[2018] UKFTT 0479 (TC)

TC06657

Appeal number: TC/2014/04502

VALUE ADDED TAX – provision of grant-funded education and training – meaning of "economic activity" and of "business" – "Lennartz" treatment – lead case – Article 26(1) Principal VAT Directive

FIRST-TIER TRIBUNAL
TAX CHAMBER

COLCHESTER INSTITUTE CORPORATION **Appellant**

- and -

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

TRIBUNAL: JUDGE ALEKSANDER
RUTH WATTS DAVIES

Sitting in public at Taylor House, London EC1 on 24 to 26 July 2017

Eamon McNicholas, counsel, (24 July) and Noel Tyler, chartered tax advisor, (25 and 26 July), instructed by VATangles Consultancy, for the Appellant

Peter Mantle, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This appeal by Colchester Institute Corporation ("CIC") is against a decision of HMRC to reject an application by CIC pursuant to a voluntary disclosure to be repaid £1,528,499 in respect of overpaid VAT pursuant to s80 VAT Act 1994.

2. On 18 October 2016, the Tribunal gave directions that this appeal be a "lead appeal" pursuant to Rule 18, Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, and that seventeen other appeals as set out in those directions be stayed behind it. The Tribunal gave directions as to the common or related issues of act and law, and these are set out below.

3. On the first day of the hearing, CIC was represented by Mr McNicholas, and on the subsequent two days by Mr Tyler. HMRC was represented throughout by Mr Mantle.

4. A Statement of Agreed Facts was submitted by the parties. Witness statements were submitted on behalf of CIC from Jason Peters (Vice-principal – curriculum delivery and performance), Julie Cox (Director of Funding and Information), Gary Horne (Executive Vice-principal – Finance and Corporate Development) and James Hurst (an employee of VATangles, CIC's VAT advisor).

5. The evidence given by Mr Horne and Mr Hurst was not controversial, and they did not give oral evidence. Mr Hurst's evidence was a solely a series of photographs taken at the College's Colchester campus in April 2017. Ms Cox and Mr Horne gave oral evidence and were cross-examined. We found them both to be credible and reliable witnesses.

6. In addition, bundles of documentary evidence were also submitted.

Applicable law

7. Section 14, Education Act 2002 gives the Secretary of State for Education (in relation to England) the power to give, or make arrangements for the giving of, financial assistance to any person in connection with (inter alia)

> (a) the provision, or proposed provision, in the United Kingdom or elsewhere, of education or of educational services:
>
> […]
>
> (c) enabling any person to undertake any course of education, or any course of higher education provided by an institution within the further education sector". […]

8. For these purposes "education" includes vocational training.

9. Section 16, Education Act 2002 gives the Secretary of State power to determine the terms on which financial assistance will be given, and requires persons receiving financial assistance to comply with such terms.

10. The Secretary of State for Education delegates to the Education Funding Agency its responsibilities under s14 for the provision of financial assistance in the further education sector (which includes the College).

11. The Skills Funding Agency is an agency of the Department of Business, Innovation and Skills. Its funding comes from a combination of the European Union's Social Fund and from the UK government. We were not referred to the statutory basis under which the Skills Funding Agency operates.

12. Item 1, Group 6 (Education) of Schedule 9, VAT Act 1994 ("VAT Act") provides that the following are exempt supplies for the purposes of VAT:

> The provision by an eligible body of:-
>
> (a) education;
>
> (b) [omitted by art 2, SI 2013/1897]; or
>
> (c) vocational training.

13. This appeal is concerned with the application of "*Lennartz* treatment" to goods[1] acquired by a taxable person which are intended to be used both for economic activity and for private (or "non-business") use. There was something of a semantic debate before the Tribunal as to whether this treatment was rightly called "*Lennartz* treatment" or the "*Lennartz* mechanism", or whether it was just an illustration of a requirement of VAT law. The decision of the ECJ in *Lennartz v Finanzamt München III* (Case 97/90) [1995] STC 514 was instrumental in establishing this approach to the treatment of credit for input VAT, and it is convenient to use the terms "*Lennartz* treatment" or "*Lennartz* mechanism" when discussing these issue - and these terms are in common use amongst VAT practitioners. In this decision, the use of these terms is to be taken as convenient shorthand, and is not intended to suggest that this treatment or mechanism in any way derogates from VAT law.

14. At its simplest, *Lennartz* treatment is available where a taxpayer acquires goods which it plans to use both for making taxable supplies and for private use. In this case it can choose to obtain full credit of all the input VAT incurred by it on acquiring the goods. If it makes this choice, any subsequent private use of those goods is treated as a taxable supply for consideration, which gives rise to output VAT.

15. Provision for *Lennartz* treatment is made in Article 26(1), Principal VAT Directive (2006/112/EC) ("PVD"), which reads as follows:

> Each of the following transactions shall be treated as a supply of services for consideration:
>
> (a) the use of goods forming part of the assets of a business for the private use of a taxable person or of his staff or, more generally, for

[1] Which prior to 1 January 2011 included immovable property. So, costs incurred in constructing building were, at all relevant times, expenditure eligible for *Lennartz* treatment).

> purposes other than those of his business, where the VAT on such goods was wholly or partly deductible;
>
> (b) the supply of services carried out free of charge by a taxable person for his private use or for that of his staff or, more generally, for purposes other than those of his business."

16. Article 26(1) is transposed into UK law in paragraph 5(4), Schedule 4, VAT Act. This provides that:

> Where by or under the directions of a person carrying on a business, goods held or used for the purposes of the business are put to any private use or are used, or made available to any person for use, for any purpose other than a purpose of the business, whether or not for a consideration, that is a supply of services.

17. The requirement to account for output VAT in respect of deemed supplies is in Part 15A of the VAT Regulations 1995 ("VAT Regulations"), and in regulation 116E ("Regulation 116E") in particular, which provides as follows:

> 116E Value of a relevant supply
>
> Subject to regulations 116F, 116H and 116I, the value of a relevant supply is the amount determined using the formula—
>
> $$\frac{A}{B} \times (C \times U\%)$$
>
> where—
>
> A is the number of months in the prescribed accounting period during which the relevant supply occurs which fall within the economic life of the goods concerned;
>
> B is the number of months of the economic life of the goods concerned or, in the case of an economic life commencing on 1st November 2007 by virtue of regulation 116L, what would have been its duration if it had been determined according to regulation 116C or 116G as appropriate;
>
> C is the full cost of the goods excluding any increase resulting from a supply of goods or services giving rise to a new economic life; and
>
> U% is the extent, expressed as a percentage, to which the goods are put to any private use or used, or made available for use, for non-business purposes as compared with the total use made of the goods during the part of the prescribed accounting period occurring within the economic life of the goods.

18. The effect of the formula in Regulation 116E is to provide for taxpayers to account for deemed output VAT on the basis of the private (or non-business) use of the *Lennartz* asset as compared with its total use.

19. The decision of the ECJ in the case of *Vereniging Noordelijke Land- en Tuinbouw Organisatie v Staatssecretaris van Financiën* (Case C-515/07) [2009] STC 935 ("*VNLTO*") clarified the circumstances to which *Lennartz* treatment was available. In *VNLTO*, the ECJ held that "economic activities" and "business" were not synonymous

– in other words, business activities would include non-economic activities - and business use encompasses a broader range of activities than economic activities. Thus, in the context of Article 26(1) PVD, use for "non-business" purposes does not include use for the purposes of economic activities, but also does not include use for the purposes of many non-economic activities.

20. In 2010 HMRC issued Revenue and Customs Brief 02/10 which set out their response to *VNLTO*. In essence, taxpayers who had utilised *Lennartz* treatment in circumstances where (in the light of *VNLTO*) it was not properly available, could choose to unravel that treatment, adjusting both over-deducted input VAT and over-declared output VAT. However, HMRC had decided not to insist on unravelling in all cases - even where the unravelling would have been advantageous to HMRC. Instead, taxpayers were free to retain the benefit of over-claimed input VAT deductions (on the basis of the law as it was understood pre-*VNLTO*), but only on the basis that the taxpayer continued to treat itself as making deemed supplies, and to account for output VAT on those deemed supplies. This alternative arrangement was brought into force by paragraph 4, Schedule 8, Finance (Number 3) Act 2010 ("Paragraph 4"):

> 4(1) Sub-paragraph (2) applies where—
>
> (a) a person carrying on a business or any of that person's predecessors has been allowed credit under sections 25 and 26 of VATA 1994 for input tax on the basis that the input tax is attributable to a thing done or to be done which is or would be a paragraph 5(4) supply,
>
> (b) some or all of that credit was allowed before 22 January 2010, disregarding sub-paragraph (2), the thing done or to be done is not or would not be a paragraph 5(4) supply, and
>
> (c) the credit allowed as mentioned in paragraph (a) is not reversed in full.
>
> (2) The thing done or to be done is to be treated for the purposes of VATA 1994 as if it were or would be a paragraph 5(4) supply.
>
> (3) But sub-paragraph (2) does not confer on the person allowed credit as mentioned in sub-paragraph (1)(a) any entitlement to that credit under sections 25 and 26 of that Act.
>
> (4) For the purposes of sub-paragraph (1) credit for input tax is "allowed" under sections 25 and 26 of VATA 1994 to the extent that the credit is claimed, and the claim is satisfied by one or more of the following—
>
> (a) the deduction of input tax under section 25(2) of that Act from any output tax that is due to the Commissioners;
>
> (b) a payment by the Commissioners in respect of the credit under section 25(3) of that Act;
>
> (c) the setting off of the credit against a sum payable to the Commissioners, whether under section 81(3) of that Act or section 130 of FA 2008 or otherwise.
>
> (5) In this paragraph—

> "paragraph 5(4) supply" means a supply under paragraph 5(4) of Schedule 4 to VATA 1994 (goods held or used for the purposes of a business which are put to private use etc);
>
> "predecessor" has the same meaning as in paragraph 5 of that Schedule.

