Neutral Citation Number: [2010] UKUT TCC

Case No: FTC/20/2009

IN THE UPPER TRIBUNAL
(TAX CHAMBER)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/05/2010

Before :
MR JUSTICE BRIGGS
- -
Between :

GRIMSBY COLLEGE ENTERPRISES LIMITED

Appellant

- and -
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

- -
- -

Mr Keith Gordon and Ms Ximena Montes Manzano (instructed by **Roger McCracken, Director of Corporate Governance, Grimsby Institute of Further & Higher Education, Grimsby, Lincolnshire DN34 5BQ**) for the Appellant
Mr James Puzey (instructed by **Solicitors Office, HM Revenue & Customs, Ralli Quays, 3 Stanley Street, Salford M60 9LB**) for the Respondents

Hearing dates: 26th – 27th April 2010
- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE BRIGGS

Mr Justice Briggs:

INTRODUCTION

1. This is an appeal against part of the decision of Mr Colin Bishopp sitting as a judge of the First Tier Tribunal (Tax) released on 15th July 2009, in proceedings by way of two conjoined appeals against the disallowance of the recovery of input tax paid by Grimsby College Enterprises Limited ("the Company") in connection with the construction and equipping of a new engineering centre within the precincts of the main campus of the Grimsby Institute of Further & Higher Education ("the Institute"), of which the Institute was the freehold owner. The engineering centre consisted of a new building erected at a cost of approximately £2 million and equipment installed therein at a cost of approximately £475,000 (in both cases net of VAT). I shall refer to the centre and its contents respectively as "the Building" and "the Equipment".

2. The Institute is an educational charity, and the Company is its wholly owned subsidiary. It was set up in 1993 for the purpose of undertaking commercial profit-making activities designed to provide the Institute with additional funding by way of supplement to grants from the Further Education Funding Council. The reasons for its formation related to the difficulties sometimes occasioned to charities from the direct carrying-on of profit making activities, rather than for the achievement of any fiscal advantage.

3. The Company's business consists of the supply of engineering and vocational courses to third parties (mainly local employers requiring training for their employees). Its annual turnover is about £1 million and its annual profits of about £150,000 are paid (I assume by way of dividend) to the Institute. The Company's directors are all governors of the Institute and the Company has no employees of its own, relying exclusively upon the services provided from time to time by employees of the Institute for the carrying on of its administrative and commercial activities.

4. The educational activities carried on at the main campus of the Institute, at Nun's Corner Grimsby, consist of further education in the fields of technology and the arts. The students taught there consist of two types or classes. First there are the students of the Institute whose education is wholly or partly grant funded. Secondly, there are students consisting of employees of the company's customers whose education is provided in consideration of contractual payments made by those customers to the Company. I shall refer to them as the Company's students, although the Company is in no direct contractual relationship with them.

5. Sometimes both classes of students are taught together and sometimes separately. All the teachers are employees of the Institute, whose contracts of employment (so I was told, although there is no specific finding of fact to this effect) require them to teach the Company's students as well as the Institute's students, as and when directed by the Institute as their employer. The Institute also plans and examines (to the requisite extent) all courses taught at the main campus, to both classes of students. Similarly, course materials used for all teaching at the campus are routinely acquired and made available by the Institute, and both the services of its staff and the course materials provided for the education of the Company's students are re-charged by the Institute to the Company at cost plus a small mark-up.

6. In 2001 the Institute's governors decided to replace its existing inadequate engineering facility by the erection and equipping of the new engineering centre. An important plank in the reasoning behind that decision was that it would enable the Company to obtain increased scope for the provision of fee-paying courses to employees of its customers, and thereby increase its profits available for payment to the Institute. Initially, and without taking tax advice, the Institute entered into the requisite building contract, in December 2001, for the construction of the Building, and also entered into the appropriate contracts with consultants for engineering, architectural and quantity surveying services. At that stage the Institute had erroneously assumed that the construction work would be zero-rated, but tax advice obtained thereafter was to the contrary. Accordingly, the Institute and the Company attempted to re-arrange affairs whereby the construction work would be supplied to the Company, so that it could recover as input tax the VAT charged by the builders and consultants. The advice was that this should be achieved by the novation of the building and consultancy contracts.

