[2017] UKUT 0484 (TCC)
Appeal number: UT/2016/0201

VALUE ADDED TAX– exemption for welfare services in Item 9 Group 7 Sch 9 VATA 1994-whether Item 9 incompatible with article 132 (1) (g) of the Principal Directive-no-whether legislation can be given a conforming construction-yes-whether taxpayer a state regulated private welfare institution and therefore entitled to the exemption-no

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Appellants

- and -

L I F E SERVICES LIMITED

Respondent

TRIBUNAL: Mr Justice Mann
Judge Timothy Herrington

Sitting in public at The Rolls Building, Fetter Lane, London EC4A 1NL on 9 October 2017

Jonathan Davey QC and Natasha Barnes, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellants

Jonathan Bremner, Counsel, instructed by Essential VAT Services Ltd, for the Respondent

DECISION

Introduction

1. This is an appeal by HMRC against a decision of the First-tier Tribunal ("FTT") (Judge Charles Hellier and Mr William Haarer) released on 23 June 2016.

2. L I F E Services Limited ("LIFE") is a profit-making private organisation which provides day care services for adults with a range of disabilities. The FTT allowed LIFE's appeal against HMRC's determination that LIFE's supplies were subject to VAT at the standard rate, contrary to LIFE's contention that its services were welfare services which were exempt for VAT purposes as falling within the terms of Item 9 of Group 7 of Schedule 9 ("Item 9") to the Value Added Tax 1994 ("VATA 1994").

3. Article 132 (1) (g) of the Principal VAT Directive 2006/112/EEC ("PVD") requires Member States to exempt the following transactions from VAT:

> "the supply of services and goods closely linked to welfare and social security work, including those supplied by old people's homes, by bodies governed by public law or by other bodies recognised by the Member States concerned as being devoted to social well-being"

4. Accordingly, Item 9 specifies as exempt:

> "The supply by -
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> (a) a charity,
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> (b) a state-regulated private welfare institution or agency, or
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> (c) a public body,
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> of welfare services and of goods supplied in connection with those welfare services."

5. Note (6) to Item 9 defines "welfare services" so as to include "the provision of care, treatment or instruction designed to promote physical or mental welfare of elderly, sick, distressed or disabled persons."

6. The basis of the FTT's decision was that although LIFE's supplies did not fall within Item 9 the appeal should nevertheless be allowed on the basis that Item 9 was incompatible with the PVD by recognising, as exempt from VAT, supplies made by charities but not those made by LIFE.

7. Permission to appeal against the Decision was granted to HMRC on 20 September 2016 by Judge Hellier on the basis that it was arguable that the FTT erred in law:

> (1) by adopting an overly restrictive interpretation of the phrase "devoted to social well-being" in Article 132 (1) (g) of the PVD ("Article 132 (1) (g)");

(2) by concluding that item 9 was incompatible with Article 132 (1) (g) because it entitled bodies to the exemption without regard to whether they were devoted to social well-being;

(3) by disapplying Item 9 without first considering whether the legislation could be given a conforming construction; and

(4) in how it applied the concept of fiscal neutrality to Item 9.

The Facts

8. The following summary is taken from the findings of fact made by the FTT at [6] to [15] of the Decision and the further finding made at [93].

9. LIFE is a limited company which is not a non-profit-making organisation. It provides day services for adults with a broad spectrum of disabilities. Services are provided at various locations provided by LIFE away from the residences of the relevant clients. Services include providing forms of exercise, and teaching how to cope with everyday living.

10. Gloucestershire County Council monitors and inspects the provision of the services which are provided under a formal care plan agreed with the social services department of Gloucestershire County Council. LIFE is approved and registered with Gloucestershire County Council to provide the services on its behalf to the clients and is paid by the Council to do so. In some cases, the recipient of the services contracts for their provision directly with LIFE and LIFE is paid by the recipient out of the budget provided by the Council. The Council was involved in setting the terms of the care and inspected LIFE regularly.

The Decision

11. In respect of the domestic law, it was common ground before the FTT that LIFE provided "welfare services" within the meaning of Item 9. It was also common ground that LIFE was neither a charity nor a public body.

12. Therefore, the only issue in the appeal in respect of the domestic law was whether or not LIFE was a "state-regulated private welfare institution".

