[2012] UKUT 378 (TCC)
Appeal number FTC/40/2010

VAT – exemption in Item 2 of Group 6, Schedule 9, VATA 1994 – whether tuition supplied by an individual teacher acting independently of an employer – relevance of principle of fiscal neutrality – appeal dismissed

UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)

MARCUS WEBB GOLF PROFESSIONAL **Appellant**

- and -

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

TRIBUNAL: MR JUSTICE HENDERSON

Sitting in public at The Rolls Building, London EC4A 1NL on 9 May 2012

Mr B J Rice of B J Rice & Associates for the Appellant

Ms Suzanne Lambert, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal by a partnership called Marcus Webb Golf Professional ("the Partnership") against a decision ("the Decision") of the First-tier Tribunal (Tax Chamber) ("the FTT") released on 31 December 2009, following a hearing in London on 6 April and 14 December 2009. The members of the FTT were Judge John Avery Jones CBE (Chairman) and Diana Wilson.

2. The only live issue on the appeal is whether supplies of golfing tuition services made on behalf of the Partnership by a Mr Richard West, in the factual circumstances which I will describe, between about 2003 and 2006, qualified for exemption under item 2 of Group 6 of Schedule 9 to the Value Added Tax Act 1994 ("VATA 1994"). A further issue before the FTT, which related to a repayment claim for an accounting period in 2003, has not been pursued on appeal.

3. Item 2 of Group 6 exempts:

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

4. This exemption was intended to give effect in domestic UK law to the corresponding exemption then contained in Article 13A(1)(j) of the Sixth VAT Directive (Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment). It needs to be read in the context of Article 13A as a whole, which is headed "Exemptions for certain activities in the public interest", and in particular with the immediately preceding sub-paragraph (i):

> "1. Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purposes of ensuring the correct and straightforward application of such exemptions and of preventing any possible evasion, avoidance or abuse:
>
> …
>
> (i) 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, provided by bodies governed by public law having such as their aim or by other organisations defined by the Member State concerned as having similar objects;
>
> (j) tuition given privately by teachers and covering school or university education;
>
> …"

These exemptions are now contained, in materially the same language, in Article 132(1)(i) and (j) of the Principal VAT Directive of 2006, Council Directive of 28 November 2006 on the common system of value added tax.

5. The FTT held that the UK had correctly transposed Article 13A(1)(j) of the Sixth Directive into domestic law, and that "tuition supplied by Mr West as an employee of [the Partnership]" was not exempt: see paragraph 12 of the Decision. The Partnership now appeals against that conclusion, with permission granted (I was told) by Sir Stephen Oliver QC.

6. I emphasise that the scope of the appeal is confined to this single issue, because Mr B J Rice of B J Rice & Associates (a firm of chartered tax advisers and accountants), who appeared for the Partnership as he had at the hearing before the FTT, seemed anxious at times in both his written and oral submissions to stray into related but distinct disputes which Mr Webb has been conducting with HMRC. The limited nature of the present appeal was reinforced when the FTT gave directions at a hearing on 22 October 2010 that the Partnership's wide-ranging application for permission to appeal should not stand as a notice of appeal, but permitting the Partnership, if so advised, to serve a notice of appeal by 19 November 2010 "directed to the decision in paragraph 12 of [the Decision]" which covered the transposition of the Sixth Directive and the treatment of fees for tuition by Richard West as an employee of the Partnership. A notice of appeal pursuant to this direction was then duly served on 19 November 2010.