(6) This paragraph is to be treated as having always had effect.

Background facts

21. The background facts are for the most part not in dispute. On the basis of the statement of agreed facts and of the evidence before us, we find them to be as follows.

Students and application process

22. CIC is a body corporate incorporated as a further education corporation under the Further and Higher Education Act 1992. CIC operates the Colchester Institute ("the College"), which is categorised by the Department of Education as a general further education college. Its main campus is in Colchester, but it has satellite campuses elsewhere in North Essex. The College is a large provider of further and higher education and of vocational training programmes with over 11,000 students. Approximately 49% of students are aged 16-18. The College offers 800 different courses each year. The College is an "eligible body" for the purposes of Item 1, Group 6 (Education) of Schedule 9, VAT Act.

23. The College does not provide academic courses, such as A levels - although if a student under 19 comes to the college without GCSE English Language and Mathematics at grade 4 (or grade C) or above, they are required to attend either a GCSE resit course or compulsory basic skills training and qualifications.

24. The College's courses are "vocational", with the aim of providing its students with technical knowledge, skills, and attitudes to secure and succeed in employment. Many of the College's courses lead to accredited qualifications. However, the College also provide non-accredited full cost and commercial vocational courses to meet the needs of local employers.

25. The courses provided by the College that are the subject of this appeal are all "education" or "vocational training" within the meaning of Item 1, Group 6 of Schedule 9, VAT Act.

26. The College provides courses to students from age 16 upwards. Students of all ages are educated or trained together, and there is no separation between them on grounds of age.

27. Prospective students apply to the College online. They are then invited for interview, and a written course offer will be made to them (this may be unconditional, or may be conditional upon academic grades being achieved). If the offer is accepted (and any conditions are satisfied), the student is invited to attend the College to complete their enrolment. As part of that process, the student will meet their tutor to confirm their results. The student will also meet members of the College's enrolment

team in order to allow the College to complete an "Individualised Learner Record Data" ("ILR") for that student.

28. The College then issues the student with a document headed "Receipt". This sets out the courses on which the student is enrolled. In relation to students whose costs are not met in full by one of the funding agencies, the Receipt will set out the fees payable for those courses, the amount paid on enrolment by the student, and any amount that remains outstanding.

29. In the case of a student whose costs are met in full by one of the funding agencies (as to which see below), the Receipt sets out a "fee" for the course (and any associated examinations), but also states that the student is entitled to a "waiver" and that the outstanding balance is nil. The evidence of Ms Cox was that the funding agencies required CIC to make students aware of the cost of their courses.

Funding

30. CIC's annual income is approximately £40m.

31. At the relevant times CIC was funded primarily by three government agencies: the Skills Funding Agency ("SFA"), the Education Funding Agency ("EFA") and the Higher Education Funding Council for England ("HEFCE"). This appeal relates to courses funded by the EFA and SFA (who are referred to in this decision as the "funding agencies").

32. The EFA funds the provision of education and vocational training for students aged 19 and under, certain categories of students aged over 19, and students with learning difficulties aged between 19 and 25. EFA funding amounts to approximately £19.7m.

33. The SFA funds all or part of the provision of education and vocational training for students aged 18 and over who have not achieved a specified level of academic qualification, or who are entitled to free education or training due to their personal circumstances in areas of the economy that are treated as priority areas for learning. For 2017/18 and subsequent periods, some of the funding previously provided by the SFA for 19-year-old students is moving to the EFA. The SFA used to fund apprenticeship training at all ages (but this funding is transferring to the Apprenticeship Levy) SFA funding amounts to approximately £4.7m.

34. The HEFCE provides grants for degree level courses. CIC's income in respect of such students amounts to approximately £7.5m per annum, of which £7m is fees charged to students, and £500,000 is represented by HEFCE grants.

35. CIC receives tuition fees for other students who are not eligible for EFA, SFA or HEFCE funding. International students will pay more for courses than domestic students – Ms Cox's evidence was that this reflected the additional tuition and support that international students required. Fees charged to these students amounts to approximately £700,000 per annum.

36. In addition to income from the provision of education and vocational training, CIC also generates income from the rental of studio and other space in the evenings, weekends and in the holidays. It also generates income from MoT testing and motor vehicle repairs. This other income is approximately £3.7 million per annum.

Funding agencies

37. Funding by the EFA is provided pursuant to s14 Education Act 2002. CIC enters into agreements with the EFA and the SFA each year in relation to the funding that those agencies provide. The agreements are in standard form, and are not negotiable. The agreement with the EFA is described as the "Conditions of Funding Agreement". The agreement with the SFA is described as a "Financial Memorandum".

38. The agreements are lengthy, and refer to (and incorporate by reference) a series of other documents (some of which are in electronic form and are published on the internet). Taken together, these agreements and the other associated documents set out the basis on which the agencies will fund CIC, and the obligations placed on CIC to deliver education and vocational training, and to provide information to the funding agencies.

39. Neither the SFA nor the EFA agreements set out the courses that CIC must provide. Indeed, the EFA funding agreement states that "it is not for the Government or its agencies to determine either which individual qualifications a student should take, or develop or generate new qualifications." But CIC is only funded by these agencies for the provision of courses leading to qualifications that have been approved by the Government and which are listed on a website maintained by the Government. Theoretically, CIC could provide courses leading to qualifications that have not been approved – but it would not be funded by either the EFA or the SFA to provide such courses – and it therefore does not do so. Subject to the other requirements of the funding agreements and CIC's own requirements, students are free to choose which of CIC's courses they wish to follow, and the EFA and the SFA will fund the course chosen by the student.

40. The amount paid by the EFA to CIC for any year is calculated on the basis of a national funding formula that incorporates various factors including student numbers in prior years, student retention, provision of higher cost subjects, disadvantaged students, and area costs. This is supplemented by additional funding for high needs students, bursaries and other financial support awarded to individual students.

41. For the period 2016/17, CIC's basic funding allocation from the EFA was £18,772,634. This was supplemented by £318,000 for High Needs Student Funding and £646,938 for Student Financial Support Funding, making £19,737,572 in total. The EFA represents the largest single source of funding for CIC, but is just under 50% of CIC's income.

42. The basic funding allocation was determined by the following funding formula:

[(Student numbers) x (National funding rate per student) x (Programme cost weighting)] + (Disadvantage funding) + (Large programme funding)

This amount is then multiplied by the area cost allowance.

43. In the case of CIC, the elements of the formula were determined as follows:

a. Student numbers for 2016/17 were 4105. This is not the number of students enrolled on EFA funded courses in 2016/17. It is instead determined by reference to "lagged student numbers" – being the number of EFA funded students in the preceding year (2015/16) which is then adjusted by various factors.

b. The national funding rate per student has £4000 per student as a basis (for a full-time course with 540+ hours of tuition) – but is then adjusted by reference to bands reflecting the planned hours per course and the lagged student numbers in each band.

c. The retention factor is based on the number of students who do not drop out and attend their course to the anticipated end date. For CIC this factor was 0.952.

d. The programme cost weighting reflects the fact that some courses are more expensive to deliver than others. For CIC this was 1.115.

e. Disadvantage funding relates to economic deprivation, students who are leaving care and students with learning difficulties and disabilities. For CIC this was £2,445,874.

f. Large programme funding addresses the fact that some study programmes are larger than 600 hours. For CIC this was zero.

g. The area cost allowance addresses the additional cost of providing education in London and the South-east of England. This uplift was not applied to CIC.

44. The funding received by CIC from the EFA is determined by the national funding formula, and is not a negotiated amount. The only scope for negotiation relates to student numbers in the event that CIC were to open a new campus for the College, for example. In such a case, the lagged student number formula would not reflect fairly the likely additional students, and in such circumstances the EFA might be prepared to increase the number of students for the purposes of the formula.

45. The terms of the EFA's funding agreement prohibits CIC from charging fees to students for the courses that it funds.

46. The amount paid by the SFA is based upon a monetary funding allocation calculated before the start of the year, but subject to a claw-back for under-delivery against allocation, which is reconciled at the end of the year (and repayable in the following January). No additional payments are made for over-delivery. We were not provided with a breakdown of SFA funding for 2016/17. But for 2013/14 the SFA

funding for CIC was £8,707,441, which was broken down by reference to Adult skills, 16-18 apprenticeships, and various other budgets.

47. Where the SFA only partly funds a student, there is an expectation that the student will pay the balance of the cost (although there is nothing in the SFA's funding agreement to require this). In practice, the College will charge the student the balance of the "fee".

48. The SFA's Financial Memorandum provides at clause 6.2 that:

> The College is free to spend its funding as it sees fit providing it fulfils the conditions of funding imposed by the SFA.

49. Some students who are over 18 may be eligible for an advanced learning loan from the Student Loan Company.

50. We note, and find, that for students who are fully funded by the EFA or the SFA, the "fee" set out on the "Receipt" does not accurately mirror the funding actually received by CIC for that particular student – but will be the baseline funding amount per student for that course (for an EFA funded full-time course, this will typically be £4000). However, the actual amount paid for that student by the funding agencies will depend on their respective funding formulae. For the EFA, for example, this will reflect the number of students in the prior year, the College's retention rates, and disadvantage funding. So, the actual funding received from the EFA by CIC to deliver its courses could be more or less than the aggregate of the amount stated on the Receipts issued for EFA funded courses.

51. Similar kinds of issues arise in respect of SFA funded students - such that the amount actually received by CIC from the SFA (together with any fees charged to the student) in any year would not exactly match the aggregate shown on the Receipts issued in respect of SFA funded courses.