7. The second feature of the advice tendered by the Institute's tax advisers was that it should grant a lease of the site of the proposed new building to the Company, and this was duly granted in the form of a lease dated 1st August 2002 for a term of twenty years from that date, at an initial rent of £4,500 per annum with upward only rent reviews every five years.

8. On the same day the Company and the Institute entered into a written contract described as a "Licence to Use Facilities" at what was described as the "New Engineering Centre", by which the Company purported to grant to the Institute a right to share the use of the Equipment within the Building on a non-exclusive basis jointly with the Company and with all others authorised by the Company to do so, for a period consisting of one year from 1st August 2002 and then from year to year subject to three months' written notice by either side, and subject to summary determination for breach by the Institute of its payment or other obligations under the Licence. The consideration for the grant of the Licence was the payment of £12 (exclusive of VAT) per annum for each student (whether or not a student of the Institute) allowed by the Institute to use the Equipment, subject to a minimum payment of £55,000 per annum. I shall have to return to the detailed terms of the Licence in due course.

9. The Judge found that the Institute had, unfortunately, failed properly to implement the tax advice to carry out a novation, with the consequence that the Judge held that the supply of the construction work was, and continued to be, made to the Institute rather than to the Company. By contrast the Company undoubtedly purchased the equipment. Rejecting an argument by HMRC that the company did so only as the Institute's agent, the Judge held that the Company had itself received the supply of the equipment, so that the VAT which it paid in connection with it was input tax in the Company's hands. There has been no appeal by either party against those differential findings in relation to the Building and the Equipment.

10. The ability of the Company to recover the input tax paid by it in relation to its acquisition of the Equipment depended however upon a conclusion, for which the Company contended unsuccessfully before the Judge, that the supply of the use of the Equipment and (by necessary implication) the Building pursuant to the Licence was not a "licence to occupy land" within the meaning of Item 1 in Group 1 within Part II of Schedule 9 to the Value Added Tax Act 1994, and not therefore an exempt supply.

If it is not, then the whole of the input tax paid by the Company in connection with the acquisition of the Equipment is recoverable. If it is, then only certain parts of it may be recoverable. The question whether the terms upon which the Company granted the Institute the right to use the Equipment and the Building was or was not an exempt supply is the only issue raised by this appeal.

THE PART OF THE DECISION APPEALED

11. The Judge's conclusion on this issue, set out in paragraphs 47 and 48 of the Decision, together with his adoption of the submissions of Mr Puzey for HMRC in paragraph 46, may be summarised as follows:

    i) The arrangements made between the Institute and the Company for the teaching both of the Company's and the Institute's students within the Building were such that the Institute, rather than the Company was in sole occupation of the Building.

    ii) This was because, under those arrangements, the Company relied on the Institute and its teaching staff to provide the courses supplied to the Company's students under the Company's contracts with its customers.

    iii) In particular, the teachers were both employed by the Institute and under the Institute's control in relation to everything they did within the Building, so that their presence within the Building was an aspect of the Institute's rather than the Company's occupation of it.

    iv) Since the Company was in practice incapable itself of delivering courses to students, whether within the Building or elsewhere, but merely sold to its customers courses conducted by the Institute, it did nothing more under the Licence than passively allow the Institute to use the Building and the Equipment within it for the teaching of courses, to both classes of student.

    v) Although the arrangements between the Company and the Institute included the making available to the Institute by the Company of the use of the Equipment, it was unrealistic to treat the conferral upon the Institute of the right to enter the Building for that purpose as merely ancillary to the use of the Equipment.

12. The Judge therefore concluded, at the end of paragraph 48 of the Decision that:

> "The true nature of the licence, I am satisfied, is a letting of immovable property."

The Company challenged that conclusion on two broad grounds. The first was that the Judge was wrong to conclude that the Licence conferred any right of occupation of the Building (exclusive or otherwise) upon the Institute. The second was that the Judge should have characterised the nature of the supply conferred by the Licence as essentially a right for the Institute to use the Equipment, the implied right of entry to the Building for that purpose merely being an ancillary or subordinate part of that supply.