Facts

7. The facts were said by the FTT not to be in dispute, and were stated by them with extreme concision as follows in paragraph 3 of the Decision:

> "(1) The Appellant is a partnership ("the Partnership") between Mr Marcus Webb, his wife and Marcus Webb Golf Professional Limited ("the Company"). Mr and Mrs Webb are directors and employees of the Company.
>
> (2) Mr Webb makes supplies both as a member of the Partnership, which are treated as exempt, and as a director of the Company, which HMRC have taxed and the Appellant claims are exempt.
>
> (3) Mr Richard West is employed by the Appellant. He also provides golf tuition to his own clients on a self-employed basis at fees determined by him and invoiced on his own letterhead.
>
> (4) Mr West also provides tuition to the Appellant's clients who come to the golf professional's shop or who are passed on to him by the Appellant. These are for fees published in the shop and are invoiced on the Appellant's letterhead. The Appellant claims that these are exempt."

8. With every respect to the FTT, I think it is regrettable that they did not make rather fuller findings of fact about the basis on which Mr West provided tuition to clients of the Partnership. This was, after all, the factual issue which lay at the heart of the case and by reference to which the application of the exemption had to be tested. I was informed that Mr West had given oral evidence for most of the first morning of the hearing, and he also provided a witness statement. In addition, the FTT had before it a good deal of documentary material, as well as a statement by Ms Carol-Anne Mooney, the officer of HMRC who had been responsible for investigating the VAT affairs of Mr Webb's business entities. It needs to be remembered, in this connection, that the FTT is the sole tribunal of fact, and an appeal to the Upper Tribunal lies only on questions of law. It is therefore essential that all the facts necessary for the fair disposal of the case should be clearly found by the FTT.

9. The reason why I am labouring this point is that the brief findings of fact quoted above give the impression that when Mr West provided tuition to clients of the Partnership he did so in the course, and pursuant to the terms, of a contract of employment between him and the Partnership, and quite separately from the tuition which he gave to his own clients on a self-employed basis. The true position, however, appears to have been a good deal less straightforward than that summary might suggest; and although Mr West was indeed employed by the Partnership under a contract of employment, the relevant tuition services were provided by him on a freelance basis.

10. The position was put in this way in a letter which Ms Mooney wrote to the Partnership on 2 November 2007:

> "I now refer to the situation surrounding lessons provided by Richard West. You have advised that Richard is employed by the Partnership in respect of his work in the shop – this I accept. In terms of the coaching provided, I accept that Richard has his own client list separate and distinct from your own. The difficulty arises in respect of coaching passed on to Richard by you. For example, you have agreed to provide coaching at other courses in the area. Sometimes you provide that coaching, and sometimes Richard provides it. In these circumstances Richard is providing a service to you, albeit on a self-employed basis, and you provide the service to the client. A similar situation occurs if a new client books lessons through your shop. You have an agreement to supply lessons to the client, and Richard may well assist you in fulfilling that agreement. In these circumstances, although Richard actually coaches the client, he is supplying you with his services, and you are supplying the client. Richard should invoice you for his time, and you then charge the client."

11. This account appears to have been substantially corroborated by Mr Webb in his oral evidence, to judge from a helpful summary of the main points of evidence (again described as "not controversial") set out by counsel for HMRC, Ms Suzanne Lambert, in written supplementary submissions which she prepared before the adjourned hearing in December 2009:

> "(c) Mr West is the Appellant's assistant and employee, who works in the Appellant's retail outlet.
>
> (d) However, Mr West also provides golf tuition directly to his own clients on a self-employed basis.
>
> (e) In addition, Mr West also provides tuition to the Appellant's clients, either those who have come "through the shop" or who have been passed on to Mr West by the Appellant. The Appellant objects to these supplies not being exempt.
>
> (f) When bookings for tuition are made through the Appellant they go into the Appellant's diary and Richard West undertakes some of these lessons on behalf of the Appellant. Mr Webb accepted in cross-examination that if it were not for the Appellant's shop then Mr West probably would not get that particular tuition request and if a lesson is cancelled then the client may rebook. The booking, again, is made via the Appellant and is not necessarily undertaken by Mr West. Similarly, appointments for future tuition are entered into the Appellant's diary not Mr West's personal diary.