13. That issue was argued before the FTT on a different basis to that on which, as described at [24] below, it is now put. The effect of Regulations made under the Health and Social Care Act 2008 is to regulate, by the Care Quality Commission, the provision of personal care for disabled persons provided at their place of residence, which it was accepted did not apply in relation to any of LIFE's services. LIFE argued, however, that because it was "exempted from registration" it was "state-regulated" within the meaning of Note (8) to Item 9, which provides that an institution or agency is to be regarded as "state-regulated" if it is "approved, licensed, registered or exempted from registration…".

14. The FTT rejected that argument at [34] of the Decision. It also rejected at [37] an argument that LIFE's registration with Gloucestershire County Council and the

Council's monitoring of its performance meant that it fell within Note (8) on the basis that it was shown no public Act pursuant to which the Council could register or approve LIFE or exempt it from registration. The FTT therefore concluded at [38] that the welfare supplies made by LIFE did not fall within Item 9 on a domestic construction of its provisions and there has been no appeal against the basis on which the FTT came to that conclusion.

15. The FTT then turned to consider the relevant provisions of the PVD and whether it required LIFE's services to be treated as VAT exempt, observing at [39] that if it does either Item 9 must be construed, if possible, in a manner which gives effect to that requirement or LIFE may take the benefit of the PVD's provisions if they are sufficiently unconditional and precise.

16. At [50] the FTT observed that LIFE must be recognised by the State as being devoted to social welfare before exemption may be conferred on its supplies and therefore rejected an argument by LIFE that the PVD could be construed so as to require any welfare or social service to be exempted.

17. The FTT based its decision that Item 9 was incompatible with the directive by application of the concept of fiscal neutrality, noting at [51] that in *Kingscrest Associates v CCE* [2005] STC 1547 the Court of Justice of the European Union ("CJEU") explained that the relevant concept of fiscal neutrality in the context of the examination of the recognition of bodies for the purpose of the exemption in Article 132 (1) (g) was that supplies of goods and services which are similar, and which are accordingly in competition with each other, may not be treated differently for VAT purposes.

18. At [64] the FTT observed that the provisions of Article 131 (1) (g) differed from the corresponding wording in the predecessor Directive which permitted Member States to exempt the supply of services "linked to welfare and social security work... by bodies governed by public law or by other bodies recognised as charitable by the Member State concerned," noting that the change in wording reflected the judgment in *Kingscrest* where it was stated that most versions of the Directive used a term close to "of a social nature" rather than the English expression "charitable", observing that "charitable" had an EU law meaning which was of broader scope and included all policies that support people in need.

19. At [71] the FTT referred to the fact that in *Kingscrest* the CJEU had recognised the discretion afforded to the Member State in recognising bodies as being devoted to social welfare and the need to exercise that discretion in accordance with EU principles. It referred to the factors identified by the CJEU at [53] of its judgment to be taken into account by the member state in that regard as including:

> (1) the existence of specific provisions, be they national or regional, legislative or administrative, or tax or social security provisions;
>
> (2) the general interest of the activities of the taxable person concerned;

(3) the fact that other taxable persons carrying on the same activities already have similar recognition; and

(4) the fact that the cost of supplies in question may be largely met by health insurance schemes or other social security bodies.

20. At [73] the FTT referred to the Advocate General's observation in that case that in exercising its discretion a Member State must observe fiscal neutrality and "have regard to the nature of the activity and the aims for which it is carried on, so that it is classified by reference to predetermined, objective and abstract criteria which take account of the nature of the business, its organisational structure and the manner in which it is conducted."

21. At [87] the FTT held that if a State sets a condition which is related to whether or not a body is devoted to social welfare that limitation on recognition is prima facie permissible but, relying on the CJEU's judgment in *Zimmerman* [2016] STC 2104 stated that if an otherwise permissible condition is coupled with a provision which entitles other bodies to the exemption without satisfying the condition, then the condition taken with the provision breaches the principle of fiscal neutrality.

22. The FTT therefore identified at [89] the issue on the appeal as being whether the provisions of Item 9 set out a test for "devoted to social welfare" or merely specified certain types of body which were entitled to the exemption. If it is the latter, then in the FTT's view it was open to the challenge that it breached fiscal neutrality because it did not provide that the categories of establishments governed by private law referred to in the Directive be subject to the same conditions for the purposes of their recognition for the provision of similar services.

