[2013] UKUT 0594 (TCC)
Appeal number FTC/82/2012

Value Added Tax – whether services provided by Appellant exempt under Value Added Tax Act 1994, Schedule 9, Group 6, Item 1 – whether Appellant was "an eligible body" within Note (1)(b)- whether Appellant was a college or institution of the University of Wales – whether possible to be an eligible body in relation to some of the Appellant's activities and not an eligible body in relation to the remainder of its activities

IN THE UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)
ON APPEAL FROM THE FIRST-TIER TRIBUNAL
(TAX CHAMBER)

Between :

FINANCE & BUSINESS TRAINING LIMITED **Appellant**

- AND -

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

TRIBUNAL: MR JUSTICE MORGAN

Sitting in public at Royal Courts of Justice, Rolls Building, Fetter Lane, London, EC4A 1NL on 20 and 21 November 2013

Mrs Melanie Hall QC (instructed by **Ms Lola Moses,** in-house solicitor) for the **Appellant**
Mr Raymond Hill (instructed by **General Counsel and Solicitor for HM Revenue**) for the **Respondents**

DECISION

RELEASE DATE: 26 November 2013

Tribunal Judge: Mr Justice Morgan:

Introduction

1. This is an appeal by Finance & Business Training Ltd ("FBT") against the decision of the First-tier Tribunal ("the FTT") (Judge Anne Scott and Mr Tym Marsh), released on 12 June 2012. On 13 September 2012, the FTT gave FBT permission to appeal to the Upper Tribunal.

2. The basic facts of this matter are that FBT is an institution based in Birmingham which provides certain educational services, amongst other things. Some of those services are provided in relation to courses taught to some of its students in accordance with arrangements which FBT has made with the University of Wales. I will refer to these services as "the university courses". Put shortly, FBT says that the services provided by it in relation to the university courses are exempt from VAT in accordance with the exemption conferred by Item 1 of Group 6 in schedule 9 to the Value Added Tax Act 1994 ("VATA 1994").

3. In order to be able to rely on that exemption, FBT must establish that it is "an eligible body" in accordance with Note (1) to Group 6. In particular, Note (1)(b) refers to "a United Kingdom university, and any college, institution, school or hall of such a university". There is no dispute that the University of Wales is "a United Kingdom university". FBT says that, pursuant to the arrangements it has made with the University of Wales in respect of the university courses, it is a college or institution of the University of Wales in relation to those courses; it accepts that it is not a college or institution of the University of Wales in relation to the remainder of its activities.

4. The FTT rejected FBT's case. The FTT did not accept the starting point of FBT's argument that it was possible to be an eligible body in relation to only some of the activities of a body. However, the FTT went on to hold that FBT was not a college or institution of the University of Wales, even in relation to the university courses.

5. This appeal from the decision of the FTT raises the question whether it is possible to be "an eligible body" in relation to some of the activities of that body and not "an eligible body" in relation to the remainder of the activities of that body. FBT accepts that there is no authority on the point in its favour but it contends that there is no authority to the contrary either. If the Upper Tribunal were to accept FBT's proposition, then it would be necessary to go on to consider whether, contrary to the decision of the FTT, FBT was a college or institution of the University of Wales in relation to the university courses.

6. An appeal to the Upper Tribunal is restricted to an appeal on a point of law: see section 11(1) of the Tribunals Courts and Enforcement Act 2007.

7. Mrs Hall QC appeared on behalf of the Appellant and Mr Hill appeared on behalf of the Respondent.

The relevant legislation

8. Article 13A(1)(i) of the Sixth Directive (Council Directive 77/388/EEC) required Member States to exempt certain services, in connection with certain forms of education, provided by certain bodies. This provision was re-enacted in the Principal VAT Directive (Council Directive 2006/112/EC), the relevant provisions of which are in Articles 131, 132 and 133. Article 131 is in Chapter 1 of Title IX, which is headed "Exemptions" and Articles 132 and 133 are in Chapter 2 of Title IX. These articles provide as follows, so far as material:

> "Chapter 1
>
> **General provisions**
>
> Article 131
>
> The exemptions provided for in Chapters 2 to 9 shall apply without prejudice to other Community provisions and in accordance with conditions which the Member States shall lay down for the purposes of ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse.
>
> Chapter 2
>
> **Exemptions for certain activities in the public interest**
>
> 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;
>
> (j) tuition given privately by teachers and covering school or university education;
>
> …
>
> (o) the supply of services and goods, by organisations whose activities are exempt pursuant to points (b), (g), (h), (i), (l), (m) and (n), in connection with fund-raising events organised

> exclusively for their own benefit, provided that exemption is not likely to cause distortion of competition;
>
> …
>
> 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;
>
> (b) those bodies must be managed and administered on an essentially voluntary basis by persons who have no direct or indirect interest, either themselves or through intermediaries, in the results of the activities concerned;
>
> (c) those bodies must charge prices which are approved by the public authorities or which do not exceed such approved prices or, in respect of those services not subject to approval, prices lower than those charged for similar services by commercial enterprises subject to VAT;
>
> (d) the exemptions must not be likely to cause distortion of competition to the disadvantage of commercial enterprises subject to VAT.
>
> … "

9. These exemptions were transposed into UK domestic legislation as Group 6 of Schedule 9 to VATA 1994. Group 6 has been amended since it was first enacted, although the provisions which are most material for present purposes (Item 1 and Note (1)(b)) have not been amended. I will set out Group 6 in its current form. Although only a few of these provisions are directly relevant in this case, it is useful to see the full extent of the definition of "eligible body" in Note (1). Group 6 is in the following terms:

> "GROUP 6 –
>
> Item No. 1
>
> 1 The provision by an eligible body of –
>
> (a) education;
>
> (b) … ; or

(c) vocational training.

2 The supply of private tuition, in a subject ordinarily taught in a school or university, by an individual teacher acting independently of an employer.

3 The provision of examination services—

(a) by or to an eligible body; or

(b) to a person receiving education or vocational training which is—

(i) exempt by virtue of items 1, 2, 5 or 5A; or

(ii) provided otherwise than in the course or furtherance of a business.

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.

5 The provision of vocational training, and the supply of any goods or services essential thereto by the person providing the vocational training, to the extent that the consideration payable is ultimately a charge to funds provided pursuant to arrangements made under section 2 of the Employment and Training Act 1973, section 1A of the Employment and Training Act (Northern Ireland) 1950 or section 2 of the Enterprise and New Towns (Scotland) Act 1990.

5A The provision of education or vocational training and the supply, by the person providing that education or training, of any goods or services essential to that provision, to the extent that the consideration payable is ultimately a charge to funds provided by—

(a) . . .

(b) the Chief Executive of Skills Funding under Part 4 of the Apprenticeships, Skills, Children and Learning Act 2009; or

(c) the National Assembly for Wales under . . . Part II of the Learning and Skills Act 2000.

5B The provision of education or vocational training and the supply, by the person providing that education or training, of any goods or services essential to that provision, to persons who are—

(a) aged under 19,

(b) aged 19 or over, in respect of education or training begun by them when they were aged under 19,

(c) aged 19 or over but under 25 and subject to learning difficulty assessment, or

(d) aged 25 or over, in respect of education or training begun by them when they were within paragraph (c),

to the extent that the consideration payable is ultimately a charge to funds provided by the Secretary of State.

6 The provision of facilities by—

(a) a youth club or an association of youth clubs to its members; or

(b) an association of youth clubs to members of a youth club which is a member of that association.

Notes:

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

(a) a school within the meaning of the Education Act 1996, the Education (Scotland) Act 1980, the Education and Libraries (Northern Ireland) Order 1986 or the Education Reform (Northern Ireland) Order 1989, which is—

(i) provisionally or finally registered or deemed to be registered as a school within the meaning of the aforesaid legislation in a register of independent schools; or

(ii) a school in respect of which of which grants are made by the Secretary of State to the proprietor or managers; or

(iii) a community, foundation or voluntary school within the meaning of the School Standards and Framework Act 1998, a special school within the meaning of section 337 of the Education Act 1996 or a maintained school within the meaning of the Education and Libraries (Northern Ireland) Order 1986; or

(iv) a public school within the meaning of section 135(1) of the Education (Scotland) Act 1980; or

(v) . . .

