[2011] UKUT 495 (TCC)

Appeal number
FTC/24/2011

***Value Added Tax – zero-rating – VAT Act 1994 Schedule 8 Group 5 Item 2 – whether building intended solely for use by charity otherwise than in course of or furtherance of business – whether business use* de minimis.**

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

WAKEFIELD COLLEGE **Appellant**

- and –

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

Tribunal: The Hon Mr Justice Arnold

Sitting in public in London on 12 December 2011

Kevin Prosser QC, instructed by Deloitte LLP, for the Appellant

James Puzey, instructed by the HMRC Solicitors' Office, for the Respondents

MR JUSTICE ARNOLD:

Introduction

1. This is an appeal from a decision of the First-Tier Tribunal (Tax) (Tribunal Judge Richard Barlow) ("the Tribunal") dated 20 January 2011 [2011] UKFTT 70(TC) dismissing the appeal of Wakefield College ("Wakefield") against a ruling of the Commissioners for Her Majesty's Revenue and Customs ("HMRC") in a letter dated 23 May 2007 to the effect that the construction of a new building called the skillsXchange at Glasshoughton in West Yorkshire ("the Building") did not qualify for zero-rating for VAT purposes under the Value Added Tax Act 1994 Schedule 8 Group 5 Item 2 as "the supply in the course of construction of (a) a building … intended for use solely for … a relevant charitable purpose … of any services related to the construction other than [certain exceptions]", "a relevant charitable purpose" being defined by Note (6) as "use by a charity … otherwise than in the course or furtherance of a business". It is common ground that Wakefield's intentions as regards the use of the Building can be determined by reference to the use which has actually been made of the Building since it was opened in February 2009.

2. Wakefield appeals on two related grounds. First, it contends that, as a result of the failure by both parties to refer it to relevant guidance, the Tribunal misconceived its jurisdiction. Secondly, it contends that the Tribunal failed to make a finding on one matter. For these reasons Wakefield requests that the Tribunal's decision be set aside and the matter remitted to it for further consideration.

Background

3. Wakefield is a charity. Wakefield provides education to over 10,000 students. It offers a range of full-time and part-time courses, including apprenticeships, for students aged 14 or over. A majority of the students are part-time and a majority are 19 or over.

4. Over 80% of Wakefield's income is in the form of grants from funding councils, primarily the Learning and Skills Council ("the LSC"), but also the Higher Education Funding Council for England ("HEFCE"). Less than 10% of Wakefield's income is in the form of tuition fees paid by students or their employers.

5. Wakefield says that for present purposes the students may be divided into three groups:

    i) Students who qualify for a full grant, representing about 73% of the total. These students do not pay any tuition fees.

    ii) Students who qualify for a reduced grant, representing about 11% of the total. These students or their employers are expected to pay a proportion of the fees for their courses. The LSC assumes that

Wakefield will receive a certain level of fee income, namely 37.5% in 2007-2008 rising to 50% in 2010-2011 ("the assumed fee income"), and only funds the balance by way of grant. In practice, the fees which Wakefield receives are less than the assumed fee income – about 70%.

iii) Students who do not qualify for any grant and who pay the full cost of their courses, representing about 16% of the total.

6. There is no dispute that the provision of education to the first group of students does not constitute a business for VAT purposes. Nor is there any dispute that the provision of education to the third group of students does constitute a business for VAT purposes. There is a dispute as to whether the provision of education to the second group of students constitutes a business for VAT purposes or not.

7. On its appeal to the Tribunal Wakefield advanced two arguments against HMRC's ruling. First, that the Building was being used otherwise than in the course or furtherance of a business. Secondly, that in providing further education pursuant to a legislative framework, Wakefield was acting as a public body, and so was not a taxable person for VAT purposes at all.

8. The first argument was summarised in Wakefield's skeleton argument before the Tribunal as follows:

> "12. The Appellant's core activity is the provision of government-funded education where the Appellant either charges limited fees or there are not fees at all. Where limited fees are charged, there is no 'direct link' between these fees and the provision of education so that they do not constitute consideration in the VAT sense (see paras. 45 to 51 of the ECJ's judgment in the recent case of (C-246/08) *EC Commission v Finland*.
>
> 13. It is accepted that the Appellant provides some courses for full consideration. Those courses provided for full consideration could not, however, be provided as a separate activity but depend on the existence of the core activity. The activities have to be viewed as whole and, so viewed, are not economic: see *British Olympic Association v Winter* (1995) STC (SCD) 85."

