[2021] UKUT 0015 (TCC)

Appeal number: UT/2019/0097

VALUE ADDED TAX – individual teaching Ceroc dancing in dance classes – whether exempt as the supply of private tuition in a subject ordinarily taught in a school or university – no – appeal allowed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Appellants**

- and -

ANNA COOK **Respondent**

TRIBUNAL: MR JUSTICE ZACAROLI
JUDGE THOMAS SCOTT

Sitting in public by way of video hearing treated as taking place in London on 28, 29 and 30 October 2020

John Brinsmead-Stockham, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellants

Dario Garcia and Richard Harvey, instructed by Mishcon de Reya LLP, for the Respondent

DECISION

1. HMRC appeal, with the permission of the Upper Tribunal, against the decision of the First-tier Tribunal (the "FTT") reported at [2019] UKFTT 321 (TC) (the "Decision"). The appeal concerns the FTT's decision that supplies of Ceroc dancing classes taught by Ms Cook were exempt from value added tax ("VAT").

Background and summary of facts

2. In the period 1 October 2010 to 16 September 2012 Ms Cook personally made supplies of Ceroc dancing classes to the public. HMRC considered that those supplies were standard rated for VAT purposes. Ms Cook appealed against that decision, contending that the supplies were exempt on the basis that they were supplies of private tuition in a subject ordinarily taught in a school or university, namely the subject of dance.

3. In the Decision, at paragraphs [5] to [14] the FTT summarised the relevant primary facts, and the parties in this appeal were agreed that this was an accurate summary. We therefore set it out in full, as follows:

> 5. Ms Cook makes supplies of Ceroc dancing classes to the general public under the terms of a franchise agreement with Ceroc Enterprises Limited ("the franchisor").
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> 6. Ms Cook has carried on a business of supplying Ceroc dancing classes to the general public in the following ways:
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> (1) Ms Cook traded as Ceroc Fusion Limited ("CFL") between 25 September 2006 and 30 September 2010,
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> (2) Ms Cook then operated as a sole trader, trading as "Ceroc Fusion", between 1 October 2010 and 16 September 2012 (ie the relevant period), and
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> (3) Ms Cook incorporated and began to trade as Ceroc Fusion (East Anglia) Limited ("CFEA") on 17 September 2012.
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> 7. Ms Cook did not register for VAT in the relevant period, and did not account to HMRC for any VAT in respect of that period.
>
> *The relevant supplies*
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> 8. The teaching of Ceroc uses a form of pairs dancing that incorporates moves from many other styles of dance (eg Ballroom, Salsa, Jive, Hip Hop and Tango), and involves a particular methodology for learning those moves. Ceroc teachers are only allowed to teach moves which are set out on the Ceroc intranet, which illustrates approximately 900 different moves.
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> 9. All Ceroc dancing classes follow a set format that involves:
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> (1) A five minute warm-up session.

(2) A Beginners' Class for 45 minutes where participants learn three or four basic moves out of a fixed set of 12.

(3) A 15 minute Beginners practice session.

(4) An Intermediate Class for 30 minutes (subject to demand) where participants learn four or five more advanced moves. The Intermediate syllabus is twelve "classic" moves and a number of advanced moves to make a total of 36 at the relevant time. The total has varied slightly from time to time.

(5) During this time Beginners dance separately with experienced volunteers known as "taxi-dancers".

(6) A Freestyle session for 90 minutes where all participants dance to music played by a disc-jockey ("DJ"). During this time the instructor will observe the class and effectively give one-to-one tuition as required.

10. Customers may attend for all or only part of the class and do not need to attend every class on a sequential basis but Beginners are only allowed to progress to the Intermediate Class when they have attended six Beginners Classes, by which time they should have learnt all of the 12 basic moves which are taught to Beginners.

11. When they progress to the Intermediate level, students are taught a much wider range of moves, including 24 Classic Moves and a large number of more advanced moves. After attending six Beginner Classes and two "courses" of Intermediate Classes of 12 sessions each, most students will have learnt approximately 84 moves.

12. During the relevant period when Ms Cook was carrying on the business of supplying Ceroc dancing classes as a sole trader:

(1) Ms Cook supplied the classes at 11 venues throughout Norfolk.

(2) There was no set course of classes for customers to enrol into, instead customers were able to turn up to classes whenever, and wherever, they wished to.

(3) In order to supply the classes Ms Cook hired other self-employed individuals ("staff hire") including a DJ for each class, someone to work on the door, and in some cases an instructor to teach the class.

(4) In order to participate in a Ceroc dancing class, customers were required to purchase Ceroc life membership for a small nominal fee (between £1-£3), and then to pay a fixed fee (between £5-£8) for each class ("the class fee"). In practice Ms Cook included the membership fee in the fee for the first class.

(5) Ms Cook received all of the class fees and was required to pay a percentage of her takings (usually between 9-13%) to the franchisor.

(6) The class fee was charged in respect of the evening as a whole (ie including all of the elements set out above).

(7) Ms Cook paid all of the expenses of the business (e.g. venue hire, staff hire).

13. Ms Cook also organised what were termed Freestyle or Party Evenings approximately once a month in each area in which she taught. We were not provided with any substantial evidence as to what happened at these events. There was no formal tuition at these events but HMRC did not seek to separate out the treatment of these supplies from that of the normal evening classes and neither will we.

14. Although, as set out above, Ms Cook engaged instructors to teach some of the Ceroc dancing classes that she supplied, these appeals are concerned only with the classes that were personally taught by Ms Cook.

The law

4. The relevant legislation is contained in Principal VAT Directive 2006/112/EC ("PVD") and the Value Added Tax Act 1994 ("VATA").

5. PVD Article 132(1)(j) provides that:

> (1) Member States shall exempt the following transactions:
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> …
>
> (j) tuition given privately by teachers and covering school or university education.