52. Ms Cox's evidence was that, as far as she was aware, all further education colleges used the term "waiver" on their receipts. However, we consider and find that the term "waiver" in relation to EFA funded students is inaccurate. The fee shown on the "Receipt" is not waived, as CIC is precluded from charging fees to EFA funded students – it is not the case that the student is liable for a fee which CIC waives – rather the student is not liable to any fee in the first place.

53. As a condition of EFA and SFA funding, CIC is required to upload the ILR for each student on a monthly basis to a national Data Service Hub. There are in excess of 200 fields of data for each student. There are six members of CIC's staff employed solely to deal with the collection and submission of ILR data to the funding agencies. The December ILR return is monitored by the EFA and used to calculate the provisional funding allocation for the following year.

54. At the end of the year, a final ILR return will determine the basis of reconciliation against the funding allocation of the SFA, and is used to calculate any claw-back.

The Project and VAT

55. CIC reached an agreement with the former Learning and Skills Council ("LSC") to contribute funding to the rebuilding of the College's campus at Colchester – the Property Reorganisation Project ("the Project"). This was a £100m project, and the LSC agreed to fund 75%. Phase 1 of the project was the construction of two buildings (Blocks 1 and 6). These were completed in 2008 and the blocks were first brought into use in the VAT quarter ended 31 January 2009.

56. However, LSC was closed by the Government in March 2010, following mismanagement of its college building programme. CIC had spent £40m on Phase 1 of the Project at the point when the LSC was closed – and received a contribution of only £12.5m from the LSC towards this. CIC were left with £27.5m unfunded. This shortfall was met from CIC's cash reserves and from a £17.5m loan from Barclays Bank.

57. As regards VAT, HMRC have always considered that the provision of education and vocational training to students aged 19 and under, which is funded by a relevant funding body, is not a "business" activity within the meaning of the VAT Act – in other words it is an activity outside the scope of VAT.

58. In 2004, CIC applied to HMRC for permission to use the *Lennartz* mechanism in relation to various capital projects it was undertaking. That application was withdrawn on 17 October 2005 before HMRC had made any decision in relation to the application.

59. CIC applied to HMRC to approve a partial exemption special method ("PESM") in April 2007. As CIC had decided at that point not to use the *Lennartz* mechanism the PESM did not include it.

60. HMRC agreed the principles set out in the PESM in December 2007. But as CIC were reconsidering whether to use the *Lennartz* mechanism, the PESM needed to be redrafted.

61. On 1 February 2008, CIC's then VAT advisor wrote to HMRC seeking to apply the *Lennartz* mechanism to Phase 1 of the Project. Following correspondence and discussions between HMRC and CIC's advisors, a revised PESM was submitted for approval to HMRC in October 2009, which was formally approved by HMRC on 23 December 2009.

62. On 3 November 2009 CIC made a claim for recovery of input VAT in respect of the Project under the *Lennartz* mechanism. The claim was in respect of the elements of the buildings that were to be used for what CIC then considered to be "non-business" activities.

63. In December 2009, HMRC made a repayment of £2,087,477 to CIC – being input VAT (including *Lennartz* input VAT) less accrued output VAT on the deemed supplies arising under Part 15A of the VAT Regulations for the periods 01/09 to 07/09 inclusive.

64. A further repayment of £138,329 was made by HMRC to CIC in November 2010 in respect of input VAT (including *Lennartz* input VAT) on construction costs, less accrued output VAT on the deemed supplies for the periods 01/10 to 07/10 inclusive.

65. CIC continued to account for output VAT on deemed supplies under Part 15A of the VAT Regulations in respect of the non-business use of the Project buildings thereafter.

66. On 23 April 2014, CIC's VAT advisor submitted a net claim in respect of over-declared output VAT for periods 04/10 to 01/14 minus input VAT overclaimed for the periods 04/10 to 07/10 totalling £1,522,277.

67. The basis of the claim was that the provision of education to students was a business activity, irrespective of how it was funded. In consequence no part of the buildings within the scope of the Project were put to non-business use, and there was no requirement for CIC to account for deemed output VAT under paragraph 5(4), Schedule 4, VAT Act ("Paragraph 5(4)") and Regulation 116E. CIC argued that – subject to the four-year cap – the wrongly declared output VAT was reclaimable. A logical consequence of this claim was that the credit claimed for input VAT under the *Lennartz* mechanism was also wrongly reclaimed. To the extent that this input VAT fell within the four-year time limited period, it had to be repaid to HMRC. It was for this reason that the claim was netted-off to reflect the overclaimed input VAT. However, as most of the *Lennartz* input VAT was claimed in 01/10, it fell outside the four-year time limit, and the input VAT netted-off amounted to £138,329.

68. On 11 June 2014, HMRC refused CIC's claim. That refusal was upheld on a review by a letter dated 23 July 2014. On 13 August 2014, CIC appealed against that review decision.

69. On 5 February 2015, HMRC issued an alternative decision under s81(3) and (3A) VAT Act. The alternative decision only applies if CIC are successful in its appeal against the 23 July 2014 review decision as to the business, or non-business, nature of its supplies. The alternative decision operates by extinguishing CIC's claim through setting-off against the claim the *Lennartz* input VAT previously deducted by CIC. CIC appealed against the alternative decision on 23 March 2015.

70. The Tribunal issued directions on 18 May 2015 for both appeals to be consolidated. In this decision, references to the appeal against HMRC's 23 July 2014 review are to the appeal against HMRC's "preferred decision", and references to the appeal against HMRC's 5 February 2015 decision are to the appeal against HMRC's "alternative decision".

71. Following the decision of the Upper Tribunal in *Wakefield College* [2016] UKUT 19 (TCC), CIC accepted that some of its supplies were "non-business" (the "*Wakefield* rump"). By a letter dated 20 June 2016, CIC amended its 23 April 2014 claim. The amendment reduced the amount of the claim by £23,778, being deemed output VAT in respect of those activities found to be "non-business" in the *Wakefield* case. The resulting amount of the claim is therefore £1,528,499.

72. CIC continued to account for deemed output VAT until VAT period 01/15. Since CIC did not have any activities that it considered to be "non-business", it took the view that there was no requirement to account for deemed output VAT, and stopped doing so.

Arguments of the parties.

73. CIC's amended grounds of appeal against HMRC's preferred decision comprise seven numbered grounds.

74. The essence of these grounds (combining some of them) are that:

(1) the provision of education and vocational training by the College is a "business activity" for the purposes of Regulation 116E, irrespective of whether it is a supply for consideration.

(2) the provision of education and vocational training by the College is a supply for a consideration because the grant income received by CIC from government agencies must constitute consideration (within the meaning of Article 2(1)(c) PVD and s5(2) VAT Act) for the provision of that education and vocational training.

(3) it is not possible to split the activities of the College between business and non-business activities. All the activities of the College amount to a single business activity.

(4) a distinction can be drawn between the "provision" of education and vocational training, and the "supply" of education and vocational training - and that the provision of education and vocational training does not require consideration.

(5) HMRC's publicly stated policy is that the provision of vocational training is an exempt supply for VAT purposes - and as it is a "supply", it must by definition be a business activity.

(6) Even if CIC is wrong on points (1) to (3) above, the payments made by funding agencies amount to consideration for the provision of education and vocational training, and in consequence the education and vocational training funded by such payments must amount to a business. CIC submit that for a payment to amount to consideration, it does not have to be student-specific.

75. Accordingly, CIC submit that (apart from the *Wakefield* rump) it does not have any non-business activities - irrespective of whether payments by the funding agencies constitutes consideration. It therefore follows that CIC is entitled to a refund of the overpayment of output VAT (less the corresponding overclaimed input VAT) - subject to the 4-year cap. CIC note that the impact of the *Wakefield* rump is negligible.

76. CIC's amended grounds of appeal against HMRC's alternative decision consists of a single ground, that CIC has (and can have) no activities that are non-business (apart from the *Wakefield* rump), and therefore none that can lead to a deemed output VAT charge under Regulation 116E.

Lead case – common or related issues

77. The common or related issues of fact and law identified in the Tribunal's Rule 18 Directions released on 18 October 2016 arising on the appeals are:

Issue 1

78. Whether the provision of education and/or vocational training by "further education colleges" (as defined in Note 1(c), Group 6, Schedule 9, VAT Act is not an "economic activity" within Article 9 of the PVD and is outside the scope of VAT for the purposes of the PVD, and is not a "supply of services for consideration" within Article 2(1)(c) PVD and/or is not treated as such by the VAT Act (i.e. as not in the "course or furtherance of a business" within s4, VAT Act) and is not a "supply as defined by s5(2)(a) VAT Act" in circumstances where:

(1) Such education and/or vocational training is provided free of charge to students; and

(2) The further education college is wholly funded by grants provided to it by government in order to perform the activity in (1); and

(3) The further education college also educates and trains students and/or trainees alongside those at (1) above who pay fees for the education and/or tuition, or on whose behalf fees are paid or are payable to the further education college?

79. CIC contends that the provision of education and vocational training is an "economic activity" and a "supply for consideration", the consideration being the funding provided by the funding agencies.

80. HMRC disagree, and consider that the provision of education and vocational training is not an economic activity to the extent that it is funded by the funding agencies – on the basis that there is no direct link between the funding provided by the agencies and the provision of education and vocational training by the College to individual students.

Issue 2

81. In relation to goods for which "*Lennartz* treatment" (see *Lennartz v Finansamt München III* Case C-97/90) has been previously adopted by a person, to what extent is that person liable to output tax pursuant to Paragraph 5(4) (read together with Paragraph 4) and Part 15A of the VAT Regulations?

82. CIC submit that there is no liability to account for output VAT.

83. HMRC submit that CIC is liable to the output VAT in dispute by virtue of that legislation

Issue 3

84. Whether a further education college has any entitlement to credit for input tax by reason of carrying on the activity described in issue 1, in the circumstances described in issue 1?