The Tribunal's decision

9. The Tribunal rejected both Wakefield's arguments. It is not necessary for present purposes to set out its reasons for rejecting the second argument, but it is important to see how it dealt with the first argument:

> "30. It is firstly so far as the payment of fees is concerned that an issue arises in this case and in the appellant's skeleton argument and at the hearing [counsel for Wakefield] made it clear that where 'full consideration' is charged to the students he accepts that the provision of education would be a business activity and the fee would be consideration but for one factor.

That factor is that the appellant contends that its 'core activity' takes it outside the scope of a body which is in business at all. The core activity is the provision of education funded by grant income. The appellant argues that as that activity is by far the larger part of its total activities the effect is that when it provides education for payment of fees it is not conducting a business because it would be wholly uneconomic for it to supply the education for those fees without the overheads and other costs having already been covered by the grant income.

31. The well known cases of *Customs and Excise –v- Morrison's Academy* [1978] STC 1, *Customs and Excise –v- Lord Fisher* [1981] STC 238 as approved in the *Chartered Accountants* case (already cited) establish the following general propositions which need to be considered when a question arises at to whether an activity is to be categorised as a business or economic activity for VAT purposes.

> No possible exhaustive definition of what constitutes a business is possible.
>
> The whole of an activity has to be considered when deciding whether it is a business.
>
> Regard is to be given to whether the activity is carried on as a serious undertaking earnestly pursued.
>
> Whether it has reasonable continuity.
>
> Whether it has reasonable substance in terms of the value of the supplies made.
>
> Whether it is carried on in a regular manner with sound business principles.
>
> Whether it is principally concerned with making supplies to consumers.

32. The education of students who pay fees is, on the facts of this case, certainly an activity carried on as a serious undertaking earnestly pursued. The College is encouraged to maximise its income from this source both by it having as one of its aims the provision of further education and more specifically because of the incentive provided by the reduction of the grant by the assumed fee income. A college that did not seek to educate any paying students would suffer the reduction in its grant without any amelioration from such fee income as it managed to secure. It is clear from the documents that the College markets itself with a view to securing such fee income and does so vigorously.

33. The fee paying students are a small minority of the total but they and their fees are of reasonable substance. Their education is an activity carried out in a regular manner and does amount to the making of supplies to consumers. The appellant's argument implies that the fee paying students do not represent an activity conducted on sound business principles because the teaching of those students would not be possible without the subsidy in effect provided by the grant income on which the existence of the College itself and the courses it runs depend. I do not agree. Given that the College will put on such courses and as a consequence will receive grants but given also that it will then receive a grant reduced by the assumed income, it makes very good business sense to take on the fee paying students as well in order to off set as far as possible the effect of the assumed fees.

34. In my opinion the analogy sought to be drawn between the appellant and the playgroup and nursery that were considered in *Customs and Excise –v- Yarburgh Children's Trust* [2002] STC 207 and *Customs and Excise –v- St Paul's Community Project* [2005] STC 95 is not a valid one. Those organisations were conducted on a wholly different scale from that of the College and those cases were decided on their own facts which are too far removed from those of the appeal under consideration for them to support any such analogy.

35. A number of other cases were cited but I do not think they alter the principles established by those I have mentioned. I hold therefore that when the College provided education for fee paying students who paid full fees it was carrying on a business and that when the skillsXchange was constructed that was an intended use of the building with the consequence that the construction of it was not eligible for zero rating.

36. Although that holding would be enough to dispose of the appeal I was told that the Commissioners operate a concession for cases where only a small element of business use is intended. Such concessions fall outside the scope of the Tribunal's jurisdiction but the parties invited me to make findings about other aspects of the College's activities the better to enable them to decide whether the concession might apply. In any event in case I am wrong about the conclusion I have reached about the fee paying students I should make those findings as well."

10. Having rejected both Wakefield's arguments, the Tribunal dismissed its appeal.

First ground of appeal

11. Wakefield does not pursue either of the arguments outlined above on this appeal. In relation to the first argument, Wakefield does not now dispute that use of the Building to educate students who pay the full cost of their courses amounts to use in the course of a business. Wakefield contends, however, that it does not necessarily follow that the Building is disqualified from zero-rating, because it is common ground that business use can be ignored if it is *de minimis*.