6. This exemption is given effect in UK law by section 31 and Schedule 9 Group 6 Item 2 VATA , which state:

> **31 Exempt supplies and acquisitions**
>
> (1) A supply of…services is an exempt supply if it is of a description for the time being specified in Schedule 9…
>
> **Schedule 9 Group 6**
>
> **Item 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.

7. The parties agreed, correctly in our view, that Article 132(1)(j) and the UK provisions were identical in their effect, with "ordinarily" in the UK legislation to be read as meaning "commonly". It was also agreed that Ms Cook is entitled to rely on the direct effect in UK law of Article 132(1)(j).

8. The words "school or university education" in the PVD were interpreted by the Court of Justice of the European Union ("CJEU") in *Haderer v Finanzamt Wilmersdorf* (Case C-445/05) [2008] STC 2171 ("*Haderer*") so as to exclude

activities which are "purely recreational"[1]. This appeal relates in part to the FTT's decision in relation to the application of this exclusion.

The issues in this appeal

9. The following points were common ground:

(1) The relevant supplies were supplies of services for VAT purposes.

(2) The relevant supplies constituted "tuition given privately by [a teacher]".

(3) Dance is a subject commonly taught in schools and universities.

10. The CJEU decisions discussed below refer more often to the tuition of "activities" than the tuition of "subjects". However, it is apparent that the CJEU is using the two terms synonymously. It was also common ground in this appeal that in order to fall within the exemption the subject or activity in question must be commonly taught in schools and universities.

11. HMRC appeal on the following grounds[2]:

(1) **Ground 1**: The FTT erred in concluding that the relevant supplies constituted the teaching of dance. Ceroc is a distinct form or style of dance, and there was no evidence before the FTT that Ceroc was commonly taught in schools or universities.

(2) **Ground 2**: The FTT erred in law in its interpretation of the "purely recreational" test.

(3) **Ground 3**: The FTT erred in concluding on the facts that the classes taught by Ms Cook were not "purely recreational".

12. In order to succeed in the appeal, HMRC must succeed either on Ground 1, or on both of Grounds 2 and 3.

Relevant case law

13. The relevant case law in relation to the private tuition exemption is found primarily in the three decisions of the CJEU which we discuss below. We were also referred to several decisions of the FTT, which, although not binding on us, we have considered where relevant. This is the first decision by any superior UK court or tribunal concerning the exemption since the CJEU's decision in *Haderer*.

14. *Haderer* concerned the meaning of tuition being given privately, which is not in issue in this appeal. However, it contained important guidance in relation to other elements of the exemption. We discuss below the statements in *Haderer* relating to

[1] At [26] of its judgment.

[2] In their skeleton argument HMRC reverse the order of Grounds 2 and 3, but the issues are more easily understood in the order we have set out.

the "purely recreational" test. In relation to Ground 1, the parties agreed that the FTT correctly summarised that guidance, at paragraphs [37] to [40] of the Decision, as follows:

> 37. In its judgment, the CJEU referred, at [18], to the well-known principles of construction of exemptions from VAT. The terms used to specify those exemptions are to be interpreted strictly, because they constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person. However, the interpretation of those terms must be consistent with the objectives pursued by those exemptions and comply with the requirements of the principle of fiscal neutrality inherent in the common system of VAT. Therefore, the requirement of strict interpretation does not mean that the terms used to specify the exemptions should be construed in such a way as to deprive the exemptions of their intended effect. Those principles apply equally to the specific conditions laid down for the exemptions to apply.
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> 38. The CJEU went on, at [22], to observe that, under the Sixth Directive (the predecessor to the PVD) there was no precise definition of the term "school or university education" for the purposes of the exemption. It did so because, although the referring court had not expressed any doubt whether the ceramics and pottery courses provided by Mr Haderer fell within that expression, the German Finanzamt had submitted that those courses did not involve the same demands as those of courses normally given in schools or universities, but were intended purely for leisure purposes.
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> 39. In that regard, the CJEU said, at [24] – [26]:
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> > "24. In that regard, although the terms used to specify the exemption envisaged under art 13A(1)(j) of the Sixth Directive are, admittedly, to be interpreted strictly, a particularly narrow interpretation of 'school or university education' would risk creating divergences in the application of the VAT system from one member state to another, as the member states' respective education systems are organised according to different rules. Such divergences would be incompatible with the requirements of the case law referred to in para 17 of this judgment.
> >
> > 25. Furthermore, in so far as the Finanzamt's arguments on that point are based on a particular interpretation of 'school' or 'university' in terms of the German education system, it should be noted that whether a specific transaction is subject to or exempt from VAT cannot depend on its classification in national law (see *Kingscrest Associates* and *Montecello* (para 25)).
> >
> > 26. While it is unnecessary to produce a precise definition in this judgment of the Community concept of 'school or university education' for the purposes of the VAT system, it is sufficient, in this case, to observe that that concept is not limited only to education which leads to examinations for the purpose of obtaining qualifications or which provides training for the purpose of carrying out a professional or trade activity, but includes other activities

> which are taught in schools or universities in order to develop pupils' or students' knowledge and skills, provided that those activities are not purely recreational."
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> 40. The CJEU therefore made clear that the concept of school or university education was not limited to courses leading to examinations. In addition, it did not limit the exemption to defined programmes.

15. In *Ingenieurbüro Eulitz GbR v Finanzamt Dresden 1* (Case C-473/08) ("*Eulitz*") the Court emphasised that "tuition" must be understood as essentially encompassing the transfer of knowledge and skills between a teacher and pupils or students. This could include activities other than teaching in the strict sense as long as they are carried out in the context of such a transfer; the issue was one for the national courts.