85. Both HMRC and CIC agree that there is no entitlement to recovery of input VAT in these circumstances.

CIC's submissions on issue 1

Grant income constitutes consideration

86. Although CIC submit that the all the activities of the College (other than the *Wakefield* rump) constitute business activities, without the need for the payments by the funding agencies to constitute "consideration" (and this is relevant to Issue 2), CIC further submit that the payments by the funding agencies are consideration.

87. Article 73 PVD provides as follows:

> In respect of the supply of goods or services [...] the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party, including subsidies directly linked to the price of the supply.

88. Therefore, it is implicit that the provision of consideration by a third party can constitute consideration for a supply.

89. We were referred to the decisions of ECJ in *Office des Produits Wallon ASBL v Belgian state* (C-184/00) and *Keeping Newcastle Warm v Commisioners of Customs & Excise* (C-353/00) in relation to whether grant income can constitute consideration.

90. In Office des Produits Wallon ASBL the Court said:

> 10. It should first be noted that, as has been pointed out both by the Commission in the observations which it has submitted to the Court and by the Advocate General in point 40 of his Opinion, in circumstances such as those in the main proceedings it is immaterial whether or not there is a distinct service by a taxpayer such as OPW to the body paying the subsidy. Article 11A of the Sixth Directive [now Article 73 PVD] deals with situations where three parties are involved: the authority which grants the subsidy, the body which benefits from it and the purchaser of the goods or services delivered or supplied by the subsidised body. Thus, transactions covered by Article 11A of the Sixth Directive are not those carried out for the benefit of the authority granting the subsidy.
>
> 11. It should also be noted that subsidies such as those identified in the first question referred - namely operating subsidies covering a part of running costs - nearly always affect the cost price of the goods and services supplied by the subsidised body. In so far as it offers specific goods or services, that body can normally do so at prices which it would be unable to offer if were obliged at the same time both to pass on its costs and make a profit.
>
> 12. However, the mere fact that a subsidy may affect the price of the goods or services supplied by the subsidised body is not enough to make that subsidy taxable. For the subsidy to be directly linked to the price of

> such supplies, within the meaning of Article 11A of the Sixth Directive, it is also necessary, as the Commission has rightly pointed out, that it be paid specifically to the subsidised body to enable it to provide particular goods or services. Only in that case can the subsidy be regarded as consideration for the supply of goods or services, and therefore be taxable.

91. A similar point is made by the Advocate General in *Keeping Newcastle Warm*:

> 39. A subsidy from public funds may, however, take the most diverse forms. It could, for example, comprise a global subsidy to cover general operating costs, in which case no parties other than the donor and the recipient of the supplies are affected in any ways, or only indirectly. Or it could comprise a subsidy granted by the donor to the recipient to enable a third party to obtain a specific service (or obtain it more cheaply). As a rule, there can only be a taxable transaction where the subsidy is of the latter type, that is to say one granted int he context of a tripartite relationship.
>
> 40. The reason for this is that subsidies from public funds are made in the furtherance of the public interest, not to procure goods or services for the state. In order for there to be a supply, and therefore a taxable transaction, the beneficiary of the supply must be a third party.

92. CIC submit that the payments they receive from the funding agencies constitute third party consideration within the scope of Article 73 PVD. The payments are made by the relevant funding body specifically so that the College can provide education and vocational training to students.

93. CIC submit that the right of funding agencies to claw-back funding in the event of a student not completing a course (either specifically in relation to SFA funded students, or through the retention factor in the case of EFA funded students) indicates that there is a direct link between the provision of finance by the funding agencies and a particular student.

94. But even if it is conceded that payments are not calculated individually for each student, this does not prevent the payment from being third-party consideration. In the case of Le Rayon d'Or SARL (C-151/13), the ECJ considered the VAT implications of a "healthcare lump sum" paid to a care home by the French government's sickness insurance fund. The services to be provided to the residents were not defined in advance, and the residents were not aware of the price of those services. The amount paid to the care home did not coincide with the cost of the healthcare provided. The care home was required not to charge residents for healthcare.

95. The Court stated:

> 29 With a view to answering that question, it must be borne in mind, firstly, that, in accordance with Article 2 of the Sixth Directive, which defines the scope of VAT, 'the supply of … services effected for consideration' is subject to VAT and that, in accordance with the Court's settled case-law, a supply of services is effected 'for consideration', within the meaning of Article 2(1) of the Sixth Directive, only if there

is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient (see, inter alia, Case C-16/93 *Tolsma* EU:C:1994:80, paragraph 14; Case C-174/00 *Kennemer Golf* EU:C:2002:200, paragraph 39; and Case C-37/08 *RCI Europe* EU:C:2009:507, paragraph 24).

30 Secondly, the Court has held that subsidies directly linked to the prix of a taxable transaction are only one situation amongst others referred to in Article 11A(1)(a) of the Sixth Directive and that, irrespective of the particular situation in question, the taxable amount in respect of a supply of services is everything which makes up the consideration for the service (see, to that effect, Case C-353/00 Keeping Newcastle Warm EU:C:2002:369, paragraphs 23 and 25).

31 Since Article 73 of the VAT Directive, which replaced Article 11A(1)(a) of the Sixth Directive, is, in essence, identical to the latter provision, the case-law cited in the two preceding paragraphs and the following discussions apply mutatis mutandis to Article 73 of the VAT Directive.

32 It is clear that the 'healthcare lump sum' at issue in the main proceedings paid by the national sickness insurance fund to the RCHEs is received by the latter as consideration for the care which they provide, in different forms, to their residents.

33 Firstly, as Rayon d'Or accepted at the hearing, the RCHEs are actually obliged to provide services to their residents in consideration of the payment of that lump sum.

34 Next, it is not a requirement of the directive that, for a supply of goods or services to be effected 'for consideration', within the meaning of that directive, the consideration for that supply must be obtained directly from the person to whom those goods or services are supplied, since it may be obtained from a third party (see, to that effect, Joined Cases C-53/09 and C-55/09 *Loyalty Management UK and Baxi Group* EU:C:2010:590, paragraph 56).

35 The fact that, in the main proceedings, the direct beneficiary of the services in question is not the national sickness insurance fund which pays the lump sum but the insured person is not, contrary to the submissions of Rayon d'Or, such as to break the direct link between the supply of services made and the consideration received.

36 Finally, it is clear from the Court's case-law that where, as in the main proceedings, the supply of services in question is characterised, inter alia, by the permanent availability of the service provider to supply, at the appropriate time, the healthcare services required by the residents, it is not necessary, in order to recognise that there is a direct link between that service and the consideration received, to establish that a payment relates to a personalised supply of healthcare at a specific time carried out at the request of a resident (see, to that effect, Kennemer Golf EU:C:2002:200, paragraph 40).

> 37 Accordingly, the fact, in the main proceedings, that the healthcare provided to residents is neither defined in advance nor personalised and that the payment is made in the form of a lump sum is also not such as to affect the direct link between the supply of services made and the consideration received, the amount of which is determined in advance on the basis of well-established criteria.

96. CIC submit that the College is in a similar position to that of the care home in *Rayon d'Or*. It provides education and vocational training to students for lump sum payments by the funding agencies. Even though there may be no direct relationship between the payments by an agency to a particular course taken by a particular student, the payment is still - submit CIC - third party consideration.

97. CIC rely also on the Rayon d'Or case to support their submission that payments by the funding agencies do not need to be student-specific to amount to third-party consideration.

98. CIC further submit that the funding of an activity by the state does not have any bearing on whether it can amount to an economic activity. We were referred to the decision of the ECJ in *Lajvér Meliorációs Nonprofit Kft. Et al v Nemzeti Adó- és Vámhivatal Dél-dunántúli Regionális Adó Főigazgatósága* (C-263/15), where the Court stated

> 38 Lastly, the fact that the investments were largely financed by aids granted by the Member State and the European Union cannot have a bearing on whether or not the activity pursued or planned by the applicants in the main proceedings is to be regarded as an economic activity, since the concept of 'economic activity' is objective in nature and applies not only without regard to the purpose or results of the transactions concerned but also without regard to the method of financing chosen by the operator concerned, which also holds true in relation to public subsidies (see, as regards the prohibition of limiting the right to deduct, judgments of 6 October 2005 in *Commission v France*, C-243/03, EU:C:2005:589, paragraphs 32 and 33, and 23 April 2009 in *PARAT Automotive Cabrio,* C-74/08, EU:C:2009:261, paragraphs 20 and 26).
>
> […]
>
> 42 It has been held that the fact that the activity in question consists in the performance of duties conferred and regulated by law in the public interest is irrelevant for the purposes of determining whether that activity can be classified as a supply of services effected for consideration (see, to that effect, judgments of 12 September 2000 in *Commission* v *France*, C-276/97, EU:C:2000:424, paragraph 33, and 29 October 2009 in *Commission* v *Finland,* C-246/08, EU:C:2009:671, paragraph 40). Furthermore, it has also been held that even where the activity in question is designed to fulfil a constitutional obligation exclusively and directly incumbent upon the Member State concerned, the direct link between the supply of services and the consideration received cannot be called into question by this fact alone (see, to that

> effect, judgment of 29 October 2015 in *Saudaçor*, C-174/14, EU:C:2015:733, paragraph 39).

99. As the College is receiving third-party consideration for its activities, these must, say CIC, constitute supplies for consideration - and so be business activities for VAT purposes.

HMRC's submissions on Issue 1

Business and economic activities

100. HMRC note that the PVD distinguishes between "business" in Article 26(1) and "economic activities" in Article 9(1). Article 26(1) has already been set out above.

101. Article 9(1), PVD states that:

> "Taxable person" shall mean any persons who, independently, carries out in any place any economic activity, whatever the purposes or results of that activity.
>
> Any activities of producers, traders or persons supplying services, including mining and agricultural activities and activities of professions, shall be regarded as "economic activity".