23. In the light of that, the FTT considered the four factors set out at [19] above and concluded at [98] that by recognising charities and not recognising LIFE Item 9 breaches the principle of fiscal neutrality with the consequence that LIFE's services were exempt. Its reasoning for that conclusion are set out at [94] to [97] as follows:

> "94. Taking those factors together it does not seem to me that if the UK had provided predetermined, abstract, and objective criteria for recognition which encompassed the appellant, it would have acted outside the discretion afforded to it. But there is no obligation on the member state to attribute "charitable status" to any body which makes welfare supplies for, as the Advocate General pointed out in *Kingcrest*, that would convert the exception into a general rule. If Note 9's *[sic]* conditions are permissibly directed to social welfare it is to my mind only if, by breaching the principle of fiscal neutrality, that Note 9 has excluded the appellant's supplies that it can claim exemption under the Directive. If Note 9 was limited to state regulated bodies there would be in the case of the Appellant no possible breach of the principle.
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> 95. In Note 9 *[sic]* the UK provides two ways in which a private body may be recognised: either it must be state regulated or a charity. The state regulated condition appears to me, given in particular the broad hint from the Court in *Kingcrest,* to be permissible. But persons such as the Appellant do not fall within

> the statutory regulatory regime because they do not supply services at the recipient's home. Thus the only way a private body making such supplies can qualify for exemption is if it is a charity. The question I ask myself is whether this test has "regard to the nature of the activity and the aims for which it is carried on, so that it is classified by reference to predetermined, objective and abstract criteria which take account of the nature of the business, its organisational structure and the manner in which it is conducted."
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> 96. The UK does not appear to have been "cautious" (as Arden LJ described it in *FBT)* in setting the Note 9 *[sic]* condition (when viewed in the light of the newer understanding of the meaning of "charitable"). The condition that a body be a charity is predetermined, abstract and objective. But a charity is an institution established for charitable purposes and those include: the advancement of science, environmental protection or improvement, the advancement of animal welfare, or the efficiency of the armed services (see section 2(2) (f),(i),(k),and (l)) Charities Act 2006); those purposes do not all seem to me to be to be redolent of social welfare even though they may be for the public benefit. In Mr Bradley's appealing categorisation "charities" in Item 9 includes bodies whose purposes are not relevant to devotion to social welfare. This condition also seems to me not to take account of the organisational structure of the body or the manner in which it conducts its business.
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> 97. It seems to me that although the recognition of charities followed the terms of the original form of the Directive it is, given the meaning given to "charitable" by the CJEU and its reflection in the new term "devoted to social welfare", the recognition of certain bodies entitled to the exemption rather than a test for devotion to social welfare which takes account of the nature of the business and the manner in which it is conducted. The criterion in effect specifies bodies which are entitled to the exemption without regard to devotion to social welfare."

24. Thus it would appear that the basis of the FTT's reasoning was that the inclusion of all charities within the scope of the exemption in Item 9 regardless of whether the charities concerned were "devoted to social welfare" meant that Item 9 did not provide predetermined, abstract and objective criteria for recognition. As a result, the test simply specified certain bodies who were entitled to the exemption without regard to the nature of their business and the manner in which it was carried on, thus excluding from the scope of the exemption other bodies, such as LIFE, which provided similar services but were not subject to the same conditions for the purpose of their recognition.

25. As a consequence of that conclusion, the FTT determined that the PVD required LIFE's services also to be exempt. Although it is not clear from the FTT's reasoning, it would appear that its finding was that Item 9 should be read as meaning that all supplies of welfare services by charities were entitled to the exemption as well as all supplies of such services by profit-making bodies. If that is so, it would appear that the effect of the FTT's reasoning would be that all bodies who supplied welfare services would be entitled to the exemption, without reference to any other criteria.