16. In *A&G Fahrschul-Akademie GmbH v Finanzamt Wolfenbüttel* (Case C-449/17) ("*A&G*") the Court provided a more comprehensive definition of "school or university education", at [25] and [26] of its decision, as follows:

> 25 It follows that, as the Advocate General observes in points 13 to 17 of his Opinion, by that concept, the EU legislature intended to refer to a certain type of education system which is common to all the Member States, irrespective of the characteristics particular to each national system.
>
> 26 Consequently, the concept of 'school or university education' for the purposes of the VAT system refers generally to an integrated system for the transfer of knowledge and skills covering a wide and diversified set of subjects, and to the furthering and development of that knowledge and those skills by the pupils and students in the course of their progress and their specialisation in the various constituent stages of that system.

17. The relevant FTT decisions concerning the private tuition exemption are *Cheruvier v HMRC* [2014] UKFTT 7 (TC) ("*Cheruvier*"); *Hocking v HMRC* [2014] UKFTT 1034 (TC) ("*Hocking*"); *Tranter v HMRC* [2014] UKFTT 959 (TC) ("*Tranter*"); *Newell v HMRC* [2015] UKFTT 535 (TC) ("*Newell*"), and *Premier Family Martial Arts LLP v HMRC* [2020] UKFTT 0001 (TC) ("*Premier*"). These decisions largely turn on their facts and we have not found them to be of material assistance in relation to the issues in this appeal. The exception is *Hocking* (a decision of Judge Berner sitting in the FTT). We agree with the conclusion in *Hocking* that there is no free-standing test of "comparability" in applying the exemption, as explained in that decision at [53] as follows:

> 53. It is not necessary that the tuition should mirror the way in which the subject or activity is taught in schools or university, or for it to be analogous to what is there taught. Mr Shepherd accepted that the two need not be identical. But he argued that the purpose of the exemption was to provide a level playing field between education provided at schools and universities and that provided privately by mirroring mainstream education, and that consequently the tuition had to be of a comparable standard, or of a similar nature and level. We do not agree.

> To impose such a test would, in our view, be to place a gloss on the legal test which is unwarranted. It would introduce a restrictive interpretation. The requirement is, first, that the subject or activity should be one that is commonly taught in schools or universities, and not one that is purely recreational; it must be part of school or university education. Secondly, the supply must be one of tuition in that subject or activity, in the sense of a transfer of knowledge or skills. The tuition must be educational in character but, beyond that, there is no test of comparability.

Grounds 1 and 3: Edwards v Bairstow

18. An appeal to this tribunal lies only on a point of law: section 11(1) of the Tribunals, Courts and Enforcement Act 2007 ("TCEA 2007"). While there cannot be an appeal on a pure question of fact which is decided by the FTT, the FTT may arrive at a finding of fact in a way which discloses an error of law. That is clear from *Edwards v Bairstow* [1956] AC 14. In that case, Viscount Simonds referred to making a finding without any evidence or upon a view of the facts which could not be reasonably entertained, and Lord Radcliffe described as errors of law cases where there was no evidence to support a finding, or where the evidence contradicted the finding or where the only reasonable conclusion contradicted the finding. Lord Diplock has described this ground of challenge as "irrationality"[3].

19. Grounds 1 and 3 of HMRC's appeal are *Edwards v Bairstow* challenges. In considering those grounds, we have borne in mind the caveats helpfully summarised in *Ingenious Games LLP & Others v HMRC* [2019] UKUT 226 (TCC), at [54]-[69]. The bar to establishing an error of law based on challenges to findings of fact is deliberately set high, and that is particularly so where the FTT is called on to make a multi-factorial assessment. As stated by Evans LJ in *Georgiou v Customs and Excise Commissioners* [1996] STC 463, at 476:

> … for a question of law to arise in the circumstances, the appellant must first identify the finding which is challenged; secondly, show that it is significant in relation to the conclusion; thirdly, identify the evidence, if any, which was relevant to that finding; and fourthly, show that that finding, on the basis of that evidence, was one which the tribunal was not entitled to make. What is not permitted, in my view, is a roving selection of evidence coupled with a general assertion that the tribunal's conclusion was against the weight of the evidence and was therefore wrong. A failure to appreciate what is the correct approach accounts for much of the time and expense that was occasioned by this appeal to the High Court.

20. Our evaluation of HMRC's challenges under Grounds 1 and 3 has therefore taken into account all the evidence heard by the FTT in the course of its hearing in assessing whether "irrationality" is made out, and, if so, on what basis. The bar is indeed set

[3] *Council for Civil Service Unions v Minister for the Civil Service* [1985] AC 374, at 410F-411A.

high, but, as is shown by the tribunal's decision in *Ingenious Games* itself, it is not insurmountable.

Ground 1: The FTT's decision

21. By Ground 1, HMRC assert that the FTT erred in concluding that Ceroc was dance in the form taught in schools and universities, and therefore within the private tuition exemption, and not a distinct form or style of dance, which was not so taught. It is not contended by HMRC that the FTT misdirected itself as to the principles derived from the relevant case law, summarised at [46] of its decision, or as to the applicable law. This challenge therefore requires a detailed review of the FTT's findings, reasons and conclusions in relation to this issue.

22. The FTT considered a substantial number of documents. In addition, it received witness statements and heard oral evidence from Ms Cook; Michael Ellard, the owner of Ceroc Enterprises Ltd ("CEL"), which owned the rights to the Ceroc brand; Tim Sant, Head of Dance at CEL; Claire Jiggins, a schoolteacher, and Joanna Hastie, a solicitor at HMRC. The FTT "found all witnesses to be very open and honest": [3].