(vi) . . .

(vii) . . .

(viii) a grant-maintained integrated school within the meaning of Article 65 of the Education Reform (Northern Ireland) Order 1989;

(b) a United Kingdom university, and any college, institution, school or hall of such a university;

(c) an institution—

(i) falling within section 91(3)(a), (b) or (c) or section 91(5)(b) or (c) of the Further and Higher Education Act 1992; or

(ii) which is a designated institution as defined in section 44(2) of the Further and Higher Education (Scotland) Act 1992; or

(iii) managed by a board of management as defined in section 36(1) of the Further and Higher Education (Scotland) Act 1992; or

(iv) to which grants are paid by the Department of Education for Northern Ireland under Article 66(2) of the Education and Libraries (Northern Ireland) Order 1986; or

(v) managed by a governing body established under the Further Education (Northern Ireland) Order 1997;

(d) a public body of a description in Note (5) to Group 7 below;

(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;

(f) a body not falling within paragraphs (a) to (e) above which provides the teaching of English as a foreign language.

(2) A supply by a body, which is an eligible body only by virtue of falling within Note (1)(f), shall not fall within this

Group insofar as it consists of the provision of anything other than the teaching of English as a foreign language.

(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.]

(4) "Examination services" include the setting and marking of examinations, the setting of educational or training standards, the making of assessments and other services provided with a view to ensuring educational and training standards are maintained.

(5) For the purposes of item 5 a supply of any goods or services shall not be taken to be essential to the provision of vocational training unless the goods or services in question are provided directly to the trainee.

(5A) For the purposes of items 5A and 5B a supply of any goods or services shall not be taken to be essential to the provision of education or vocational training unless—

(a) in the case of the provision of education, the goods or services are provided directly to the person receiving the education;

(b) in the case of the provision of vocational training, the goods or services are provided directly to the person receiving the training.

(5B) In item 5B, "subject to learning difficulty assessment" has the same meaning as in the Education Act 1996.

(6) For the purposes of item 6 a club is a "youth club" if—

(a) it is established to promote the social, physical, educational or spiritual development of its members;

(b) its members are mainly under 21 years of age; and

(c) it satisfies the requirements of Note (1)(f)(i) and (ii)."

FBT's case

10. Although there was some lack of clarity during the hearing of this appeal as to what precisely FBT's case was, by the end of the hearing FBT had made its case sufficiently clear. FBT accepts that if one asks, taking account of all of its activities and all relevant circumstances, whether FBT is a college or institution of the University of Wales, the answer is "No". However, FBT submits that this question is the wrong question. Instead, one should focus on the services in relation to which exemption from VAT is claimed. One should ask, in relation to those services, whether FBT is such a college or institution.

11. It is pointed out that a body can have more than one capacity; a body can act in one capacity some of the time and in another capacity the rest of the time. FBT says that what matters in this case is whether FBT was acting in the capacity of a college or institution of the University of Wales when it provided the services for which it claims exemption.

12. FBT accepts that if its approach in this respect were wrong in law, then its appeal cannot succeed. It can only assert it is an eligible body on the basis it puts forward and it cannot say that it was, generally speaking, a college or institution of the University of Wales. In opening its appeal, counsel for FBT expressly accepted that when one asked whether FBT was a college or institution of the University of Wales, one did not confine oneself to the activities involved in the university courses but one looked widely at all the relevant circumstances including the full range of activities of FBT. I found at the time, and still find, that this acceptance is very difficult (if not impossible) to square with what was later clarified to be FBT's case that the relevant question is whether FBT is a college or institution of the University of Wales in relation to the university courses only.