Procedural matters

26. In its response to HMRC's Notice of Appeal, which was belatedly filed on 15 September 2017, LIFE sought to introduce two new arguments which had not been put to the FTT as follows:

(1) In relation to its finding at [37] referred to at [14] above, the FTT should have held that the "public Act pursuant to which the county council could register or approve" LIFE was the Care Act 2014 (in particular sections 18 and 79 thereof), with the result that LIFE's supplies are exempt (as it was a state-regulated private welfare institution or agency for the purposes of Item 9); and

(2) In the event that LIFE was not regulated in the relevant sense, Item 9 involved the further breach of the principle of fiscal neutrality in that bodies located in Scotland and Northern Ireland making identical supplies to LIFE were granted exemption when LIFE was not (because non-residential care services are regulated in those jurisdictions) as the FTT had held in the closely analogous case of *The Learning Centre (Romford) Limited v HMRC* [2017] UK FTT 492 (TC) ("*TLC*")

27. HMRC did not object to LIFE arguing the Care Act issue and accordingly we permitted LIFE to rely on it.

28. HMRC did object to the question as to whether there had been a breach of fiscal neutrality caused by different treatment across the devolved nations ("the devolution issue") being argued on this appeal, noting that *TLC* was decided after the FTT's decision in this case and that the Upper Tribunal has given HMRC permission to appeal the *TLC* decision. In those circumstances, HMRC contended that the *TLC* appeal was the appropriate place to air the devolution issue.

29. We decided that the appropriate course was, so far as necessary, for argument on the devolution issue to be adjourned and be heard at the same time as the appeal in *TLC* is heard and directed accordingly.

Grounds of appeal and issues to be determined

30. We first need to determine the issue as to whether Article 9 is compatible with Item 132 (1)(g) by reference to HMRC's grounds of appeal, as set out below. Only if we find in favour of HMRC on that issue do we need to consider the Care Act argument advanced by L I F E in its response to HMRC's Notice of Appeal.

31. HMRC advance four grounds of appeal as follows:

Ground 1: the FTT erred in adopting an overly restrictive interpretation of the phrase "devoted to social well-being" in Article 132 (1)(g).

32. In support of this ground, HMRC contend that the FTT adopted an overly narrow interpretation of "social well-being", drawing a false distinction between "social well-being" and "public benefit" with the result that its conclusion that Item 9

is unlawful because it exempts charities without regard to whether they are devoted to social welfare is incorrect.

Ground 2: the FTT erred in concluding that Item 9 was incompatible with Article 132 (1) (g) because it entitled bodies to the exemption without regard to whether they were devoted to social well-being.

33. In support of this ground, HMRC contend that the exemption in Item 9 is premised not only on the nature of the entity providing the supplies but also on the nature of the supplies themselves. When read as a whole, Item 9 does not extend exemption to all charities but only charities which make supplies of welfare services. HMRC therefore contend that the correct question to ask was whether all charities, which make supplies of social welfare, are devoted to social well-being.

Ground 3: The FTT erred in disapplying Item 9 without first considering whether the legislation could be given a conforming construction.

34. HMRC contend that a conforming construction can remedy any perceived defect in the legislation, for example, by reading it so as to exempt supplies of welfare services made by a charity whose objects include social well-being.

Ground 4: the FTT erred in how it applied the concept of fiscal neutrality to Item 9

35. HMRC contend that in enacting Item 9 Parliament has drawn the line, as regards which non-public bodies are considered to be devoted to social well-being, at charities and state-regulated private welfare institutions and that this was a position which Parliament was entitled to take.

The compatibility issue

36. We consider that the FTT erred in its analysis. We consider that the correct position lies in one or other of two analyses, both of which determine this appeal in favour of HMRC.

37. The first assumes the correctness of the FTT's conclusion that many charities are not "redolent of social welfare". That assumption does not mean that all charities would have the benefit of the exemption, contrary to the assumption apparently made by the FTT. Not all charities can properly make the supply of welfare services within the meaning of Item 9. It is only charities whose objects include such activities that could properly supply such things. A charity with such an object would, in our view, be "devoted to social well-being" and therefore capable of being recognised pursuant to Article 132(1)(g). Those without such an object would not. So the constitutional ability to make the exempt supplies becomes the factor which divides charities which can have the benefit of the exemption from those which cannot. It is not the case that the reference to charities in Item 9 automatically includes all charities, irrespective of their objects.

38. This analysis in substance underpins Ground 2. We accept HMRC's case on it.

The second analysis is one which is embodied in HRMC's Ground 1. In this analysis the definition of charities in Item 9 is not limited by the implications arising out of the nature of the welfare supplies they can make. In considering this analysis one has to consider how a charity qualifies as being charitable in English law and how that interacts with the phraseology of Article 132(1)(g).