23. Having summarised the facts, recorded at paragraph 3 above, the FTT set out its views on what "Ceroc" was, as follows, at [18] to [23]:

> *What is Ceroc?*
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> 18. Ceroc is a commercial enterprise earning income from dance and trading on the franchise model. First and foremost we find that Ceroc is a brand, promoting and selling an evening of entertainment, socialising and dance tuition. Ms Cook was not concerned with the higher levels of dance tuition or competition also run by Ceroc.
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> 19. Secondly, both Ms Cook and Mr Ellard described Ceroc as an approach or methodology of teaching dance and we accept this as factually correct. In his witness statement, Mr Ellard explained that the twelve basic Ceroc moves were designed to cover many core competencies and techniques. He then set out a table listing the application of those moves to a wide range of dance forms. The main distinguishing feature of the Ceroc approach was avoiding the use of traditional technical jargon. The aim of this down-to-earth approach to terminology was to make the teaching more acceptable to men who might otherwise be reluctant to engage.
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> 20. The more difficult question is whether or not the dancing which is taught is a particular dance, such as waltz or tango or salsa or jive, a broader style, such as Ballroom or Latin American or Jazz or Contemporary or Street, or merely a generic dance technique of broad application.
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> 21. Key to this assessment in our view is that the Ceroc moves which a teacher such as Ms Cook is allowed to teach are set out on the Ceroc intranet, which illustrates approximately 900 different moves. Many of these are minor variations of others and there are approximately 500 moves if these minor variations are removed.

> 22. These 500 moves have been borrowed/adopted from a number of different dance styles, predominantly of a Latin American origin, but they also incorporate moves from other styles, including ballet. This compares with perhaps only 12 moves which are within the prescribed moves for a waltz. Ceroc is clearly therefore not comparable in its scope to a single dance such as a waltz or tango.
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> 23. Given the number of moves which Ceroc teachers are allowed to teach we cannot regard what is being taught as a sub-set of Modern Jive, which was suggested by HMRC. In our view Ceroc dancing incorporates a wide range of moves and techniques from different dance genres and is therefore a generic dance technique of broad application.

24. The FTT then discussed the Ceroc syllabus developed by Mr Sant for CEL. This syllabus was described as mirroring very closely the national curriculum syllabus for dance in Key Stage 3 and Key Stage 4 modules published by the Department of Education: [24]. The Ceroc syllabus covered "opportunities to gain medals/awards for achievement at Ceroc": [25]. Mr Ellard explained that "he hoped to take Ceroc into schools but this has thus far been unsuccessful": [26].

25. The FTT found that the level at which Ms Cook was teaching was most closely reflected in the Key Stage 3 module of the teaching of physical education in schools published by the Department of Education: [27]. The FTT set out a detailed comparison prepared by Mr Sant of the Key Stage 3 syllabus and that for the Ceroc Beginner Classes which were taught by Ms Cook: [29].

26. The FTT's analysis, and the reasons for its conclusion, are set out at [54] to [66], in a section headed "Is teaching Ceroc teaching dance?". Its key findings and conclusions can be summarised as follows:

> (1) The FTT was provided with no direct evidence as to how dance was taught in schools but this was "not directly relevant": [54]. However, it found the evidence from Mr Sant and Mrs Jiggins very helpful: [55]. Mrs Jiggins was a Ceroc enthusiast who taught dance in her school using the Ceroc moves and methodology. Others would have to make use of a "style" of dancing in order to teach dance: [56].
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> (2) In order to qualify as a subject commonly taught in schools "it is necessary that the form of dance in question is of sufficiently broad application to be regarded as the teaching of dance as a generic subject": [57].
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> (3) In all of *Cheruvier*, *Hocking* and *Tranter*, the conclusion of the FTT was that although the particular subject being taught might contribute to the physical and/or mental development of the individual, it was too narrow to be considered as something which was commonly taught in schools: [59]. "The simple question therefore is whether or not Ceroc is such a narrow form of dance that it cannot be regarded as commonly taught in schools": [60].

(4) The FTT referred to a number of documents containing references which were relied on by HMRC: [62]. In relation to the franchise agreements which governed the relationship between CEL and Ms Cook, the FTT considered that it was "usually problematic to consider individual words in documents which were prepared for one purpose, in this case for the purpose of protecting the intellectual property of Ceroc Enterprises Ltd, and to take them out of context and apply them for another purpose in another context". For this reason it did not find HMRC's arguments in relation to this document persuasive: [61], [62]. In relation to HMRC's point that the Ceroc website from 2012 described Ceroc as a fusion of jive and salsa, the FTT did not discuss that point but instead referred to "another, later" marketing document on the website which described Ceroc more broadly: [63], [64].

(5) The FTT then set out its conclusions in the following paragraphs:

> 65. We have found as a matter of fact that the Ceroc "vocabulary" consists of 900 different moves, or at least 500 if we ignore those which are merely minor variations of each other. We have also found that, in its essence, Ceroc is a methodology or an approach to teaching dance.
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> 66. We therefore find that teaching Ceroc should be considered as being the same as teaching dance in a school or university and that the teaching of Ceroc is therefore to be treated as being the teaching of a subject which is commonly taught in schools.

Ground 1: Discussion

27. We have considered HMRC's challenges in relation to Ground 1 with the principles summarised in *Ingenious Games* firmly in mind.

28. In relation to those challenges, Mr Garcia made the overarching submission that since HMRC served no first-hand or direct evidence before the FTT, the FTT was correct to prefer and accept Ms Cook's evidence. In particular, it was right to discount the weight to be afforded to any documentary evidence relied on by HMRC as compared to the direct, first-hand evidence given by and on behalf of Ms Cook and the witnesses for Ms Cook.

29. We do not accept that broad proposition. In relation to the general approach to be taken to evidence, the relevant principles were recently summarised by the Court of Appeal in *Kogan v Martin* [2019] EWCA Civ 1645, at [88]. The "fallibility of human memory" may in certain circumstances mean that in fact "contemporaneous documentary evidence and evidence upon which undoubted or probable reliance can be placed" might be afforded more weight than witness evidence, although the Court of Appeal made clear that that is not a general principle. The FTT needed to consider and weigh the totality of the evidence.

