activity which can, in principle, be described as a supply of services closely related to education. Indeed, where there is a temporary shortage of teachers in some educational establishments, making qualified teachers attached to other establishments available to those experiencing the shortage will enable students better to enjoy the education provided by the host establishments.
>
> 31 That conclusion is not altered by the fact, emphasised by the Greek and Netherlands Governments, that the host establishments benefit from the supply of those teachers, without there being a direct relationship between Horizon College and the students of the host establishments. Similarly, the fact, noted by the Netherlands Government, that the supply of teachers is an activity that is separate from the teaching provided by Horizon College on its own account has no bearing on that conclusion.
>
> 32 In fact, in order for students of the host establishments better to enjoy the education provided by those establishments, it is not necessary for services closely related to that education to be supplied directly to those students. Furthermore, any lack of a close connection between the principal activity of the establishment making teachers available and its secondary activity - the supply of services closely related to education - is, in principle, irrelevant."

83. However, the CJEU went further in the remainder of its decision (in paragraphs both preceding and following those cited above), and in *Loughborough* Rose J set out the principles laid down in that case as follows (which I gratefully adopt):

> "17…The Court noted that there is no definition in the PVD of the term "closely related". It then set out the following principles:

(a) the supply of goods or services can be closely related only where they are actually supplied as services ancillary to education which constitutes the principal service;

(b) a service may be regarded as ancillary to a principal service if it does not constitute an end in itself but a means of better enjoying the principal service;

(c) it does not matter that there is no direct relationship between Horizon College and the students of the host establishment; in fact it is not necessary for the closely related supplies to be supplied directly to those students. Any lack of a close connection between the principal supply of education by Horizon College and the secondary activity of making closely related supplies is irrelevant;

(d) both the principal activity of education and the supply of the closely related goods or services must be provided by an eligible body;

(e) in order to qualify for exemption, the closely related supplies must be essential to the transactions exempted, that is to say they must be of a nature and quality such that, without recourse to such a service, there could be no assurance that the education provided by the supplier of the principal activity would have an equivalent value; this is a matter for the national court to determine;

(f) the closely related supplies must not fall within Article 134(b), that is they must not be for the purpose of obtaining additional income for bodies which are in direct competition with commercial enterprises liable for VAT;

(g) the closely related supplies must also satisfy any conditions that the Member State has imposed pursuant to Article 133."

84. These principles were set out by the CJEU against the background that Horizon College supplied teachers to the host establishment which then supplied education to the students. Nevertheless, it is significant that the CJEU emphasised (at [28] and [29]) that the supply of goods and services can be regarded as "closely related" only where they are actually supplied as services ancillary to the education which constitutes the principal service and do not constitute an end in themselves but a means of better enjoying the principal service.

85. USSU also referred to Case C-699/15 *HMRC v Brockenhurst College* [2017] STC 1112 at [28] and [43]. Brockenhurst is a higher education establishment which offers courses in catering and hospitality (as well as the performing arts). For the purpose of enabling the students to learn skills in a practical context, the College, through its students acting under the supervision of their tutors, runs a restaurant and stages performances aimed at persons not connected to the establishment. This practical training was designed as part of the courses, and the students were aware of this at the time they enrolled.

86. HMRC in that case argued that Item 4 precluded the supply from being exempt as it was not for the "direct use of the student". The CJEU stated:

"26. In that regard, the application of the exemption for activities 'closely related' to education is, in any event, subject to three conditions, laid down, in part, in Articles 132 and 134 of Directive 2006/112. In essence, first, both the principal supply and the supplies of services closely related to it must be provided by bodies referred to in Article 132(1)(i) of that directive; secondly, those supplies of services must be essential to the exempt activities; and, thirdly, the basic purpose of those supplies of services must not be to obtain additional income for those bodies by carrying out transactions which are in direct competition with those of commercial

enterprises liable for VAT (see, to that effect, judgments of 14 June 2007, *Horizon College*, C-434/05, EU:C:2007:343, paragraphs 34, 38 and 42, and 25 March 2010, *Commission v Netherlands*, C-79/09, not published, EU:C:2010:171, paragraph 61).

…

28 As regards the second condition, it follows from paragraph 39 of the judgment of 14 June in *Horizon College* (C-434/05, EU:C:2007:343), that, in order to be classified as supplies of services essential to the exempt activities, those supplies must be of a nature and quality such that, without recourse to them, there could be no assurance that the education provided by the body referred to in Article 132(1)(i) of Directive 2006/112 and, consequently, the education from which their students benefit, would have an equivalent value. ….