39. The phrase "services…. closely linked to welfare", as now appears in Article 132 (1) (g) has been given a broad interpretation. The phrase was considered in *Yoga for Health v CEE* [1984] STC 630 where Nolan J (as he then was) had to consider whether the provision of services of residential accommodation for the study and practice of yoga to help people improve their mental and physical well-being benefited from the exemption. Applying a purposive construction, Nolan J held that there was no need nor justification to confine the word "welfare" to material benefit even when the word is associated with the adjective "social". He said that it includes, generally, being well and thus includes the state of mental and physical well-being which the taxpayer in this case sought to promote: see [24] of the judgment. He went on to say at [26] that in none of the cases he reviewed was the service essentially concerned with the relief of poverty or the provision of purely material benefits, giving the example of an old people's home where the inhabitants may include well-to-do people.

40. We therefore accept, as Mr Davey submitted, that the concept of "welfare" as used in Article 132 (1) (g) is not limited to the provision of material financial support for the needy but, rather is broader in scope. Therefore, it follows that the phrase "devoted to social well-being" as used in Article 132 (1)(g) will embrace all entities which work to enhance, in some regard, the well-being of society and the provision of welfare services must be regarded as coming within the scope of that work.

41. On this analysis a charity, using that term in accordance with its domestic law meaning, can be regarded as a body "devoted to social well-being" for the purposes of the Article for the following reasons.

42. One of the requirements for a body to be treated as a "charity" for VAT purposes, as provided in paragraph 1 (1) of Schedule 6 to the Finance Act 2010, is that it is established for "charitable purposes only". The phrase "charitable purpose" bears the meaning given to it in s 2 (1) of the Charities Act 2011, which means that it must be one of the specific purposes falling within s 3 (1) of the Charities Act 2011, one of which is the advancement of health or the saving of lives and another of which is the relief of those in need because of youth, age, ill-health, disability, financial hardship or other disadvantage and others which have no obvious connection with health or welfare. In addition, the purpose in question must be "for the public benefit" if it is to be a charitable purpose: see s 4 (1) of the Charities Act 2011.

43. The concept of "public benefit" was considered by the Upper Tribunal in *The Independent Schools Council v Charity Commission and others* [2011] UKUT 421 (TCC). Having observed that the case law clearly established that a charitable trust must benefit the community or a section of the community and cannot be charitable if

it confers only private benefits, the Tribunal said at [44] that there are two related aspects of public benefit. The first aspect is that the nature of the purpose itself must be such as to be a benefit to the community and the second aspect is that those who may benefit from the carrying out of the purpose must be sufficiently numerous and identified in such a manner as, to constitute a section of the public.

44. Thus on this analysis any body which is recognised under UK domestic law as a charity must be regarded as being a body "devoted to social well-being" for the purposes of Article 132(1) (g) because any such body must operate to benefit the public, in the sense and manner referred to at [36] above and will therefore work to enhance, in some regard, the well-being of society. On this analysis the FTT erred in finding that some charities were not "redolent of social welfare". They all are.

45. In this alternative we therefore accept Ground 1 of the HMRC's Grounds of Appeal. We consider that the first alternative is probably the correct one, but if it is not then the second succeeds.

46. Having thus decided, it becomes necessary to consider whether in making the choice that it has in limiting the exemption for private bodies who are not state-regulated to charities and not extending it to other non-charitable bodies, such as LIFE who provide similar services, the UK has breached the principle of fiscal neutrality. In this context we need to refer to European authorities.

47. Mr Bremner starts by submitting that the purpose of Article 132(1)(g) is to reduce the cost of supplies of welfare services so as to make them more readily accessible to individuals who might benefit from them, in the general interest of the social sector. We agree with that. It is apparent enough from its wording and was held to be the case by the ECJ in *Kingscrest Associates Ltd v Customs & Excise Commissioners* [2005] STC 1547 at [30]. We also agree that the fact that the an entity is profit-making does not automatically exclude it from the exemption (*Kingscrest* at [31]. Member States have a discretion in deciding which non-public law authorities should benefit from the exemption. Mr Bremner's case in the present matter is that the distinction between non-regulated non-public law entities on the one hand and (as he would say) non-regulated charities on the other is not justified and infringes the principal of fiscal neutrality.

