[2017] UKFTT 492 (TC)

TC05946

Appeal number: TC/2014/6045

VAT – welfare services exemption – whether appellant 'state-regulated' as staff DBS checked – no – whether UK's implementation of exemption in breach of principle of fiscal neutrality – yes – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

THE LEARNING CENTRE (ROMFORD) LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE Barbara Mosedale

Sitting in public at Fox Court, Brook Street, London on 13 and 14 June 2016 and at the Royal Courts of Justice, the Strand, London on 15 and 16 November 2016

Mr E McNicholas, Counsel, for the Appellant

Ms N Barnes, Counsel, for the first two days of the hearing; and Mr J Davey QC and Ms N Barnes, Counsel, for the final two days of hearing, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

1. On 15 August 2014, the appellant ('TLC') applied to be de-registered with respect to value added tax with retrospective effect from 1 September 2009 on the basis that it considered its supplies to be exempt. On 8 October 2014, HMRC notified it by letter that its application was refused. That refusal is the decision which is the subject of this appeal.

2. The appellants' directors felt that HMRC had failed to properly consider their application: Mr Spence had written a long and detailed letter addressing (some) of the VAT issues in this case: HMRC's reply, however, entirely failed to acknowledge any of the issues he raised and just said HMRC would not de-register the company as it was not below the deregistration threshold. However inept this decision letter, HMRC's position was that the relevant VAT issues had been thoroughly ventilated in prior correspondence. In any event, the question for this appeal is whether the appellant's supplies were exempt, and not HMRC's failure to give full reasons in its decision letter.

3. As all parties accept that this appeal is about whether or not the appellant's supplies were exempt and had been exempt since its first registration on 1 September 2009. If its supplies were exempt, it should never have been registered and should now be retrospectively de-registered; if its supplies were not exempt, HMRC were correct to refuse to deregister the appellant.

Lead case

4. This case is a lead case under Rule 18. The common or related issues of law was stated to be:

> what is the meaning of a 'state-regulated private welfare institution or agency' within Item 9 of Group 7 of Schedule 9 of the Value Added Tax Act 1994 and in particular what is the effect of Note (8) to that group; and
>
> whether Item 9 and Note (8) correctly transpose the Directive and in particular whether the 'organisations recognised by the Member State concerned as being devoted to social wellbeing' referred to in Article 132(1)(g) of the Principle VAT Directive includes more bodies within its scope than Item 9 and Note (8).

Split hearing

5. The case was originally listed for 2 days in June 2016 but the hearing did not complete within the allotted time due to issues being raised by the appellant for which HMRC had not had time to prepare, in particular, the question of different VAT treatment of the same welfare supplies between (a) local authorities and private

entities and (b) entities in England, Wales, Scotland and Northern Ireland. The hearing reconvened for a further two days in November 2016.

The facts

The Evidence

6. Evidence was given by Mr and Mrs Spence, who were the directors and shareholders of the appellant. While Mr Spence gave some oral evidence, and Mrs Spence was asked a few questions, their evidence was not really disputed. I accept it.

7. Written evidence was given by Mr Richard Abbott and Ms Jan Laws, both employees of TLC. This evidence was not in dispute and they were not called to give live evidence. I accept their evidence.

Background facts

8. The appellant is a limited liability company owned by Mr and Mrs Spence. It provides day-care to vulnerable adults with learning difficulties, who were referred to as 'students' by the company and in the hearing. Both directors have relevant qualifications and a great deal of experience in providing the care which the company provides. In very brief summary, the company provided their students with education, activities, and entertainment during working hours Monday to Friday, providing meals and, where required, assistance with eating, administering medication, and personal care (such as helping students with intimate matters like toileting). They also provided the transport to bring the students to and from their homes and the facility. The education provided was geared towards teaching the students independent living.

9. While I do not set out the detail of the care provided, as it is not necessary, the appellant's directors' evidence of the high level of care provided was not disputed. The appellant stressed the high quality nature of care the company provided and were keen for me to watch their promotional video, created to give potential new students an idea of what care the company provided. Their local authority had provided a very positive report on their services following an inspection (see §14). But the nature and quality of the care provided by the company was not in dispute. HMRC accepted that what the appellant provided was 'welfare services' within the meaning of the Value Added Tax Act 1994 ('VATA') Schedule 9 ('Sch 9') Group 7 Item 9 and Note (6) to that Item.

Appellant's attempts to resolve position

10. Ever since being required to register and account for VAT on their supplies, the appellant, via its directors, had sought to challenge the VAT position with HMRC, to persuade bodies such as the CQC (see below) to regulate them, and to seek a change in the law by approaching various MPs and Ministers. They had not yet been successful as at the time of the hearing.

Disclosure and Barring service

11. The disclosure and barring service check ('DBS' check) is perhaps better known by its old title of the Criminal Records Bureau check ('CRB' check). I set out the legislation below at §§31-34.

12. All the appellant's staff (save for one volunteer who did not provide personal care nor was ever alone with a student) had current DBS checks in place, as required by law. The appellant kept a database to ensure it renewed each member of staff's DBS check before the earlier one expired. Each renewal cost the appellant about £58. Any volunteer, or new member of staff for whom a check had not yet been obtained was not allowed to attend to personal needs of the students nor allowed ever to be alone with them, in accordance with the law. HMRC did not challenge the appellant's evidence on this and I accept it.

Other regulation of the appellant

13. HMRC did not challenge the appellant's case that various, unspecified pieces of legislation obliged them to have a number of health and safety checks for various pieces of equipment and to meet food hygiene laws.

14. In consequence of this, the appellant voluntarily contracted with a private company which checked its compliance with health and safety and employment law requirements. It was also registered with 'ASDAN' and 'OCR' which provided accreditation for various educational programmes run by TLC. It had also consented to an inspection by the Local Authority ('Healthwatch Havering') but accepted that this inspection was not carried out under a statutory power.

15. It was agreed that the appellant was not regulated by Ofsted, as its students were adults, and Ofsted only regulated care and education provided to children.

The financing of day-care provision

16. Local authorities have the responsibility to provide the care needed by vulnerable adults. Currently, the legislation is contained in the Care Act 2014: I was not referred to the predecessor legislation which would have been in force at the time at issue in this appeal, presumably because it was not directly relevant nor in issue. As is now codified in the Care Act 2014, a local authority would be obliged to assess a vulnerable adult for (a) their needs and (b) their financial resources, and from that to draw up a Care Plan. The plan would set out what care was required to be provided for out of the local authority's resources.

17. It was accepted that at the time in question, as is now codified in s 8 of the Care Act 2014, the local authority could discharge its obligations to vulnerable adults by (a) providing the care themselves, (b) contracting out the obligation to a private entity or (c) making 'direct payments' to the vulnerable adult or their carer to enable them to buy the services required.

18. Before 2001, only options (a) and (b) had been available: direct payments were introduced at that time.

19. TLC would only accept students who had been assessed by their local authority and had a care plan. TLC was situated within the London Borough of Havering ('LB Havering') so most of its students were residents of that borough, but the TLC did have some students from neighbouring boroughs. LB Havering and a couple of other boroughs provided their students attending TLC with direct payments with which to pay TLC; however, one of the neighbouring boroughs (Redbridge) paid TLC direct.

20. The appellant's unchallenged evidence was that local authorities would make 'direct payments' available by transferring the allocated funds to an account in the name of the parent/carer and the parent/carer would then pay the chosen day care provider, such as TLC, direct. The funds were provided on the condition that they were only spent on paying for the care specified in the care plan (now contained in s 33(3) Care Act 2014). The local authority would insist that the account used was a separate account used solely for direct payments, and if any funds were unspent at the end of the year they had to be returned to the local authority.

21. While all TLC's students had care plans, and most of TLC's fees ultimately derived from the state, a small minority of the care provided for by TLC was paid for out of the parent/carer's own funds. For instance, the local authority might only assess the vulnerable adult as requiring 4 days' care per week: the parent/carer might choose to pay privately for an additional day of care per week.

Competitors

22. Over time, the number of local authority facilities has diminished with the consequent increase in private facilities, such as the appellant's in this case. Nevertheless, one of the most similar service providers to the appellant in the area was LB Havering's Avelon Road facility.

23. At the time of Mr Spence's witness statements, the appellant charged £76.02 a day inclusive of VAT. HMRC considered their services taxable so 20% of this had to be paid to the Government as VAT. If the vulnerable adult opted to attend a local authority day care facility in the same area, such as the Avelon Road facility, the local authority would discharge its obligation to the student by providing services direct. The vulnerable adult would not be given direct payments for this.

24. The local authority in providing the Avelon Road facility, unlike TLC, had no sticking VAT. It could not charge itself, although, if it did, its supply would be exempt as it was a public body – see §38. But it would be able to recover any VAT it incurred in providing the care under s 33(1) VATA. On the other hand, so far as TLC was concerned, any local authority using its services was concerned with TLC's gross price as it either was or considered itself to be unable to recover the VAT paid to TLC (for a further discussion of this see §§186-189). VAT was therefore an absolute cost to TLC: it was unable to pass it on to its customers. For instance, it was Mr Spence's

unchallenged evidence that when VAT increased from 15% to 20% the appellant was unable to pass on the increase: to retain clients it had to absorb it.

Relevant non-tax law

Regulation of care for vulnerable adults

25. The Health and Social Care Act 2008 established the Care Quality Commission ('CQC'). The object of the CQC was to protect and promote the health, safety and welfare of people using health and social care services (s 3) and to do so by registering service providers and reviewing and investigating those registered (s 2).

26. Section 8 of the Act set out what was a 'regulated activity'. S 10 provided that a person who carried on a regulated activity without being registered with the CQC committed an offence.