29. In the present case, it is apparent from the order for reference that the practical training was designed to form an integral part of the student's curriculum and that, if it were not provided, students would not fully benefit from their education.

30. In that regard, the order for reference notes that the catering functions of the restaurant are all undertaken by students of the College, under the supervision of their tutors, and that the purpose of operating the College's training restaurant is to enable the students enrolled in catering and hospitality courses to learn skills in a practical context.

31. The same applies to the performing arts courses. The College, through the students enrolled on those courses, stages concerts and performances to enable the students to acquire practical experience.

32. It must be stated that, without these practical aspects, the education provided by the College in the fields of catering and hospitality and of the performing arts would not have an equivalent value.

33. That finding is corroborated by the assertion of the United Kingdom of Great Britain and Northern Ireland that the College's training restaurant is tantamount to a classroom for the students, and the assertion of the European Commission that students benefit from preparing meals and performing table service in a real-life setting, which is an important part of their education.

34. In those circumstances, it appears that the supplies of restaurant and entertainment services at issue in the main proceedings must be regarded as essential to guaranteeing the quality of the principal supply of education provided by the College.

…

43. In the light of all the foregoing considerations, the answer to the questions referred is that Article 132(1)(i) of Directive 2006/112 must be interpreted as meaning that activities carried out in circumstances such as those at issue in the main proceedings, consisting in students of a higher education establishment supplying, for consideration and as part of their education, restaurant and entertainment services to third parties, may be regarded as supplies 'closely related' to the principal supply of education and accordingly be exempt from VAT, provided that those services are essential to the students' education and that their basic purpose is not to obtain additional income for that establishment by carrying out transactions in direct competition with those of commercial enterprises liable for VAT, which it is for the national court to determine." 104.

87. Whilst the services in issue in *Brockenhurst* were supplied to third parties who were not the recipients of any supply of education, the CJEU emphasised that:

(1) the practical training was designed to form an integral part of the student's curriculum, and the purpose of operating the training restaurant was to enable students enrolled in catering and hospitality courses to learn skills in a practical context (see [29] and [30]);

(2) without these practical aspects the education provided would not have an equivalent value (see [32]); and

(3) the supplies of restaurant services must be regarded as essential to guaranteeing the quality of the principal supply of education provided by the College (see [34]).

88. This is again different from the facts before me – there is no evidence of any such matters in relation to the hot food and coffee supplied from USSU's shop.

89. In *Loughborough* the appellant (also represented by Mr Tyler of VATangles) had also argued that the requirements of Item 4 go beyond what is required by EU law, and Rose J concluded as follows:

> 23. The second argument is that Group 6 goes beyond what is required by articles 132 – 134 PVD in requiring the closely related supplies made by the eligible body to be closely related to the principal supplies that it is making itself rather it being sufficient that the ancillary supplies are closely related to principal supplies made by another eligible body. Mr Tyler relied on Horizon College as authority that there is nothing in article 132 that prevents an eligible body which itself makes principal supplies from claiming an exemption for closely related supplies even if they are not closely related to its own principal supply as long as they are closely related to another eligible body's principal supply. On this point I do not see that *Horizon College* is authority for the proposition that there is no need for the eligible body claiming exemption to show that its closely related supplies are closely related to its own principal supply rather than to the principal supply of a different eligible body. That case was dealing with the case where the exemption applied because the eligible body was making supplies "to" another eligible body. The question whether the exemption can only apply if the supplies are closely related to the eligible body's own principal supply was discussed briefly in the Opinion of Advocate General Sharpston in *Horizon College*: see [73] – [74] as it was a point raised in argument by the Netherlands Government. She considered that none of the cases relied on by the Netherlands Government in support of the need for that link were determinative but that the point did not arise in the case before her. Similarly here, I do not need to decide whether, if LSU could still claim the benefit of the exemption if it were an eligible body making principal supplies of a different kind but the shops' goods and services were closely related not to those principal supplies but to the principal supplies of the University.
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> 24. Mr Tyler suggested in his skeleton argument that if Item 4 is too restrictive then the modification needed would be to remove all the words "by or to the eligible body making the principal supply". That cannot be right because it is the reference in Item 4 to the eligible body making the principal supply that provides the link between the eligible body and the making of principal supplies that the FTT was concerned was missing from the definition of eligible body in Note 1(e) itself. In other words, if it is right (contrary to HMRC's submissions) that a tax payer can be an eligible body within Note 1(e) even if it has no connection with education, it is the requirement in Item 4 that the eligible body makes the principal supply that

> provides the missing link required for the domestic provisions properly to implement Article 132. Articles 132 – 134 clearly do require that any taxpayer claiming exemption must make a principal supply because the taxpayer must either be a public body which has the aim of providing education or vocational training or it must be a recognised other organisation "having similar objects". If Mr Tyler is right that Item 4 is too restrictive, the only modification that would be needed to the wording of Item 4 to make it compliant with the PVD position would be to construe it as if it said, for example "by or to the eligible body making **a** principal supply" rather than "**the** principal supply". But that would not help LSU in this case since it does not make any principal supply.