13. In support of the first of those two grounds, the Company maintained that, having acquired exclusive possession of the Building pursuant to the Lease, it remained thereafter in occupation of it by its students, by the staff and by the Equipment. In relation to occupation by the staff, Mr Gordon for the Company relied by way of analogy on the majority decision of the House of Lords in HMRC v. Newnham College Cambridge [2008] UKHL 23, a case about arrangements between the college and a wholly owned subsidiary for the construction and management of a new library, in which the subsidiary had retained occupational control of the library through the librarian and her staff who, although employees of the college, were seconded to and controlled by the subsidiary on a full-time basis for that purpose.

THE LAW

14. The exemption in Schedule 9 for a supply consisting of the grant of a licence to occupy land implements the requirement upon member states in Article 13B(b) of the Sixth VAT Directive to provide, subject to certain exceptions, an exemption for the "leasing or letting of immovable property". One of the four exceptions from that obligation consists of lettings of permanently installed equipment and machinery.

15. It is common ground that the exemption in Schedule 9, and therefore the meaning of the phrase "licence to occupy land" must be interpreted in accordance with the meaning and purpose of Article 13B(b), as an independent concept distinct from the meaning which domestic law might confer upon the same phrase.

16. There was no significant dispute between counsel as to the legal meaning of the exemption in Schedule 9, or of the phrase "licence to occupy land". In particular, Mr Gordon was content to remind me, without critical comment, of my own summary of the relevant principles in HMRC v. Denyer [2007] EWHC 2750 (Ch) at paragraph 19. The most important decisions of the European Court of Justice on the meaning of the Article 13B(b) exemption are Belgian State v. Temco Europe (Case C-284/03) and Sinclair Collis v. Customs and Excise Commissioners (Case C-275/01). For present purposes, the relevant aspects of those principles are as follows:

    i) The concept of the letting of immovable property within the meaning of Article 13B(b) is essentially the conferring by a landlord on a tenant, for an agreed period and in return for payment, of the right to occupy property as if that person were the owner and to exclude any other person from enjoyment of such a right: see Temco at paragraph 19 and Sinclair Collis at paragraph 25.

    ii) The letting of immovable property is characteristically a relatively passive activity linked simply to the passage of time and not generating any significant value, to be distinguished from other activities which are either industrial and commercial in nature, or which have as their subject matter something which is best understood as the provision of a service rather than simply the making available of property: see Temco at paragraph 20 and Sinclair Collis at paragraphs 27 to 31.

    iii) The right to occupy an area or space for a period of time may not be a letting of immovable property if it is merely the means of effecting the supply which is the principal subject matter of the relevant agreement: see Sinclair Collis at paragraph 30.

iv) Occupation (in the sense outlined above) is to be distinguished from mere user of land: see per Lord Nicholls in Sinclair Collis [2001] UKHL 30 at paragraph 35.

v) An agreement is not disabled from being a letting of immovable property merely because the grantee's exclusive use is subject to conditions (such as a landlord's right to enter and inspect) or because it includes the right to use parts of the landlord's property in common with other occupiers: see Temco at paragraph 24.

17. The law relating to the Company's second main ground of appeal, namely the characterisation for VAT purposes of mixed supplies, is perhaps less well settled. I attempted a summary of the principles in Tumble Tots (UK) v. Revenue and Customs Commissioners [2007] EWHC 103 (Ch) at paragraph 11. For present purposes, the relevant aspects of the principles are as follows:

i) Where the proper analysis of a transaction by which a number of benefits are conferred is that it constitutes a single supply, its character for VAT purposes may be that of one or other of its constituent elements, if predominant. Alternatively it may have a unique character enjoyed by none of the constituent elements, viewed separately: see Byrom v. Revenue and Customs Commissioners [2006] STC 992 per Warren J at paragraphs 46 to 48 and 51.

ii) The identification of the appropriate characterisation for VAT purposes is a question of fact and degree. Although the Upper Tribunal is not bound by the characterisation arrived at by the tribunal of fact (in this case the First Tier Tribunal) it is nonetheless the conclusion of a specialist tribunal which ought to be afforded proper respect, and an appeal court should show some circumspection before departing from it merely because it would have put the case on the other side of the line: see Beynon v Customs and Excise Commissioners [2004] UKHL 53, at paragraph 27, per Lord Hoffmann.