27. A regulated activity had to be prescribed. Only certain activities could be prescribed. In particular, a prescribed activity had to involve or be connected with the provision of health or social care in England (s 8(2)(a)). 'Health or social care' is defined in s 9. The appellant clearly did not provide health care; but on the face of it, it provided social care within the meaning of the Act. Social care was defined as:

> 9(3) 'Social care' includes all forms of personal care and other practical assistance provided for individuals who by reason of age, illness, disability, pregnancy, childbirth, dependence on alcohol or drugs, or any other similar circumstance, are in need of such care or other assistance.

28. However, the Health and Social Care Act (Regulated Activities) Regulations 2936/2014 (replacing earlier similar regulations) at regulation 3 provided that the activities in Schedule 1 to the Regulations were prescribed for the purposes of s 8 of the Heath and Social Care Act 2008. Schedule 1 set out prescribed personal care. It specifically excluded personal care other than such care 'provided in a place where those persons are living at the time the care is provided.' In other words, personal care provided <u>outside</u> the place where the subject was living was not a prescribed activity, and therefore not a regulated activity. Day care for vulnerable adults was not regulated by the CQC.

29. This was not really in dispute: HMRC's case is that the appellant's services were not regulated. The appellant had been very reluctant for many years to accept that it was not regulated, writing to various MPs and Minister and to the CQC. However, while it did not positively accept that it was not regulated by the CQC, I was not addressed with any legal argument that it was so regulated. I find that it was not.

30. The appellant's directors were very unhappy with this legal position. They considered that day-care of vulnerable adults needed to be regulated as much as residential care of vulnerable adults and thought it wrong in principle that it was not.

The disclosure and barring service

31. The Safeguarding Vulnerable Groups Act 2006 provided for a body to be established known as the Independent Barring Board (s 1). It had to maintain an 'adults barred list' (S 2(1)). The effect of a person being included on that list was that s/he was 'barred from regulated activity relating to vulnerable adults' (s 3(3)). That meant that that person would commit a criminal offence if they sought to, or did, engage in providing a regulated activity.

32. The Act also defined regulated activity providers (s6(2)) being persons who were 'responsible for the management or control of regulated activity'. Under s 9, a regulated activity provider would commit a criminal offence if it permitted a barred person to engage in a regulated activity if it knew or suspected that that person was barred.

33. Regulated activities were defined in Part 2 of Schedule 4. It was accepted and I find that the appellant's activities were regulated under this Act, as regulated activities included (if regular as defined) training, teaching and instruction provided to vulnerable adults, care or supervision of vulnerable adults and assistance, advice or guidance provided to vulnerable adults (paragraph 7 of Sch 4). Vulnerable adults were defined in s 59(1) and included (s 59(9)(b) a disabled person.

34. It was accepted that the appellant was required to ensure that each member of staff who provided personal care or was left alone with a student had an Enhanced DBS Certificate. These certificates had to be renewed every 3 years. I have found as a fact that TLC complied with these requirements: §§11-12.

Scottish, Welsh and Northern Irish law

35. I was not taken through this in detail. The above legislation only applied to England as it was a devolved matter. Nevertheless, Scotland had similar provisions requiring care homes providing care to vulnerable adults to have DBS checked staff. In addition, it was agreed by the parties that a private care home providing day-care to vulnerable adults, such as TLC, but if situated in Scotland, was subject to regulation by the 'Care Inspectorate' in the same way that residential care homes were subject to regulation by the CQC in England.

36. Both parties accepted that the same was true in Northern Ireland, although the regulation was carried out by the Regulation & Quality Improvement Authority.

37. The position in Wales was, however, similar to the position in England. Providers of day care to vulnerable adults had to have DBS checked staff but were not regulated by the Welsh equivalent to the CQC (the Care & Social Services Inspectorate Wales).

Tax law

Nature of the dispute

38. HMRC accepted, and had always accepted, that TLC provided welfare services. The provision of welfare services was exempt under the VAT Act 1994 ('VATA') Schedule 9 Group 7 Item 9 but only where it was supplied by a specified type of entity. Those were:

(1) A charity;

(2) A state-regulated private welfare institution or agency, or

(3) A public body.

39. The appellant was not a charity: on the contrary, the appellant was a company which ran the business for profit. As a privately owned company, it was not a public body either. The only possible category for the appellant was 'a state-regulated private welfare institution or agency' and HMRC did not accept that the appellant fell within it.

40. The appellant's case (including as it developed during the hearing) can be summarised as a case that the appellant's supplies were exempt because:

(1) It was (said the appellant) a state-regulated private welfare institution because it was state-regulated in the sense that its staff were regulated by the Disclosure and Barring Service;

(2) It was exempt under the directly effective provision of EU law which the UK welfare services exemption purported but (said the appellant) had failed to properly to enact.

Case 1: the appellant was a state-regulated private welfare institution?

41. As I have said, HMRC accept that TLC fulfils the requirements for exemption under Item 9 except in one respect: in other words, HMRC accepted that TLC provided welfare services and was a private welfare institution; HMRC did not accept that TLC was state-regulated.

42. Note 8 of Group 7 of Schedule 9 to VATA gives a definition of 'state-regulated' as follows:

> In this Group 'state-regulated' means approved, licensed, registered, or exempted from registration by any Minister or other authority pursuant to a provision of a public general Act, other than a provision that is capable of being brought into effect at different times in relation to different local authority areas.
>
> Here 'Act' means –
>
> (a) An Act of Parliament
>
> (b) An Act of the Scottish Parliament;
>
> (c) An Act of the Northern Ireland Assembly;

(d) An Order in Council under Sch 1 to the Northern Ireland Act 1974;

(e) A Measure of the Northern Ireland Assembly established under section 1 of the Northern Ireland Assembly Act 1973;

(f) An Order in Council under section 1(3) of the Northern Ireland (Temporary) Provisions Act 1972;

(g) An Act of the Parliament of Northern Ireland.

43. The appellant's case was that it was regulated because:

(a) its staff were DBS checked; and/or

(b) the appellant was regulated in the sense that it could only employ persons who were DBS checked. If TLC used staff who were not DBS checked, it would (if it knew or suspected it) commit a criminal offence (§32). Therefore, TLC did not have entirely free choice in choosing its staff and to that extent was regulated.

44. HMRC did not agree that either (a) or (b) amounted to state-regulation within the meaning of Item 9 because the DBS checks were made on individual employees and not on the appellant; moreover, the requirement to have DBS checked staff only checked suitability of the staff in a negative sense (that the employee had no criminal record and had not been reported as unsuitable to work with children or vulnerable adults); moreover, the checking procedure did not regulate the services provided by the appellant. The DBS did not regulate TLC's services as it had no control over them nor any ability to affect their quality and suitability; DBS could not approve the appellant or prevent them offering their services.

45. I go on to consider the issues at (a) and (b).

(a)Identity of regulated person

46. The facts were that the supplies were made by TLC which was a company. The question was whether the company was state-regulated and not whether its staff were state- regulated.

47. I was referred to the case of *K&L Childcare* [2005] EWHC 2414 (Ch) where a company supplied the services of nursery nurses on its books to its clients. The company claimed it was regulated because some of the staff it provided were qualified nursery nurses, and the institutions they were placed with were regulated. Although the appellant company in that case succeeded at first instance, that decision was overturned in the High Court which ruled that:

> [14]....Even if it be correct to regard the hired staff as themselves being subject to a system of regulation (which seems to me to be far from established by the facts found by the Tribunal), it does not follow that the respondent itself can be described as 'state-regulated'....

48. Mr McNicholas for the appellant suggested that the High Court decision was not binding on this Tribunal but it is difficult to understand his position on this: the case involved the exact same exemption as in issue in this appeal. He pointed out that

the taxpayer in that case was not represented in the High Court: while apparently true, that makes the decision no less binding. I consider that it is a binding decision that the supplier of the services in question must be state-regulated. It is irrelevant whether or not the staff are state-regulated but I note in passing that the High Court did not accept that the staff were state-regulated in that case; the appellant also lost that case on the basis that it supplied staff and not welfare services in any event ([10]).

49. I was also referred to *Planet Sport* [2013] UKFTT 639 (TC). The appellant company supplied staff who ran after school activities for children. It was not regulated by Ofsted, but its staff were DBS checked. The Tribunal applied *K&L Childcare* and held that the question was whether the appellant company was regulated; it held that DBS checks of its staff did not mean that the appellant company was regulated within the meaning of Item 9. It dismissed the appellant's claim that its supplies were exempt.

50. In conclusion, even if it was proper to see the DBS checks on staff as regulation of the staff, the question was whether TLC was state-regulated, because it was TLC which made the supplies. So regulation of its staff was irrelevant to the question of whether TLC was regulated.

(b)Meaning of regulation

51. The appellant's second point was that TLC was itself regulated because it was unlawful for the appellant to employ non-DBS checked staff. Not only that, the reason why TLC was subject to this legislation was because it provided welfare services: in other words, as explained at §33 above, it was because it provided care to vulnerable adults that TLC had to ensure all its staff were DBS checked. So, said the appellant, it was regulated in its provision of welfare services.

52. I note that Note (6) of Group 7 which contained the definition of welfare services went on to provide that in respect of a state-regulated private welfare institution, welfare services

> 'includes only those services in respect of which the institution is so regulated.'

53. In other words, for the supply of services to be exempt, the institution had to be regulated in respect of those supplies. Moreover, the exemption only applied to a 'state-regulated private welfare institution' which indicated that the regulation had to be in respect of its activities as a private welfare institution. But the appellant's point as I understood it, was that it was regulated in respect of its supplies of welfare services, because it could only make such supplies using DBS checked staff.