90. I am bound by this decision, with which I agree. I would also note that USSU have not established that the supplies of hot food and coffee are essential to the supply of education or vocational training – Article 134(a) would thus preclude the supplies from qualifying for exemption.

91. I have concluded that the supplies of hot food and coffee are not closely related to a supply of education or vocational training, either within Item 4 as drafted, within a modified version thereof as set out by the Upper Tribunal in *Loughborough*, or based on direct reliance on the provisions of the Principal VAT Directive.

Whether USSU meets the definition of an "eligible body" as set out in Note (1)(e)

92. Note (1) defines what constitutes an "eligible body" and includes at Note (1)(e) (the only sub-paragraph on which USSU seeks to rely) 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.

93. HMRC accept that USSU is precluded from distributing and does not distribute any profit it makes.

94. The only dispute between the parties is whether USSU satisfies Note (1)(e)(ii). It was common ground (and I found as a fact) that any profits or surpluses arising from the sale of hot food and coffee are applied to the continuance or improvement of the services supplied by USSU in accordance with its objects. There is no ring-fencing. The dispute is as to the meaning and/or requirements of Note (1)(e)(ii), having regard to the language of Article 133(a).

95. HMRC submit that USSU must establish that:

(1) they make exempt supplies within Group 6 (and HMRC deny this is the case); and

(2) the profits from those supplies are applied to the continuance or improvement of those supplies (and not the wider range of activities permitted by its objects). The approach taken by USSU fails to meet the requirements because any profits generated by supplies made under Group 6 could be reinvested in, eg, promoting the interests and welfare of members of the University of Southampton or providing social, cultural, sporting and recreational activities and forums for discussions and debate for the personal development of its members.

96. USSU submit that:

(1) neither Article 132(1)(i) nor Note (1)(e)(ii) require this – and such an approach would place an undue burden on organisations to track and monitor profits to ringfence them, breaching fiscal neutrality and equal treatment;

(2) HMRC have misinterpreted the Note – USSU does satisfy the condition when that Note is read in light of the Principal VAT Directive and CJEU case-law;

(3) referring to *Kennemer*, the key requirement is that the body is precluded from distributing profits – it does not require that profits be re-invested into the "same" supplies; and

(4) given that HMRC have accepted that USSU does not distribute its profits, USSU automatically satisfies both parts of Note (1)(e)

97. Looking at Note (1)(e) in isolation (or, at least, without regard to the provisions of the Principal VAT Directive and the case law of the CJEU) I agree with HMRC's reading of its requirements. The language used is clear – to be an "eligible body" within Note (1)(e) a body must satisfy two distinct requirements, namely that it is precluded from distributing and does not distribute any profit it makes, and it must apply any profit it does made from supplies which fall within Group 6 – ie whether as principal supplies or closely related supplies – to the continuance or improvement of these supplies within Group 6. The restriction is the natural consequence of the use of the phrase "such supplies".

98. Following this approach, USSU cannot be an eligible body – not only have I concluded that it does not make supplies within Group 6 (either principal supplies or closely related supplies) but also if this were wrong and it did make such supplies, USSU accepts that any profits from such supplies would not only be applied to the continuance or improvement of those supplies but would be used for its (charitable) objects more generally.

99. However, the drafting of Note (1)(e) does differ from the language used in Article 133(a), as the Principal VAT Directive states that the optional condition which Member States may impose is that the bodies "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". The differences are discussed further below after considering the decision of the CJEU in *Kennemer*.

100. In Case C-174/00 *Kennemer Golf & Country Club* [2002] ECR I-3293, the CJEU was asked questions regarding the application of the condition that a body be a non-profit-making organisation within Article 13A(1)(m) of the Sixth Directive (now Article 132(1)(m) of the Principal VAT Directive) and about the application of Article 13A2(a) of the Sixth VAT Directive (now Article 133(a)). Kennemer was a Dutch association, with about 800 members, and its objects (according to its Articles of Association) are the pursuit and promotion of sport and games, in particular golf. It owned facilities for this purpose. Members had to pay an annual subscription fee as well as an admission fee. Non-members could also use the course and facilities in return for payment of a day subscription fee, and the club earned relatively large sums in this way, amounting to approximately one-third of the amounts paid by members as annual subscription fees. The club made an operating surplus, which was appropriated as a provisional reserve fund for non-annual expenditure. The club treated its services to non-members as exempt from VAT.