48. In *Kingscrest* (supra) the question was whether a partnership which operated a residential care home was within the scope of the exemption. Unusually, in that case the tax payer did <u>not</u> wish to have the benefit of the exemption, but that does not affect the principles involved. At the time the then equivalent of Article 132(1)(g) was in a different form which permitted the exemption to be given to bodies "recognised as charitable by the Member State concerned". One of the things determined in the case was that that expression had a wider meaning than the UK

technical view of charities. There is no need to dwell further on that aspect. What is of more significant is what the CJEU said about the application of exemptions to non-public bodies and fiscal neutrality.

49. In [47] the Court determined that private profit-making entities were not necessarily excluded from the exemption, and it then turned to the discretion of the Member State in defining which non-public law entitles should be afforded it. [51] recognised the existence of the discretion and [53] gave some guidance as to the considerations which should be taken into account:

> "53. In that regard, it follows from the case-law that it is for the national authorities, in accordance with Community law and subject to review by the national courts, to take into account, in particular, the existence of specific provisions, be they national or regional, legislative or administrative, or tax or social security provisions, the general interest of the activities of the taxable person concerned, the fact that other taxable persons carrying on the same activities already have similar recognition, and the fact that the costs of the supplies in question may be largely met by health insurance schemes or other social security bodies…."

50. The imposition of regulation seems to be a significant factor:

> "57. For the purposes of determining whether the limits of the discretion have been exceeded in this case, the national court may, on the other hand, take into account in particular the fact that, under the amended VAT Act, entitlement to the exemptions provided for in Article 13A(1)(g) and (h) of the Sixth Directive extends to all organisations registered under the Care Standards Act 2000, as well as the fact that that Act and the amended VAT Act contain specific provisions which not only reserve entitlement to those exemptions to organisations supplying welfare services, the content of which is defined by those Acts, but also govern the conditions for providing those supplies, by making the organisations which provide them subject to restrictions and checks by the national authorities, in terms of registration, inspection and rules concerning both buildings and equipment and the qualifications of the persons authorised to manage them."

51. Fiscal neutrality is dealt with shortly at [54]:

> "54. In addition, it must be recalled that principle of fiscal neutrality precludes, in particular, treating similar supplies of services, which are thus in competition with each other, differently for VAT purposes…"

52. The same factors were repeated (with slightly different wording for one of them) in *Zimmerman* (supra) at [31]. The CJEU also considered fiscal neutrality and emphasised (at [43]):

> "43. … the principle of fiscal neutrality requires, in principle, that all the organisations other than those governed by public law be placed on an equal footing for the purposes of their recognition for the supply of similar services …"

53. The United Kingdom has adopted two criteria for determining which non-public law bodies should be entitled to the exemption. The first is that the body is regulated. The second is that it be a charity. To be able to claim that its exclusion from the class breaches the principles of fiscal neutrality LIFE must be able to demonstrate that it falls within the same class as one or other of those classes. That is apparent from *Finance and Business Training Ltd v HMRC* [2016] 4 WLR 47. The question in that case concerned an education exemption and whether the taxpayer could claim to be in the same position as a university or part of a university (in essence). The Court of Appeal held that the taxpayer could not establish that it was such an entity, and that its exclusion from the exemption did not contravene the principles of fiscal neutrality. In her judgment Arden LJ summarised her conclusions as follows:

> "21. In my judgment, for the detailed reasons given below, the jurisprudence of the CJEU supports HMRC's argument. Even though it is supplying educational services, FBT fails to meet the EU law-compliant supplier condition for the education exemption. FBT has fundamentally misunderstood the statutory

scheme which in brief is that, in the case of university education, the UK has exercised a member state option to recognise non-public law bodies carrying on qualifying educational activities to a small group consisting of college and halls of universities which are integrated into the university's activities. This appeal must therefore be dismissed."

54. She elaborated on them later in her judgment:

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

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

55. Parliament is obviously constrained by Article 132.1(i) as to what bodies it can include. In those circumstances, it has taken the view that the body must be one which provides education in like manner to a body governed by public law, that is, there must be a public interest element in its work. It has decided to draw the line, in the case of universities to those colleges, halls and schools which are integrated into universities and which are therefore imbued with its objects.

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

55. Applying that to the present case, the conferring of the exemption on a regulated body is plainly a rational choice open to the United Kingdom under the above criteria. It is sufficiently certain, and paragraph 57 of *Kingscrest* demonstrates the acceptability and rationality of regulation as a criterion. There is no way in which LIFE can equate itself with entities which are subject to the sort of regulation regime which is applied to regulated bodies. Those bodies are obliged to conform to certain standards. For LIFE that is optional, even if it chooses for the time being to do so.