> (g) The Appellant has no control over the fees charged by Mr West to his own clients. Mr West produces invoices on his own letterhead for those services … and/or is paid directly on the golf course. However, the fees for tuition provided to the Appellant's clients and for bookings that come through the shop are publicised by the Appellant and invoices are created on the Appellant's letterhead …"

12. Ms Lambert's submission to the FTT, on the basis of those undisputed facts, was that even though Mr West may have been self-employed, and had his own separate client list, he effectively contracted with the Partnership to provide tuition services on the Partnership's behalf to the Partnership's clients. That seems to me a fair summary, and I would only add that the question whether, when he provided the relevant tuition, Mr West was technically acting as a self-employed person in the course of his own profession, or pursuant to an umbrella contract of service separate from his main employment with the Partnership, or even pursuant to a series of separate ad hoc contracts of service, could well be a difficult one to resolve, were it necessary to do so.

13. In these circumstances, I have considered whether I should remit the matter to the FTT for fuller findings of fact to be made. I would be very reluctant to take such a course, however, given the length of time which has already elapsed since the hearing below, and since the amounts at stake are so small. Furthermore, neither side suggested to me at the hearing that there was any real dispute about the underlying facts. I propose to proceed, therefore, on the basis of the facts found in the Decision, as supplemented by the further material quoted above. Fortunately, as will appear in due course, the precise legal classification under English law of the relationship between Mr West and the Partnership when he provided the relevant services is immaterial, the crucial point being that he provided them on behalf of the Partnership and not acting on his own account.

The law: relevant decisions of the Court of Justice of the European Union

14. The correct interpretation of Article 13A(1)(j) of the Sixth Directive has been considered in two decisions of the European Court of Justice (now the Court of Justice of the European Union): Case C-445/05, Haderer v Finanzamt Wilmersdorf [2007] ECR I-4841, [2008] STC 2171 ("Haderer") and Case C-473/08, Ingenieurbüro Eulitz GbR Thomas und Marion Eulitz v Finanamt Dresden I ("Eulitz"). The ECJ delivered its judgment in Eulitz on 28 January 2010, four weeks after the FTT had released the Decision, and it did so having decided to dispense with an opinion from Advocate-General Sharpston (who had also been the Advocate-General in Haderer). The FTT was therefore

unable to take account of Eulitz, but it considered and applied Haderer, taking the view that it was determinative of the case in HMRC's favour.

15. The relevant facts in Haderer were stated substantially as follows by the ECJ in paragraphs 5 to 9 of its judgment. Mr Haderer worked for a number of years in a freelance capacity for the *Land* of Berlin. In 1990, he provided assistance with schoolwork at an adult education institute, and ran ceramics and pottery courses at another adult education institute and at a parents' centre. During that year, his teaching activities, taken together, regularly amounted to over 30 hours per week. Contracts, which were renewed every six months, contained clauses stating that no "employment relationship", within the meaning of that term under German employment law, was thereby established. His fees were calculated on an hourly basis and paid by the *Land* of Berlin. Social security contributions, insurance and taxes were not included. He was not entitled to the continued payment of those fees if he was prevented from working, and he bore the risk of not being paid if courses were cancelled, even if this was due to a lack of participants. The tax office did not receive VAT returns from Mr Haderer over a period from 1989 to 1991, so it fixed a lump sum for which he was liable in respect of 1990, on the basis that his activities did not fall within the relevant exemption from VAT under German law. Mr Haderer appealed, and the German court referred the matter to the ECJ for a preliminary ruling, asking in essence whether Mr Haderer's freelance teaching in the above circumstances fell within Article 13A(1)(j) of the Sixth Directive.