30. The question before the FTT was this. Were the supplies of Ceroc dancing classes made by Ms Cook during the relevant period exempt because they were supplies of private tuition in *dance*, being a subject commonly taught in a school or university, or

were they supplies of private tuition in *a form or style of dance, namely Ceroc,* which is not so taught?

31. The FTT concluded that teaching Ceroc was teaching generic dance and not teaching a form or style of dance. That decision rested on two primary reasons (set out at [65] and [66]). The first was that Ceroc consists of 500 different moves (ignoring minor variations). The second was that Ceroc is a methodology or approach to teaching dance.

32. For the following reasons, which we develop below, we consider that the decision that Ceroc is not a form of dance, as opposed to dance in a generic sense, was not one that was reasonably open to the FTT. First, we do not think that the decision was supported by the two primary reasons given for it. Second, the decision failed to take into account certain of the FTT's primary findings of fact, and matters of common ground. Third, the FTT failed to take into account other relevant evidence and placed reliance on certain factors we consider to be irrelevant.

Primary reasons: Number of moves and methodology

33. The FTT's reasoning at [65] that Ceroc is not a form or style of dance because it consists of 500 moves echoes its conclusion at [23] (set out above) that "given the number of moves" Ceroc could not be regarded as a subset of modern jive as it "incorporates a wide range of moves and techniques from different dance genres and is *therefore* a generic dance technique of broad application" (emphasis added to original).

34. There appear to be two elements to the FTT's reliance on this factor. The first is that the sheer number of moves is inconsistent with Ceroc being a separate style or form. The second is that Ceroc utilises moves and techniques from other dance genres. We consider that neither element provides a reasonable basis for the conclusion that Ceroc is a generic dance technique and not a form or style of dance.

35. First, there was no evidence before the FTT as to the number of moves permitted in any other dance form or style, or in dance forms and styles as a whole. In the absence of such evidence, there was no basis on which the FTT could conclude that the number of permitted moves in Ceroc indicated that it was not a form of dance. There was evidence (cited at [12] of the Decision) that there are only 12 prescribed moves for a waltz, but that is irrelevant since a waltz is a single dance, not a style or form of dance.

36. Second, it is a logical fallacy to conclude that because Ceroc incorporates a wide range of moves from other genres it cannot be its own form or style. This may support the conclusion that Ceroc is not a *subset* of modern jive (as the FTT said), but that misses the point. A style of dance may be a fusion of other styles just as a fusion of two or more styles or forms in other areas (such as cuisine and music) may produce a distinct style or form in its own right. Mr Ellard's evidence was that "…dance styles are borrowed, blended, invented, and combined from every imaginable dance type: from jazz and jive, bollywood and bhangra, samba and zumba, waltzing and

quickstepping, disco and dancehall, to ballet and tap, flamenco and folk, breakdance and swing, and burlesque, hip-hop and street."[4]

37. The second primary reason given by the FTT for its conclusion was that Ceroc is a methodology or an approach to teaching dance. In the passage set out at paragraph 23 above, the FTT found that Ceroc was three things. "First and foremost" it was a brand: [18]. Second, it was "an approach or methodology of teaching dance": [19]. Third, it was "a generic dance technique of broad application" and not a form or style of dance: [20]-[23]. Both of the first two findings were irrelevant to the third. Ms Cook learned the Ceroc methodology in order to provide the tuition, but in making her supplies she did not provide tuition to the public in the approach or methodology of teaching dance. The fact that Ceroc is also a brand and an approach or methodology is irrelevant to the question before the FTT, which was whether Ceroc was a particular form or style of dance, albeit taught under a particular brand and pursuant to a particular methodology.

38. In reaching a decision not supported by the two factors relied on, we consider that the FTT reached a conclusion not reasonably open to it, and made an *Edwards v Bairstow* error of law.

Primary findings of fact and matters of common ground

39. Further, in focusing only on these two factors in reaching its conclusion, the FTT failed to take account of certain of its own primary findings of fact and matters of common ground which provided a strong indication, at least, that Ceroc is a form of dance.

40. Those findings of fact and matters of common ground included the following:

(1) The teaching of Ceroc "uses a form of pairs dancing that incorporates moves from many other styles of dance (eg Ballroom, Salsa, Jive, Hip Hop and Tango)": [8]. It is difficult to square this finding, which acknowledges both that Ceroc is a form of "pairs dancing" and that it incorporates moves from other styles of dance with the conclusion that Ceroc is merely a generic dance technique. It is important in this context to note that there was no evidence before the FTT that "pairs dancing" of any kind was commonly taught in schools, and there was no evidence before the FTT that the other styles of which Ceroc is a fusion[5] were commonly taught in schools.

(2) Ceroc teachers are only allowed to teach the moves specifically set out on the Ceroc intranet: [8]. Again, this indicates that Ceroc is a distinct style or form.

[4] Michael Ellard First Witness Statement paragraph 26.

[5] As noted below, Ceroc's own website from the relevant period described Ceroc as a fusion of jive and salsa.

(3) There are opportunities to gain medals/awards for achievement "at Ceroc": [25]. Ceroc dancers can undertake medal tests for Ceroc at bronze, silver and gold levels and are graded for their performance in these tests. Mr Ellard presented detailed evidence as to the medal tests.[6] The Ceroc medal programme was compiled in association with the International DanceSport Judges and Trainers Association. Mr Ellard and Mr Sant also gave evidence as to the annual world Ceroc Championship.[7] Viewed objectively, this suggests that Ceroc was a specific form or style of dance and not generic dance. The FTT wrongly concluded (at [25]) that because the medals and awards were featured in the Ceroc syllabus relating to workshops and advanced studies, and these were not provided by Ms Cook, "we are not therefore concerned with the more extensive syllabus". The issue was the relevance of these points to what Ceroc is. They did not cease to be relevant because they were not provided in Ms Cook's classes.

