Neutral Citation: **[2025] UKUT 00101 (TCC)**

Case Number: UT/2023/000073

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Rolls Building
London EC4A 1NL

Value Added Tax – exemption for supplies of education – Article 132(1)(i) Principal VAT Directive – whether properly implemented by Group 6 Schedule 9 VATA 1994 – whether definition of eligible body in Note (1) Group 6 breaches principle of fiscal neutrality – Item 5B Group 6 – whether consideration for courses supplied by two appellants to students who were eligible for student loans was ultimately a charge to funds provided by the Secretary of State – whether one appellant which was an eligible body pursuant to Note 1(f) by virtue of teaching English as a foreign language was entitled to exemption for all supplies of education

Heard on: 11 and 12 December 2024
Judgment date: 24 March 2025

Before

MR JUSTICE RAJAH
JUDGE GREG SINFIELD

Between

(1) ST PATRICK'S INTERNATIONAL COLLEGE LIMITED
(2) LONDON COLLEGE OF CONTEMPORARY ARTS LIMITED
(3) INTERACTIVE MANCHESTER LIMITED

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS
Respondents

Representation:

For the Appellant: Nicola Shaw KC and Ben Blades, counsel, instructed by PricewaterhouseCoopers LLP

For the Respondents: Raymond Hill and Laura Inglis, counsel, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

DECISION

INTRODUCTION

1. The issue in this appeal is whether certain supplies of education made by the Appellants should have been treated as exempt for VAT purposes by virtue of Article 132(1)(i) of Council Directive 2006/112/EC ('the Principal VAT Directive' or 'PVD') and/or Group 6 of Schedule 9 to the Value Added Tax Act 1994 ('VATA 1994'). It was common ground that Article 132(1)(i) is directly effective and that the Appellants are entitled to rely on it if the United Kingdom has failed to implement it properly; in particular if Group 6 is in breach of the principle of fiscal neutrality. In brief, the Appellants say that the domestic provisions do not properly implement Article 132(1)(i) and their supplies should be treated as exempt. In the alternative, the Appellants contend that their supplies are exempt under provisions in Group 6 of Schedule 9.

2. The Appellants were represented by Ms Nicola Shaw KC with Mr Ben Blades. Mr Raymond Hill and Ms Laura Inglis appeared for HMRC. We are grateful to counsel for their clear submissions, both written and oral, on behalf of the parties.

3. For the reasons set out below, we have decided that the Appellants' appeals must be dismissed.

LEGISLATION

4. So far as material, the PVD provided:

> "Article 131
>
> The exemptions provided for in chapters 2 to 9 shall apply without prejudice to other Community provisions and in accordance with conditions which the Member States shall lay down for the purposes of ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse.
>
> Chapter 2
>
> Exemptions for certain activities in the public interest
>
> Article 132
>
> 1. Member States shall exempt the following transactions:
>
> …
>
> (i) the provision of children's or young people's education, school or university education, vocational training or retraining, including the supply of services and of goods closely related thereto, by bodies governed by public law having such as their aim or by other organisations recognised by the Member State concerned as having similar objects;
>
> …
>
> Article 133
>
> Member States may make the granting to bodies other than those governed by public law of each exemption provided for in points (b), (g), (h), (i), (l). (m) and (n) of Article 132(1) subject in each individual case to one or more of the following conditions:
>
> (a) the bodies in question must not systematically aim to make a profit, and any surpluses nevertheless arising must not be distributed, but must be assigned to the continuance or improvement of the services supplied …"

5. Article 132(1)(i), like all exemptions, must be interpreted strictly. That does not mean, however, that the terms used to specify the exemptions referred to in Article 132 should be construed in such a way as to deprive them of their intended effect (see Case C-612/20 *Happy Education SRL v Direcția Generală Regională a Finanțelor Publice Cluj-Napoca* ('*Happy Education*') at paragraph 28). The objective of the exemption is to facilitate access to educational services by avoiding the increased costs that would result if the services were subject to VAT (see Case C-287/00 EC *Commission v Federal Republic of Germany* ('*EC v Germany*') paragraph 47 and Case C-319/12 *Minister Finansów v MDDP sp z oo Akademia Biznesu sp komandytowa* ('*MDDP*') paragraph 26).

6. The exemption under Article 132(1)(i) is subject to two cumulative conditions (see *Happy Education* paragraph 29):

> (1) a supply condition - the supply must be the provision of children's or young people's education, school or university education, vocational training or retraining, including the supply of closely related goods and services; and
>
> (2) a supplier condition – the service must be provided by bodies governed by public law which have the provision of such education and training as their aim or by other organisations recognised by the Member State concerned as having similar objects.

7. It was common ground that the Appellants supplied education, and thus satisfied the supply condition in Article 132(1)(i), and had similar educational aims to universities, colleges of universities and FECs but they were not recognised as such by the United Kingdom. In relation to the supplier condition, it is for the Member State to lay down the rules in accordance with which recognition may be granted to organisations that are not governed by public law in so far as the conditions are not specified in article 132(1)(i). The Member States have a discretion in that respect (see *Happy Education* paragraph 31). In exercising that discretion, Member States must comply with the principles of European Union law, in particular the principle of equal treatment which, in the field of VAT, takes the form of the principle of fiscal neutrality (see *Happy Education* paragraph 32).

8. Article 132(1)(i) is implemented in United Kingdom legislation by the following provisions of VATA 1994. Section 31 VATA 1994 provides that supplies of goods or services described in Schedule 9 are exempt. The education exemption is found in Group 6 of Schedule 9. The supply condition is implemented by the various Items of Group 6 which include:

> "1 The provision by an eligible body of –
>
> (a) education
>
> (b) …or
>
> (c) vocational training.
>
> …
>
> 5B The provision of education or vocational training … to persons who are –
>
> (a) aged under 19,
>
> (b) aged 19 or over, in respect of education or training begun by them when they were aged under 19,
>
> …
>
> to the extent that the consideration payable is ultimately a charge to funds provided by the Secretary of State."