54. However, Note 8 defined 'state-regulated' to mean 'approved, licensed, registered, or exempted from registration....' So while in a general sense it might be said the appellant was 'regulated', its inability to employ staff without a DBS check did not amount to approval, licencing, registration or exemption from registration. It was regulated in a general sense but not in the sense intended by VATA.

55. In particular, there was no approval of the welfare services provided; there was no licensing of the appellant to provide those services, nor was there any registration or exemption from registration.

56. As the TLC said, it was 'regulated' in a general sense in many ways: various health and safety laws applied as well as the need for its staff to hold DBS checks. It contracted with a private company (§14) to help it comply with its various obligations. But its supplies of welfare services were not approved, licenced, registered or exempted from registration. Therefore, its supplies were not exempt under Item 9 of Group 7 of Schedule 9 of VATA.

57. I reject the appellant's case that it was state-regulated within the meaning of Item 9.

Legal nature of appellant

58. A part of the appellant's case was that HMRC's refusal to accept that its supplies were exempt within Item 9 was due to its directors' decision to constitute their business as a company rather than just trading in partnership. Mr and Mrs Spence, of course, were each DBS checked themselves. Their view was that, had they traded as a partnership, HMRC would have accepted that the partnership was regulated as the partners were DBS checked. HMRC did not accept this. I do not need to decide this issue as in fact the appellant was a company and not a partnership but, consistent with what I have said at §56, my view would be that it would have made no difference. Firstly, whether a company or a partnership made the supplies, the regulation of its staff is not state-regulation of the entity making the supplies; secondly, as I have said, DBS checks do not amount to state-regulation of a private welfare institution. In other words, I agree with HMRC that the supplies of TLC would not be exempt under Item 9 whether TLC was constituted as a company or partnership.

Case 2: the appellant was exempt under EU law

59. Item 9 implemented Article 132(1)(g) of the Principle VAT Directive 2006/112/EC ('PVD') which provided:

> 'the supply of services....by bodies governed by public law or by other bodies recognised by the Member State concerned as being devoted to social wellbeing'

60. The appellant's case was that the PVD granted exemption to its supplies of welfare services, that exemption was directly effective, and therefore its supplies were exempt, irrespective of the terms of UK legislation.

61. HMRC accepted, and were right to accept, that Art 132(1)(g) was directly effective: its predecessor in the Sixth VAT Directive 77/388 ('6VD'), Art 13A(1)(g), was held to be directly effective in *Kingscrest Associates Ltd and another* C-498/03. However, as Mr Davey for HMRC pointed out, a taxpayer can only rely on the provisions of the Directive as directly conferring exemption on it where the UK has

failed to properly implement the Directive. HMRC did not accept that the UK had failed to properly implement Art 132(1)(g).

62. The question was, therefore, whether the UK had failed to properly implement Art 132(1)(g). There were a number of reasons why Mr McNicholas suggested that there was a failure to fully implement the Directive. These had not been clearly articulated in advance and, as I have said at §5, HMRC were taken by surprise by some and that led to a postponement of the hearing. My summary of all Mr McNicholas' objections to the UK's implementation of Art 132(1)(g), as they had developed by the end of the hearing, is as follows:

(a) EU law gave exemption to bodies 'recognised' and not merely 'regulated' by the UK;

(b) There was (said Mr McNicholas) a major widening of the scope of the exemption in the PVD from the 6VD and UK law had failed to recognise this as Group 7 Item 9 had not been amended when the PVD came into effect;

(c) The UK exercised its discretion improperly when implementing Art 132(1)(g) in not recognising TLC as TLC was largely state-funded;

(d) The appellant was in direct competition with LB Havering whose supplies were exempt and that meant the UK had breached fiscal neutrality in its implementation of Art 132(1)(g);

(e) Bodies located in Scotland and Northern Ireland making identical supplies to the appellant were granted exemption so there was a further breach of fiscal neutrality by the UK in its implementation of Art 132(1)(g);

(f) There was also a breach of fiscal neutrality for the reason stated in *Life Services Ltd* in relation to the exemption for charities.

Case II (a) 'recognised' bodies

63. The welfare services exemption in the Directive, as I have said, applied to the following persons:

> "bodies governed by public law or other bodies recognised by the Member State concerned as being devoted to social wellbeing"

64. My understanding of the appellant's case on this was that the word 'recognised' should not be interpreted as conferring any discretion on member states. It should simply be given a meaning along the lines of 'acknowledged' so that the exemption should be read as applying to any entity which was in some way recognised or acknowledged by one arm or another of the government of a Member State as supplying welfare services.

65. The appellant's case is that it was 'recognised' in a number of different ways by different arms of government. Its local authority 'recognised' it because LB Havering promoted the services of the appellant in a leaflet which explained to parents/carers of

those in need of the services the various options available, not to mention that it undertook the voluntary inspection referred to at §9 above; TLC was even 'recognised' by HMRC, suggested Mr McNicholas, as HMRC had stated in a letter (and indeed in this hearing) that it accepted that TLC's services were welfare services within the meaning of the exemption.

66. HMRC gave 'recognised' a different interpretation. HMRC read it as a term intended by the EU to confer discretion on a Member State as to which private bodies should benefit from the exemption for welfare services. In other words, it was up to each individual Member State to choose which private welfare institutions to 'recognise'.

67. The appellant's interpretation largely makes the word 'recognised' redundant. Its interpretation in effect would see Art 132(1)(g) conferring exemption on any entity providing welfare services. HMRC's reading is clearly correct. The EU used 'recognised by the Member State concerned' to confer on each individual Member State a discretion as to which private welfare institutions should be granted exemption.

Case law on the meaning of 'recognised'

68. The Court of Justice of the European Union ('CJEU') has consistently read 'recognised' to mean that a discretion was conferred on each Member State to decide which bodies would be entitled to the exemption. For instance, this is how the word 'recognised' was understood in *Kingscrest.* While that case was decided on Art 13A(1)(g) in the 6VD (the forerunner to Art 132(1)(g) in the PVD) the word 'recognised' was used in both versions of the exemption. The CJEU said:

> [49] In that regard, it must be stated at the outset that art 13A(1)(g) and (h) of [the 6VD] do not specify the conditions and procedures for recognising organisations other than those governed by public law as charitable. It is thus in principle for the national law of each member state to lay down the rules according to which such recognition may be granted to such organisations.....
>
> [51] It follows therefore that art 13A(1)(g) and (h) of [the 6VD] grant the member states....a discretion to recognise as charitable certain organisations not governed by public law.

69. Another instance of this interpretation is in the CJEU decision of *Les Jardin de Jouvence* (C-335/14) where the CJEU refers to the exercise of discretion by Member States:

> [35] ...[Member States] when considering whether to recognise as charitable organisations other than those government by public law, it is for the national authorities, in accordance with EU law, and subject to review by the national courts, to take various factors into account...

Many other examples of this consistent interpretation of the word 'recognised' could be cited, but it is not necessary. HMRC's reading of 'recognised' is clearly correct and the appellant's is wrong.

Go Fair and *Kinderopvang*

70. Mr McNicholas sought to persuade me otherwise by reference to the CJEU's decisions in *Go Fair* (C-594/13) and *Kinderopvang* (C-415/04). However, he was wrong to consider these cases as offering any support for his proposition that 'recognised' meant anything other than that each Member State had a discretion as to which providers of welfare services would be entitled to exemption.

71. The taxpayer in *Go Fair* was an agency supplying nursing staff to care institutions. The nurses were qualified and 'state-examined' but the German tax authority refused to exempt the charges made by the taxpayer: the CJEU upheld this because the agency made the supply but the agency was not 'recognised' by the German government as devoted to social welfare. The CJEU appeared to give consideration to the question of whether the German Government ought to have treated the agency as 'recognised' because it supplied care staff to care institutions, but concluded at [28] that the supply of staff was not a supply of services in the general interest, whatever the use to which the staff was put.

72. Mr McNicholas appears to infer from the case that the CJEU was implying that if the taxpayer had been 'devoted to social wellbeing' in the sense of actually supplying care services rather than just staff, then it should have been recognised by the German Government. But I do not accept that that is what the CJEU meant: it would be inconsistent with what it said in that case at [20] and in other cases such as *Kingscrest* where the CJEU interpreted 'recognised' as giving Member States a discretion. The CJEU must be understood at [28] to be saying that because the taxpayer was not in fact supplying care services, Member States had no discretion to recognise it.

73. Mr McNicholas also relied on the case of *Kinderopvang* C-415/04. In that case the taxpayer was a non-profit making charitable foundation whose services, for which it charged, was introducing child minders to those who required child minding services. While the taxpayer was 'recognised' as charitable by the relevant member state, as it did not itself provide the welfare services (ie the child care), the question was whether its charges were exempt on the basis it provided a closely linked and essential service to the exempt welfare service provided by the child minder. The child minder clearly provided welfare services, but was the child minder 'recognised'? It was held at [23] that they could be 'recognised' but it was for the national courts to decide whether national law did recognise them.

74. It is difficult to see how this case could be thought to assist the appellant. It reiterates that while a body or person who provides welfare services may be 'recognised' by the relevant Member State, the Member State has a discretion on whether or not to recognise such bodies/persons, albeit that that discretion must be exercised within certain boundaries. Largely the *Kinderopvang* case was about the position of an intermediary (ie someone who introduces a person looking for certain services to a person who would provide such services) and has no direct relevance to this appeal, which does not concern intermediaries.

Conclusion on the appellant's Case II (a)

75. It is not enough to show that a local council or a department of central government considers the appellant to supply welfare services: EU law gives the Member States a discretion to choose which private suppliers of welfare services should have exemption. In giving Member States such a discretion, it is implicit that Member States may decide that some suppliers of welfare services are not exempt. The mere fact that its services are welfare services, and acknowledged as such by the government, therefore does not mean that the appellant is entitled to exemption.