(4) It had been hoped to take Ceroc into schools but this had thus far been unsuccessful: [26].

(5) There was no evidence that Ceroc was commonly taught in schools.

41. We accept, as Mr Garcia submitted, that a fact-finding tribunal is not required to identify each piece of evidence it has relied on or taken into account. It is, however, in each case a question of fact and degree. The above findings and matters of common ground provided a sufficiently strong indication that Ceroc is a form of dance that they needed to be addressed by the FTT in reaching the opposite conclusion.

Failure to take account of relevant evidence

42. In the course of its reasoning in support of the decision that Ceroc is generic dance, the FTT did refer to the following two pieces of documentary evidence which indicated to some extent that Ceroc is a form of dance, but rejected them for the wrong reasons:

(1) The terms on which Ms Cook was permitted to teach Ceroc were governed by a franchise agreement between CEL and Ms Cook. This defined "Partner Dance" as "the dance form" taught by trainers of the Ceroc Teaching Association, and referred to "the style of dance"[8]. It precluded teachers from teaching "any other dance form" without prior approval[9]. It referred to "the dance form known as Ceroc"[10]. The FTT (at [62]) dismissed the relevance of these references on the basis that they were prepared in a different context, namely the protection of CEL's intellectual property. That was an error for a number of reasons. As Mr

[6] Ibid paragraphs 59 to 66.

[7] Ibid, paragraph 10, and Tim Sant Witness Statement at paragraph 21.

[8] Contract Agreement dated 1 September 2009 Clause 1.1.

[9] Contract Agreement Clause 7.5.

[10] Contract Agreement Clause 7.10.

Garcia conceded, there was no evidence that that was the purpose of the document. More importantly, the franchise agreement read as a whole does not merely relate to the protection of intellectual property, even if that were a legitimate basis for dismissing its relevance. It was, as HMRC contend, the foundation document on which Ms Cook's business was based and under which it was regulated. It defined the services which she was permitted to supply. The references on which HMRC relied were material, and the FTT was wrong to dismiss them.

(2) The official Ceroc website for 2012 (which fell within the relevant period) stated as follows:

> What is Ceroc? Ceroc is a fusion of jive and salsa, fun and easy to learn. It is the original, largest and fastest growing partner dance in the UK.

This was highly relevant evidence on the critical question "what is Ceroc?". The FTT referred briefly to this at [63], but did not explain why it considered it irrelevant. Instead, it chose to set out an extract from what it described as "another, later, marketing document on the website". In fact, the extract was from the Ceroc website from 2017, some five years after the relevant period. The FTT did not explain why this extract, which in any event was irrelevant to the period under appeal, countered the language relied on by HMRC from the relevant (2012) website. The extract set out by the FTT itself referred to Ceroc skills as transferable to "other partner dance styles", implying Ceroc was itself a dance style.

Irrelevant factors taken into account

43. We have already explained why we consider the primary matters relied on by the FTT (the number of dance moves, and the fact that Ceroc is also a teaching methodology) and the statements on the Ceroc website in 2017 are irrelevant to the decision the FTT was required to make.

44. There is a further factor on which the FTT appears to have placed reliance which, on examination, was not relevant to the question of what Ceroc is. The FTT set out in some detail (at [24]-[29]) the evidence presented by Mr Sant as to the similarities between the Ceroc syllabus for Beginners' Classes (as taught by Ms Cook) and the Key Stage 3 dance syllabus taught in schools. The Ceroc syllabus identifies the "skills" developed by various "activities" and compares that to the applicable Key Stage 3 targets. Having described the factual position in some detail, the Decision does not discuss or disclose what significance it was thought to have by the FTT, but the numerous references to comparability in the relevant passage suggest that the FTT saw the similarities as supporting its conclusion (at [66]) that "teaching Ceroc should be considered as being the same as teaching dance in a school or university".

45. However, the listed skills are too abstract and highly generalised to assist in determining the question of what Ceroc is. They refer to skills such as alignment, balance, stamina, rhythm, mobility and coordination. The fact that there is some correlation between these skills and the Key Stage 3 targets is not relevant to whether

or not Ceroc is dance as commonly taught in schools. Organised physical activities (such as the kickboxing in *Premier* or the belly-dancing in *Cheruvier*) will often develop the same skills, described at this level of abstraction, as activities which are commonly taught in school or university, but that does not tell us whether those organised physical activities are themselves subjects or activities commonly taught in school or university.

46. To the extent that the FTT took into account the syllabus comparison in reaching its decision, that was an error of law, because that factor was not relevant to the determination of the issue.

Ground 1: Conclusion

47. We have concluded that the FTT made errors of law in reaching its decision that Ms Cook's classes involved a supply of tuition in dance and not of tuition in a form or style of dance, namely Ceroc. Having found that the making of the decision involved the making of an error on a point of law, section 12(2) TCEA 2007 provides that we may (but need not) set the Decision aside. It is clear in our opinion that it must be set aside.

48. We must then decide whether to remit the decision for reconsideration by the FTT, or remake it. Mr Brinsmead-Stockham contended that we have the necessary materials to remake the decision, and Mr Garcia accepted that contention. Since we have available and have considered the witness evidence produced by and on behalf of Ms Cook and the material documents, we consider that we can and should remake the decision.

49. It was agreed that dance is a subject commonly taught in schools. It was never Ms Cook's case, and there was no evidence, that if Ceroc is a distinct style or form it is commonly taught in schools. The question is, therefore, whether Ceroc is a distinct style or form of dance.