9. The supplier condition is implemented by Note 1 to Group 6 which defines "eligible body" for the purposes of Group 6. So far as material, the eligible bodies include:

"…

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

(c) an institution -

(i) falling within section 91(3)(a) … of the Further and Higher Education Act 1992;

…

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

10. The application of Note 1(f) is subject to Note 2 to Group 6:

"A supply by a body, which is an eligible body only by virtue of falling within Note 1(f), shall not fall within this Group insofar as it consists of the provision of anything other than the teaching of English as a foreign language."

11. It was also common ground before us that the Appellants were not United Kingdom universities, colleges of such universities or FECs.

BACKGROUND

12. The FTT set out its detailed findings of fact at [16] – [145]. This is an appeal on point of law (section 11 Tribunals Courts and Enforcement Act 2007) and, save for the points discussed at paragraphs 54 to 57 below, the FTT's findings of fact are not challenged in this appeal. It is, therefore, sufficient for the purposes of this appeal to summarise the facts as follows.

13. The Appellants were providers of higher education. Higher education is education which is part of an undergraduate or postgraduate degree course. Higher education includes Higher National Certificates ('HNCs') and Higher National Diplomas ('HNDs'), also referred to as Level 4 and Level 5 qualifications, as well as degree courses, which are Level 6 qualifications. An HNC is equivalent to the first year of a degree course and an HND is equivalent to the second year of a degree course. Further education is post-secondary school education which does not include Level 4, 5 or 6 qualifications.

14. Providers of higher education include:

(1) Higher Education Institutions ('HEIs'), namely universities, colleges of universities, higher education corporations and other bodies designated by the Secretary of State for Education;

(2) Further Education Corporations ('FECs') which also offer higher education courses; and

(3) Alternative Providers ('APs'), ie institutions offering higher education which are not HEIs or FECs:

Some providers of higher education have degree awarding powers ('DAPs') and/or university title, but not all do. The Appellants were APs which did not have DAPs or university title.

15. The main source of funding for all higher education providers was tuition fee funding. In many cases, tuition fees were paid by students using student loans provided by the Student Loan Company ('SLC'). Student loans were available in respect of eligible courses provided by designated providers and designated courses provided by APs. HEIs were automatically treated as designated providers and all their eligible courses qualified for SLC funding. APs could apply for specific course designation and, if granted, students on those courses would qualify for SLC funding.

16. During the period relevant to this appeal, the Appellants provided higher education as follows:

(1) St Patrick's International College Limited ('SPIC') operated a further and higher education college in London supplying a range of HNCs and HNDs in business management, tourism and hospitality, technology and health and social care.

(2) London College Of Contemporary Arts Limited ('LCCA') was a provider of further and higher education courses in fashion, visual arts, media, business and hospitality in partnership, from 2016, with South Thames College and Walsall College, both of which were providers of further and higher education.

(3) Interactive Manchester Limited ('IMAN') offered undergraduate and postgraduate degree courses as well as HNC and HND courses, professional programmes and certain English language courses. It was divided into four schools: an accountancy school, a business school, an English language school and a vocational school. Until 2016, IMAN also provided courses in collaboration with the University of Wales ('UoW'), London Metropolitan University ('LMU') and Grenoble Graduate School of Business ('Grenoble').

17. The Appellants considered that all or some of the supplies made by them should have been treated as exempt for the purposes of VAT. The Respondents ('HMRC') disagreed and issued various decisions and assessments for VAT relating to supplies made by the Appellants in the period 1 December 2012 to 6 August 2017. In 2019, the Appellants appealed to the First-tier Tribunal ('FTT').

18. There were originally five issues in the FTT but the FTT treated the first two as a single issue. In summary, the four issues were:

(1) whether the UK's implementation of Article 132(1)(i) PVD breached the EU principle of fiscal neutrality because the Appellants' supplies of education were treated differently for VAT even though they were similar to supplies of education made by universities, colleges of universities and FECs;

(2) whether supplies of education by SPIC and LCCA were exempt in any event under Item 5B of Group 6 of Schedule 9 VATA 1994 because the consideration payable for those courses was ultimately a charge to funds provided by the Secretary of State and, if so, whether the age restrictions in Item 5B were discriminatory and therefore in breach of EU law;

(3) whether IMAN was a college of a UK university, namely UoW and LMU, and thus an "eligible body" within Note 1(b) of Group 6 of Schedule 9 VATA 1994; and

(4) whether the fact that IMAN was an "eligible body" within Note 1(f) of Group 6 of Schedule 9 VATA 1994 because it taught English as a foreign language meant that all of its supplies of education were exempt.

19. In a decision released on 3 May 2023 with neutral citation [2023] UKFTT 00408 (TC) ('the Decision'), the FTT (Judge Jonathan Cannan) dismissed the Appellants' appeals, having found against them on all four issues. References in this decision to paragraphs in the Decision are in the form '[*x*]'.

20. In relation to issue (1), the FTT held that the Court of Appeal's decision in *Finance & Business Training Limited v HMRC* [2016] EWCA Civ 7 ('*FBT CA*') established that Article 132(i) PVD was validly implemented in the UK by Notes 1(b) and 1(c) to Group 6 of Schedule 9 VATA 1994 and the UK was entitled to limit the exemption to specified bodies, namely universities, colleges of universities and FECs (see [156]). The FTT held, however, that *FBT*

CA did not prevent the Appellants arguing that the principle of fiscal neutrality required that they be treated in the same way as the institutions mentioned in Notes 1(b) and 1(c) (see [157]). The FTT accepted HMRC's submission that it is inherent in Article 132(1)(b) that similar or identical supplies of education will be treated differently and be taxable or exempt by reference to the supplier condition, ie that the supply must be made by a university, college of a university or FEC. The FTT concluded that the focus is not only on whether the supplies were similar from the perspective of the consumer, but also on whether the suppliers were comparable (see [175]). The FTT found that excluding the Appellants from exemption under Group 6 Schedule 9 did not breach of the principle of fiscal neutrality because the Appellants were not sufficiently similar to universities, colleges of universities and FECs. The FTT found that the regulatory regime for universities and colleges of universities was significantly stronger than the regulatory regime for APs with designated courses and these differences were not merely differences of detail, but differences of degree and substance (see [168] and [176]). The FTT found that the Appellants were not comparable to FECs because they were required to be charities by section 22A of the Further and Higher Education Act 1992 ('FHEA'), with the result that they were non-profit making organisations, whereas the Appellants were not charities and were profit making institutions (see [177]).