ANALYSIS

18. The necessary starting point for the analysis of the question whether the Licence constituted a letting of immovable property or (in the language of Schedule 9) a licence to occupy land must be the terms of the Licence itself. It was plainly drafted with a view to avoiding any such consequence. It is described on its front page as a "Licence to use Facilities" i.e. as a licence to use the Equipment, rather than the Building. Clause 2 contains the following recital:

> "2.1 The Company wishes to share the Facilities with the College (*meaning the Institute*) and other persons authorised by the Company
>
> 2.2 The Company in order to retain control of the use of the Facilities by the College and all others authorised by the Company has required the College to enter into this Licence."

Clause 3, headed 'Licence' provides that:

> "The Company upon payment of the Fee by the College to share the Facilities on a non-exclusive basis jointly with the Company and all others authorised by the Company or such part or parts thereof as the Company shall reasonably determine from time to time for the Period."

19. Under clause 10 headed 'Declaration':

> "10.1 Nothing in this Licence shall operate as a demise of any part of the Centre (*meaning the Building*) and the College shall at no time throughout the period enjoy exclusive possession of any part of the Centre or any Facilities."

By clause 4 and the First Schedule the Institute promises:

> "2. Not to impede in any way the Company or its agents or employees in the exercise of its rights of possession occupation or control of the Centre or the Facilities."

By clause 5 and the Second schedule the Company promises:

> "1. To allow the College to share the use of the Facilities for the purposes of educating and training the Students and for such other purposes of the College as the Company shall time to time agree.
>
> …
>
> 4. To use all reasonable endeavours to manage and timetable the use of the Facilities at the Centre (whether on a shared basis or otherwise) by the College and the Company and all others authorised by the Company in such a way as to avoid disputes subject always (in the case of dispute) to the absolute right to manage and timetable the use of the Facilities (including the variation of previously agreed arrangements upon three months written notice) remaining with the Company at all times."

20. The relationship between the Company and the Institute contemplated by those terms of the Licence, taken at face value, includes the following features. First, the Licence is expressly categorised as being predominantly for the use of the Machinery rather than for the Building. It is indeed only by implication (because the Machinery is situated within the Building) that it constitutes any licence to use the Building at all. Secondly, the relationship is stated to be one under which control of the Building and all activities within it remains from start to finish with the Company, by its employees, rather than with the Institute. Thirdly the use of the Equipment and Building by the Institute is expressed to be subject at all times to the uncontrolled right of the Company to require it to be shared with such other persons, not limited to the Company itself, as the Company should from time to time specify.

21. Whether singly or in combination, those features of the relationship apparently created by the Licence would be sufficient to prevent it from constituting a licence to occupy the Building in the relevant sense. Those provisions were designed to provide by way of contract that the Institute was to have nothing more than the shared use, rather than occupation of the Building with such others, including the Company, as it should specify from time to time, and the Licence was, from start to finish, designed to attract categorisation as, primarily and essentially, the provision of a service consisting of use of the Machinery, access to the Building being merely ancillary to that primary purpose.

22. The Judge's findings of fact about the arrangements actually put into place with regard to the use, control and management of the Building, and the conduct of the courses provided both to the Company's and Institute's students within it, demonstrate that those provisions of the Licence did not in fact represent the real bargain made between the parties. Although the Judge did not dwell upon the provisions to which I have just referred, his findings of fact, underlying his conclusion that: "the true nature of the licence I am satisfied, is a letting of immoveable property." leave no room for doubt that he regarded those provisions, albeit not the Licence as a whole, as an artifice, designed to present to the outside world in general (and, no doubt, HMRC in particular) a picture of the relationship between the parties very different from that which had been agreed. In HMRC's amended Statement of Case it contended that the wording of the Licence was "an attempt by the Appellant to "artificially convert what is an exempt supply of leasing or letting of immovable property into a taxable supply". That is, in my judgment, what the Judge concluded. Although neither he nor HMRC in its submissions specifically used the word "sham" that it is an appropriate description of those provisions of the Licence: see by way of analogy the treatment of the licence employed in Somma v. Hazelhurst [1978] 1 WLR 1014 by Lord Templeman when disapproving that case in Street v. Mountford [1985] AC 809 at 825.