102. In contrast, UK domestic law refers to "business" both in para 5(4), Schedule 4, VAT Act (which transposes Article 26(1) into UK domestic law), and also in s4, VAT Act (which transposes Article 9(1) into UK domestic law).

103. HMRC submit that the term "business" as used in

(1) s4 VAT Act must be interpreted consistently with the concept of "economic activity" as used in Article 9(1) (see for example *Healthwatch Hampshire CIC v HMRC* [2017] UKFTT 325 (TC) at [21]); and

(2) paragraph 5(4) must be interpreted consistently with Article 26(1) as interpreted in *VNLTO* by the ECJ.

104. Therefore, submit HMRC, "business" in paragraph 5(4) extends beyond economic activities, whereas "business" in s4 VAT Act refers only to economic activities.

105. HMRC accept that the provision of education and vocational training by the College amount to "business activities" for the purposes of Article 26(1) PVD and paragraph 5(4). However, HMRC do not accept that the provision of education and vocational training (when funded by the funding agencies) amounts to "economic activities" for the purposes of Article 9(1) (or an activity "in the course of furtherance of any business" for the purposes of s4 VAT Act), and that it is not a supply for a consideration.

Consideration for a supply – economic activities

106. HMRC contend that the payments made by the funding agencies to CIC are of the nature of block grants – and are not third-party consideration for a series of supplies

of education and training to students. The funding constitutes payment out of public funds in the furtherance of the public interest in the education and training of young people. It is not, submit HMRC, a payment to purchase services, but funding which enables CIC to carry out education and vocational training, and that there is no direct link between the funding provided by the EFA and the SFA and the provision of any specific service to students.

107. HMRC point to the statutory background under which CIC was formed under the Further and Higher Education Act 1992 as a further education corporation to provide further education, and to s14 Education Act 2002 which empowers the Secretary of State to fund the provision of further education and vocational training.

108. HMRC acknowledge that CIC has entered into agreements with the EFA and SFA, but submit that the VAT analysis does not turn on whether these agreements are legally binding or not – especially given that the Secretary of State has powers under s16 Education Act 2002 to specify (and therefore effectively, impose) the terms on which funding is provided. HMRC note that these agreements are not negotiable, and that there was no negotiation on the terms of these agreements or the formulae under which the funding agencies would make payments to CIC. The fact that there are agreements which set out conditions is not, say HMRC, surprising. It is in the public interest that requirements are placed on CIC as to the nature and quality of the education and vocation training that it provides.

109. HMRC submit that a supply for consideration presupposes the existence of a transaction in which a price or consideration is stipulated, that there is a legal relationship between the provider of the services and the recipient, reciprocity and a direct link between the services provided and the consideration received (see *R. J. Tolsma v Inspecteur der Omzetbelasting Leeuwarden* (C-16/93) (ECJ)).

110. HMRC submit that, first, no price or consideration has ever been agreed between the College and students (who pay no fee) for the provision of any particular course. Nor is any price for any particular course fixed in the agreements between CIC and the funding agencies, or by legislation. HMRC submit that the amounts shown on a "waived" Receipt issued to a student could not be the amount of any consideration, as has no direct relationship to the amount paid by a funding agency for the education and vocational training provided to that student.

111. HMRC drew our attention to the terms under which the EFA provided funding to CIC. In particular the EFA would fund any eligible course, and it was up to the College to determine which courses to teach, the resources to be devoted to any particular course (subject to meeting the minimum quality thresholds), and whether to stop providing any course. The EFA had no control over the number of students offered places by the College. The use of lagged student numbers in EFA's funding formula was a consequence of the inability of the EFA to predict numbers of students enrolling in the current academic year, and therefore there was a need to look back at the prior year. HMRC also noted that the funding formula used by the EFA was a national formula, which did not change between colleges (although the different factors in the formula would affect colleges differently).

112. In relation to funding by the SFA, we were referred to a number of the conditions of the SFA's Financial Memorandum. This included clause 6.2 which provides that:

> 6.2 The College is free to spend its funding as it sees fit providing it fulfils the conditions of funding imposed by the SFA. …

And clause 7.2 which provides that:

> The maximum value of each Learning Programme as shown in Appendix 1 of this Financial Memorandum may not be exceeded for Financial Memorandum (Further Education Colleges) 2016 to 2017 any reason. The SFA will not be liable to make any payment in excess of the Maximum Value of each Learning Programme unless this has been agreed and evidenced by a variation in writing.

113. HMRC submit that, secondly, there is no direct link between the funding and the provision of education and vocational training to students. This was not a case of negotiated consideration, but the provision of public funding subject to conditions. CIC are funded in order to enable it to carry on its activities of providing education and vocational training, not in return for making supplies to students.

114. The fact that the College provides to (fee-paying) students the same (or similar) education and vocational training in return for consideration (the fee paid by, or on behalf of, the student) does not mean that the provision of education and vocational training to students who do not pay a fee becomes a supply for consideration – particularly, say HMRC, where VAT is chargeable at the level of individual transactions and there is a need for a direct link between the supply and the consideration received by the supplier.

115. HMRC acknowledge that it is possible for payments by a government agency to constitute third-party consideration, where the relevant requirements are satisfied. However, for the reasons we discuss below, HMRC distinguish the facts in both *Rayon d'Or* and *Keeping Newcastle Warm* from those in this appeal.

116. Once it is accepted, say HMRC, that the provision of education and vocational training by the College is not a supply for consideration, then it must follow – given the nature and scale of the College's activities - that it is not an economic activity and outside the scope of VAT (as to which we were referred to *Longridge* in the Court of Appeal).

Discussion

117. We agree, for the reasons given by HMRC, that "business" in paragraph 5(4) does not have the same meaning as "business" in s4, VAT Act. Accordingly, the term "business" as used in

(1) s4 VAT Act must be interpreted consistently with the concept of "economic activity" as used in Article 9(1); and

(2) paragraph 5(4) must be interpreted consistently with Article 26(1) (as interpreted in *VNLTO* by the ECJ).

118. Therefore, "business" in paragraph 5(4) extends beyond economic activities, whereas "business" in s4 VAT Act refers only to economic activities. We agree with HMRC that the provision of education and vocational training by the College amounts to "business activities" for the purposes of Article 26(1), PVD and paragraph 5(4).

119. The ECJ discusses the meaning and scope of supply for consideration in a number of its decisions

120. In *Odvolací finanční ředitelství v Český rozhlas* (C-11/15) it says:

> 20 In that regard, it must be recalled that, within the framework of the VAT system, taxable transactions presuppose the existence of a transaction between the parties in which a price or consideration is stipulated. Thus, where a person's activity consists exclusively of providing services for no direct consideration, there is no basis of assessment and the services are therefore not subject to VAT (see judgments of 3 March 1994 in *Tolsma*, C-16/93, EU:C:1994:80, paragraph 12; 29 October 2009 in *Commission v Finland*, C-246/08, EU:C:2009:671, paragraph 43; and 27 October 2011 in *GFKL Financial Services*, C-93/10, EU:C:2011:700, paragraph 17).
>
> 21 It follows from this that a supply of services is effected 'for consideration' within the meaning of Article 2(1) of the Sixth VAT Directive, and hence is taxable, only if there is a legal relationship between the provider of the service and the recipient, pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient (see judgments of 3 March 1994 in *Tolsma*, C-16/93, EU:C:1994:80, paragraph 14; 29 October 2009 in *Commission v Finland*, C-246/08, EU:C:2009:671, paragraph 44; and 27 October 2011 in *GFKL Financial Services*, C-93/10, EU:C:2011:700, paragraph 18).

121. As regards the requirement for there to be a direct link between the services provided and the consideration received, we were referred by both parties to the ECJ's decision in *Rayon d'Or* (cited above) and by HMRC to *R. J. Tolsma v Inspecteur der Omzetbelasting Leeuwarden* (C-16/93):

> 14 […] a supply of services is effected "for consideration" within the meaning of Article 2(1) of the Sixth Directive, and hence is taxable, only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient.

122. This paragraph in *Tolsma* was quoted with approval by Lord Neuberger in the Supreme Court's majority decision in *Airtours Holidays Transport Limited v Commissioners for Her Majesty's Revenue and Customs* [2016] UKSC 21.

123. We found the summary provided by Advocate General Lenz at paragraph 14 of his opinion in *Toslma* to be helpful in describing the meaning of the term "consideration" for the purposes of VAT:

> 14. Certain criteria have been developed in the case law to define this principle more closely: there must be a direct link between the service supplied (which in this case would be the music provided) and the consideration received (in this case the payments by passers-by) (see the judgments in *Staatssecretaris van Financiën v Coöperatieve Aardappelenbewaarplaats* (Case 154/80) [1981] ECR 445 at 454, para 12, *Apple and Pear Development Council v Customs and Excise Comrs* (Case 102/86) [1988] STC 221 at 237, [1988] ECR 1443 at 1468, para 11 and *Naturally Yours Cosmetics Ltd v Customs and Excise Comrs* (Case 230/87) [1988] STC 879 at 894, [1988] ECR 6365 at 6389, para 11). The link must be such that a relationship can be established between the level of the benefits which the recipients obtain from the services provided and the amount of the consideration (see the *Apple and Pear Development Council* judgment [1988] STC 221 at 238, [1988] ECR 1443 at 1468, para 15). The consideration must be capable of being expressed in money (see the *Coöperatieve Aardappelenbewaarplaats* judgment (at 454, para 13), and the *Naturally Yours Cosmetics* judgment [1988] STC 879 at 894, [1988] ECR 6365 at 6390, para 16). It must be a subjective value (see para 23 below), since the taxable amount is the consideration actually received and not a value estimated according to objective criteria. A service for which no subjective consideration is received is consequently not a service 'for consideration' (see the *Coöperatieve Aardappelenbewaarplaats* judgment (at 454, paras 10, 11), the *Naturally Yours Cosmetics* judgment [1988] STC 879 at 886, [1988] ECR 6365 at 6390, para 16).