16. The ECJ began its analysis by giving important general guidance about the correct approach to the interpretation of exemptions under Article 13A:

> "16. As a preliminary point, it should be noted that Article 13A of the Sixth Directive relates to the exemption from VAT of certain activities in the public interest. However, that exemption does not cover every activity performed in the public interest, but only those which are listed in that provision and described in great detail (see Case C-149/97 *Institute of the Motor Industry* [1998] ECR I-7053, paragraph 18; Joined Cases C-394/04 and C-395/04 *Ygeia* [2005] ECR I-10373, paragraph 16; and Case-401/05 *VDP Dental Laboratory* [2006] ECR I-12121, paragraph 24).
>
> 17. According to the case-law of the Court, the exemptions provided for in Article 13 of the Sixth Directive constitute independent concepts of Community law whose purpose is to avoid divergences in the application of the VAT system from one Member State to another …

> 18. The terms used to specify those exemptions are to be interpreted strictly, since they constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person (see Case C-287/00 *Commission v Germany* [2002] ECR I-5811, paragraph 43, and Case C-8/01 *Taksatorringen* [2003] ECR I-13711, paragraph 36). Nevertheless, 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 (see Case C-45/01 *Dornier* [2003] ECR I-12911, paragraph 42; Case C-498/03 *Kingscrest Associates and Montecello* [2005] ECR I-4427, paragraph 29; and Case C-106/05 *L.uP*. [2006] ECR I-5123, paragraph 24). Thus, the requirement of strict interpretation does not mean that the terms used to specify the exemptions referred to in Article 13 should be construed in such a way as to deprive the exemptions of their intended effect (see, to that effect, Case C-284/03 *Temco Europe* [2004] ECR I-11237, paragraph 17, and also, in relation to university education, *Commission v Germany*, paragraph 47).
>
> 19. The same must also be true of the specific conditions laid down for those exemptions to apply, and in particular of those concerning the status or identity of the economic agent performing the services covered by the exemption (see, to that effect, Case C-216/97 *Gregg* [1999] ECR I-4947, paragraphs 16 to 20)."

17. In Gregg, the ECJ had said this at paragraph 20:

> "20. The principle of fiscal neutrality precludes, *inter alia*, economic operators carrying on the same activities from being treated differently as far as the levying of VAT is concerned. It follows that that principle would be frustrated if the possibility of relying on the benefit of the exemption provided for activities carried on by the establishments or organisations referred to in Article 13A(1)(b) and (g) was dependent on the legal form in which the taxable person carried on his activity."

The paragraphs of Article 13A(1) which were in issue in Gregg were (b) and (g), which respectively provided exemption for "hospital and medical care and closely related activities undertaken by bodies governed by public law … by hospitals, centres for medical treatment or diagnosis and other duly recognised establishments of a similar nature" and "the supply of services and of goods closely linked to welfare and social security work including those supplied by

old people's homes, by bodies governed by public law or by other organisations recognised as charitable by the Member State concerned".

18. In relation to Article 13A(1)(j), the ECJ in Haderer then pointed out that there was no definition of the terms "school or university education", and in paragraph 26 gave this guidance about their meaning:

> "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."

No point has been taken by HMRC in the present case that the golf tuition provided by Mr West fell outside the concept of "school or university education" as thus elucidated by the ECJ. I confess to finding that a little surprising, but as the point is not in issue I say no more about it.

19. The ECJ then turned to the meaning of the words "given privately by teachers". That is the question at the heart of the present case, so I need to cite the reasoning of the ECJ substantially in full:

> "30. The term "privately" enables the services supplied by the bodies mentioned in Article 13A(1)(i) of the Sixth Directive to be distinguished from those referred to in Article 13A(1)(j), which are provided by teachers *on their own account and at their own risk* [my emphasis].
>
> 31. The services referred to in Article 13A(1)(j) of the Sixth Directive may include private lessons, for example, in which case there is in principle a link between the actual content of the tuition and the teacher's qualifications. In that regard, the wording of Article 13A(1)(j) in no way precludes tuition given to several people at a time from being covered by the exemption introduced by that provision.
>
> 32. In addition, as the Commission submits, the requirement that the tuition be given privately does not necessarily mean that there has to be a direct contractual link between the recipients of that tuition and the teacher who provides it.