12. The Tribunal was referred to an extra statutory concession, ESC 3.29, to the effect that business use could be ignored as *de minimis* if, according to various alternative criteria including income, it amounted to 10% or less of total use. As the Tribunal recorded at [36], such concessions fall outside the scope of the Tribunal's jurisdiction, but the parties invited the Tribunal to make findings about Wakefield's other activities to enable them to decide whether the concession might apply. Accordingly, the Tribunal went on at [37]-[39] to make findings regarding certain other uses of the Building.

13. Unfortunately, however, the parties did not inform the Tribunal that *de minimis* use could be ignored as a matter of statutory interpretation, and not merely of extra-statutory concession. In particular, the Tribunal was not referred to HMRC's Business Brief 39/09, issued on 1 July 2009, which announced a change in HMRC's interpretation of the law to the effect that the term "solely" in Schedule 8 Group 5 Item 2 could accommodate a *de minimis* margin of 5% business use.

14. Thus, contrary to what the Tribunal understood to be the case, it did have jurisdiction to determine whether the extent of business use of the Building was *de minimis* or not.

15. Counsel for Wakefield submitted that it could be seen from [35]-[36] of the decision that the Tribunal had wrongly proceeded on the basis that Wakefield's appeal should be dismissed if the Building was put to any business use at all, however small, whereas the Tribunal should have gone on to decide whether in the light of its subsequent findings the extent of the business use was *de minimis* or not. Accordingly, the Tribunal had, through no fault of its own, made an error of law.

16. Counsel for HMRC had no real answer to this submission, and I accept it.

Second ground of appeal

17. Wakefield also contends that the Tribunal did not make a decision on the issue raised by the second sentence of paragraph 12 of its skeleton argument as to whether the provision of education to the second group of students referred to above was a business for VAT purposes, and accordingly made a second error of law.

18. In its initial response to the appeal, HMRC suggested that the Tribunal had dealt with this point in its decision at [37], as follows:

> "I was told that some fee paying students are entitled to partial remission of their fees and the appellant argues that those fees should not be regarded as consideration on the same basis as the part payment of legal aid costs was so treated in *Commission of the European Communities –v- Finland* [2009] ECR I-10605. The part payments made by some of the recipients of the legal aid in Finland were based on the aided party's income and bore no specific relationship to the aid granted. If that is the case where students receive partial remission of fees then I agree that should be treated the same way but if the remission is based on factors such as the student coming from a deprived area so that all students of a particular category would be entitled to the same remission regardless of their personal circumstances then that would only amount to a reduced level of consideration and the relevant supply would still be by way of business."

19. In an amended response, however, HMRC contended that the Tribunal had decided the issue at [32]-[33].

20. Counsel for Wakefield said that Wakefield had been prepared to agree with HMRC's reading of [37], but disputed that the Tribunal had dealt with this point at [32]-[33]. He argued that it was clear from the references to "full consideration" and "core activity" in [30] that in this section of the decision the Tribunal was addressing the argument summarised in paragraph 13 of Wakefield's skeleton argument and that it was equally clear from the reference to "full fees" in [35] that the Tribunal had rejected that argument. Furthermore, he pointed out there was no reference to the *Finland* case at [32]-[33].

21. Counsel for HMRC submitted that the Tribunal could not have overlooked the point about students who paid "limited costs" given that Wakefield had placed it at the forefront of its argument, that the Tribunal had set out the relevant facts in its decision at [22]-[23] and that the Tribunal's reasoning in [32]-[33] was to the effect that there was no distinction between paying full costs for a course and paying limited costs, since either way the fee charged was the consideration for the service. He disputed that the words "full fees" in [35] referred to full costs. He sought to explain [37] as referring to a fourth category of students who benefited from partial remission of fees, as opposed to paying limited costs. He was driven to accept in the course of argument, however, the decision was not wholly clear in this respect.

22. In my judgment, the better view is that the Tribunal addressed Wakefield's argument summarised in paragraph 13 of its skeleton argument at [30]-[35], including [32]-[33], and addressed the argument raised in the second sentence of paragraph 12 of the skeleton argument in [37]. It seems to me, however, that the Tribunal did not actually reach a conclusion in [37], but rather indicated that further information – or at least further argument – was required on the point.

23. Given that the matter must be remitted to the Tribunal anyway for it to make a determination on the *de minimis* issue, the Tribunal will be able to make clear what its decision is on this point in the light of such further argument as it deems appropriate.

Conclusion

24. For these reasons the appeal is allowed. I shall set aside the Tribunal's decision and remit the matter to it for reconsideration in the light of this judgment and further argument. The costs of the appeal will be reserved to the Tribunal in the light of its further decision.

Mr Justice Arnold

Release date: 20 December 2011