76. To succeed in its case the appellant must show that in implementing Item 9 in the form that it did, the UK improperly exercised its discretion and I move on to consider this.

Case II (b): widening of scope of supplies of welfare services?

77. As I have said, the exemption now contained in the PVD Art 132(1)(g) was originally contained in the 6VD Art 13A(1)(g) but it was in a different form as the 6VD granted exemption to:

> "bodies governed by public law or by other organisations recognised as charitable by the Member State concerned"

78. The second limb was amended when re-enacted in the PVD, as I have already recorded, as:

> "bodies governed by public law or other bodies recognised by the Member State concerned as being devoted to social wellbeing"

79. The 6VD ceased to be of effect at the end of 2006 but Item 9 (including Notes (6) and (8)) had been introduced into UK law by the VAT (Health and Welfare) Order 2002/762 with effect from 21 March 2002. In other words, the UK government did not alter the welfare services exemption when the PVD was introduced, even though the 6VD and PVD had distinctly different wording.

80. HMRC's position on this is that the change in wording of the welfare services exemption in EU law at the end of 2006 was not intended to widen the exemption, but on the contrary simply to codify the CJEU's 2005 decision in ***Kingscrest.***

81. The facts in that case were that the taxpayer was a profit making body which provided residential welfare services. It had been registered for VAT and charged VAT on its services; but when the law changed on 21 March 2002, HMRC cancelled its registration on the basis that, although profit making, it was 'state-regulated' as regulated under the Care Standards Act and therefore its supplies were from then onwards exempt. The taxpayer challenged the decision and ultimately it came before the CJEU.

82. The taxpayer pointed out that the 6VD only permitted Member States to recognise organisations which were 'charitable'. The CJEU's reply was, predictably, that 'charitable' had to have an EU meaning: it did not necessarily mean charitable in the sense of English law ([27]). Rather less predictably perhaps, the CJEU went

further and said that 'charitable' did not even mean something akin to non-profit making, but meant an activity in the general interest whether or not it was profit-making ([31]).

83. In short, the CJEU decided in favour of HMRC and, impliedly, in favour of the legality of the UK's implementation of the welfare services exemption. It seems to me, therefore, that HMRC are right to say that the difference in wording between Art 132(1)(g) of the PVD and Art 13A(1)(g) of the 6VD reflects nothing more than the judge-made law in *Kingscrest*. As the CJEU had determined that being non-profit making was not a key requirement to the welfare services exemption, the word 'charitable' was deleted from the exemption and the public interest object (social wellbeing) inserted. The words changed, but not the meaning of the words.

84. So I do not accept that there was any change in meaning to the welfare services exemption when the PVD was substituted for the 6VD. In any event, Mr McNicholas did not explain what he thought the difference between the two versions of the exemption was nor how it helped his client. It seemed to me that his submissions on this came down to what he had said before, which was that in his view 'recognised' did not confer a discretion on Member States but should simply be read as something akin to 'acknowledged as supplying welfare services'. However, the word 'recognised' was used in both versions of the exemption: it had the same meaning in both. Therefore, as I have said, as it was clearly read by the CJEU as conferring discretion on Member States in the 6VD (see §§68-69 and [47] of *Kingscrest*), it did so in the PVD too.

85. I reject the appellant's case that the implementation of the PVD required the UK to amend its exemption for welfare services. In reality, the exemption contained in the PVD was the same as the exemption in the 6VD, despite the difference in wording.

Case II (c): the UK exercised its discretion improperly as the appellant was state-funded

86. While Mr McNicholas did not articulate a case on this clearly, it seemed to me that he was also making a more general case that the UK, in failing to recognise TLC as exempt, must have exercised the discretion it had under Art 132(1)(g) improperly.

The limits on the Member State's discretion to 'recognise' welfare bodies

87. He referred me to the case of *PFC Clinic* C-91/12 where the taxpayer carried out plastic surgery and cosmetic treatments. The question was whether the taxpayer provided medical care, as medical care was exempt. The CJEU ruled that its services were only exempt to the extent they involved diagnosing or treating ill-health or preserving good health. Purely cosmetic surgery not carried out for physical or mental health reasons was not exempt. Mr McNicholas did not appear to suggest that the case was directly relevant to this appeal but stated he relied on [37-38] of the CJEU's decision. But those paragraphs were simply a general statement by the CJEU

that the entirety of the terms of an exemption must be taken into account and that is not in dispute.

88. And it is certainly true that Member States do not have complete discretion in deciding which bodies to recognise under Art 132(1)(g). The CJEU has repeatedly said this. For instance, the full citation from *Les Jardin de Jouvence* at [35] at §69 above read as follows, and was a repeat of earlier statements made by the CJEU in cases including both *Zimmerman* C-174/11 and *Kingscrest* [53]*:*

> [35] ...[Member States] when considering whether to recognise as charitable organisations other than those government by public law, it is for the national authorities, in accordance with EU law, and subject to review by the national courts, to take various factors into account. They include the existence of specific provisions, be they national or regional, legislative or administrative, or tax or social security provisions; the public interest nature of the activities of the taxable person concerned; the fact that other taxable persons carrying on the same activities already enjoy similar recognition; and the fact that the costs of the supplies in question may be largely met by health insurance schemes or other social security bodies....

89. In other words, Member States must consider its own laws before deciding which welfare institutions should be given exemption; they are also required to take into account fiscal neutrality (see [54] of *Kingscrest* cited at §108) and in particular whether other persons making similar supplies are exempt; they are also required to consider whether the state or insurance ultimately funds the cost. The list is stated not to be exhaustive.

The relevance of state funding

90. But has the appellant made out a case that the UK went beyond what it was permitted to do in chosing to limit the exemption to state-regulated suppliers of welfare services? Mr McNicholas considered *Les Jardins de Jouvence SCRL* supported the appellant's appeal. In that case a cooperative company with the objective of providing assistance to sick, disabled and old persons, constructed a block of flats to rent out in circumstances where it would supply additional services to the tenants for consideration. It was VAT registered and sought to recover VAT on the construction charges. The tax authority refused to repay the tax on the basis that it considered the taxpayer's supplies were exempt under the national provisions which implemented Art13A(1)(g). The issue for the CJEU was whether the national law had properly implemented Art 13A(1)(g).

91. The taxpayer pointed out that it received no financial assistance from the government or otherwise: it was paid entirely privately. The CJEU's ruling was that that did not prevent it being recognised as being devoted to social welfare, if the Member State concerned chose to so recognise it [55(2)]. Mr McNicholas referred me to the Advocate General's opinion at §30 but he said much the same as the CJEU and in any event it is the CJEU decision which is binding. I understand Mr

McNicholas' point to be that if a Member State can recognise a body which is entirely privately funded as deserving of the welfare exemption, then surely a Member State ought to recognise as deserving of the welfare exemption a body like TLC which was very largely funded by the government (see §21).

92. While I accept that the Member State ought to take funding into account, I do not accept that that necessarily means a Member State ought to recognise all publicly funded private welfare institutions as within the welfare exemption: all Member States were given discretion and the CJEU only requires that they consider the funding when deciding which institutions should be exempt. The case of *Les Jardins de Jouvence* therefore does not assist the appellant.

Relevance of welfare objectives

93. Mr McNicholas also considered that the case of *Order des Barreaux* assisted his client. The question in that case was whether the services of legal aid lawyers were exempt from VAT. The CJEU ruled at [62] that it would not be possible for a Member State to recognise legal aid lawyers as exempt under Art132(1)(g) because they were not devoted to social wellbeing: they simply took on cases some of which concerned social welfare.

94. This case illustrates that there are limits to the Member States' discretion, as the CJEU has said (see §88) and one of those limits appears to be that the institution recognised must have as its objective social wellbeing or at least it should not undertake anything other than social wellbeing. However, while the TLC would clearly be eligible for exemption if the UK had chosen to recognise it in Item 9, as its sole raison d'etre was social wellbeing, the fact remains that the UK did not chose to recognise it.

Conclusion on Case II (c)

95. In summary, while the appellant was largely state-funded, and was devoted to social wellbeing, and therefore was eligible to be 'recognised' by the UK government if it chose to do so, the UK had a discretion not to recognise such bodies, as long as it respected the principles of equal treatment, fiscal neutrality and so on. And in law the UK had chosen not to recognise day care facilities in England. If the appellant is to win its appeal it must point to an actual breach of fiscal neutrality or some other principle of EU law in how the UK implemented Art 132(1)(g).

Non-regulation of day-care in England

96. Apart from the above generalised allegations that the UK had failed to fulfil its obligations under Art 132(1)(g), Mr McNicholas only really identified two specific areas where he considered that the UK had failed to respect fiscal neutrality in its choice of which entities it recognised, and that was the treatment of (a) local authorities and (b) private welfare institutions in Scotland and Northern Ireland, both making the same kind of supplies as TLC. I deal with these separately below. So far as the generalised criticism was concerned, I note that in *Kingscrest* the CJEU

actually appeared to approve the UK's decision only to recognise bodies regulated (at that time) under the Care Standards Act 2000:

> [57] '....the national court may....take into account in particular the fact that....entitlement to the exemptions...extends to all organisations registered under the Care Standards Act 2000, as well as the fact that that Act ... also govern the conditions for providing those supplies, by making the organisations which provide them subject to restrictions and checks by the national authorities, in terms of registration, inspection and rules concerning both buildings and equipment and the qualifications of the persons authorised to manage them.'

97. The appellant was not registered or registrable under the Health and Social Care Act (see §§25-34); it was not subject to restrictions and checks nor required to be registered. And the CJEU in *Kingscrest* suggested that it was a valid exercise of the UK's discretion to draw the line between bodies which are so regulated and bodies which are not. I consider that that is a lawful exercise of the UK's discretion and the appellant's case that it was not fails.