13. FBT submits that if its approach to the interpretation of an eligible body were correct in law, then it wishes to challenge the decision of the FTT that it was not a college or institution of the University of Wales even in relation to the university courses. FBT challenges that part of the decision on a number of grounds, which included the contentions that the FTT:

    (1) had not considered the implications of the University of Wales being a federal university;

    (2) had not considered the matter from the perspective of the University of Wales;

    (3) had been wrongly influenced by the fact that FBT was a private company running a business;

    (4) had wrongly applied a test which relied on an assessment of "the fundamental purpose" of FBT;

    (5) had failed to evaluate the evidence;

    (6) had made inconsistent findings;

    (7) had reached a decision which was "riddled with errors of law";

(8) had reached a decision which was perverse.

14. Initially, FBT argued that its case was supported by the decision of the European Court of Justice in R (TNT Post UK Ltd) v HMRC [2009] STC 1438 (to which I will refer as TNT). Later, FBT accepted that this decision was not directly in point but it was said that it was nonetheless helpful to its analysis. FBT submitted that its principal ground of appeal was not considered in any earlier case and, in particular, there was no contrary authority.

HMRC's case

15. HMRC submitted that a body was either an eligible body or it was not an eligible body. It was not possible for a single body to be an eligible body in relation to some of its activities and not an eligible body in relation to the remainder of its activities. The matter had to be judged by reference to all the relevant circumstances and the assessment should not be based on, or by reference to, a part only of its activities. If FBT was not an eligible body within Note (1)(b), then it could not claim exemption under Item 1 of Group 6, even if it provided the service of education.

16. As to the challenges made to the FTT's decision that FBT was not a college or institution of the University of Wales even in relation to the university courses, considered alone, HMRC submitted that, reading the decision as a whole and paying attention to the precise language used by the FTT, each challenge was without substance.

An eligible body

17. In considering the point of law raised by FBT as to the meaning of "an eligible body" in Note (1) of Group 6 in schedule 9 to VATA 1994, it is necessary to consider the language of the Principal VAT Directive, the language of Group 6, the purpose of the provisions and any authority which might contain a helpful discussion as to the meaning of these provisions.

18. Article 132 requires Member States to grant exemption from VAT, in the public interest, in relation to certain specified goods and services provided (in the case of many of the exemptions) by certain specified bodies. In the case of Article 132(1)(i), the Directive specifies bodies which are governed by public law and which have certain aims. It is not said that the University of Wales or FBT are such bodies. However, Article 132(1)(i) permits Member States to recognise certain other organisations with "similar objects" to those referred to in Article 132(1)(i).

19. The United Kingdom has recognised other bodies for the purposes of Article 132(1)(i). In particular, in Note (1)(b) to Group 6, it has included in the list of eligible bodies "a United Kingdom university, and any college, institution, school or hall or such a university". In the remainder of this decision, for convenience, I will not at all times repeat the entirety of the phrase "college, institution, school or hall" but I will refer to a "college or institution" only. It is not suggested that the additional words "school" or "hall" add anything to the discussion on the facts of the present case.

20. There is no issue in this appeal as to whether Group 6, and Note (1)(b) in particular, are compatible with Articles 131, 132 and 133 of the Principal VAT Directive. It is therefore not strictly necessary to ask whether the University of Wales or any college or institution of the University of Wales has "similar objects" within Article 132(1)(i). However, in accordance with general principle, the provisions of Group 6 are to be construed so that they conform to and/or are consistent with the community law obligations of the United Kingdom under the Principal VAT Directive.

21. Article 133 allows Member States to impose certain conditions on the grant to bodies (other than those governed by public law) of the exemption conferred by Article 132(1)(i). The United Kingdom has not imposed on a United Kingdom university or a college or institution of such a university the conditions identified in Article 133. No issue arises in this appeal as to Article 133.

22. Many, but not all, of the paragraphs of Article 132 are drafted so that the exemption is conferred in relation to the provision of certain goods and services by certain specified bodies. Some of the paragraphs of Article 132 confer the exemption in relation to the provision of certain goods and services but there is no express reference to the body by which the service must be provided. An example of this is in Article 132(1)(d) which refers to "the supply of human organs, blood and milk" but does not specify the bodies by which the supply must be made.