124. In *Lajvér Meliorációs Nonprofit Kft. Et al v Nemzeti Adó- és Vámhivatal Dél-dunántúli Regionális Adó Főigazgatósága* (C-263/15), the ECJ considered whether a non-profit organisation which constructed and maintained a water disposal system was engaged in economic activities. The organisation was in receipt of substantial state aid, and it appears that it was presumed by the parties that the payment of state aid did not amount to consideration for any supplies. We therefore disagree with CIC's submission that this case supports their contention that state funding has no bearing on whether activities are economic activities. Rather the case concerned the status of the "modest fees" to be charged to local landowners for ancillary services. It was held that these fees could constitute consideration for the supply of services. What this case did not determine was whether the funding provided by the state amounted to consideration for the supply of services.

125. The *South African Tourist Board* case concerned the UK branch of a South African statutory corporation which was funded by the South African government. The question was whether the funding constituted consideration for supplies. On appeal, the Upper Tribunal considered the application of the decision of the ECJ in *Apple and Pear Development Council v Customs and Excise Commissioners* (Case 102/86) [1988] STC 221. The Upper Tribunal found that a range of factors needed to be taken into account in determining whether there was consideration for supplies, and no one factor is necessarily conclusive, that the fact that the payments made by the growers allowed the Council to function (the "but for" test) was a factor supporting payments being consideration, but not a strong one, and that fact that the growers lacked control over what the Council did for them was a factor indicating that payments did not amount to

consideration. When considering the factors relevant to the *South African Tourist Board*, the Upper Tribunal decided that the payments by the South African government did not constitute consideration for any supplies, notwithstanding the existence of a contract between the government and the tourist board governing the performance of the tourist board.

126. The decision of this Tribunal in *Groundwork Cheshire v HMRC* [2012] UKFTT 750 (TC) concerned whether funding received by the appellant through the Enworks programme constituted third party consideration for the supply of services. The appellant provided environmental services to clients. In providing these services, the appellant kept records of the time spent by its staff on work for a particular client, and any disbursements incurred. The appellant was reimbursed on the basis of an appropriate charge-out rate for the members of staff, and office costs by reference to a space/time apportionment. The grant funding was claimed retrospectively for costs which could be determined were incurred in delivery of specific activities within the Enworks contract. The Tribunal held that there was a direct link between the services provided to clients and the funding provided by Enworks, such that the funding constituted third party consideration.

127. We find that education and vocational training the funding provided by the EFA and the SFA does not amount to consideration for any supplies made by CIC. In reaching this conclusion we take the following factors into account:

(1) The statutory background for the provision by the Secretary of State for funding for education and vocational training. This is not a strong factor against the payments amounting to consideration, but it is a factor.

(2) The absence of any direct link between the education and training provided to any particular student, and the funding provided by the funding agencies. This is a strong factor against the funding constituting consideration. We note in particular the fact that the funding is provided by reference to formulae which are set out by the agencies on a "take it or leave it" basis – and are not negotiated. There is no direct link in the formulae between the costs actually incurred by CIC in providing a particular course to a particular student, and the funding it receives. The College has great freedom in the courses it chooses to provide. There is no control by the funding agencies over the number of students offered places, or (as regards EFA funding) the courses they will fund (providing they meet certain basic criteria).

(3) The existence of agreements between the funding agencies and CIC is a neutral factor, as it is consistent both with the funding arrangements amounting to third party consideration, and with the funding arrangements amounting to a block grant made out of public funds but subject to conditions.

(4) The rights of the funding agencies to "claw back" amounts in the event that a student does not attend the course to the end, or other conditions of funding are not met. This is a point in favour of the funding amounting to third-party consideration. But as the amount clawed-back bears no direct relationship to the actual amount of resources expended by the college on that student's education or vocational training (or, indeed the "fee" that was "waived") it is a weak point.

(5) The amount shown on the "Receipts" issued to students whose fees are "waived" does not reflect a fee that is charged to the relevant funding agency for the provision of the course. It will not be the case (except by happenstance) that the aggregate amount shown on such receipts will equal the amount funded by the funding agencies, because of the components of, and adjustments made under, the funding formulae. This is a strong factor in demonstrating that there is not a fixed monetary amount which represents consideration paid in respect of each student.

(6) The College would not be able to provide education and vocational training "but for" the funding it receives from the funding agencies. This is a factor in favour of the payments being consideration, but is a weak factor.

(7) The College educating paying and non-paying students together. We consider this to be a neutral point, as it is consistent both with the funding provided to non-paying students being a block grant made out of public funds but subject to conditions, and the fees paid by fee-paying students amounting to consideration.

128. We agree with HMRC that funding provided is not a negotiated consideration paid for services, but rather a public block grant provided subject to conditions, and we so find.

129. Although the PVD recognises that it is possible for third parties to provide consideration, we do not consider that there is third party consideration in this case. The facts in both *Keeping Newcastle Warm* and in *Groundwork Cheshire* can be readily distinguished. In both cases, the facts are very different from those in this appeal. In both of those cases, the client contracted with the supplier for the provision of the consultancy services, and there was a direct link between the subsidy paid by the public agency to the supplier for cost of the advice or consultancy services that it provided.

130. In the *Rayon d'Or* case, the public authority made payments to residential care homes for the provision of care services to elderly residents. There were tariffs fixed by legislation - and lump sum payments based on daily rates for accommodation and social care were accepted by all parties as consideration for the supply of services to the residents. The issue before the ECJ related to lump sum payments for healthcare, which *Rayon d'Or* contended did not amount to consideration for a supply. The ECJ held that as there was an obligation on *Rayon d'Or* to provide the healthcare services for the lump sum, the payment amounted to consideration. The ECJ held that there was a direct link between the payment and the provision of services, because of the requirement on *Rayon d'Or* to make permanently available the provision of a personalised supply of healthcare services at a specific time to residents. We note also that the services were provided for a specified consideration, namely the mandatory tariff fixed by legislation.

131. We find that the terms of the agreements with the funding agencies do not amount to third party consideration, as there is not a sufficient direct link between the provision of education to the students and the funding provided by the agencies. Nor are the requirements for consideration met, as there is no link between the amount paid by the funding agencies and the actual cost of the provision of any particular course to a

particular student. We find that the amount of the "fee" shown on the "Receipts" does not represent the amount of consideration for a course where the student is not in fact charged any fee, for the reasons given earlier.

132. We therefore find that the payments made by the EFA and the SFA do not amount to consideration for the supply of services.

133. Given the scale of the activities of the College and the amount funded by the EFA and the SFA, we also find that these funded activities do not amount to economic activities, and are outside the scope of VAT.

CIC's submissions on issue 2

Business activity

134. CIC submit that the provision of grant-funded further education or vocational training must be a "business" activity, irrespective of whether the grant income constitutes consideration.

135. CIC submit that it is, and at all relevant times has been, a taxable person for the purposes both of Article 9(1), PVD and s3(1) VAT Act, not least because it is registered for VAT. The provision of such vocational training is integral to its "undertaking or enterprise".

136. We were referred to the opinion of Advocate General Mengozzi in *VNLTO* at paragraphs 54 and 55 where he said:

> 54. I therefore consider that use "for purposes other than those of [the] business" as provided for in Article 6(2) of the Sixth Directive [now Article 26 PVD] cannot include any use for the purposes of the taxpayer's non-economic activities.
>
> 55. That assessment does not prejudice the effectiveness of the expression "purposes other than those of [the] business" since this may extend to any use for private purposes by persons other than the taxpayer or members of his staff.

137. CIC submit that this opinion was followed by the Court in reaching its decision, and that it must follow that the provision of education and vocational training which is financed by the funding agencies must therefore be a "business" activity. Regulation 116E VAT Regulations provides that the deemed output VAT is determined on the basis of the use of the *Lennartz* goods for private or non-business purposes - it must therefore follow that if there is no non-business use of the *Lennartz* goods, there can be no deemed output VAT.

138. CIC submit that it therefore follows that the only circumstances where activities can be "non-business" are:

(1) If the activity is undertaken by someone who is not a taxable person;

(2) The activity is not undertaken "independently";

(3) The activity is undertaken by a state, regional or local government authorities, or bodies governed by public law (see Article 13(1) PVD)

(4) Where the activity does not form part of the purposes of the taxable person's undertaking or enterprise.

139. It is not in dispute that CIC is a taxable person and undertakes its activities "independently" It is not in dispute that, in the light of the decision of the decision in Riverside *Housing Association v HMRC* [2006] EWHC 2383 (Ch), CIC is not a body governed by public law.

140. CIC submit that the education and vocational training provided by the College are part of the purposes of CIC's undertaking or enterprise.

141. CIC submit that as the provision of grant-funded vocational training forms part of CIC's business activities, it follows, according to CIC, that there is little or no deemed output VAT arising under Regulation 116E of the VAT Regulations.

142. It therefore must follow that (apart from the *Wakefield* rump) CIC does not have any non-business activities - irrespective of whether the grant income constitutes consideration - and that the impact of the *Wakefield* rump is negligible.

Single activity

143. CIC submit that it is not possible to split their grant-funded activities from those which are not grant-funded. They submit that they have a single business - namely the provision of education and vocational training - and there is no practical difference between the provision of education and vocational training provided to a student aged under 19 (who is fully funded by the EFA), or one over the age of 19, who pays fees. CIC submit that HMRC's position - that the provision of education and vocational training for a fee is an exempt supply (under Item 1 of Group 6, Schedule 9 VAT Act) is wrong.