98. Fundamentally, the appellant's real complaint here is that it is not regulated. It is clear that Mr and Mrs Spence consider that private institutions offering the sort of services which they supply ought to be regulated. What difference, they say, does it make whether their students are resident or not? Disabled persons are vulnerable to ill-treatment in the day as much as at night and day-care providers, say Mr and Mrs Spence, ought to be regulated.

99. It was in this context that I understood I was referred to Lady Hale's dissenting speech in the case of *MA and Rutherford* [2016] UKSC 58. That was a case in which various persons challenged the legality of the newly introduced the cap on housing benefit on persons with more bedrooms than required. One of the issues in the case was whether the UK had discriminated against a woman because the new cap did not make a special exception for women in sanctuary housing because they were at serious risk of domestic violence and it might be particularly problematic for them if forced to move. The Supreme Court rejected the appeal but in her dissenting judgement Lady Hale said:

> [73] It has been recognised for a long time, both nationally and internationally, that the State has a positive obligation to provide effective protection for vulnerable people against ill-treatment and abuse, not only from agents of the State but also from private individuals. The aim of such protection is effective deterrence; prevention of the abuse taking place at all is a far more effective remedy than punishment or compensation after the event.

100. So it seemed it was the appellant's case that the government ought to have regulated day care in England for vulnerable adults and, had they done so, the appellant's supplies would have been exempt.

101. But while relying on *Rutherford* may establish that the government has a duty to vulnerable persons, the appellant has failed to establish that the Government has breached that duty by not regulating day care in England. I have absolutely no

evidence from which I could conclude (even if it were within my jurisdiction to consider the matter) that there has been a breach of duty.

102. In any event, it seems to me that even if the appellant were right, and, by not regulating day care, the UK is in breach of duty to offer effective protection to vulnerable adults, the persons with the right to complain are the vulnerable adults and not those persons providing the day care. The Government owes no duty to the providers of day care to regulate them.

103. And the Tax Tribunal has absolutely no jurisdiction over the question in any event: all it has power to do is to decide whether the appellant's supplies were exempt. Day care centres for vulnerable adults in England are not regulated: even if vulnerable adults have a cause of action against the Government for its failure to regulate the suppliers of the care, that does not bring the suppliers within the exemption.

104. In conclusion, and putting aside the issues regarding (d) local authorities and (e) devolution, I have not been satisfied by the appellant that the UK Government exercised its discretion improperly in deciding only to recognise for exemption those providers of welfare whose provision of such care is regulated.

Case II(d): the appellant is at a competitive disadvantage vis-à-vis local authorities?

105. HMRC did not necessarily accept that factually the appellant was at a competitive disadvantage to LB Havering. However, it is difficult to see why they did not accept this. The unchallenged evidence was that LB Havering effectively set the appellant's maximum charge rate: most of the students attending TLC were persons for whom LB Havering paid direct payments and the unchallenged evidence was that Havering would not approve rates higher than those actually charged by the appellant and those rates were VAT inclusive. Nevertheless, as a matter of fact, LB Havering provided similar services at Avelon Road and either did not charge itself or its students for these services, or to the extent that it did, its charges were, as a matter of law, exempt.

106. So assuming TLC and Avelon Road would otherwise each had the same net charges, TLC was at a competitive disadvantage because it had to either increase its charges to pay VAT or reduce its net charges to retain the same gross cost as Avelon Road.

107. The reason why any charges made for the Avelon Road facility were exempt is that they were exempt under Item 9(c) of Group 7 of Schedule 9: the local authority was a 'public body' because (Note 5)(b)) defined 'public body' to include a local authority. In reality, it probably did not levy charges: but it still had a VAT advantage over TLC in that it would be able to recover its input tax under s33 VATA but without any concomitant liability to account for VAT.

108. The appellant's case appeared to be that by refusing providers of welfare services exemption when they were in competition with local authorities providing exactly the same service free of VAT, the UK had acted in excess of the discretion permitted to it in implementing Art 132(1)(g), in particular by failing to have regard to equal treatment and 'fiscal neutrality'. As the CEJU said in *Kingscrest:*

> [54] ...it must be recalled that the principle of fiscal neutrality precludes in particular, treating similar supplies of services, which are thus in competition with each other, differently for VAT purposes.....

109. However, that was a very general statement. It was considered in more detail in *Zimmerman* where the CJEU explained that 'fiscal neutrality' is only a concept relevant to a Member State's implementation of a Directive: it is not relevant to the terms of the Directive itself. In other words, a taxpayer can complain if a Member State has implemented a directive unfairly, but they cannot complain if the unfairness was inherent in the Directive:

> [50]... 'fiscal neutrality [is an] expression of the principle of equal treatment....[and] is not a rule of primary law against which it is possible to test the validity of an exemption provided for under Art 13...."
>
> .....
>
> [52] Accordingly, the principle of fiscal neutrality does not preclude, for example, the situation under Art 13A(1)(g) of [the 6VD], whereby, for the purposes of the exemption, it is unnecessary for bodies governed by public law to be recognised as 'charitable', but such recognition is required in the case of organisations other than bodies governed by public law.
>
> [53]...it is not in relation to bodies governed by public law that the principle of fiscal neutrality requires equal treatment in terms of recognition as 'charitable', but in relation to all other organisations, each as compared with the others.

110. In other words, Art 132(1)(g) gave exemption to both (a) public bodies and (b) recognised bodies devoted to social wellbeing. Public bodies were entitled to the exemption whether or not they were recognised as devoted to social wellbeing: the inequality in treatment between local authorities and private welfare service providers was therefore inherent in the Directive. VATA has done no more in this respect than implement the Directive. The inequality in treatment results from the Directive and not from how the UK has chosen to implement it.

111. So while it is clear that there is fiscal inequality between LB Havering and TLC, it is a fiscal inequality inherent in the Directive. There is no remedy for that.

112. I mention in passing that Mr McNicholas referred me to the case of *Isle of Wight* C-288/07 where a local authority was held liable to account for VAT on car parking fees to the extent it could be shown that its car parking services were in competition with private providers. I was also referred to the similar case of *Comune di Carpaneto Piacentino* C-231/87. But these cases are quite irrelevant to this appeal:

those cases were nothing to do with exemption from VAT, but with the question whether a local authority is to be treated as being a taxable person at all. Public bodies acting as public bodies are not within the scope of VAT except to the extent that they are in competition with private entities: Art 13 PVD. The question in *Isle of Wight* was a question about to what extent the local authority was a taxable person in providing car parking services and the answer to that depended on whether it did so in competition with other car parking providers. *Comune di Carpaneto Piacentino* was similarly about the extent to which a local authority was acting as a taxable person.

113. Here, LB Havering is in competition with private providers when it provides day care services to vulnerable adults and so it would appear that, under Art 13 PVD, it acts as a taxable person when making such supplies: but Art 132(1)(g) provides that those supplies made by the public body are nevertheless exempt. There is no exemption for car parking and so the issue of exemption was not relevant in *Isle of Wight*. But it is relevant here. The fact that the UK's welfare services exemptions results in private providers being at an competitive disadvantage with local authorities providing the same service does not mean that the UK implemented Art 132(1)(g) incorrectly as the lack of fiscal neutrality results from the Directive itself as it provides all public bodies supplying such services will be exempt.

114. However, is there a case that the UK ought to have considered the fact that local authorities' day care is exempt in deciding whether or not to exempt day care services provided by private welfare institutions? Certainly, one of the factors that the UK must consider is whether 'other taxable persons carrying on the same activities already enjoy similar recognition' (see §88). However, it follows from what the CJEU said in *Zimmerman* that inequality between local authorities and private providers is inherent, so while it is perhaps something the UK should consider, it is not a bar to refusing exemption to private welfare institutions in competition with local authorities. I reject the appellant's case on this.

Case II(e): devolution related issues – competitive disadvantage/discrimination

115. Mr McNicholas put the case that there would be no issues on devolution if only HMRC and/or the Tribunal would accept that providers of day-care in England were regulated because of the requirements of the disclosure and barring service. I have already rejected this case: the disclosure and barring service did not make TLC 'regulated' within the meaning of the welfare services exemption.

116. Therefore, discrimination did arise between private welfare institutions situated, on the one hand in England and Wales, and on the other hand, in Scotland and Northern Ireland. HMRC accepted that a private welfare provider providing exactly the same services as TLC would nevertheless be exempt if situated in Scotland or Northern Ireland (§§35-37).

117. Are member states entitled to implement an exemption in such a way that such discrimination results? As I have said, the CJEU in *Zimmerman* indicated that a member state could exercise its discretion unlawfully if it failed to take into account

issues of fiscal neutrality which arose between different private welfare institutions. So I consider whether what the CJEU said in *Zimmerman* is relevant to this appeal.

Zimmerman

118. The facts of *Zimmerman* were that the taxpayer lived in Germany and supplied private nursing services. Her supplies were seen as welfare services but were only exempt under German law if at least 2/3rds of her charges were paid out of social security funds. However, certain non-profit making organisations specified on a list drawn up by the German tax authority which provided exactly the same type of services as Ms Zimmerman were exempt under German law irrespective of the proportion of their charges which were paid out of social security funds. The CJEU was asked to consider whether this was a valid exercise of the Member State's discretion to recognise some private providers of welfare services as exempt and not others.

119. The CJEU noted that Member States were allowed to discriminate on certain grounds as set out in Art 133, including at Art133(a) which permitted Member States to limit the exemption to bodies which were non-profit making. However, Germany had not availed itself of this option as profit making bodies which fulfilled the 2/3rd criterion were exempt. Art 133(a) was therefore irrelevant.