23. In the case of Article 132(1)(i), the Directive specifies both the services in question and the bodies which may provide those services. The paragraph refers to bodies governed by public law and with certain aims but it also leaves it to Member States to recognise certain other bodies. Other paragraphs of Article 132 confer on Member States a similar power of recognition of the bodies which can take advantage of the exemption.

24. The language of Article 132 makes a clear distinction between the identification of the body which can take advantage of the exemption and the activities of any such body which will qualify for exemption. Taking the language of the Directive alone, the process involved in any given case will require one to ask two separate questions: (1) is the body claiming the exemption a body which is specified in the words of the exemption or recognised for that purpose by the Member State? and (2) is the supply for which exemption is claimed within the description of the exempted supply? It would seem to follow that if the first of these questions is answered "No", then the second question will not arise. If the first question is answered "Yes", then the second question will arise but can be answered "Yes" or "No", according to the relevant circumstances. There is no sign in the language of the Directive that the first question will depend only on the activities for which the exemption is claimed, that is to say, there does not appear to be any warrant for an approach whereby one asks the different question: in relation to the supply which is within the exemption, is the body in question acting in the capacity of a specified or recognised body? Another way of putting it is to say that when answering the first question, the answer is either "Yes" or "No". The body is either a specified/recognised body or it is not. The question may

not be answered by saying: in relation to some of its activities, the body is a specified/recognised body but in relation to the remainder of its activities it is not.

25. The drafting style of Group 6 differs from the drafting style of Article 132 in a number of respects. However, both Article 132 and Group 6 share the feature that they make a clear distinction between the identification of the body which can take advantage of the exemption and the activities of any such body which will qualify for exemption. In Group 6, the concept of an eligible body is of central importance. Most, but not all, of the exemptions refer to the specified supply being by an eligible body. That applies in particular to Item 1. This is not the case in relation to every part of every Item. For example, some of the Items include an alternative of a supply being "to" an eligible body: see Items 3 and 4. Further, Item 3(b)(ii) refers to a supply without requiring that it be by or to an eligible body, although it must be to a person receiving education or vocational training.

26. Note 1 defines "an eligible body" for the purposes of Group 6. As a matter of language, it would appear that the concept of an eligible body should be approached in the same way as one approaches the concept of a specified or recognised body for the purposes of Article 132, as described above. Speaking generally, the Notes to Group 6 when referring to "an eligible body" appear to require one to be able to say whether the body is or is not eligible. The language does not appear to permit one to hold that a body is an eligible body in relation to some of its activities and not an eligible body in relation to others of its activities. Thus, a body is either a school within Item (1)(a) or it is not. A body is either a university or it is not. It would seem therefore that one will have to determine whether a body is, or is not, a college or institution of a university.

27. HMRC referred to the type of body initially referred to in Note (1)(e) and Note (2) of VATA 1994 (as originally enacted) and now, following amendment, referred to in Note (1)(f) and Note (2). In both versions of the provision, it will be possible to answer "Yes" or "No" to the question whether the body comes within the definition and is "an eligible body". However, what is perhaps different about this type of body is that a body will qualify as "an eligible body" by having the teaching of English as a foreign language as one of its activities, irrespective of the significance of that activity in the context of its overall activities.

28. Apart from its case as to the meaning of "any college, institution, school or hall or such a university", FBT did not identify any other part of the definition of "an eligible body" where it was permissible to hold that a body was an eligible body in relation to some of its activities and not an eligible body in relation to the remainder of its activities. Similarly, FBT did not identify any other part of that definition, where one was required to ask in relation to the requirement of "an eligible body" (as distinct from the definition of exempted services) in what capacity the body was acting when providing the supply. For example, FBT accepted that a body was either a school within Note (1)(a) or it was not; further, that a body was either a United Kingdom university within Note (1)(b) or it was not. It was submitted that the position was different in

relation to the question whether a body was a college of a university. With that question, one was not applying a statutory definition from some other statute but was evaluating all the facts to determine whether the body was such a college. I cannot see why the difference between applying a definition from some other statute and carrying out an evaluation of all the facts is relevant to the present question. The fact that the process involves an evaluation of all the facts does not appear to me, in the case of this part of the definition only, to allow one to say that a body can be, at one and the same time, an eligible body in relation to part of its activities and not an eligible body in relation to the remainder.