101. The CJEU stated as follows:

> "24. By its third question, which it is appropriate to examine before the second question owing to its close link to the first question, the national court is asking, essentially, whether Article 13A(1)(m) of the Sixth Directive, read together with the first indent of paragraph (2)(a) of that provision, is to be interpreted as meaning that an organisation may be categorised as non-profit-making even if it systematically seeks to achieve surpluses which it then uses for the purposes of the provision of its services.

25. Whilst the Finnish and United Kingdom Governments, and also the Commission, submit that the most important consideration is whether the organisation in question aims to make a profit and not the fact that it actually makes a profit, even if it does so habitually, the Netherlands Government, on the other hand, contends that the VAT exemption should not be granted when profits are made systematically. In its submission, the exemption is applicable only where surpluses are achieved occasionally or merely incidentally.

26. On that point, it must be observed first of all that it is clear from Article 13A(1)(m) of the Sixth Directive that an organisation is to be classed as being non-profit-making for the purposes of that provision by having regard to the aim which the organisation pursues, that is to say that the organisation must not have the aim, unlike a commercial undertaking, of achieving profits for its members (see, as regards the exemption provided for in Article 13A(1)(n) of the Sixth Directive, the judgment given today in Case C-267/00 *Commissioners of Customs & Excise v Zoological Society of London* [2002] ECR I-3353, paragraph 17). The fact that it is the aim of the organisation which is the test of eligibility for the VAT exemption is clearly borne out by most of the other language versions of Article 13A(1)(m), in which it is explicit that the organisation in question must not have a profit-making aim (see besides the French version, the German version - Gewinnstreben, the Dutch version - winst oogmerk, the Italian version - senza scopo lucrativo and the Spanish version - sin fin lucrativo).

27. It is for the competent national authorities to determine whether, having regard to the objects of the organisation in question as defined in its constitution, and in the light of the specific facts of the case, an organisation satisfies the requirements enabling it to be categorised as a non-profit-making organisation.

28. Where it is found that this is indeed the case, the fact that an organisation subsequently achieves profits, even if it seeks to make them or makes them systematically, will not affect the original categorisation of the organisation as long as those profits are not distributed to its members as profits. Clearly, Article 13A(1)(m) of the Sixth Directive does not prohibit the organisations covered by that provision from finishing their accounting year with a positive balance. Otherwise, as the United Kingdom points out, such organisations would be unable to create reserves to pay for the maintenance of, and future improvements to, their facilities.

29. The referring court is also unsure whether this interpretation can be maintained in cases where the achievement of surpluses is systematically sought by an organisation. It refers in this regard to the first indent of Article 13A(2)(a) of the Sixth Directive which would seem to suggest that the VAT exemption is to be disallowed where an organisation systematically seeks to make profits.

30. As far as that provision is concerned, it must be observed at the outset that it lays down an optional condition that the Member States are at liberty to impose as an additional condition for the grant of certain exemptions set out in Article 13A(1) of the Sixth Directive, amongst which figures the exemption covered by that same provision, under (m), which concerns the present case. The Netherlands legislature seems to require compliance with that optional condition before the benefit of that exemption can be granted.

31. As far as the interpretation of that optional condition is concerned, the Netherlands Government maintains that the exemption must be refused

where an organisation systematically seeks to achieve surpluses. The Finnish and United Kingdom Governments, as well as the Commission, on the other hand, submit that systematic pursuit of profits is not of decisive importance where it is clear from both the circumstances of the case and the kind of activity actually carried on by an organisation that it is acting in accordance with the objects set out in its constitution and that these do not include any profit-making aim.

32. It must be observed, with regard to this point, that the first condition set out in the first indent of Article 13A(2)(a) of the Sixth Directive, namely that the organisation in question must not systematically aim to make a profit, clearly refers, in the French version of that provision, to profit, whilst the two other conditions set out there, namely that no profits should be distributed and that any profits be assigned to the continuance or improvement of the services that supplied, refer, in the French text, to bénéfices.