21. In relation to issue (2), the FTT held that the supplies by SPIC and LCCA were not exempt by virtue of Item 5B of Group 6 of Schedule 9 VATA 1994 for three reasons:

(1) The funds provided by the SLC did not fall within the phrase "ultimately a charge to funds provided by the Secretary of State" in Item 5B viewed in its historical context (see [188]);

(2) the word "charge" in Item 5B implied a contractual liability on the part of the Secretary of State to pay the consideration payable to SPIC and LCCA for the courses and there was no such obligation in this case (see [189]); and

(3) the VAT liability of the supply must be determined at the time of the supply and, at that time, it could not be known whether the student loan would be repaid and thus whether the Secretary of State would bear the cost of the education (see [191]).

In view of its conclusion, the FTT did not need to address the age discrimination claim.

22. In relation to issue (3), the FTT held that IMAN was not a college of UoW or LMU. There was no appeal against the FTT's decision on that issue and we do not consider issue (3) any further in this decision.

23. It was common ground that IMAN was an "eligible body" within Note 1(f) of Group 6 of Schedule 9 VATA 1994 to the extent that it provided teaching of English as a foreign language ('TEFL'). The question raised by issue (4) was whether its status meant that all of its supplies of education or training should be exempt. The FTT considered that it was bound by the decision of Richards J, as he then was, in *HMRC v Pilgrims Language Courses Ltd* [1998] STC 784 ('*Pilgrims*') which decided that the combined effect of Notes 1 and 2 to Group 6 meant that only IMAN's supplies of TEFL were exempt (see [247]).

24. The Appellants now appeal against the FTT's conclusions in relation to issues (1), (2) and (4) above.

25. In relation to issue (1), the Appellants contend that the FTT erred in concluding that they were not entitled to rely on the direct effect of Article 132(1)(i) PVD on the ground that the United Kingdom had implemented that provision in domestic law in a way that breached the principle of fiscal neutrality. In particular, the FTT erred in concluding that the Appellants were not objectively comparable either to universities and colleges of universities on account

of the regulatory regime to which such bodies are subject or to FECs on the basis that such bodies are required to be charities.

26. In relation to issue (2), SPIC and LCCA contend that the FTT erred in concluding that their supplies were not exempt from VAT by virtue of Item 5B of Group 6 of Schedule 9 VATA 1994. In particular, the FTT erred in restricting the scope of Item 5B by reference to the predecessor legislation and erred, in any event, in concluding that the word "charge" implied a contractual liability resting with the Secretary of State.

27. In relation to issue (4), IMAN contends that the FTT erred in concluding that IMAN's supplies were not exempt under Item 1(a) of Group 6 of Schedule 9. The FTT should have held that, as IMAN was an "eligible body" for TEFL, it was implicit that it was an organisation recognised by the United Kingdom as having similar objects to bodies governed by public law. The Appellants submitted that, once a provider has been recognised by a Member State as having such objects, Article 132(1)(i) requires all of its supplies of education to be exempt.

DISCUSSION

Did Group 6 of Schedule 9 VATA 1994 breach the principle of fiscal neutrality?

28. It was common ground before the FTT and us that the Appellants are entitled to rely on the direct effect of Article 132(1)(i) PVD if the way that it had been implemented in the United Kingdom breached the principle of fiscal neutrality. The Appellants contended that the FTT erred in concluding that Group 6 of Schedule 9 VATA 1994 was not in breach of the principle of fiscal neutrality. In short, the issue is whether treating APs, such as the Appellants, differently from universities, their colleges and FECs was contrary to the principle of fiscal neutrality. As stated above, the FTT found that the Appellants were not comparable to universities and colleges of universities because the latter were subject to a significantly stronger regulatory regime. The FTT found that the Appellants were not comparable to FECs because they were required to be charities and thus non-profit making which the Appellants were not. As they were not comparable, the FTT held that the United Kingdom was entitled to exclude them from the exemption in Group 6 of Schedule 9.

29. In summary, Ms Shaw submitted that in reaching its decision on this issue, the FTT made three errors, namely:

> (1) it failed to consider whether the Appellants were materially the same as universities, colleges of universities and FECs from the point of view of the typical consumer;
>
> (2) it was wrong, in the *Edwards v Bairstow* [1954] AC 14 sense, to rely on the evidence of one witness, Ms Lapworth, and gave insufficient weight to other evidence in finding that that there were substantive differences between the regulatory requirements for APs with designated courses and those for providers with DAPs/university title; and
>
> (3) the reasons given for finding that the regulatory regime for providers with DAPs or university title was significantly more stringent were incorrect or inadequate.

30. The first sub-issue in relation to this ground raises the question of what is the correct approach to determining whether there is a breach of the principle of fiscal neutrality where there is a supplier condition. The FTT applied a test of comparability (see [175]) and concluded that the Appellants were not sufficiently similar to universities and colleges of universities based on the applicable regulatory regimes or to FECs based on their charitable status. Ms Shaw contended that the correct test required the FTT to consider the issue of comparability from the perspective of the typical consumer rather than by reference to the regulatory regimes that applied to the different bodies. Viewed in that way, any differences in the regulatory regime applicable to the Appellants and to other providers eg those which had DAPs and

university title, would be irrelevant as they would not be regarded as significant by the typical consumer as the Appellants offer the same courses, leading to the same qualifications and qualify for the same SLC funding as those other providers. The Appellants did not dispute that the United Kingdom was entitled to recognise universities, colleges of universities and FECs as organisations with similar objects to providers governed by public law for the purposes of the exemption. The Appellants' case was that the United Kingdom was also required to recognise the Appellants because they also provided education which qualified for public funding and are comparable to universities, colleges of universities and FECs. Failure to recognise the Appellants was a breach of the principle of fiscal neutrality.