120. The CJEU went on to rule that the 2/3rds condition in German law could only be lawful if it resulted in equal treatment between different private bodies supplying welfare services ([53]) and so Germany was not permitted to apply the 2/3rd condition to profit making bodies because it did not also apply it to the listed non-profit making bodies ([58]) which were granted exemption.

121. In other words, Germany was not allowed to make a distinction between profit making and non-profit making bodies. So is the UK allowed to make a distinction between bodies supplying services in Scotland and Northern Ireland, on the one hand, and bodies supplying services in England and Wales, on the other?

122. This is something which this Tribunal must consider. In *Kingscrest,* in commenting on the limits of a Member State's discretion in implementing Art 132(1)(g) the CJEU said:

> [52]....it is for the national courts to examine whether the competent authorities have observed the limits of the discretion granted by Art 13A(1)(g) and (h) of [the 6VD] in applying Community principles, in particular the principle of equal treatment.....
>
> [53] In that regard,...it is for the national authorities...to take into account, in particular, the existence of specific provisions, be they national or regional....the fact that other taxable persons carrying on the same activities already have similar recognition.....

123. So the UK should certainly have considered devolution issues when implementing the exemption: the appellant's case is that means that they cannot allow distinctions between different regions. Certainly on its face the different

treatment of day care facilities in Scotland and Northern Ireland on the one hand, and England and Wales on the other, looks like an impermissible exercise of discretion by the UK as there is no fiscal neutrality amongst profit-making suppliers of day care welfare services in the UK: some are exempt and some are not.

124. HMRC denied that Item 9 was an impermissible exercise of discretion by the UK. Mr Davey put a number of points forward, which I summarise here, although not in the same order as referred to by HMRC:

(1) different Member States are permitted to set different criteria for recognition under Art 132(1)(g) and so it is a reasonable extension to accept that different devolved regions in a single Member State can treat similar suppliers differently;

(2) The EU recognises that the UK is a devolved member State (citing *International Fruit Company and Others 1971)* and so it is lawful for the UK to devolve welfare services to the regions and therefore lawful for there to be differences between the regions as to which type of service providers are regulated and which are not.

(3) There are already differences in VAT treatment between devolved areas;

(4) HMRC's case is that because the UK is devolved, it is lawful for the UK to make distinctions between law in different devolved regions and the legislation (see §42) contemplated this possibility because Item 9 actually refers to Acts of the Scottish Parliament and Acts of the Northern Irish Assembly.

(5) there is no unequal treatment because all <u>regulated</u> bodies providing day care services in the UK are exempt while <u>unregulated</u> bodies providing such services in the UK are standard rated;

(6) Moreover, there was no lack of fiscal neutrality because the TLC was not in competition with day care providers situated in Scotland and Northern Ireland: it was treated exactly the same for VAT purposes as other private suppliers of day care with which it was actually in competition.

(1)Differences between Member States

125. It is certainly clear that each Member State is given a discretion by Art 132(1)(g) on which bodies devoted to social welfare to confer exemption. It is quite clear that each Member State may exercise that discretion differently, and apparent from the case law referred to above that the rules of each Member State on this are not the same as those of other Member States.

126. But that does not permit HMRC to make a quantum leap and say that it therefore follows that different regions within a single Member State can recognise different types of bodies as exempt. That is in complete contradiction to the CJEU's insistence on equal treatment and fiscal neutrality within Member States.

(2)Differences between devolved regions

127. HMRC makes out a case that the EU recognises that some Member States, like the UK, are, in effect, federal, and so that different devolved regions within a Member State, can, says Mr Davey, have different VAT rules.

128. The Rotherham case: I was referred by Mr Davey to the Supreme Court case of *R (oao Rotherham Borough Council) v S/S for Business Innovation and Skills* [2015] UKSC 6.

129. The facts of that case were that the EU provided structural funding to Member States: it was the responsibility of each Member State to allocate the funding to its different regions. The responsibility in the UK fell to be exercised by the Secretary of State for Business Innovation and Skills. His decision was to allocate the funding between England and the three devolved areas of the UK (Scotland, Northern Ireland and Wales) in the same proportions as the funds had been split in previous years; then he had taken the funds available to each of these four national areas and divided them up on other criteria between various regions within the four national areas. That second tier of decisions led to the regions of Merseyside and South Yorkshire receiving substantially less than the region of the Scottish Highland and Islands, despite Merseyside and South Yorkshire being significantly more deprived regions.

130. Four out of seven of the Judges (and therefore a binding majority) decided that the Secretary of State's exercise of his discretion was lawful even though it led to this above anomaly.

131. Part of their consideration of the lawfulness of the decision reached by the Secretary of State concerned whether he had acted lawfully under EU law. Lord Sumption (giving a judgment with which two other judges concurred) referred to the CJEU decision in *Horvath* (discussed below) and concluded:

> [32] ....It is true that the relevant entity in international law is the United Kingdom, and that, as regards the institutions of the European Union, the United Kingdom is the Member State. England and the devolved administrations of Scotland, Wales and Northern Ireland have no formal status in the EU legal order. But it does not follow that their status within the United Kingdom is irrelevant. EU law is not insensitive to the relationship between Member States and their internal federal or regional units of government and will not necessarily treat regional variations arising from the distribution of constitutional responsibility within a Member State as discriminatory....
>
> [*Horvath*] is significant not just for the answer that was given to the particular question posed by the High Court, but because it necessarily followed from the reasoning that the mere fact that the United Kingdom was a unitary state in international law did not mean that regional differences in the way that Community law was applied called for objective justification.

132. The conclusion, therefore, was that it was lawful to make a decision which resulted in one area located in a devolved region receiving more funds than more deprived areas in a different region.

133. HMRC relied on this as authority that it was lawful for UK law to treat English day care providers as standard rated and Scottish ones as exempt. I do not accept that it is authority for such a broad proposition. *Rotherham* concerned funding where it was expected and intended by the EU that some regions of a Member State would receive more than other regions of the same Member State: so far as EU law was concerned the Supreme Court concluded that it was not necessarily an illegal exercise of discretion to decide that a more deprived region would get less funding than a less deprived area. VAT law, on the other hand, is not intended by the EU to have regional differences within a Member State. The position with VAT is quite different.

134. The *Horvath* case: Lord Sumption's statement on EU law in *Rotherham* was made having considered the CJEU's decision in *R (Horvath) v S/S for the Environment, Food and Rural Affairs C-428/07* in some depth, so it is also worth referring to that case for insight.

135. The case concerned the General Agricultural Policy. Members States had power under EU law to determine which farming land qualified the farmers for income support on the basis that the land was in 'good agricultural and environmental condition'. The GAP was a devolved matter, so each of the UK's four devolved regions set their own conditions for what land was to be treated as in 'good agricultural and environmental condition'. Only in respect of England was a condition set that required public rights of way across the land to be maintained in order for the farmer to be entitled to the income support. A farmer located in England (Mr Horvath) complained this was discriminatory.

136. At [48] the CJEU stated that:

> As a preliminary point, it should be pointed out that, in conferring on Member States the responsibility of defining minimum GAEC requirements, the Community legislature gives them the possibility of taking into account the regional differences which exist on their territory.

This appeared to be reference to the specific community legislation concerned which provided:

> 'Member States shall ensure that all agricultural land, especially land which is no longer used for production purposes, is maintained in good agricultural and environmental condition. Member States shall define, at national or regional level, minimum requirements for good agricultural and environmental condition on the basis of the framework set up in Annex IV, taking into account the specific characteristics of the areas concerned ....
>
> (Article 5(1) of Regulation No 1782/2003 cited at [9])

In other words, the relevant EU legislation itself contemplated the possibility that the conditions which farmers had to meet to qualify for income support would vary from region to region. This was reiterated at [52]:

> [52] The possibility for the Member States, to the extent authorised by their constitutional system or public law, to permit regional or local authorities to implement Community law measures is, moreover, expressly recognised in Article 5(1) of Regulation No 1782/2003. That provision states that 'Member States shall define, at national or regional level, minimum requirements for [GAEC] on the basis of the framework set up in Annex IV'.

137. Lord Sumption in *Rotherham* did not specifically refer to the fact that *Horvath* was dealing with EU legislation which recognised that each Member State could implement the legislation differently in different regions, but that may well have been because, as I have said, that was true in the *Rotherham* case as well.

138. The conclusion in *Horvath* was:

> [56] With regard to the last condition referred to in the previous paragraph, it must be pointed out that, in Joined Cases 201/85 and 202/85 *Klensch and Others* [1986] ECR 3477, relied on by the applicant in the main proceedings, at issue was indeed discrimination between producers of a Member State resulting from a measure adopted by that Member State implementing a Community obligation concerning them. It was in that context that the Court, in paragraph 11 of that judgment, held that, where there is a choice between a number of ways of implementing the Community legislation in question, the Member States may not choose an option whose implementation in its territory would be liable to create, directly or indirectly, discrimination between the producers concerned within the meaning of Article 40(3) of the EEC Treaty (now Article 34(2) EC).
>
> [57] Where, as in the main proceedings, it is the devolved administrations of a Member State which have the power to define the GAEC minimum requirements within the meaning of Article 5 of and Annex IV to Regulation No 1782/2003, divergences between the measures provided for by the various administrations cannot, alone, constitute discrimination. Those measures must, as is clear from paragraph 50 of this judgment, be compatible with the obligations on the Member State in question which stem from that regulation.

139. What does this mean? Paragraph [56] says national laws should not lead to internal regional discrimination; but [57] says that internal regional discrmination is acceptable if the decision making is given to devolved regions although, from its reference to [50] it seems that is only the case where the EU law itself permits regional variations.