23. This is not a case in which a genuinely agreed right to require the licensee to submit to the licensor's management, control and imposed sharing of the subject property was simply not implemented thereafter. It is a case in which, on the Judge's findings of fact, there was never any genuine intention, at the time of the grant of the Licence, that the Company would do any of those things. From start to finish, the arrangement was to be (and was) that the Institute should be in control, through its employed staff, of the whole of the conduct of the educational activities within the Building, for the education both of its own and the Company's students. Furthermore, the Judge accepted the submission by Mr Puzey that "the Company was incapable of delivering courses to students, being wholly dependent for that purpose on the Institute": see paragraphs 46 and the first line of 47 of the Decision.

24. Mr Gordon struggled long and hard to persuade me that the proper analysis of the basis upon which the Institute's staff supervised and controlled all educational activities within the Building was that the staff were, for that purpose, agents of the Company. The issue is however highly fact intensive, as a comparison between the facts found in the Newnham College case and the analogous case of Brambletye School Trust Ltd v. Customs and Excise Commissioners (2002) VAT Decision 17688 clearly demonstrates. The question in each case was, by which of the grantor and grantee of the relevant interest in land were the staff responsible for its management

and control themselves employed and governed. Lord Hoffmann approved the reasoning of the decision in Brambletye that the staff were managed by the school, rather than its subsidiary, while reaching the opposite conclusion on the different facts of the Newnham College case. At paragraph 27 he said:

> "In my opinion a decision as to whether acts attributable to a body like the school or college amount to occupation of premises is a question of degree sensitive to the particular constellation of facts. An appellant court must pay considerable respect to the opinion of the fact-finding body:"

25. I can discern no error of law in the Judge's analysis in the present case of the hotly debated question whether the teaching staff in day to day control of the Building were for that purpose representing the Institute or the Company. Mr Gordon pointed me to no evidence, or findings of primary fact, from which I could possibly conclude that the Judge's conclusion, to the extent that it involved fact rather than law, was in any sense perverse within the principles established by, and following, Edwards v. Bairstow [1956] AC 14.

26. Mr Gordon submitted that the Company continued its occupation of the Building, originally granted by the Lease, not merely by a presence constituted by the teaching staff, but also by what I have loosely called the Company's students. I reject that submission. Those students were employees of customers of the Company whose education was provided, under contract between the Company and its customers, by the Institute pursuant to an implied contract between the Company and the Institute. It is in my judgment unreal (and wrong in law) to suggest that the students therefore constitute an occupational presence by the Company within the Building. Finally, the Company can be in no better position by reference to its submission that the Machinery constituted an occupying presence of the Company in the Building.

27. I consider therefore that, on the Company's first ground of appeal, the facts found by the Judge clearly demonstrate that the reality of the arrangement masked by the provisions of the Licence to which I have referred, was that the Company granted the Institute a right of occupation of the Building, rather than merely a right of use, either of the Building or of the Machinery.

28. As for the second main ground of appeal, namely that the essence of the Licence was the use of the equipment, the use of the Building being merely ancillary, this submission was made to and squarely rejected by the Judge as being, in his view, "quite unrealistic": see paragraph 48 of the Decision. He continued:

> "Doubtless the equipment is important, to the extent that some of the courses could not be effectively taught without it, but the only reasonable view is that the Institute has constructed a teaching facility consisting of a building which, because of the nature of the courses to be taught in it, houses engineering equipment. The proper conclusion, in my judgment, is that the equipment is incidental to the main purpose of the building, that is the teaching of engineering courses by the Institute."

29. In repeating the contrary submission by way of appeal, Mr Gordon contributed little more than bare assertion to seek to contradict the Judge's conclusion. He pointed to no error in legal analysis by the Judge, and to no perverse aspect of the findings of fact upon the basis of which the Judge made that finding as to characterisation.

30. I consider that the Judge's conclusion that the supply constituted by the real arrangement masked by the Licence was properly to be characterised as the grant of a right of occupation of the Building, rather than use of the Machinery, was both reasonable and indeed correct. The fact that the contrary may be asserted by way of argument does not begin to afford a basis upon which the Judge's conclusion to that effect can be upset on appeal.

31. The consequence is that the Company's appeal fails and must be dismissed.

Released on 07 May 2010