31. Both counsel referred us to Case C-363/05 *JP Morgan Fleming Claverhouse Investment Trust Plc v HMRC* ('*JP Morgan*') at [44] - [48] which stated the principle of fiscal neutrality precludes economic operators carrying out materially similar transactions from being treated differently for VAT purposes. Mr Hill emphasised that the purpose of the principle was to eliminate distortions of competition. The test for determining whether the supplies in question are sufficiently similar is whether, from the point of view of the consumer, differences between them do not have a significant influence on the choice of the consumer and they meet the same needs of the consumer (see Joined Cases C-259/10 and C-260/10 *Rank Group Plc v HMRC* ('*Rank*') at [36]).

32. Ms Shaw submitted that, from the point of view of the typical consumer, there was no material difference between supplies of 'designated' HND and HNC courses by APs such as the Appellants and supplies of equivalent HND and HNC courses by universities, colleges of universities or FECs. That may be so but, as stated above, the issue is whether the typical consumer's point of view is the right test where there is a 'supplier condition'.

33. Neither *JP Morgan* nor *Rank* concerned a supplier condition although there was a reference to it in paragraph 50 of *Rank*:

> "… in certain exceptional cases, the court has accepted that, having regard to the specific characteristics of the sectors in question, differences in the regulatory framework or the legal regime governing the supplies of goods or services at issue, such as whether or not a drug is reimbursable or whether or not the supplier of a service is subject to an obligation to provide a universal service, may create a distinction in the eyes of the consumer, in terms of the satisfaction of his own needs."

34. The mention of a universal service was a reference to Case C-357/07 *TNT Post UK Ltd v HMRC* ('*TNT*') which concerned whether the provision of postal services by TNT (a private provider not subject to any regulation) was sufficiently similar to the provision of postal services by Royal Mail (which was required to provide a universal postal service). Ms Shaw submitted that the reference to *TNT* in paragraph 50 of *Rank* showed that the CJEU considered that the approach to assessing similarity of suppliers is exactly the same as the approach to assessing similarity of supplies ie from the point of view of the consumer. We do not accept that submission. The relevant exemption in *TNT* (now Article 132(1)(a)) contains a supplier condition in that the exemption applies to "public postal services" which the CJEU interpreted as meaning operators, whether they are public or private, who undertake to provide all or part of the universal postal service in a Member State. The CJEU made clear that the consideration of fiscal neutrality involved comparing not only the services supplied but also the context. At paragraphs 38 and 39, the CJEU said:

> "38. As the Advocate General observes in para 63 of her opinion, the assessment of the comparability of the services supplied hinges not only on the comparison of individual services, but on the context in which those services are supplied.

> 39. As the facts in the main proceedings demonstrate, on account of the obligations described in para 12 of this judgment, which are required under its licence and connected with its status as the universal service provider, an operator such as Royal Mail supplies postal services under a legal regime which is substantially different to that under which an operator such as TNT Post provides such services."

35. Ms Shaw also submitted that paragraph 50 showed that the ECJ regarded *TNT* as an exceptional case. In support of that, she referred to paragraph 26 of the CJEU's decision in Case C-127/07 *Société Arcelor Atlantique et Lorraine and others v Premier Ministre and others* which stated, in relation to assessing whether situations are comparable for purposes of fiscal neutrality:

> "26 The elements which characterise different situations, and hence their comparability, must in particular be determined and assessed in the light of the subject-matter and purpose of the Community act which makes the distinction in question. The principles and objectives of the field to which the act relates must also be taken into account …"

36. Mr Hill referred us to Case C-45/01 *Christoph-Dornier-Stiftung für Klinische Psychologie v Finanzamt Giessen* ('*Dornier*') which concerned whether psychotherapeutic treatment by qualified psychologists should be exempt under what is now Article 132(1)(b) which exempts hospital and medical care. Germany required such services to be provided under the supervision of a doctor to qualify for exemption. The CJEU held that national implementation of point (b) had to be consistent with fiscal neutrality but did not suggest that should be assessed from the viewpoint of the consumer. Instead, the CJEU said, in paragraphs 72 and 73, that the factors to be taken into consideration when carrying out that exercise should include "the public interest of the activities of the taxable person in question, the fact that other taxable persons carrying on the same activities already have similar recognition, and the fact that the costs incurred for the treatment in question may be largely met by health insurance schemes or other social security bodies". Mr Hill submitted that *Dornier* showed that a member state is entitled to take account of the framework of national law under which services are provided in order to deduce whether the supplier of the services should be recognised. The member state is not required to consider whether the typical consumer might regard the recognised and non-recognised suppliers as similar.

37. The *Dornier* formula was referred to in two other cases which concerned a supplier condition. They were Case C-498/03 *Kingscrest Associates Ltd v Customs and Excise* ('*Kingscrest*') and Case C-174/11 *Finanzamt Steglitz Zimmermann* ('*Zimmermann*'). *Kingscrest* concerned the exemption for supplies of services and goods closely linked to welfare and social security work in point (g) and for supplies of services and goods closely linked to the protection of children and young persons in point (h) of Article 132(1). *Zimmermann* concerned point (g). Both points (g) and (h) were subject to a supplier condition that the suppliers be "bodies governed by public law" or "other organisations recognised as charitable by the Member State concerned". The CJEU said in *Kingscrest* at [53] and in *Zimmermann* at [31], that, in accordance with EU law, it was for the national authorities granting recognition as 'charitable':

> "… 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."

38. In paragraph 58 of *Zimmermann*, the CJEU stated:

> "… national legislation may not, in implementing the exemption provided for under art 13A(1)(g) of the Sixth Directive, lay down materially different conditions for profit-making entities, on the one hand, and non-profit making legal persons … on the other."