140. So even putting aside the quibble that both *Horvath* and *Rotherham* involved EU legislation which permitted or anticipated regional differences, there is another point in the appellant's favour. VAT law is not devolved; the devolved governments, while they are entitled to make their own law on regulation of care institutions, have

no say in VAT exemptions. Paragraph [57] of *Horvath* clearly does not apply to VAT law which is not devolved.

141. But [56] of *Horvath* certainly does apply to VAT law. And here the CJEU said:

> '...Member States may not choose an option whose implementation in its territory would be liable to create, directly or indirectly, discrimination....'

142. That echoes what the CJEU said in various cases, such as *Kingscrest* at [54], cited above at §108, that 'the principle of fiscal neutrality precludes in particular, treating similar supplies of services, which are thus in competition with each other, differently for VAT purposes.....' And yet it appears that that is exactly what Item 9 has done. By making entitlement to VAT exemption dependant on whether or not the day care provider is regulated, UK law has created discrimination between day care providers in England and Wales, on the one hand, and those in Scotland and Northern Ireland, on the other.

143. And as I have already cited at §88, in the same vein, the CJEU in *Kingscrest* at [53] and other cases on what is now Art 132(1)(g), indicated that in exercising their discretion in deciding which welfare institutions to recognise national authorities should

> 'take into account, in particular, the existence of specific provisions, be they national or regional....the fact that other taxable persons carrying on the same activities already have similar recognition.....'

In other words, while it is not unlawful for the UK to have regional differences in their laws on the regulation of care providers, it appears to be unlawful for the UK to have regional differences in its VAT law.

144. In conclusion, I reject HMRC's case that EU law permits Member States to discriminate between suppliers situated in different devolved parts of the UK

(3) The UK already had different VAT treatment between different devolved areas

145. Mr Davey pointed out that welfare services is not the only part of VAT law where there is differences in treatment of entities simply because of where they are located in the UK. He pointed out that police authorities in England, Wales and Northern Ireland are treated as local authorities and therefore able to reclaim input VAT under s 33 VATA; however, Scotland has a national police force which is not seen as a local authority and therefore cannot use s 33 to recover its input VAT.

146. Nevertheless, while that may be a correct interpretation of UK VAT law, Mr Davey did not even attempt to persuade me that it was lawful under the PVD. Presumably, if he had done, he would rely on the same cases that he cited in support of his case that it was lawful to treat day-care providers differently. So this point adds nothing to his case. And I comment in passing that in any event, even if this treatment is discriminatory, the 'victim' (the Scottish police force) is a part of the state and the

state cannot be heard to complain that it discriminates against itself, nor use such discrimination to justify discrimination between private entities.

(4) UK law anticipates differences in treatment between the devolved areas

147. As HMRC pointed out, the UK appears to have anticipated that its VAT rules would lead to different VAT treatment of the same type of supply in different devolved regions as its definition of 'state-regulated', cited at §42 above, specifically provides that exemption is available to persons regulated under devolved legislation made by the Scottish Parliament and Northern Irish Assembly.

148. I do not see how this helps HMRC's case: it is true that the UK exemption results in, and may have anticipapted, the discrimination. But even if the discrimination was contemplated when the legislation was drafted, it does not make it lawful.

(5) VAT law has no regional differences in the UK?

149. Of more validity is HMRC's case that there are no regional differences in VAT law. The law is consistent: all regulated day care providers are exempt; all unregulated day care providers are standard rated.

150. But that simply begs the question. While the VAT rule is the same, does it actually create discrimination, directly or indirectly (see [56] of *Horvath* cited at §139)? Indirectly, it clearly does. A supplier of day care in England making exactly the same supply of care as a provider in Scotland must charge VAT while its Scottish equivalent is exempt.

151. Returning to what Lord Sumption said in *Rotherham* about the UK not having to objectively justify why it treated similar regions in one devolved area differently to a similar region in a different devolved area, in my view while that probably means that the UK does not need objective justification of why its care laws are different in the different devolved regions, but because VAT is not a regional matter, the UK does need objective justification of why it chose to make its VAT exemption for welfare services dependant on criteria that would lead to regional inequalities.

(6) TLC not in competition with exempt suppliers

152. HMRC's last point on this was that the choice of the UK to take statutory regulation as the determining criterion on whether or not a day care facility was recognised as devoted to social wellbeing did not create unfair competition for TLC. TLC was based in the South of England and was certainly not in competition with day care providers based in Scotland or Northern Ireland.

153. But that misses the point. There is no requirement for TLC to show that it has itself been put at a competitive disadvantage: all that has to be shown is that in principle similar supplies are treated differently. The question is whether there is direct or indirect discrimination and if there is, then the Member State's

implementation of the Directive is unlawful and any affected taxpayer can rely on the direct effect of the Directive. While there might be an interesting question whether the position in Northern Ireland has any relevance because in practice it is not possible for a day care provider in Northern Ireland to be in competition with a day care provider elsewhere in the UK, the same is clearly not true for Scotland and England which share a land border.

154. It is not the case that a taxpayer has to prove he was actually in competition with someone granted the exemption withheld from it: for instance, in *Zimmerman*, the taxpayer did not have to show she was actually in competition with one of the listed non-profit making bodies which were (unlawfully) treated as exempt, in order to benefit from the direct effect of the exemption. It is not the case that a day care provider situated in Berwick-on-Tweed could challenge the discrimination inherent in the UK's welfare services exemption but not TLC situated in the South: and a moment's reflection would show that this must be right. Why would a Berwick-on-Tweed day care facility be exempt under direct effect but not a facility slightly further to the south which was not in competition with Scottish facilities but which was in competition with day care facilities based in Berwick-on-Tweed, and so on?

155. The CJEU has talked of 'discrimination': it does not require the appellant to prove it has suffered unfair competition, but merely to show that the legislative provision does in principle discriminate between similar suppliers.

Conclusion on the devolution issue

156. My understanding of the law, taking *Horvath* and *Rotherham* into account, as well as what was repeatedly said by the CJEU in *Kingscrest* and other cases on Art 132(1)(g) and its predecessor, about how member States should exercise their discretion that that provision gave them, is that the UK is entitled to differences in its devolved laws as between one devolved area and another. But the UK is not entitled to regional differences where the EU does not permit regional variations, such as with VAT law.

157. And while it is true that Item 9 applies uniformly across all the UK, in practice its interaction with devolved laws on social care regulation, has led to discrimination in that an identical supply of day care services in Scotland and Northern Ireland will be exempt while the same supply in England and Wales will be standard rated. The UK was required by EU law to consider this discrimination before choosing the law on care regulation to be the defining criteria in its selection of bodies eligible for exemption. While the CJEU certainly appeared to approve the UK's choice of care regulation as the criteria to decide eligibility for exemption ([57] of *Kingscrest* cited at §96), that was without any reference to, and presumably in ignorance of, the regional differences in the law of regulation for day care providers in the UK.

158. HMRC's point is that there is an objective difference between the services provided in Scotland to the services provided in England, in that the former can only be made by the regulated entities, and the latter only by unregulated entities. I do not accept that this is a valid distinction because the services provided could be identical:

a day care provider in England providing care of the same quality as a regulated provider in Scotland nevertheless is not exempt. Indeed, TLC's evidence on the high quality of the services it provided was not disputed and it has been informally successfully vetted by Havering Healthwatch (§14) and no doubt it considers it would carry on providing exactly the same services if it was regulated. But what matters is that there is in law discrimination because in England day care providers do not have the possibility of being regulated and therefore cannot qualify for exemption, whereas they do in Scotland and Northern Ireland.

159. My conclusion is that the UK has unlawfully exercised the discretion conferred on it by Art 132(1)(g) in choosing the regulation of welfare facitilties as the criteria by which suppliers devoted to social wellbeing are 'recognised' for exemption and that is because the law on regulation is devolved, leading to discrimination in VAT treatment between different suppliers offering identical services but situated in different regions of the UK.

Reference to CJEU?

160. I am deciding this case on an EU point of law: should I refer the question to the CJEU? Whether an EU point of law should be referred to the CJEU depends on Art 267 of the Treaty which provides:

> "Where such a question is raised before any…tribunal of a Member State, that ...tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon."

161. The decision on the point of EU law is 'necessary' but I still have a discretion whether or not to refer. In the well-known case of *Ex parte Else* [1993] QB 534 the Court of Appeal ruled:

> "if the facts have been found and the Community Law issue is critical to the court's final decision, the appropriate course is ordinarily to refer the issue to the Court of Justice unless the national court can with complete confidence resolve the issue itself….If the national court has any real doubt, it should ordinarily refer."

162. But in the later case of *Littlewoods Organisation plc* [2001] EWCA Civ 1542 the Court of Appeal said:

> "…A measure of self-restraint is required on the part of the national courts, if the Court of Justice is not to become overwhelmed….
>
> …[a] development which is unquestionably significant is the emergence in recent years of a body of case-law developed by this court to which national courts and tribunal can resort in resolving new questions of Community law. Experience has shown that, in particular in many technical fields, such as customs and value added tax, national courts and tribunals are able to extrapolate from the principles developed in this court's case law. Experience has shown that the case-law now provides sufficient guidance to enable national courts

> and tribunals – and in particular specialised courts and tribunals – to decide many cases for themselves without the need for a reference…"

163. It seems to me that *Zimmerman* gives clear principles which can be extrapolated, and so I will not exercise my discretion to refer. The question of European law is sufficiently clear for me to decide it without a reference. *Horvath, Rotherham, Zimmerman* and *Kingscrest* are consistent with each other as explained above at §139-143 and point to the clear conclusion that the UK's implementation of the welfare exemption was in breach of the principle of fiscal neutrality and therefore outwith the discretion conferred on the UK by Art 132(1)(g).