33. Although that distinction is not to be found in any of the other language versions of the Sixth Directive, it is borne out by the objective of the provisions contained in Article 13A thereof. As the Advocate General points out in paragraph 57 to 61 of his Opinion, it is not profits (bénéfices), in the sense of surpluses arising at the end of an accounting year, which preclude categorisation of an organisation as non-profitmaking, but profit (profit) in the sense of financial advantages for the organisation's members. Consequently, as the Commission also points out, the condition set out in the first indent of Article 13A(2)(a) essentially replicates the criterion of non-profit-making organisation as contained in Article 13A(1)(m).

34. The Netherlands Government argues that such an interpretation does not take account of the fact that the first indent of Article 13A(2)(a) must, as an additional condition, necessarily have a content extending beyond that of the basic provision. In response to that argument, it suffices to observe that that condition does not refer only to Article 13A(1)(m) of the Sixth Directive but also to a large number of other compulsory exemptions which have a different content.

35. Consequently, the answer to be given to the third question must be that Article 13A(1)(m) of the Sixth Directive is to be interpreted as meaning that an organisation may be categorised as non-profit-making even if it systematically seeks to achieve surpluses which it then uses for the purposes of the provision of its services. The first part of the optional condition set out in the first indent of Article 13A(2)(a) of the Sixth Directive is to be interpreted in the same way."

102. The CJEU was primarily concerned with whether the fact that an organisation systematically makes a profit, or even if it systematically seeks to achieve surpluses, can be a non-profit-making organisation for the purposes of Article 133(a). The CJEU stated that regard must be had to the aim which the organisation pursues.

103. The focus in *Kennemer* was thus on the opening words of the optional condition (the bodies "must not systematically aim to make a profit"), and these were not in issue between the parties here. Instead, if the optional condition in Article 133(a) can be regarded as having three limbs ((i) that the body must not systematically aim to make a profit, (ii) any surpluses nevertheless arising must not be distributed, and (iii) any surpluses must be assigned to the continuance or improvement of the services supplied), it is the third limb on which the parties differ. Whilst the CJEU does recite this language, it does not give further guidance in relation thereto (no doubt because this was not the subject-matter of the questions on which a

ruling was sought). The closest it comes is at [35] where the CJEU refers to the profits "which it then uses for the purposes of the provision of its services", repeating the language used in the question put to it.

104. This raises the issue whether the restriction in Note (1)(e)(ii) – that the body "applies any profits made from supplies of a description within this Group to the continuance or improvement of such supplies" – goes beyond that which Article 133(a) permits Member States to introduce, namely that "any surpluses nevertheless arising…must be assigned to the continuance or improvement of the services supplied". USSU submit that the UK implementation goes beyond that which is permitted and that I must construe the UK definition in a manner which is consistent with EU law.

105. This turns on the meaning of "the services supplied" in Article 133(a) – does this refer to any of the services supplied by the eligible body, irrespective of whether they are exempt within Article 132(1)(i) or otherwise (as USSU contend) or is this confined to exempt services supplied by the eligible body (as has been implemented by the UK).

106. I have concluded that "the services supplied" refers only to those services provided by the body which benefit from exemption. Article 132(1) provides that Member States are required to exempt the transactions listed in sub-paragraphs (a) to (q). These activities – which are described as being in the public interest – are all defined by reference to the type of activity, and some of the sub-paragraphs go on to specify that closely linked or closely related supplies may also benefit from exemption, and some introduce conditions as to the body supplying the service. But they all focus on the description of the supply which is to benefit from exemption, whether that be of goods or services or both. Article 133 then sets out the conditions which Member States may choose to impose – Member States are permitted to make the granting to bodies other than those governed by public law of certain specified exemptions subject to one or more of four conditions. The permission applies to "each exemption provided for in points…(i)…of Article 132(1)". I do not consider that this assists in the interpretation of the relevant phrase. However, the focus of Article 132(1) is on defining supplies which benefit from exemption, and Article 133 then sets out optional conditions which Member States may impose. When Article 133(a) refers to using any surpluses for the continuance or improvement of the services supplied, I consider that the natural and logical meaning of this is to refer to the services supplied by the eligible body which have been defined in Article 132 as benefitting from exemption.

107. On this basis, the requirement in Note (1)(e)(ii) is consistent with Article 133(a). I have already concluded that, viewed in isolation, this requirement is not satisfied by USSU, and that remains the case having had regard to the relevant EU law.

108. USSU does not satisfy the definition of an "eligible body" for the purposes of Group 6.

CONCLUSION

109. The appeals are dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

110. 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.

JEANETTE ZAMAN
TRIBUNAL JUDGE

RELEASE DATE: 20 OCTOBER 2020