39. Mr Hill submitted that the UK had complied with the CJEU's ruling. In order for their supplies to be eligible under Note 1(b) to Group 6, all entities must meet the condition that they are universities or colleges of universities which, in practice, means that they must have university title or DAPs or be a college of such. In the case of Note 1(c), all the entities must be charities because of the regulatory framework that applies to FECs. But within those categories, there is no different treatment so that some entities have to comply with additional conditions (such as being non-profit making).

40. The CJEU referred to its previous judgments in *Kingscrest* and *Zimmermann* in *MDDP* which concerned Article 132(1)(i). In *MDDP*, the taxpayer, which organised training courses and conferences in areas such as taxation, accountancy, finance and management, argued that its services were not exempt so that it could recover input tax. The issue was whether educational services provided for commercial purposes by bodies not governed by public law are precluded from exemption from VAT by Article 132(1)(i) read with Articles 133 and 134. In answering this question, the CJEU confirmed that private profit-making entities could, in principle, fall within the term "other organisations recognised by the Member State concerned as having similar objects [to bodies governed by public law]" if they had similar aims. However, member states cannot exempt educational services provided by private organisations which do not have objects similar to those of bodies governed by public law (see paragraph 35). The CJEU held, in paragraph 37 and 38:

> "37. In so far as point (i) of art 132(1) of the VAT Directive does not specify the conditions or procedures for defining those similar objects, it is, in principle, for the national law of each member state to lay down the rules in accordance with which that definition may be granted to such organisations. The member states have a discretion in that respect …
>
> 38. Furthermore, it is for the national courts to examine whether the member states, in imposing such conditions, have observed the limits of their discretion in applying the principles of European Union law, in particular the principle of equal treatment, which, in the field of VAT, takes the form of the principle of fiscal neutrality …"

41. Mr Hill submitted that it was a consequence of the discretion conferred on Member States, as explained in *MDDP*, that similar supplies of education would be treated differently for VAT purposes when supplied by taxable persons recognised by the member state as having similar objects to bodies governed by public law and supplied by persons not so recognised. This was shown clearly by the decision of the CJEU in relation to a different exemption in Case C-495/12 *HMRC v Bridport and West Dorset Golf Club Ltd*. The case concerned the differential VAT treatment of green fees charged by profit-making and non-profit-making golf clubs. The CJEU observed at paragraphs 36 and 38:

> "36 In this connection, it should be observed that the scope of the exemptions in Article 132(1)(b), (g), (h), (i), (l), (m) and (n) of Directive 2006/112 is defined not only by reference to the substance of the transactions covered, but also by reference to certain criteria that the suppliers must satisfy. In providing for exemptions from VAT defined by reference to such criteria, the common system of VAT implies the existence of divergent conditions of competition for different operators.

..

> 38 The exclusion from that exemption is made on the basis of the status of the recipient of the supply of the service in question even though that status does not alter the substance of the supply, namely, the grant of access to the golf course in order to play golf."

42. Mr Hill submitted, and we accept, that where the PVD imposes a supplier condition, a person cannot obtain the benefit of an exemption simply because their supplies are similar to those provided by other entities that meet the condition. He further contended that the CJEU has not suggested in any case concerning a supplier condition that whether the national legislation breaches the principle of fiscal neutrality must be determined by reference to the perspective of the typical consumer. We consider that is correct on the CJEU case law authorities provided to us.

43. Mr Hill also referred us to other cases (Case-C262/08 *CopyGene A/S v Skatteministeriet* at paragraph 65; Case C-228/20 *I GmbH v Finanzamt H* ('*I GmbH*') at paragraph 61) which concerned conditions equivalent or analogous to supplier conditions and made no reference to considering the viewpoint of the consumer. In *I GmbH*, the CJEU stated at paragraph 63 that:

> "63 In the implementation of the exemption laid down in Article 132(1)(b) of the VAT Directive, compliance with fiscal neutrality requires, inter alia, that all organisations other than those governed by public law should be placed on an equal footing for the purpose of their recognition for the supply of similar services."

44. In answering the second question in *I GmbH*, which was what factors may be taken into account when determining whether medical care provided by a private hospital is supplied under social conditions comparable to those applicable to bodies governed by public law, the CJEU held, at paragraph 83, that:

> "… the competent authorities of a Member State may take into consideration – where they are intended to attain the objective of reducing medical costs and making high-quality care more accessible to individuals – the regulatory conditions applicable to the services supplied by hospitals governed by public law and indicators of that private hospital's performance in terms of staff, premises and equipment and the cost-efficiency of its management, in so far as those indicators are also applicable to establishments governed by public law."

45. There was no reference to the consumers' point of view by the CJEU in *I GmbH* when discussing the supplier condition in the case but it did refer to it later in the judgment when discussing the supply condition in Article 132(1)(b). We consider that shows that the CJEU applies the consumer viewpoint test quite precisely to situations where what is being assessed is whether supplies are similar for the purposes of the principle of fiscal neutrality. However, the CJEU does not use the viewpoint of the typical consumer when considering whether the supplier condition has been met, notwithstanding that the principle of fiscal neutrality still applies.

46. A further example is provided by *Happy Education*. In that case, the taxpayer was a provider of educational after-school programmes. Under Romanian law, recognition as an eligible body having similar objects to bodies governed by public law depended on the provider entering into a partnership with a State educational establishment. Happy Education had not entered into any such partnership and so its services were not exempt although it was classified as providing education by the National Trade Register Office. The issue in the CJEU was whether Happy Education fell within the concept of 'other organisations recognised by the

Member State concerned as having similar objects'. The CJEU held at [31] and [32] that (case references removed):

> "31. … in so far as Article 132(1)(i) of Directive 2006/112 does not specify the conditions or procedures under which those similar objects may be recognised, it is, in principle, for the national law of each Member State to lay down the rules in accordance with which that recognition may be granted to such organisations. The Member States have a discretion in that respect.
>
> 32. Furthermore, it is for the national courts to examine whether the Member States, in imposing such conditions, have observed the limits of their discretion in applying the principles of European Union law, in particular the principle of equal treatment, which, in the field of VAT, takes the form of the principle of fiscal neutrality."