144. It is not disputed that the College makes no distinction between students according to the source of their funding. All students enrolled on a particular course will be taught together - irrespective of whether they are funded by the EFA, the SFA, or pay course fees.

145. CIC referred us to the decision of Neil J in National Water Council [1979] STC 157 where he said:

> I consider that once a business activity has been established in relation to a particular service, all supplies of that service should be treated as made in the course of that business unless there is a clear distinction between the circumstances in which the supply is made. [...] In other words, once a relevant business has been shown to exist in relation to a particular service, there is a presumption that all supplies of that service are made in the course of that business.

146. We were also referred to *British Dental Association v HMRC* [2010] UKFTT 17, this Tribunal held that the provision of free membership to students was essentially the

same as the provision of membership to qualified dentists (to whom a fee was charged) and did not amount to a separate non-business activity.

Distinction between "provision" and "supply" of education and vocational training

147. We were referred to Article 132(1)(i) PVD. Article 131 sets out transactions that are exempt from VAT. Article 132(1)(i) is as follows:

> 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.

148. This is transcribed into UK law in Item 1 of Group 6, Schedule 9, VAT Act as follows:

> The provision by an eligible body of: -
>
> (a) education;
>
> (b) research, where supplied to an eligible body; or
>
> (c) vocational training.

149. In both cases, the legislation uses the term "provision" rather than "supply". CIC submit that the distinction is deliberate, as the term "supply" connotes something done for consideration (see s5(2)(a) VAT Act - where "supply" is defined as excluding anything done otherwise than for a consideration). CIC submit that the term "provision" does not imply consideration.

150. CIC submit that activities which fall within the scope of an exemption from VAT must - by definition - fall within the scope of business activities for VAT purposes (otherwise they would not need an exemption). Therefore, the provision of education and vocational training by the College - being exempt from VAT - must be a business activity.

HMRC public statements

151. Although HMRC have stated that their view is that the provision of grant-funded further education and vocational training is not a business activity, CIC submit that this statement is inconsistent with public statements made by HMRC in relation to vocational training (and the College is a provider almost exclusively of vocational training).

152. We were referred to HMRC Public Notice 701/30 and to section VATEDU55500 of HMRC's VAT Education manual.

153. VATEDU555000 states:

> If your trader is an eligible body all its supplies of vocational training are exempt regardless of how they are funded.

154. Public notice 701/30 is consistent with this and under the heading "Training supplied by eligible bodies" says:

> […] the training is exempt from VAT, even if it is subsidised by the eligible body.

155. It is not in dispute that the College is an eligible body for these purposes.

156. CIC submit that if (as HMRC state), the provision of vocational training is exempt from VAT - even when fully subsidised - it must form part of the business activities of the College.

HMRC's submissions on Item 2

Business activity

157. HMRC accept (subject to paragraph 4) that the provision of education and vocational training by the College was not for any purposes other than "a purpose of [CIC's] business" within the meaning of paragraph 5(4). In consequence, CIC should not be treated as having made supplies for consideration pursuant to paragraph 5(4) – and this follows from *VNLTO*. However, say HMRC, this is not an end to the matter, as paragraph 5(4) is supplemented by paragraph 4, which is treated as if it had always had effect.

158. The purpose, say HMRC, of paragraph 4 is to ensure that any person who incorrectly received the benefit of deducting sums by way of input VAT, on the basis that it was making deemed supplies under paragraph 5(4), and has retained the benefit of those deductions, will remain liable to output VAT. Paragraph 4 achieves this purpose by treating the "thing done", being the "business" activity for the purposes of paragraph 5(4), as if it were a paragraph 5(4) supply. Thus paragraph 4 treats as a "non-business activity", the thing that would otherwise be treated as a "business activity". Taxpayers do not have to adopt the treatment set out in paragraph 4. Instead they can choose to reverse any input VAT credit previously received in full. In such a case there will be no deemed supply under paragraph 4, and no output VAT liability.

159. In the circumstances of this appeal, HMRC submit that the four requirements of paragraph 4(1) are met, and therefore CIC is treated as having made deemed paragraph 5(4) supplies for the purposes generally of VAT Act, and more specifically for the purposes of Regulation 116E.

160. CIC's contends that for the purposes of the Regulation 116E formula, U% is zero. However, HMRC submit that this has no regard to the impact of paragraph 4. This is because, submit HMRC, Part 15A of the VAT Regulations (which includes Regulation 116E) applies to supplies deemed to be paragraph 5(4) supplies as a result of paragraph 4.

161. If CIC's interpretation was correct, submit HMRC, such supplies would always have a zero value, rendering paragraph 4(1) meaningless.

162. As regards whether CIC is a "body governed by public law", it is common ground that it is not. However, HMRC submit that it does not then follow that (because it is not governed by public law) a further education college (such as CIC) cannot engage in non-economic activity. HMRC submit that there is no rule that a person that makes some supplies for consideration is to be treated as only carrying on economic activity if it also provides education otherwise than for consideration. HMRC submit that that it is fundamental to the VAT system that activities done otherwise for consideration are not economic activities and are outside the scope of VAT. We were referred to the decisions of the ECJ in *Securenta Göttinger Immobilienanlagen und Vermögensmanagement AG v Finanzamt Göttingen* (Case C-437/06), *UAB "Sveda" v Valstybinė mokesčių inspekcija prie Lietuvos Respublikos finansų ministerijosand* (Case C-126/14), and *VNLTO* as examples of cases where taxable persons (who, by definition, must have been carrying on economic activities) were found also to have been carrying on non-economic activities. These cases are also authority for input VAT not being deductible in full when it is incurred on inputs used wholly or partially for non-economic activities.

Single Activity

163. HMRC submit that the question of whether the education of fee-paying and non-fee-paying students amounts to a single (economic) activity, or separate (economic and non-economic) activities gives rise to similar issues to the analysis of whether the College's activities are a "business".

164. HMRC submit that the correct approach is to consider whether an activity is an economic activity for VAT purposes. In *Longridge On the Thames v Revenue and Customs* [2016] EWCA Civ 930 at [109] Morgan J distils the following propositions from the PVD and the jurisprudence of the ECJ:

> I consider that the following general propositions are established:
>
> i) It is only supplies, of goods or services, "for consideration" which are subject to VAT: Article 2;
>
> ii) There must be a direct link between the supply and the consideration before it is right to hold that the supply is "for consideration": *Finland* at [44]-[45];
>
> iii)Indeed, if there is no direct link between the supply and the consideration, the question of economic activity does not strictly arise as there is no consideration to form the basis of an assessment to VAT: *Finland* at [43];
>
> iv)VAT is charged on the amount of the consideration; it is irrelevant for the purpose of calculating the VAT payable whether the consideration for the supply is above or below the market value of the supply: *Finland* at [44] refers to "the value actually given";
>
> v) It is irrelevant for the purpose of calculating the VAT payable whether the consideration for the supply is at a concessionary rate; whatever precisely was meant by the word "concession" in EC v France at [21], it cannot be taken to mean that any reduction in price by way of a concession takes the supply outside the scope of economic activity;

> indeed, in *EC v France* at [20], the ECJ obviously thought that lettings by local authorities at subsidised rents were an economic activity;
>
> vi) Article 9 states that a taxable person is a person who carries on any economic activity, whatever the purpose of that activity: *Finland* at [37];
>
> vii) If a person supplies goods or services "for consideration", i.e. satisfying the test of direct link referred to in (2) above, and the activity is "permanent", then there is a rebuttable presumption, or a general rule subject to possible exceptions, that the supply for consideration is an economic activity: *Finland* at [37];
>
> viii) The character of the activity (i.e. whether it is an economic activity) is to be judged objectively: *Finland* at [37];
>
> ix) The subjective motive of the person making the supply does not influence the identification of the objective character of the supply; this follows from the proposition that the character of the activity is to be judged objectively;
>
> x) A charitable activity can be an economic activity: see *EC v Netherlands*, discussed at paragraph 17 above;
>
> xi) A non-profit making activity can be an economic activity: *Finland* at [40].

165. Of these propositions, (i) to (iii) and (vii) emphasise the need for a direct link between the consideration and the activity for there to be economic activity.

166. The same point is made by Arden LJ's at [65] where she said

> The crucial words are "economic activity". The CJEU has held that this entails a permanent activity in return for remuneration, and that it is for the national court to determine whether those conditions have been met (*Gotz*). The remuneration must be given in return for the service (*SDC* at 45]).

167. HMRC submit that CIC's analysis is mistaken as treating the presence or absence of consideration as being an immaterial or insignificant difference – as the existence of consideration is central in distinguishing economic from non-economic activity. The scale of the provision of free education by the College serves to underline the fact that the provision of free education is not an incidental part of the economic activities undertaken by CIC, or that it is preparatory in nature.

168. HMRC distinguish the *British Dental Association* case on the basis that it is a decision on its particular facts (that free membership was offered to students in order to recruit them into paying members in the long term), and did not involve any element of public funding.

Distinction between "provision" and "supply" of education and vocational training

169. HMRC submit that this ground is wholly misconceived. Under Article 2, PVD, the only transactions subject to VAT are:

> (a) the supply of goods for consideration […]; and

(c) the supply of services for consideration […]

170. Exemptions – including those under Article 132(1) - can only exempt from VAT transactions that would otherwise be subject to VAT under Article 2. The use of "provision" in Article 132(1)(i) has to be interpreted, say HMRC, in that context, and cannot mean something that is neither a supply of goods nor services for consideration. Further, the other paragraphs within Articles 132(1) and 135(2) show that sometimes the term "supply" is used, and sometimes it is not. It cannot be the case, submit HMRC, that the draftsman intended that some of these provisions applied only to supplies for consideration, and some did not, as to take this interpretation would lead to absurd and distortive distinctions. The same logic applies to the use of "provision" in UK legislation.