Indeed, such a contractual link often exists with persons other than the recipients, such as the parents of the pupils or students.

33. In the main proceedings, as paragraphs 5 to 8 of this judgment show, certain matters included in the case-file before the Court, taken in isolation, could certainly suggest that Mr Haderer carried out his activities *on his own account and at his own risk, and thus that he was carrying them out "privately"* [again my emphasis]. That applies, in particular, to the lack of entitlement to the continued payment of fees if he was prevented from working, and to the fact that he bore the risk of the loss of his fee in the event of courses being cancelled.

34. However, it is clear from those same paragraphs of this judgment that Mr Haderer carried out the activities at issue in the main proceedings on the basis of successive contracts with the *Land* of Berlin. It appears that, save in the event of courses being cancelled because of a lack of pupils or students, the fees he received were calculated on an hourly basis, irrespective of the number of course participants. In addition, even though the contracts stated that no "employment relationship" – within the meaning of that term under German employment law – was thereby established, Mr Haderer was given financial assistance towards his pension contributions and health insurance, and also a proportional leave allowance. Finally, Mr Haderer carried out the activities at issue in the main proceedings at adult education centres administered by the *Land* of Berlin.

35. The matters set out in the preceding paragraph tend therefore to indicate that, far from giving tuition on his own account and at his own risk, Mr Haderer in fact made himself available as a teacher to the *Land* of Berlin, which paid him as a provider of services to the education system administered by that *Land*. It is for the referring court to verify this, taking into account all the circumstances of the case.

36. The Commission submits that to refuse to allow an exemption in situations such as that of the main proceedings is contrary to the common objective of the specific exemptions referred to in Article 13A(1)(i) and (j) of the Sixth Directive, and would create a lacuna in the system established by those two provisions …

37. Nevertheless, the mere fact that the two categories of exemption in Article 13A(1)(i) and (j) of the Sixth Directive seek, inter alia, to promote "school or university education" as an activity which is in the public interest cannot support the proposition that, together, those two provisions create a system

> capable of exempting from VAT activities which do not satisfy the conditions of one or other of them, the terms of which, as observed in paragraphs 16 to 19 of this judgment, are to be interpreted strictly and cover only the activities which are listed therein and described in detail.
>
> 38. Having regard to all of the forgoing observations, the answer to the question referred must be that, in circumstances such as those in the main proceedings, the activities of an individual acting in a freelance capacity, consisting of providing assistance with schoolwork and also running ceramics and pottery courses in adult education centres, can be exempted from VAT under Article 13A(1)(j) of the Sixth Directive *only where such activities consist of tuition given by a teacher on his own account and at his own risk* [my emphasis], and covering school or university education. It is for the referring court to verify whether that is the case in the main proceedings."

20. It can be seen from this passage that the question whether tuition is given privately by a teacher within the meaning of Article 13A(1)(j) has to be answered by asking whether it is provided by the teacher on his own account and at his own risk. The parts of the passage which I have italicised show not only that this is the relevant test, but also that it is diagnostic in the sense that the tuition in question can only qualify for exemption if the test is satisfied, and conversely that the exemption cannot apply if the test is not satisfied. In addition, paragraph 37 of the judgment makes the important point that the exemptions in sub-paragraphs (i) and (j) have to be interpreted strictly, and only activities which fall within their scope are exempt. It is in my judgment implicit in this, and in the ECJ's rejection of the submission by the Commission recorded in paragraph 36, that the principle of fiscal neutrality, important though it undoubtedly is, cannot prevail over the clear wording of the individual exemptions or broaden their scope.