47. The CJEU ruled that, as it had not concluded the required partnership, it did not have the recognition or authorisation required for that purpose under Romanian law and, subject to the requirement conforming with the principle of fiscal neutrality, Happy Education could not be regarded as an organisation recognised as having similar objects to those of an educational body governed by public law. The CJEU also held that its supplies did not qualify for exemption despite the fact that it carried out educational activities which were authorised as such by the National Trade Register Office. There was no reference by the CJEU to the point of view of the typical consumer.

48. As Mr Hill pointed out in his skeleton, the facts of *Happy Education* are consistent with a Member State being permitted to impose different conditions for exemption for different types of education provided by the same supplier. In that case, the requirement in Romanian law (partnership with a State educational establishment) only applied to one type of education (after-school education). The CJEU did not suggest that applying specific conditions for recognition to particular supplies was contrary to the principle of fiscal neutrality.

49. As stated above, the FTT accepted, in [175], Mr Hill's submissions and held that the correct approach to fiscal neutrality in this context is to focus not only on whether the supplies are similar from the perspective of the consumer, but also on whether the suppliers are comparable, namely whether the Appellants were comparable to universities, colleges of universities or FECs. In relation to the supplier condition in Article 132(1)(i), we consider that the correct question is not whether the suppliers are sufficiently similar from the point of view of the typical consumer but whether they are comparable. In this case, as can be seen from *Dornier* and *Happy Education*, whether the Appellants meet the comparability test depends on an analysis of the legal and regulatory framework under which the education and training is provided as well, of course, as the domestic legislation by which the UK exercises its discretion to recognise other organisations as having similar objects to bodies governed by public law. The principle of fiscal neutrality must still be observed and, as can be seen from *I GmbH*, requires, inter alia, that all organisations other than those governed by public law should be placed on an equal footing for the purpose of their recognition for the supply of similar services.

50. Once the correct test is understood, it follows that Ms Shaw's submissions based on the point of view of the typical consumer lose their force. Ms Shaw submitted that certain differences between the Appellants and universities, colleges of universities and FECs identified by the FTT should be disregarded because they would not have a significant influence on the choice of the consumer and the Appellants' supplies would meet the same needs of the consumer. Having regard to the approach of the CJEU in *Dornier* and *Happy Education*, it is clear that the FTT was right to conclude in [176] that the United Kingdom was entitled to recognise universities and their colleges as having similar objects to bodies governed by public law as held by the Court of Appeal in *FBT CA* at [53] and [54]:

> "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)."

51. In relation to FECs, Ms Shaw contended the FTT was wrong in [177] to hold that the Appellants were not comparable to FECs because they were required to be charities by section 22A FHEA, with the result that they were non-profit making organisations, whereas the Appellants were not charities and were profit making institutions. She made the point that some charities are profit-making. It is clear from *MDDP* and other cases that there was no prohibition on profit-making entities making exempt supplies of education. Mr Hill submitted that the requirement for FECs to be charities was an exercise by the United Kingdom of the optional condition in Article 133(a) PVD, which was compatible with EU law. The FTT referred to *MDDP* in the Decision and, at [23], expressly stated that the status of an institution for the purposes of VAT exemption does not generally depend on whether it is a charity, a non-profit making institution or a profit-making one. In the circumstances, we consider that the FTT had *MDDP* in mind and was saying no more in [177] than that the United Kingdom had chosen to restrict the exemption in relation to further education to FECs as defined in the Further and Higher Education Act 1992, ie as charities which are bodies that must not systematically aim to make a profit, which it could do under Article 133(a) PVD.

52. Accordingly, we consider that the FTT adopted the correct approach to the consideration of the issue of fiscal neutrality in the context of a supplier condition.

53. We must now consider whether the FTT's findings of fact were wrong in the *Edwards v Bairstow* sense or insufficiently reasoned. There was considerable overlap between the two submissions and we deal with them together.

54. The first point is that, for reasons given above, Ms Shaw's criticism of the FTT's reliance on the evidence of Ms Lapworth in reaching its conclusion that the regulatory regime for universities and colleges of universities was "more stringent" because it was looking at the regulatory regime from the wrong point of view, namely from the point of view of the regulator, must be rejected. Ms Shaw submitted that what matters is whether any differences in the regulatory regimes were significant from the point of view of the typical consumer but, as already explained, that is not correct where what is being considered is whether suppliers are comparable for the purposes of fiscal neutrality in the context of the supplier condition in Article 132(1)(i). Accordingly, the Operating Framework, to which we were taken and which was described as a public facing document and the only evidence of the consumers' view of the regulatory regime does not assist.

55. Ms Shaw also submitted that Ms Lapworth's evidence was at odds with other evidence and, accordingly, the FTT was wrong, in the *Edwards v Bairstow* sense, to rely on it. The short answer to that submission is that it simply does not meet the threshold for an *Edwards v Bairstow* challenge. The high (but not insurmountable) bar was set by Lewison LJ in *Fage UK Ltd & Anor v Chobani UK Ltd & Anor* [2014] EWCA Civ 5 at [114] and [115]:

> "114. Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless

> compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. … The reasons for this approach are many. They include:
>
> > i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.
> >
> > ii) The trial is not a dress rehearsal. It is the first and last night of the show.
> >
> > iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.
> >
> > iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.
> >
> > v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).
> >
> > vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done.
>
> 115. It is also important to have in mind the role of a judgment given after trial. The primary function of a first instance judge is to find facts and identify the crucial legal points and to advance reasons for deciding them in a particular way. He should give his reasons in sufficient detail to show the parties and, if need be, the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. There is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. His function is to reach conclusions and give reasons to support his view, not to spell out every matter as if summing up to a jury. Nor need he deal at any length with matters that are not disputed. It is sufficient if what he says shows the basis on which he has acted. These are not controversial observations …"