50. Taking into account all the relevant evidence (much of which we have already referred to above), we consider it clear that Ceroc is a distinct form or style of dance. We reach that conclusion essentially for the reasons advanced by HMRC, both before the FTT and in this appeal. In particular, we have taken into account the following points:

> (1) For the reasons set out above, the fact that Ceroc is also a brand and a methodology, the fact that it includes 500 moves, and the comparison of the Ceroc syllabus with the Key Stage 3 school syllabus do not mean that Ceroc is dance in generic form rather than a style or form of dance.
>
> (2) The evidence taken as a whole clearly indicates that Ceroc is an activity in its own right. In addition to the language used in the documentary evidence we have referred to, the teaching of Ceroc is controlled, Ceroc is advertised as something distinct, it has a permitted list of moves, and there are medals and championships in Ceroc. All of those characteristics apply to Ceroc as a distinct activity.

(3) The existence and enforcement of a permitted list of moves is conceptually consistent only with Ceroc as a distinct form or style of dance.

(4) The existence of medal tests for and championships in Ceroc indicates that Ceroc is its own style or form of dance. As the FTT found (at [25]) there were opportunities to gain medals/awards "for achievement at Ceroc".

(5) The Ceroc website for 2012 describes Ceroc as "the original, largest and fastest growing partner dance in the UK" and "a fusion of jive and salsa". This indicates that Ceroc is a distinct form or style of dance.

(6) The franchise agreement set out the contractual terms on which Ms Cook was permitted to give her classes. As discussed at paragraph 42 above, it contained a number of references to Ceroc as a form or style of dance.

51. Finally, as noted above, Ceroc is a form of pairs dancing (and only pairs dancing), and is a fusion of jive and salsa. Not only was there no evidence that Ceroc was commonly taught in schools, there was no evidence that pairs dancing was commonly taught in schools and there was no evidence that jive or salsa were commonly taught in schools. It would be surprising to conclude that Ceroc is commonly taught in schools or universities when neither its constituent elements nor any form of pairs dancing is so taught.

52. Our conclusion means that the relevant supplies were not exempt under the private tuition exemption.

53. In light of this, it is unnecessary to consider Grounds 2 or 3. However, since we heard arguments on them and they raise important issues, we will set out our conclusions on those grounds.

Ground 2: the application of the "purely recreational" restriction

54. The FTT recorded that the parties were agreed that the FTT were required to consider the actual supplies being made by Ms Cook and to determine whether they were "purely recreational": [68]. The FTT did so, and found that the supplies made by Ms Cook were not purely recreational. That is the subject matter of Ground 3.

55. The FTT, however, reached the view that in fact what is required by *Haderer* is that the subject or activity taught in schools should not be purely recreational: [73]. If that interpretation was correct, the FTT considered that since dance as taught in schools was not purely recreational, the test was clearly satisfied: [75]-[78].

56. HMRC appealed against that conclusion. In the event, both parties were agreed that the FTT had erred in law in reaching its preferred conclusion as to the activity which must not be purely recreational. Mr Brinsmead-Stockham contended that it was necessary in order for the exemption to apply that neither the actual supply nor the

subject or activity taught in schools was purely recreational. Mr Garcia considered that the focus of the exemption was on the actual supply.

57. We agree with the parties that the FTT's preferred interpretation of the requirement in *Haderer* was wrong in law. It cannot have been the intention of either Advocate General Sharpston or the CJEU that a supply by an individual of private tuition which was accepted to be purely recreational should fall within the exemption. The Advocate General's opinion is admittedly expressed more clearly on this point than the decision of the CJEU. In relation to this appeal, therefore, if Ms Cook's supplies had in fact been purely recreational, they would not be exempt simply because dance as commonly taught in schools was not purely recreational.

58. HMRC's appeal under Ground 2 therefore succeeds. Since we are disagreeing with the view expressed by the FTT we add the following comments.

59. The concept that the private tuition exemption does not apply if the relevant activities are "purely recreational" originates in the opinion of Advocate General Sharpston in *Haderer*[11]. At [89] of her opinion, the Advocate General stated as follows:

> 89. The concept of school or university education within the meaning of the exemption must be given a Community definition. In my view, that definition should be relatively broad. If it were not, private tuition of many kinds designed to provide support for schoolchildren might find itself subject to VAT, contrary to the apparent intention of the exemption. There must of course be a defining line between exempt tuition and purely recreational activities of no educational value, but any subject or activity in which instruction is commonly given in schools or universities must in my view fall within the scope of the exemption, regardless of whether it follows a strictly defined programme or curriculum.

60. The CJEU in *Haderer* expressed the restriction in the following terms:

> 26. While it is unnecessary to produce a precise definition in this judgment of the Community concept of 'school or university education' for the purposes of the VAT system, it is sufficient, in this case, to observe that that concept is not limited only to education which leads to examinations for the purpose of obtaining qualifications or which provides training for the purpose of carrying out a professional or trade activity, but includes other activities which are taught in schools or universities in order to develop pupils' or students' knowledge and skills, provided that those activities are not purely recreational.

61. In *A&G*, the CJEU repeated (at [22] and [23]) that activities which are "purely recreational" did not fall within the private tuition exemption.

62. Since the "purely recreational" restriction is judge-made, and not contained in the PVD, it is important to avoid interpreting it as if it were a statute. With that caveat,

[11] [2008] STC 2145.

and recognising that the point does not arise for determination in this case, we make the following observations in relation to the operation of the exclusion:

(1) It is conceptually possible for a subject to be "taught" in schools but nevertheless to be purely recreational. After-school chess clubs or teacher-led games at playtime, for example, might involve some element of tuition, but not as part of the relevant curriculum.

(2) It is also conceptually possible for a subject which is commonly taught in schools on a basis which is not purely recreational to be the subject of private tuition in a way which is purely recreational. An example would be a history quiz in which a quizmaster imparts knowledge to participants but purely for recreational purposes.