21. The basic facts in Eulitz, to which I now turn, were that Mr Eulitz was a partner in a civil law partnership, Eulitz GbR, which provided engineering consultancy services as an independent contractor in Dresden. Mr Eulitz was a graduate engineer in preventive fire protection, and between 2001 and 2005 he gave lectures at the European Institute for Postgraduate Education at the Technical University of Dresden ("EIPOS"). He also conducted examinations as a member of examination boards, and had overall technical and organisational responsibility for some of the courses at EIPOS. The Finance Court in Saxony considered that Eulitz GbR was not entitled to exemption under Article 13A(1)(j) in respect of the services provided by Mr Eulitz, because although he was acting as an independent contractor it was not Mr Eulitz himself, but rather EIPOS, which provided the relevant services to

participants in the training courses. The court was, however, uncertain whether this interpretation of the law was correct, and referred a number of questions to the ECJ.

22. For present purposes the relevant question referred by the national court was the second one, which the ECJ interpreted in paragraph 39 of its judgment as seeking, in essence, to determine whether a person in the position of Mr Eulitz could be regarded as having given tuition "privately" within the meaning of Article 13A(1)(j). Consistently with the stance that it had taken in Haderer, the European Commission submitted that, since Mr Eulitz appeared to have self-employed status in German civil and fiscal law, his activities were carried out "privately" within the meaning of that provision: see paragraph 45 of the judgment. Again, however, this submission was rejected by the ECJ.

23. The reasoning which led the ECJ to this conclusion was briefly as follows. First, the mere fact that there was no relationship of employer and employee between EIPOS and Mr Eulitz was not enough by itself to show that the relevant activities had been carried out "by him privately" (paragraphs 47 and 48). Secondly, the question whether a specific transaction is exempt cannot depend on its classification in national law (paragraph 50). Thirdly, although the German language version of Article 13A(1)(j) could be read as covering all courses given by a teacher who is not a member of the staff employed by an educational establishment, it is necessary to consider the wording of the exemption in the other official languages, none of which support such an interpretation (paragraphs 49 to 51). The ECJ then continued:

> "52. In any event, without there being any need to examine the three sets of circumstances listed in the second question referred, it is clear from the order for reference that Mr Eulitz acted as a teacher in the context of training courses offered by another body, EIPOS. According to the findings of the national court, it is that body – and not Mr Eulitz – which was in charge of the education institute within the framework of which Mr Eulitz gave tuition and which provided training to the participants of these courses.
>
> 53. As the German and Greek Governments submit, that fact, in itself, rules out the possibility that Mr Eulitz – and thus Eulitz GbR – could be regarded as giving tuition "privately" within the meaning of Article 13A(1)(j) of the Sixth Directive. The facts set out in the second question, taken together or individually, cannot lead to any different conclusion.
>
> 54. The guidance given by the Court of Justice in *Haderer* is, moreover, to that effect. In paragraphs 33 to 35 of that judgment, the Court states, in essence, that it appeared that Mr

> Haderer had made himself available as a teacher to another entity, which paid him as a provider of services to the education system administered by that body, so that a person in the position of Mr Haderer could not be regarded as having acted "privately", but that this was for the referring court to verify, taking account of all the circumstances of the case.
>
> 55. Therefore, the answer to the second question referred must be that Article 13A(1)(j) of the Sixth Directive is to be interpreted as meaning that, in circumstances such as those at issue in the main proceedings, a person such as Mr Eulitz, a partner in the claimant in the main proceedings, who performed teaching work for training courses offered by another entity, cannot be regarded as having given tuition "privately" within the meaning of that provision."

24. The particular relevance of Eulitz in the present context is in my judgment twofold. First, it establishes that the mere fact that the provider of tuition has self-employed status under national law is not in itself enough to show that the tuition must have been provided "privately". Secondly, if the tuition in question is provided in the context and for the purposes of training courses offered by another body, it is that body rather than the individual teacher which has to be regarded as providing the tuition, and it cannot be regarded as provided "privately" by the teacher.