29. It is plainly relevant to take proper account of the purpose of the provisions which fall to be construed. The purpose of Article 132 and of Group 6 which implements part of it is reasonably clear from the language used. FBT did not develop any particular argument as to their purpose which would suggest that the language in Article 132(1)(i) and Group 6 should be given anything other than its fairly clear meaning.

30. I also bear in mind the general principle in this area of the law as to the approach to the construction of an exemption from VAT. In construing Item 1 of Group 6, which is an exception to a general principle of community law as to VAT, the court should adopt a strict but not a strained approach. A strict approach is not to be equated with a restricted approach. A court should not reject a claim relying on the exemption where the claim comes within a fair interpretation of the words of the exemption because there is another, more restricted, meaning of the words which would exclude the supplies in question.

31. FBT initially placed considerable reliance, but in due course less reliance, on the decision in TNT. That decision concerned the provision originally contained in Article 13A(1)(a) of the Sixth Directive and now contained in Article 132(1)(a) of the Principal VAT Directive which refers to:

> "the supply by the public postal services of services other than passenger transport and telecommunications services, and the supply of goods incidental thereto".

32. TNT concerned the supply of certain services by Royal Mail. It was held that the phrase "the public postal services" was not a reference to services but to the operator who provided a public postal service. Royal Mail was such an operator. Thus the Court held that Royal Mail was a recognised body for the purpose of claiming the relevant exemption. Putting it another way, in answer to the question whether Royal Mail was a recognised body, the court gave the answer "Yes". It did not say: in one capacity "Yes" and in another capacity "No". The next question for the court was whether the phrase "the supply … of services" extended to all services provided by Royal Mail or only some of them. The Court held that the exemption did not apply to all services provided by Royal Mail; it applied only to services provided by Royal Mail acting in its capacity as the provider of a public postal service. It is true that this decision distinguished between the different capacities of the recognised body. However, the distinction was made in relation to the category of services

which qualified for exemption not by holding that Royal Mail was a recognised body in one capacity and not a recognised body in another capacity.

33. I do not consider that I can apply, by way of an alleged analogy, the approach adopted in TNT to the different question raised in this appeal and hold that a body, which is not "an eligible body" if one considers all the circumstances and all its activities, can be an eligible body in relation to some of its activities but at the same time not an eligible body in relation to the remainder of its activities. It should be noted that the decision in TNT resulted in a narrowing of the scope of the exemption whereas FBT's case, if I were to accept it, would result in a substantial widening of the scope of the exemption.

34. Before coming to a conclusion in relation to FBT's contention that it was an eligible body in relation to some only of its activities, I wish to consider whether any help is to be found in the decisions on the meaning of Note (1)(b) itself.

Any college, institution, school or hall of such a university

35. The principal authorities to which my attention was drawn in relation to the meaning of Note (1)(b) were HMRC v School of Finance and Management (London) Ltd [2001] STC 1690 ("SFM"), HMRC v University of Leicester Students Union [2002] STC 147 and London College of Computing Ltd v HMRC [2013] UKUT 404 ("LCC").

36. So far as material for present purposes, these authorities establish the following propositions:

    (1) The way in which the United Kingdom has implemented Article 132 of the Principal VAT Directive in Group 6 and Note (1)(b) assumes that any United Kingdom university making supplies within Group 6 satisfies the requirements of Article 132(1)(i) and that a college or institution of such a university has objects similar to such a university.

    (2) In the United Kingdom, the structure of universities is diverse.

    (3) The phrase "any college, institution, school or hall" in Note (1)(b) is a composite phrase.

    (4) The diversity of the structures of universities means that there must be a flexibility of approach in relation to the interpretation and application of the composite phrase. The phrase should be applied in a purposive way to achieve the object of the exemption.