56. So far as being a charity is concerned, that too, in our view, is a rational criterion as contemplated by the CJEU in *Kingscrest*. Charities are, in their own way, regulated by the state and therefore controlled (though not in the same way as a regulated body). It also operates, as a charity, for the public benefit, in a way analogous to public law bodies. This is not to use the absence of profit as a criterion. It is to acknowledge the public benefit functions of a charity. Again, LIFE cannot say that it falls within the same class as a charity. It is not subject to the same constraints and regulation as a charity, and does not operate for the public benefit.

57. For those reasons LIFE cannot demonstrate what it needs to demonstrate to show a breach of the principles of fiscal neutrality.

Conforming construction

58. In the light of those conclusions the question of a conforming construction does not arise. The true construction, without the need to invoke this practice, is more or less what the Revenue say a conforming construction would be. However, if we are wrong in our choice of the true construction, and if that would mean that our analysis on fiscal neutrality would therefore fail, then we would have held that the exemption should be construed so as to conform by saying it applies to charities whose objects include devotion to social well-being. Contrary to the submissions of Mr Bremner, that does not go against the grain of the legislation because it is clear that Parliament intended to exempt welfare services provided by charities, and accordingly it would not involve this Tribunal in making policy decisions.

The Care Act issue

59. LIFE contends that it is a state-regulated private welfare institution or agency and therefore exempt pursuant to Item 9 (b).

60. Note (8) to Item 9 states that "state-regulated" means:

> "approved, licensed, registered or exempted from registration by any Minister or other authority pursuant to the provision of a public general Act, other than a provision that is capable of being brought into effect at different times in relation to different local authority areas."

61. As we record at [14] above, the FTT rejected an argument that LIFE's registration with Gloucestershire County Council and the Council's monitoring of its performance meant that it fell within Note (8) on the basis that it was shown no public Act pursuant to which the Council could register or approve LIFE or exempt it from registration.

62. LIFE now argues that the public Act pursuant to which the Council could register or approve LIFE was the Care Act 2014. Mr Bremner referred us to the following provisions of that Act.

63. Under section 5 of the Care Act 2014 ("the Act"):

> (1) A local authority must promote the efficient and effective operation of a market in services for meeting care and support needs with a view to ensuring that any person in its area wishing to access services in the market (a) has a variety of providers to choose from who (taken together) provide a variety of services; (b) has a variety of high quality services to choose from; and (c) has sufficient information to make an informed decision about how to meet the needs in question (section 5(1)).
>
> (2) In arranging for the provision by persons other than it of services for meeting care and support needs, a local authority must have regard to the importance of promoting the well-being of adults in its area with needs for care and support and the well-being of carers in its area (section 5(4)).

64. Under section 13(1) of the Act:

> "Where a local authority is satisfied on the basis of a needs or carer's assessment that an adult has needs for care and support or that a carer has needs for support, it must determine whether any of the needs meet the eligibility criteria"

65. Where it has made a determination under section 13(1), a local authority is required, under section 18, to meet the adult's needs for care and support, where certain further conditions are met, including, for example, where the adult has limited financial resources.

66. Section 79(1) of the Act provides that a local authority can delegate certain functions in the following terms:

> "(1) A local authority may authorise a person to exercise on its behalf a function it has under—
>
> (a) this Part or regulations under this Part ….., or
>
> (b) section 117 of the Mental Health Act 1983 (after-care services)."

67. The functions which a local authority has "under this Part" (i.e. Part 1 of the Act) include the requirements to meet the adult's needs specified in section 18(1). Section 79(3) to (5) provide that:

> "(3) An authorisation under this section may authorise an employee of the authorised person to exercise the function to which the authorisation relates; and for that purpose, where the authorised person is a body corporate, "employee" includes a director or officer of the body.

(4) An authorisation under this section may authorise the exercise of the function to which it relates—
(a) either wholly or to the extent specified in the authorisation;
(b) either generally or in cases, circumstances or areas so specified;
(c) either unconditionally or subject to conditions so specified.

(5) An authorisation under this section—
(a) is for the period specified in the authorisation;
(b) may be revoked by the local authority;
(c) does not prevent the local authority from exercising the function to which the authorisation relates.