HMRC public statements

171. The references by CIC to VATEDU55000 in HMRC's manual and to Public Notice 701/30 are, submit HMRC, taken out of context and misread. VATEDU55000, for example, is focussed on Item 5, Group 6, Schedule 9 VAT Act, which applies to exempt certain kinds of vocational training (but not education) that are ultimately funded by the government under particular statutory provisions. It is not relevant to this appeal.

Discussion

172. We agree that CIC's interpretation of Paragraph 5(4) (read together with Paragraph 4) and Part 15A of the VAT Regulations is incorrect. We agree with HMRC's submissions that CIC's proposed application of Part 15A of the VAT Regulations does not take account of paragraph 4, and the fact that it is deemed to have always had effect.

173. We also disagree with CIC's submissions that there was no practical distinction to be drawn between the activities relating to students whose course were funded by the funding agencies, and students whose courses were funded by fees – even if the students were following the same courses. We agree with HMRC's submission that the key distinction between economic and non-economic activities are whether services are provided for consideration, and that there is nothing in the VAT legislation that prevents someone from engaging in both economic and non-economic activities.

174. We were referred by CIC to the decision of Neill J in *National Water Council*. We note that Neill J went on to say:

> …It may be helpful if I take two specific examples, though it should be emphasised that I do not intend to do more than indicate a preliminary view.
>
> There is evidence that the training and education facilities are made available on quite a wide scale and I have seen a copy of Bulletin 22 dated 13 September 1974 containing details of the statutory scheme approved by the Secretary of State. It would seem that the provision of these facilities to outside organisations and to foreign groups has all the indicia of a business activity, and I am not at present persuaded that the supply of these facilities to the water authorities under the same scheme should not be regarded in the same way.

> On the other hand, the provision to the water authorities of superannuation administration in accordance with s 27(3) of the Water Act 1973 appears to me not to be a supply in the course of business, and I do not consider that this position is altered by the fact that under some separate voluntary arrangement similar services are supplied to the Water Research Centre. If one is to give effect to the logic of s 15 and of the other provisions in the 1972 Act dealing with governmental functions, it seems to me to be right to exclude from the scope of 'business' advisory and administrative functions performed by the council exclusively for Ministers or public bodies and performed in pursuance of an express statutory obligation.

175. So, Neill J recognised that the National Water Council was undertaking both economic and non-economic activity.

176. We consider that the decision of this Tribunal in *British Dental Association* can be distinguished from the circumstances of this case because free membership was provided to students as an incentive to have them transition to paying membership in due course on qualifying. The other distinction to be drawn is that there was no element of public funding of the membership. Indeed at [13] the Tribunal expressly noted that there were other cases where a taxpayer was held to conduct both business and non-business activities, and so it is clear that the Tribunal was not making any general statement about non-economic activities, and the decision has to be read in the context of the particular facts of that case.

177. In contrast, the provision of free education by the College is not function to promote the College's economic activity of providing fee-paying education to certain students (or is in any way subservient to, or an extension of, such activity).

178. We also agree with HMRC's submissions in relation to the use of the term "provision" in Article 132(1)(i), PVD and in Item 1 of Group 6, Schedule 9, VAT Act. These have to be read in the context of Article 2, PVD and s4 VAT Act, which provide that transactions subject to VAT are supplies of goods or services for consideration. Article 132(1)(i) and Item 1 of Group 6 set out circumstances where supplies (which would otherwise be liable to VAT) are exempt from VAT. Therefore, the use of the term "provision" cannot have been intended to refer to something which is not a supply.

179. This is confirmed by the decision of the ECJ in *Stichting Regionaal Opleidingen Centrum Noord-Kennemerland/West-Friesland (Horizon College) v Staatssecretaris van Financiën* (C-434/05) at paragraph 16 where it said:

> 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).

180. As regards the alleged inconsistencies between HMRC's arguments and their publications, our initial reaction is that the Tribunal decides cases on the basis of the

law, and not on the basis of HMRC's guidance. Whilst published guidance may sometimes be helpful, it does not bind the Tribunal.

181. But in any event, on a close analysis, it is clear that the provisions in the guidance to which we were referred (both in the manual and the public notice) related to specific statutory provisions (Item 5 of Group 6, Schedule 9, VAT Act), and those provisions are not engaged in this appeal. We are satisfied that the statement in the guidance that "[...] supplies of vocational training are exempt regardless of how they are funded [...]"refers to supplies for consideration, which would be treated as economic activities.

Issue 3

182. As CIC and HMRC both agree that there is no entitlement to recovery of input VAT, we do not need to consider this issue further.

Answers to the lead case issues

183. We answer the three lead case issues as follows.

Issue 1

184. Whether the provision of education and/or vocational training by "further education colleges" (as defined in Note 1(c), Group 6, Schedule 9, VAT Act is not an "economic activity" within Article 9 of the PVD and is outside the scope of VAT for the purposes of the PVD, and is not a "supply of services for consideration" within Article 2(1)(c) PVD and/or is not treated as such by the VAT Act (i.e. as not in the "course or furtherance of a business" within s4, VAT Act) and is not a "supply as defined by s5(2)(a) VAT Act" in circumstances where:

c. Such education and/or vocational training is provided free of charge to students; and

d. The further education college is wholly funded by grants provided to it by government in order to perform the activity in (1); and

e. The further education college also educates and trains students and/or trainees alongside those at (1) above who pay fees for the education and/or tuition, or on whose behalf fees are paid or are payable to the further education college?

185. We find that the provision of education and vocational training, to the extent that it is funded by the funding agencies, is not an "economic activity" within Article 9 of the PVD and is outside the scope of VAT for the purposes of the PVD, and is not a "supply of services for consideration" with Article 2(1)(c) PVD and is not treated as such by the VAT Act and is not a "supply as defined by s5(2)(a) VAT Act"

Issue 2

186. In relation to goods for which "*Lennartz* treatment" (see *Lennartz v Finansamt München III* Case C-97/90) has been previously adopted by a person, to what extent is that person liable to output tax pursuant to Paragraph 5(4) (read together with Paragraph 4) and Part 15A of the VAT Regulations?

187. We find that such person is liable to account for output tax pursuant to the stated legislation.

Issue 3

188. Whether a further education college has any entitlement to credit for input tax by reason of carrying on the activity described in issue 1, in the circumstances described in issue 1.

189. We find that there is no entitlement on a further education college to recover input tax in such circumstances.

Conclusion on HMRC's preferred decision

190. Accordingly, we dismiss the appeal.

HMRC's alternative decision

191. As we have dismissed CIC's appeal on the basis of HMRC's preferred decision, we do not need to consider HMRC's alternative decision.

Appeals, lead case issues, and costs

192. This document contains full findings of fact and reasons for the decision. In the event that either CIC or HMRC are dissatisfied with this decision, they have a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. CIC and HMRC are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

193. On 18 October 2016, the Tribunal directed that this appeal should be a lead appeal and directed that the seventeen other appeals listed in those directions be stayed behind this appeal. The appeals listed in those directions are bound by this decision in respect of our decision on the common or related issues of fact or law as set out in paragraphs [177] to [183] above.

194. The appellants in those appeals that were stayed by the Tribunal's directions of 18 October 2016 may apply in writing for a direction that the decision in this appeal does not apply to and is not binding on their respective appeals. The time limit in which such an application is made is hereby extended to 56 days after the date that the Tribunal sends a copy of this decision to such appellant or their representatives (see rule 18(4) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009).

195. We note that the Tribunal classified this appeal as "complex" by its letter of 18 May 2015. In the bundles there are applications by CIC for the appeal to be reclassified as "standard" (dated 24 September 2015). It is unclear from the papers before us whether these applications were granted. If they were not granted, and either CIC or HMRC wants to pursue an application for costs, they should do so by making such an application in writing to the Tribunal office no later than 56 days after the release of this appeal (with a copy sent to the other). As it is unlikely that any assessment of costs would be undertaken summarily, the application need not be accompanied by a

schedule of costs. The Tribunal will then give such further directions as it considers appropriate. Paragraphs 3 and 4 of Rule 10 of the Tribunal's Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 are disapplied.

NICHOLAS ALEKSANDER
TRIBUNAL JUDGE

RELEASE DATE: 15 AUGUST 2018

Cases referred to in skeletons but not mentioned in the decision:

Birmingham Hippodrome Theatre Trust v HMRC [2014] EWCA Civ 684
Commission of the European Communities v Republic of Finland (C-246/08)
Edinburgh Telford College v HMRC [2006] CSIH 13
HMRC v Associated Newspapers [2017] EWCA Civ 54
Hotel Scandic Gåsabäck AB v Riksskatteverket (C-412/03)
Imperial War Museum v CCE [1992] VATTR 346
Laing the Jeweller Ltd v Customs and Excise [2004] UKVAT V18841
Landkreis Potsdam-Mittelmark v Finanzamt Brandenburg (C-400/15)
Marleasing SA v La Comercial Internacional de Alimentacion SA (C-106/89)
Minister Finansów v MDDP sp. z o.o. Akademia Biznesu, sp. Komandytowa (C-319/12)
R (oao Westminster City Council) v National Asylum Support Service [2002] 4 All ER 654
University of Huddersfield Students Union v HMRC (2016) FTT (unreported)
University of Southampton v HMRC [2006] EWHC 528 (Ch)
VDP Dental Laboratory NV v Staatssecretaris van Financiën and Staatssecretaris van Financiën v X BV and Nobel Biocare Nederland BV (joined cases C-144/13, C-154/13 and C-160/13)
Vehicle Control Services v HMRC [2016] UKUT 0316 (TCC)
Vodafone 2 v HMRC (No 2) [2009] EWCA Civ 446
Wellcome Trust Ltd v HMRC [2016] UKFTT 56 (TC)
Wellcome Trust Ltd v Commissioners of Customs and Excise (C-155/94)