164. That is sufficient to conclude this appeal in favour of the appellant but I go on to consider the appellant's last point on which it based its claim to exemption.

Case II (f): the exemption for charities

165. While it was not originally a part of the appellant's case, between the first two days of the hearing and the last two days of the hearing, the Tribunal published the decision in *Life Services Limited* [2016] UKFTT 444 (TC) and Mr McNicholas stated that he relied on that decision in support of the appellant's case. HMRC's view was that the case was wrongly decided and under appeal. I go on to consider whether it describes a further reason for allowing the appeal.

Life Services Limited

166. The case involved a supplier very similar to the appellant, judging by the reported decision. It was a commercial company providing day care to vulnerable adults. Like the appellant in this case, its 'students' had a care plan from their local council and it was paid by direct payments funded from the local authority ([3-8]). It was informally regulated by the local authority but not regulated by statute.

167. In brief, the Tribunal ruled that the UK had unlawfully exercised the discretion conferred on it by Art 132(1)(g) because it gave exemption to all charities but did not confer exemption on commercial providers of day care services unless they were regulated. I am not sure I entirely follow its reasoning: it appears to be that the Tribunal Judge thought exemption should not be conferred on all charities but only those devoted to social wellbeing (see [94-97]) and the failure of UK legislation to do so breached the principle of fiscal neutrality.

168. The Tribunal's decision is not binding on me and, while I respect it, I should not follow it if I consider it was wrong. But while I don't fully follow its reasoning, however, I am far from certain the case was wrongly decided. I explain why.

169. The Tribunal's reasoning was based on *Zimmerman*. While in that case the CJEU had permitted local authorities to be given exemption on more generous terms than private institutions (see [50-53] of *Zimmerman* cited at §109), it had ruled that Member States could not discriminate between profit-making and non-profit making private institutions (see [120-1]). While this does not appear to have been the reasoning of the Tribunal in *Life Services,* it seems to be that, on its face, UK law

gave the exemption for welfare services to all charities irrespective of whether they were state-regulated within the meaning of Note (8) (§42), while any other private institution had to be state-regulated to be exempt. At first glance, that appears to be a breach of fiscal neutrality.

170. This was not a point considered in the hearing and I do not have the benefit of HMRC's representations on it. In particular, I do not have HMRC's representations on whether charities are regulated. Of course, all charities are regulated in the sense they are regulated by the Charities Commission. But as I have commented above at §52-55, 'state-regulated' in Note 8 has a very specific meaning, and, particularly combined with Note 6, means that the regulation must be in respect of the welfare services provided. Charities providing day care for vulnerable adults may be regulated as charities by the Charities Commission but may be no more regulated in their provision of welfare services than TLC. If it is correct that charities are not 'state-regulated' within the meaning of the welfare services exemption, is that not a second reason why this appeal should be allowed?

Finance and Business Training Limited

171. In *Life Services,* counsel for HMRC drew the Tribunal's attention to the decision of the Court of Appeal in *Finance and Business Training Limited* [2016] EWCA Civ 7 where a challenge to the legality of the UK's implementation of the education exemption failed. The structure of that exemption in EU law (Art 132(1)(i)) was similar to Art 132(1)(g) in that public bodies having education as their aim were given exemption together with private bodies 'recognised' by the Member State as having similar aims.

172. The UK had implemented this by providing a list of eligible bodies (Schedule 9 Group 6 Note (1)), one of which were universities and bodies which were part of universities. The taxpayer in that case was found not to qualify as a part of a university, although it offered degree courses in partnership with a University. In the Court of Appeal, it claimed that the UK had improperly exercised its discretion in so limiting the exemption.

173. In *Finance and Business Training* the taxpayer relied on (amongst other matters) the case of *Zimmerman* as showing that all non-public bodies had to be placed on an equal footing: a condition limiting the right to exemption had to apply to all non-public bodies, or none.

174. The Court of Appeal's judgement is short and gives no explanation of how it is to be reconciled to the CJEU decision in *Zimmerman* to which it was referred. What the Court did say was that the UK had chosen to limit the exemption to bodies 'with a public interest element in its work' and therefore to show an unlawful exercise of discretion, the appellant would have to show that it too had a public interest element to its work. It could not do this. It lost its appeal.

175. Nor did the Court of Appeal expressly refer to Note (1)(e) of the UK education exemption which provided that non-profit making bodies were exempt (Note (1)(e)),

by implication irrespective of whether they were a part of a University. The inference to draw from the Court of Appeal's decision appears to be that the Court of Appeal's view was that all non-profit making bodies necessarily had a public interest element to their work, irrespective of any connection to a university or other educational institution.

176. If that is the correct inference, then the two cases, *Zimmerman* and *Finance and Business Training*, can be reconciled with each other as follows. The condition for recognition selected by the UK in the education exemption (even if not expressed) was 'public interest': that was a lawful criterion and one which applied to all bodies in the list, profit making and non-profit making. This was because educational institutions and non-profit making bodies by their inherent nature met the condition, as well as profit making bodies which were a part of a University. So it was permissible for the UK to deny exemption to profit making bodies which were not part of a University because they did not meet the criterion of being bodies 'in the public interest'.

177. In contrast, in *Zimmerman,* the condition for exemption selected by the German government was that the fees must be met 2/3^{rds} from public funds, but the German government failed to require certain charities to meet this condition. While the condition itself was lawful, the failure to apply it to all non-public bodies was not. Therefore, the German welfare exemption was discriminatory and unlawful but not the UK education exemption.

178. This analysis appears similar to the one more shortly expressed in *Life Services* at [87].

179. Applying that analysis to this appeal, and assuming that charities are not state-regulated within the meaning of the welfare exemption, the effect would be that the UK's implementation of the welfare services exemption was unlawful for a second reason. In other words, the UK selected a lawful criterion (regulation), but (unlawfully) did not apply it to all private entities. In particular, charities were not required to be regulated. Charities are exempt whether or not they are state-regulated in their provision of welfare services. Therefore, the implementation of the UK welfare services exemption would breach fiscal neutrality.

180. I recognise that it was no part of TLC's case that it was in competition with charities but that is irrelevant: the question is whether the implementation of Art 132(1)(g) by the UK breached the principle of fiscal neutrality. The appellant would not need to show that a breach in not regulating charities actually put it at a competitive disadvantage.

Conclusion on Case II(f)

181. As this appeal is already resolved in the appellant's favour under Case II(e), I do not need to reach a conclusion on Case II(f). If I did, I would have to ask both parties for submissions on the question of whether charities are 'state-regulated' within the

meaning of Item 9. But if they are not, then the appellant would win the appeal on Case II(f) as well as Case II(e).

Overall conclusion

182. This appeal is allowed. Reverting to the common or related issues of law mentioned at §4, my conclusion on the question of 'state-regulation' is against the appellant but my conclusion on the second issue is in favour of the appellant. The UK's welfare services exemption did not correctly transpose Art 132(1)(g) of the Directive because the UK did not have regard to the need for fiscal neutrality and the need for all private bodies in the UK providing the same service to be treated in the same manner for VAT purposes. In particular, by choosing 'state-regulation' as the criterion by which to 'recognise' certain bodies devoted to social wellbeing, it chose a criterion that led to discrimination between suppliers within the UK because some of the devolved regions have more strict regulation requirements.

183. As the UK's implementation of the welfare services exemption was unlawful, the appellant is entitled to rely on the direct effect of Art 132(1)(g) and as a body devoted to social wellbeing its supplies were and always have been exempt.

184. I was not addressed on the question of the date from which the appellant ought to have been de-registered nor on the sum of money which should be repaid to TLC. If the parties are unable to agree this, they will need to revert to the Tribunal.

Further comment on relevant issue not raised in appeal

185. Had HMRC been right, and the appellant's supplies were standard rated, it could not be said in any real sense that the appellant had a level playing field. While inherent in EU law, its main competitor (LB Havering) either did not charge VAT on its fees, or, if it did not levy fees, was able to recover the VAT on its costs in providing the care under s 33 VATA. Moreover, a day care provider situated in Scotland or Northern Ireland would be exempt; a residential care provider in England would be exempt; a charity providing day care in England would be exempt.

186. Moreover, any local authority in England which paid a day care provider itself, rather than using direct payments, should only have been concerned with the net fee charged when looking for value for money. This is because a local authority ought to able to recover the VAT on day care fees: s 33 VATA. However, as it was assumed that where direct payments are concerned, the recipient of the supply is the student or its parent/carer, it was assumed that the VAT on TLC's fees paid by direct payments was irrecoverable by either the parent/carer or local authority. The local authority therefore looked at TLC's gross fees when deciding whether or not its supplies were value for money.

187. However, the assumption that TLC's supply is to the student or his parent/carer when paid by direct payments may not be correct. As I have said at §20, the money for the direct payments was provided by the local authority to the parent/carer on the basis that it was held in a separate account, was used only to pay TLC, and any

unused funds must be returned to the local authority. When held by the parent/carer it seems the funds were actually held to the order of the local authority and therefore the supply by TLC might actually have been to the local authority.

188. I was unable to make a ruling on this. I was not addressed on the point nor was the issue raised in the appeal: the appeal was one against refusal of de-registration and the relevant question was whether TLC's supplies were exempt. But had I ruled that its supplies were standard rated, however, the question of to whom the supplies were made would be relevant to the appellant because, if its supplies were actually made to the local authority, the local authority it seems could (at least in the future) recover that VAT under s 33 VATA and should therefore consider TLC's net rather than gross price. (This point is inapplicable in so far as TLC was paid privately as per §21).

189. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has 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. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

Cases cited but not referred to in the decision:

Kugler C-141/00

TMD Gesellschaft C-412/15

Longridge on the Thames [2016] EWCA 90

Barbara Mosedale
TRIBUNAL JUDGE

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