56. A more concise statement of the hurdle that faces a party challenging primary findings of fact is found in *Lidl Great Britain Ltd & Anor v Tesco Stores Ltd & Anor* [2024] EWCA Civ 262 in which Arnold LJ set out the test on appeal at [110]:

> "It is common ground that, in so far as the appeals challenge findings of fact made by the judge, this Court is only entitled to intervene if those findings are rationally insupportable … Equally, it is common ground that, in so far as the appeals challenge multi-factorial evaluations by the judge, this Court is only entitled to intervene if the judge erred in law or principle …"

57. In this case, Ms Shaw submitted that the FTT's reasons for finding in [168] that "the regulatory regime for universities was significantly stronger than the regulatory regime for APs with designated courses [and the] differences were not simply a matter of detail but were a matter of degree and substance" were unclear. Ms Shaw said that it seemed that the FTT preferred Ms Lapworth's evidence which was inconsistent with documentary evidence. The FTT stated in [168] that the differences "arose from the additional regulations applicable to obtaining DAPS and obtaining university title". Those differences were set out by the FTT in [62] and [80] – [82]. We consider that was an evaluation of the evidence presented to the FTT and, in so far as there were any conflicts, a conclusion on the facts that it was entitled to draw. Accordingly, we consider that the FTT was entitled to come to the conclusions it did in [176] and [177].

Were all supplies by SPIC and LCCA exempt under Item 5B Group 6 Schedule 9 VATA 1994?

58. The FTT found that the supplies by SPIC and LCCA were not exempt pursuant to Item 5B on the basis that:

(1) Item 5B, construed in light of its historical context, did not apply to supplies of education ultimately funded by Student Loans provided by the SLC;

(2) The word "charge" in Item 5B implied that there would need to be a contractual liability on the part of the Secretary of State to fund the education (which there was not in relation to the Appellants' supplies); and

(3) At that time of the supply, it was not known whether the Secretary of State would bear the financial burden for the supply.

59. In short, this ground turns on whether student loans provided by the SLC in relation to tuition fees charged by SPIC and LCCA were "ultimately a charge to funds provided by the Secretary of State" and, if so, whether the age restrictions in Item 5B(a) and (b) were discriminatory and therefore in breach of EU law.

60. Ms Shaw repeated her submissions before the FTT which were set out in the Decision at [180] – [182] and submitted that the FTT was wrong to rely on the historical context of the changes that brought about Item 5B. She also submitted that the plain meaning of the words in Item 5B supported the interpretation that the SLC funds are ultimately a charge to the Secretary of State.

61. The FTT correctly noted at [185] that "the relevant question is not whether there was a loan to students in order to pay the course fees, but whether the course fees were 'ultimately a charge to funds provided by the Secretary of State' within the meaning of that phrase in Item 5B". At [189], the FTT concluded that "the word 'charge' in this context would imply a contractual liability to pay the fees resting with the Secretary of State". Ms Shaw submitted before the FTT and before us that the students did not have any liability to repay the loans until their income exceeded the applicable income threshold, which would never happen in a substantial proportion (around 50%) of cases. She contended that, in the absence of a liability to repay, the funding provided by the SLC was a charge to funds provided by the Secretary of State within Item 5B.

62. The FTT did not accept that submission and neither do we. Item 5B does not simply say that exemption applies where the cost of the courses is ultimately borne by the Secretary of State. It requires the "consideration payable" ultimately to be a charge to funds provided by the Secretary of State. The word "consideration" must refer to the amount paid or payable for the supply of the courses by the provider. It has been settled law for many years that, in the context of VAT, a supply of services is effected for consideration only where there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance (see Case C-16/93 *Tolsma v Inspecteur der Omzetbelasting Leeuwarden* [1994] STC 509 at [14]). It is correct that the legal relationship need not be legally enforceable where the parties have agreed that their agreement shall be binding in honour only (see Case C-498/99 *Town and County Factors v CCE* [2002] STC 1263 at [21]-[24]. However, there must be a relationship which envisages reciprocal performance. It was not suggested that there was any such relationship between the Appellants and the Secretary of State. The Student Loan Agreement is between the student and the SLC, which is funded by the Secretary of State. The contracts for the provision of the courses were between the Appellants and the students. It was, therefore, the students who were required to provide the consideration for the supply of the courses. Students satisfied their obligation to pay the Appellants either wholly out of their

own funds (self-funding) or with money borrowed from the SLC or by a mix of the two. At no point, was the SLC or the Secretary of State required to pay the Appellants any consideration for the provision of the courses to the students. The relevant student loans could only be used by the students for paying their tuition fees and, indeed, were paid direct to the Appellants by SLC for that purpose. However, that was simply a payment arrangement and did not convert a loan to a student into consideration for a supply of education.

63. We also agree with the FTT at [191] that the treatment of the supply must be determined (or capable of being determined) at the time of supply and that would not be possible on the Appellants' interpretation of Item 5B. As the FTT observed, it cannot be known whether the recipient of a student loan will repay it at the time of supply, ie when the SLC pays the amount to the provider of the course. Although Ms Shaw provided us with authorities on the meaning of contingent liability (*Smart v Lincolnshire Sugar Co* 20 TC 643 nor *Marren v Ingles* 54 TC 76), neither dealt with the wording at issue in Item 5B and did not concern VAT. We were not provided with any authority for the proposition that there can be a contingent VAT liability or exemption which only crystallises at an unascertainable future date.

64. In our view, the history of the legislative changes that produced Item 5B, as set out by the FTT at [186] and [187] supports the interpretation that the phrase "the consideration payable is ultimately a charge to funds provided by the Secretary of State" was intended to refer to grant funding provided directly to providers for the provision of education rather than student loans which may or may not be a cost to the Secretary of State.