(6) Anything done or omitted to be done by or in relation to a person authorised under this section in, or in connection with, the exercise or purported exercise of the function to which the authorisation relates is to be treated for all purposes as done or omitted to be done by or in relation to the local authority."

68. Mr Bremner submits that the combined effect of these provisions is that they provide statutory authority for LIFE being regarded as "state-regulated" as that term is used in Item 9 by virtue of it being registered with the Gloucestershire County Council and being subject to oversight by the Council.

69. In support of that submission, Mr Bremner refers to the finding by the FTT at [93] of the Decision to the effect that LIFE was both registered with the Council and supervised by it in the manner in which it provided the services. He submits that the finding that LIFE was registered with the Council could only be a reference to it having been authorised to carry out the Council's functions in relation to the provision of the services pursuant to s 79 of the Act and this was sufficient to amount to LIFE having been "approved" the purposes of Note (8). There was no requirement for such approval to be supported by a comprehensive scheme of regulation such as that provided pursuant to the terms of the Health and Social Care Act 2008 by the Care Quality Commission.

70. We reject those submissions. In our view, the delegation by a local authority pursuant to the powers in s 79 of the Act of its duty to provide adult care services pursuant to its duty under s 18 of the Act is plainly insufficient to constitute the delegate a "state-regulated" entity within the meaning of Note (8). The Health and Social Care Act 2008 (the "2008 Act") sets out a comprehensive regulatory regime in respect of those services which fall to be regulated by the Care Quality Commission. Those provisions not only require the registration with the Care Quality Commission of a supplier of the relevant services which fall to be regulated but failure to register when required to do so is a criminal offence punishable with a term of imprisonment of up to 12 months: see section 10 of the 2008 Act. In addition, pursuant to The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 there are detailed provisions that a registered service provider must comply with in carrying out its regulated activities, it is subject to supervision by the Care Quality Commission in

doing so and its registration can be cancelled if it fails to meet the standards prescribed by those provisions or it may be subject to financial penalties.

71. There were limited findings by the FTT as to what steps the Council took in terms of due diligence on LIFE before delegating its functions and whether its monitoring and inspection activities could amount to "regulation" in the manner contemplated by Note (8). Indeed, it would appear from [13] of the Decision that oversight arrangements may be limited in cases where LIFE provides services directly to the individual and the Council pays for them. In our view, Note (8) contemplates that there would need to be more than a simple delegation of functions before an entity could be said to be "approved" and therefore state-regulated.

72. In our view, the provisions of the Care Act 2014 to which we were referred do no more than impose duties on the relevant local authorities to provide the relevant services and give it the power to delegate its functions to another person. The provisions say nothing about how those services are to be regulated.

73. Furthermore, as submitted by Mr Davey, the wording at the end of Note (8) does not seem to contemplate a situation where activities fall within the definition of being "state-regulated" in one area of the country because the local authority concerned has chosen to delegate its functions but not in another because the local authority had chosen not to delegate the function.

74. This supports the conclusion that the correct approach is to examine whether the person who has the obligation to provide the services in question is subject to state regulation in the provision of those services, particularly in the light of s 79 (6) of the Care Act 2014 which deems the acts and omissions of the local authority's delegate to be the acts and omissions of the authority itself. It was common ground that the services which are the subject of this appeal fall outside the scope of regulation under the 2008 Act because they are day care services. Since the local authority, as the person with the obligation to provide the services pursuant to the terms of the Care Act 2014, would not be regulated itself in the provision of those services it is difficult to see why the delegate of the local authority would be regarded as being so for the purposes of Note (8).

75. For these reasons, we conclude that LIFE is not a "state-regulated private welfare institution or agency" within the meaning of sub-paragraph (b) of Item 9.

Conclusion

76. Since we have found in favour of HMRC in respect of the grounds of appeal argued before us the appeal must be allowed unless LIFE is successful on the devolution issue. Therefore, the final disposition of this appeal must await the further argument to be made on that issue with the appeal in *TLC* when the appeal is heard.

77. We should finally like to thank both counsel for their helpful submissions and in particular Mr Bremner for the help that he has provided on a pro bono basis.

MR JUSTICE MANN **JUDGE TIMOTHY HERRINGTON**

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UPPER TRIBUNAL JUDGES
RELEASE DATE: 18 DECEMBER 2017