Discussion

25. In my judgment application of these principles of EU law leads inexorably to the conclusion that the present appeal must fail. The relevant tuition was not provided by Mr West on his own account, because he provided it on behalf of the Partnership and in fulfilment of contracts entered into between the Partnership and its customers. Mr West was enabling the Partnership to fulfil the obligation to provide training which it had entered into with the customer. In contradistinction to the training which Mr West provided to his own clients, he was not providing the training on his own behalf and for his own account. The fact that in some respects he was providing the tuition at his own risk, in that he would not be paid if the lesson was cancelled, cannot in itself lead to the conclusion that the exemption was available, because the diagnostic test in Haderer requires that the relevant tuition should be provided by a teacher who is acting both on his own account and at his own risk. Even if the latter part of the test might be regarded as satisfied, the former part clearly was not.

26. On behalf of the Partnership, Mr Rice placed the principle of fiscal neutrality at the forefront of his submissions, and referred to a number of authorities

which establish its undoubted importance to the imposition of VAT and the interpretation of the VAT legislation. The fatal difficulty with this submission, in the context of the present case, is that the principle of fiscal neutrality cannot prevail over the interpretation of the exemption in Article 13A(1)(j) which has been laid down by the ECJ and which is binding on this Tribunal, just as it was on the FTT. Mr Rice also sought to draw a distinction between the tuition, viewed as an activity, and the supply to which it related. I confess that I found this distinction a difficult one to follow, and I am satisfied that it could not provide any proper basis for distinguishing or otherwise not following the principles laid down by the ECJ.

27. The process of reasoning which led the FTT to dismiss the Partnership's appeal relied to a considerable extent on the proposition that Mr West was acting as an employee when he provided the relevant tuition, and that he was not self-employed when he did so. As I have already explained, I consider this to be an over-simplification of the true factual position, and it is by no means clear that Mr West was in fact acting in the course of a contract of employment when he provided the tuition. In the end, however, it does not matter what his precise employment status was under English law when he provided the tuition, because the tests laid down by the ECJ make it clear that if a teacher provides tuition on behalf of another taxable body, the teacher cannot be said to provide it privately within the meaning of Article 13A(1)(j).

28. Finally, I should also mention that reference was made by the FTT to the decision of the Inner House of the Court of Session in Revenue and Customs Commissioners v Empowerment Enterprises Limited [2008] STC 1835, where it was held that the exemption in sub-paragraph (j) applied only where the tuition was provided by a teacher acting in an individual or personal capacity, and that the principle of fiscal neutrality could not justify a construction contrary to the clear language of the provision in question. In particular, Lord MacFadyen, delivering the opinion of the court, said this at paragraph 36:

> "We have therefore come to the conclusion that, of the two interpretations of sub-para (j) put forward by the parties, the Commissioners' interpretation is to be preferred for the reasons we have given. In particular, it is the only one which gives proper value to the concept of "privately" as that concept is expressed in the various language versions of the sub-paragraph that we have considered. The situation is not one in which two interpretations are possible and the principle of fiscal neutrality can be relied on as pointing to the one which makes the form or identity of the supplier irrelevant. Rather, sub-para (j) is an example of an exemption expressed in language which, despite the principle of fiscal neutrality, makes the nature or identity of the provider of the tuition an essential element in the definition of the scope of the exemption. On a sound construction of sub-

> para (j), it applies only where the tuition is provided by a teacher acting in an individual or personal capacity, and does not apply to tuition provided by a teacher as an employee of a company or other organisation."

I note, with admiration, that the Court of Session succeeded in anticipating nearly all the main features of the guidance subsequently to be given by the ECJ in Haderer and Eulitz, and the only reason I say no more about the Empowerment Enterprises case is that the guidance given by the ECJ must now take priority.

Conclusion

29. For the reasons which I have given, this appeal will be dismissed.

TRIBUNAL JUDGE
MR JUSTICE HENDERSON

RELEASE DATE: 23 October 2012