(3) Accordingly, we agree with HMRC that the "purely recreational" qualification applies both to the subject taught in schools and to the particular supply under consideration.

(4) A determination of whether or not an actual supply is purely recreational must be answered by reference to all the circumstances of that supply. The extent to which a supply comprises tuition (namely the transfer of skills or knowledge) is relevant but not determinative.

Ground 3: whether Ms Cook's classes were "purely recreational"

63. By Ground 3 HMRC appeal against the FTT's conclusion on the facts that the relevant supplies made by Ms Cook were not excluded from the exemption as being purely recreational. Again, it is unnecessary for us to determine this issue, and it raises no separate point of principle following our determination of Ground 2, so we will do so briefly. As this ground is an *Edwards v Bairstow* challenge, it will succeed only if it can be shown that the FTT's decision erred in one of the ways described at paragraph 18 above.

64. We deal separately below with what were called Freestyle or Party Evenings organised by Ms Cook approximately once a month.

65. HMRC's central submission is that there was no evidential basis before the FTT to justify its critical finding in respect of the purely recreational question that "the transfer of knowledge and skills was a very significant part of what happened at a Ceroc event": [71]. That, say HMRC, was an *Edwards v Bairstow* error.

66. Mr Brinsmead-Stockham argued that as a result of numerous evidential points the only reasonable conclusion for the FTT to have reached was that Ms Cook's evenings were purely recreational. Those points, together with our summary conclusions on each of them, were as follows:

(1) The fact that Ceroc was a hobby that individuals took part in during their free time.

To the extent that this was established by the evidence, we consider it irrelevant to the purely recreational question. There will be a number of

different motivations for different individuals in receiving private tuition. The private motivations of those receiving tuition, or the time of day when it is received, are not relevant factors to its characterisation for the purposes of the exemption.

(2) The social nature of the classes. This was clear from the 2012 website, the advertising of Ceroc evenings and the information provided to teachers, and supported by the finding that most venues at which Ms Cook taught had a licensed bar.

We accept that there was ample evidence as to the social nature of Ms Cook's classes. However, the fact that a class might be enjoyable or involve socialising with others does not mean that it is "purely" recreational, but rather that it has a recreational element.

(3) The fact that Ms Cook's classes involved no academic content but consisted solely of practical dance tuition.

We do not accept that an absence of academic content in tuition makes it any more "recreational".

(4) The limited amount of practical instruction in each class, because more than half of each session was taken up by a freestyle session.

We agree that the transfer of knowledge and skills taking place in each class was concentrated largely in the first 75 minutes of the class. That, however, would not make the sessions "purely" recreational.

(5) The level of dancing taught. This was found most closely to reflect the Key Stage 3 syllabus, which is taught to 11-14 year olds. Most customers were unlikely to attend to learn such skills as opposed to attending an evening for social or recreational reasons.

This is mere supposition. In any event, it is not unusual for private tuition to adults to be given which relates to a skill level (for instance in a language) which might be achieved at school age.

(6) The absence of a serious course of study.

While we accept that the presence of a serious course of study in private tuition would point strongly against the tuition being purely recreational, its absence is not of significant weight in the context of this case.

(7) The lack of any external syllabus or examinations.

Similarly, while we accept that an external syllabus and examinations would be indicators that tuition was not purely recreational, their absence is of little weight in this case.

(8) The only direct effect of the tuition given in the classes was to enable the participants to carry on the recreational activity itself.

We have already noted that the private motivations of the individuals taking part are not relevant. We do not accept that the evidence established that the only motivation of those taking part was to carry on the

recreational activity itself. It is possible, for example, that individuals took part with the intention of transferring the skills learned to another activity. In any event, we do not accept that tuition would be for purely recreational purposes simply because none of the students intend to transfer the skills learned to any other activity.

67. In summary, while we consider that certain of these factors do suggest that the evenings had a recreational aspect, they fall well short of showing that the only reasonable conclusion was that the evenings were "purely" recreational.

68. We consider that the decision reached by the FTT on this issue was one which was reasonably open to it on the facts, and entailed no *Edwards v Bairstow* error. Save to the extent discussed in the following paragraphs, HMRC's appeal on Ground 3 is therefore dismissed.

69. At [13] of the Decision, the FTT stated as follows:

> 13. Ms Cook also organised what were termed Freestyle or Party Evenings approximately once a month in each area in which she taught. We were not provided with any substantial evidence as to what happened at these events. There was no formal tuition at these events but HMRC did not seek to separate out the treatment of these supplies from that of the normal evening classes and neither will we.

70. There was a clear distinction between the Freestyle or Party Evenings and Ms Cook's other classes in the relevant period because it was common ground that the former did not include any formal tuition. Mr Garcia sought to persuade us that HMRC had made a concession before the FTT that the Freestyle or Party Evenings were not to be treated differently in relation to the purely recreational exclusion from the other evenings. However, we consider that in fact HMRC's position had simply been that all the evenings were purely recreational, not that they all stood or fell together on this point. Accordingly, the fact that it did not advance any separate argument in relation to the Freestyle or Party Evenings does not mean that it conceded that the conclusion in respect of them would follow inexorably from a negative answer (from HMRC's perspective) in relation to the other sessions.

71. We therefore consider that the FTT fell into error in not considering separately whether or not the Freestyle and Party Evenings were purely recreational. There is, however, no substantial evidence before us as to what happened at these evenings, so, had it been necessary for the purposes of this appeal, we would have remitted this aspect to the FTT for determination. In view of our conclusion on Ground 1 that is unnecessary.

Disposition

72. HMRC's appeal on Ground 1 is allowed. The Decision is set aside and remade with the result that the relevant supplies were not exempt from VAT under the private tuition exemption.

MR JUSTICE ZACAROLI

JUDGE THOMAS SCOTT

RELEASE DATE: 28 January 2021