65. For the reasons given above, we consider that the FTT reached the right conclusion and the supplies by SPIC and LCCA were not exempt under Item 5B of Group 6 of Schedule 9 VATA 1994. It follows that we do not need to consider whether the age restrictions in Item 5B are discriminatory and contrary to a general principle of EU law that precludes discrimination on the grounds of age if such a principle exists (about which we express no opinion).

Were all of IMAN's supplies of education exempt under Item 1(f)?

66. It was common ground that IMAN was an "eligible body" within Note 1(f) of Group 6 of Schedule 9 VATA 1994, in so far as it provided TEFL. Ms Shaw submitted that, as IMAN was an eligible body by virtue of Note 1(f) then all of its supplies of education and/or vocational training should be exempt and not only its supplies of TEFL. Essentially, her position was that Note 2 to Group 6 must be disregarded because Article 132(1)(i) did not permit Member States to recognise an entity as an eligible body (ie as one that has 'similar objects') for some supplies of education and vocational training but not for others.

67. The FTT found that IMAN was not an "eligible body" for the purposes of Item 1(a), i.e. in respect of its supplies of education and/or vocational training. As such, only IMAN's supplies of TEFL were exempt from VAT. The FTT reached that conclusion on the basis that it was bound by the High Court's decision in *Pilgrims Language Courses v CCE* [1998] STC 784 ('*Pilgrims HC*') which decided that the combined effect of Notes 1 and 2 to Group 6 meant that IMAN's supplies of education were only exempt in so far as they were supplies of TEFL.

68. In *Pilgrims HC*, Richards J, as he then was, held:

> "The domestic legislation contains no neat provision whereby language schools are defined for the purposes of the exemption only in so far as their object is the teaching of English as a foreign language (and not, therefore, in so far as their object is the provision of other forms of education or of vocational training for teachers). Instead, there is a definition of 'eligible body' in note (1) and a specific limitation in note (2) of the extent to which one kind of eligible body can benefit from the exemption. That does not

> accord precisely with the structure of the directive. On the other hand, the result that the provisions must in my view have been intended to achieve, and as a matter of substance do achieve, is to bring language schools within the scope of the exemption in so far as their object is the teaching of English as a foreign language, but not in so far as they have other objects. That is a result envisaged and permitted by the directive. To put the matter the other way round, there cannot be a directly effective right under art 13A(1)(i) unless Pilgrims has been defined for the material purpose as a body having vocational training as one of its objects; and in my view the relevant provisions of Group 6 are not to be read as containing such a definition."

69. Pilgrims appealed (but not on that point) and Ms Shaw relied on a passage from the judgment of Schiemann LJ in *Pilgrims Language Courses v CCE* [1999] STC 874 ('*Pilgrims CA*') at 886:

> "1. Member states are under an obligation to exempt certain supplies by certain organisations.
>
> 2. In the educational field this obligation applies to the provision of education by bodies governed by public law and by organisations (defined organisations) defined by member states 'as having similar objects'. It has been common ground in argument that member states are at liberty not to define any organisations even though they do 'have similar objects'. Similarly it has been common ground that member states are at liberty to define organisations in such a way that where an organisation carries out several of the activities set out in art 13A(1)(i) some of them are excluded. Thus, education could be included but not vocational training. I would not wish to be taken as necessarily assenting to what appears to be common ground between the parties but there is no need in this judgment to elaborate why I have hesitations."

70. Ms Shaw also relied on comments by Morgan J in the decision of the Upper Tribunal in *Finance & Business Training Limited v HMRC* [2013] UKUT 594 (TCC) at [37] to the effect that once a body had been recognised as an eligible body in one capacity, it was not possible to treat it as not being an eligible body in another capacity. However, Arden LJ, as she then was, disagreed with that conclusion which undermines the support Ms Shaw seeks to derive from it – see *FBT CA* at [33]-[34].

71. Mr Hill urged us to follow the judgment of Richards J in *Pilgrims HC*. He referred us to the decision of the Supreme Court in *Willers v Gubay* [2016] UKSC 44, in which Lord Neuberger said at [9] that, while High Court judges are not technically bound by decisions of their peers, they should generally follow a decision of a court of co-ordinate jurisdiction unless there is a powerful reason for not doing so. Mr Hill submitted that the Upper Tribunal should follow the previous decision of a court of co-ordinate jurisdiction unless we are satisfied that it is wrong.

72. We are not satisfied that the view taken by Richards J in *Pilgrims HC* was wrong. The remarks of Schiemann LJ in *Pilgrims CA* were clearly obiter as the issue was not the subject of any argument. In any event, we note that he expressed no more than "hesitations". The view of Richards J that it was open to Parliament to implement the Sixth Directive in the way in which it has in these items and notes in Group 6 is supported by the judgment of the CJEU in *Happy Education* at [31] and [32] (see paragraph 46 above).

73. In conclusion, we consider that the FTT was right to conclude that it was bound by the decision of Richards J that Note (2) to Group 6 of Schedule 9 VATA 1994 is compatible with EU law in *Pilgrims HC* and we see no reason to depart from it.

74. In any event we agree with Mr Hill that the Appellants' submissions in relation to this issue added nothing to the first issue. He stated that the Appellants accepted that, as a matter of UK law, IMAN's supplies other than TEFL cannot fall within the exemption, as defined by the United Kingdom. Therefore, the Appellants must rely on direct effect by arguing that Note 1(f) and Note 2 of Group 6 of Schedule 9 VATA 1994 do not properly implement the PVD. If that is established, the national court must consider whether IMAN meets the supplier condition in order to gain exemption of its supplies of educational and vocational training other than TEFL (see *MDDP* paragraphs 51 - 54). Mr Hill pointed out that was precisely what the first issue was about.

DISPOSITION

75. For the reasons given above, the Appellants' appeals are dismissed.

COSTS

76. Any application for costs in relation to this appeal must be made in writing and served on the Tribunal and the person against whom it is made within one month after the date of release of this decision as required by rule 10(5)(a) and (6) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

The Hon Mr Justice Rajah
Upper Tribunal Judge Greg Sinfield

Release date: 24 March 2025