    (5) For a body to qualify as an eligible body as a college or institution of a university under Note (1)(b), it must be shown that the body shares the university's objects or at least the object of providing university education. The question whether the body itself supplies education may not matter as it is only a body which is an eligible body and which

supplies education which will be able to take advantage of the exemption.

(6) The college or institution must be "of" the university and this requires that there be some degree of integration of the college or institution into the university. Whether the link between the college or institution and the university is sufficient in any particular case will depend upon an assessment of all the facts. In general, it will be necessary to consider the constitution of the university and the role played by the college. The link must be sufficiently substantial to allow one to say that the college or institution is "of" the university.

(7) Although a body can carry on other activities not related to the university, and still be sufficiently integrated into the university, a substantial portion of the body's activities must be connected with the university.

(8) When assessing whether the body is "of" the university, it will usually be helpful to consider the nature of the link between the body and the university, the importance of the link to the university and to the body and the extent to which the link is openly recognised.

(9) If, on the facts of a particular case, it is found that the fundamental purpose of the body is to provide university education, a tribunal is entitled to be influenced by such a finding in favour of holding that the body is sufficiently integrated into a particular university.

(10) The above approach to the interpretation of the exemption does not infringe the legal principles of equality and fiscal neutrality.

37. Having considered these authorities, they support an approach which involves asking of a particular body whether it is, or is not, a college or an institution of a university. On that approach, it would not be possible to conclude that a body is a college or an institution of a university and at the same time that it is not such a college or institution. The approach does not permit one to distinguish between the possible different capacities of a body when deciding whether the body is an eligible body or not. The approach does not permit one to hold that a body is an eligible body in one capacity and at the same time not an eligible body in another capacity. It is true that no one appears to have argued in those cases that a body could be eligible when acting in one of its capacities only. However, it is clear from the reasoning in those cases that if such a suggestion had been put forward, it would have been rejected as inconsistent with what the cases actually decide.

Conclusion on "an eligible body"

38. The approach contended for by FBT is not permissible as a matter of law. There is no support for such an approach in the language of Article 132, nor in the language of Group 6. Further, no support for FBT's approach is to be derived from considering the purpose of the provisions. The approach is not supported by any authority and is contrary to the tenor of relevant authorities.

If, as FBT accepts, FBT is not a college or institution of the University of Wales when one takes account of all of the circumstances, including all of its activities, then it is not within the definition of "an eligible body". It cannot in law be an eligible body and, at the same time, not an eligible body. If it is not an eligible body, it cannot claim exemption under Item 1 even on those occasions when it provides services which would be exempt services if they were provided by an eligible body.

The other challenges

39. It follows from my conclusion on "an eligible body" that the appeal must be dismissed. It is irrelevant what decision would be the appropriate one if one applied the impermissible approach advocated by FBT. Further, I consider that the concept of FBT being a college or institution of the University of Wales only when it performs certain services is an inherently difficult concept to apply. I would find it even more difficult to apply if I had to adopt the submission of FBT when opening the appeal that one has regard to all of the activities of FBT when considering whether FBT is a college or institution of the University of Wales in relation to the university courses alone.

40. It is of course possible that this decision will be appealed but I do not think it is desirable (it is certainly not necessary) to deal with the other challenges in order to offer my views on them to the Court of Appeal. The FTT has found the primary facts so that I have no function to perform in that respect. Further, I do not think that it would be of any help to other parties in other cases to consider how one would grapple with the difficult concept of an institution being a college or institution of a university when it has dealings with that university and not a college or institution of a university for the remainder of its activities. Much of the reasoning of the FTT would be relevant to whether FBT was a college or an institution of the University of Wales if one applied what I have found to be the correct approach but FBT accepts that, on that basis, it is not a college or an institution of the University of Wales.

41. For these reasons, I will not offer what would be obiter comment only on the other challenges to the decision of the FTT.

The result

42. The result is that the appeal is dismissed.

Costs

43. Finally, I direct that any applications as to the costs are to be made in writing, to be served on the other party and on the Upper Tribunal not later than 21 days following the release of this decision.

MR JUSTICE MORGAN

RELEASE DATE: 26 November 2013