Neutral Citation: [2024] UKFTT 00191 (TC)

Case Number: TC09097

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2017/06559

VAT – Further Education Colleges – Whether government funding agency grants are "consideration" for a supply of services (education and/or vocational training) provided free of charge to students – Yes – Colchester Institute Corporation v HMRC [2020] UKUT 368 (TCC) applied – Appeal allowed in part

Heard on: 26 February 2024
Judgment date: 4 March 2024

Before

TRIBUNAL JUDGE BROOKS

Between

COLCHESTER INSTITUTE CORPORATION (No. 2)

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Michael Firth of counsel, instructed by VATangles VAT Consultancy Limited

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

DECISION

INTRODUCTION

1. With the consent of the parties, the form of the hearing was a video hearing using the Tribunal video hearing system. A face-to-face hearing was not held because it was expedient not to do so. The documents to which I was referred were: skeleton arguments served by both parties, a document bundle of 624 pages and an authorities bundle.

2. The Appellant, Colchester Institute Corporation ("CIC"), appeals against a VAT assessment made, on 23 March 2017, under s 73 of the Value Added Tax Act 1994 ("VATA") by HM Revenue and Customs ("HMRC") (the "Assessment"). The Assessment, which was upheld on 13 July 2017 following a statutory review under s 83C VATA, was in the total sum of £123,642 comprising £98,965.88 output tax underdeclared and £24,676.66 of disallowed input tax. The appeal against the input tax element of the Assessment is no longer pursued.

FACTS

3. The parties produced the following Statement of Agreed Facts:

Background of Colchester Institute Corporation

(1) Colchester Institute Corporation ('CIC') is a body corporate incorporated as a further education corporation under the Further and Higher Education Act 1992, registered for VAT under registration number 623 3157 66. Its main campus is in Colchester, Essex, but it has satellite facilities in Braintree and Clacton. The College is an "eligible body" for the purposes of Item 1, Group 6 of Schedule 9, VATA.

(2) The College's courses are "vocational", with the aim of providing its students with technical knowledge and skills. Many of the College's courses lead to accredited qualifications. However, the College also provides non-accredited full cost and commercial vocational courses to meet the needs of local employers. Each of the courses provided by CIC which are the subject of this appeal are within the meaning of "education" or "vocational training", in Item 1 of Group 6 of Schedule 9 VATA.

(3) This appeal relates to CIC's VAT prescribed accounting period from 1 November 2015 to 31 January 2016 ('the Period'). In the academic year 2015/2016 (as with preceding years) CIC was funded primarily by three government agencies: the Skills Funding Agency ("SFA"), the Education Funding Agency ("EFA") and the Higher Education Funding Council for England ("HEFCE""). This appeal relates to courses funded by the EFA and SFA (the "Funding Agencies").

(4) The EFA funded the provision of education and vocational training for students aged 19 and under, certain categories of students aged over 19, and students with learning difficulties aged between 19 and 25. For the year 2015-16 EFA funding amounted to approximately £18.5m.

(5) The SFA funded all or part of the provision of education and vocational training for students aged 18 and over who have not achieved a specified level of academic qualification, or who are entitled to free education or training due to their personal circumstances and for courses related to areas of the economy that are treated as priority areas for learning. CIC's income in respect of such students amounted to approximately £4.2m per annum.

(6) CIC receives tuition fees for other students who are not eligible for EFA, SFA or HEFCE funding. CIC also generates income from the rental of studio and other space in

the evenings, weekends and in the holidays and other income from MoT testing and motor vehicle repairs.

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

(8) Funding by the Funding Agencies was provided pursuant to s 14 Education Act 2002. CIC entered into separate agreements with the EFA and the SFA each year in relation to the funding that those agencies provided for the next academic year. The agreements were in standard form, and were not negotiable. The agreement with the EFA is described as the "Conditions of Funding Agreement". The agreement with the SFA is described as a "Financial Memorandum". The agreements are lengthy, and refer to (and incorporate by reference) a series of other documents (some of which are in electronic form and are published on the internet). Taken together, these agreements and the other associated documents set out the basis on which the funding agencies would fund CIC, and the obligations placed on CIC to deliver education and vocational training, and to provide information to the funding agencies.

(9) Neither the SFA nor the EFA agreements set out the courses that CIC must provide. But CIC is only funded by these agencies for the provision of courses leading to qualifications that have been approved by the Government and which are listed on a website maintained by the Government. Theoretically, CIC could have provided courses leading to qualifications that have not been approved – but it would not have been funded by either the EFA or the SFA to provide such courses – and it therefore did not do so.

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

(11) The basic funding allocation was determined by the following funding formula:

> (Student numbers) x (National funding rate per student) x (Retention factor) x (Programme cost weighting)] + (Disadvantage funding) + (Large programme funding)
>
> This amount is then multiplied by the area cost allowance.

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

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

(13) The amount paid by the SFA is based upon a monetary funding allocation calculated before the start of the year, but subject to a claw-back for under-delivery against allocation, which is reconciled at the end of the year (and repayable in the following January). No additional payments are made for over-delivery.

(14) The SFA's Financial Memorandum provides at clause 6.2 that:

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

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

In the case of a student whose costs are met in full by one of the funding agencies, the Receipt sets out a "fee" for the course (and any associated examinations), but also states that the student is entitled to a "waiver" and that the outstanding balance is nil. In relation to students whose costs are not met in full by one of the funding agencies, the Receipt will set out the fees payable for those courses, the amount paid on enrolment by the student, and any amount that remains outstanding. For students who are fully funded by the EFA or the SFA, the "fee" set out on the "Receipt" does not accurately mirror the funding actually received by CIC for that particular student – but will be the baseline funding amount per student for that course. However, the actual amount paid for that student by the funding agencies will depend on their respective funding formulae.

(16) For the EFA, for example, this will reflect the number of students in the prior year, the College's retention rates, and disadvantage funding. So, the actual funding received from the EFA by CIC to deliver its courses could be more or less than the aggregate of the amount stated on the Receipts issued for EFA funded courses.

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

The Lennartz Projects

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

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

(20) As regards VAT, HMRC have always considered that the provision of education and vocational training to students, where funded by a relevant funding body, is not a "business" activity within the meaning of the VATA – in other words it is an activity outside the scope of VAT.

(21) Following the CJEU's judgment in *Lennartz* C-97/90, HMRC's understanding of the position was that to the extent that education and vocational training was provided as part of its non-business activity, CIC would be entitled to reclaim the input tax incurred on Blocks 1 and 6, in the percentage that its use related to these non-business activities. However, CIC would subsequently be due to account for deemed output tax

over the economic life of the blocks to the extent that their use was for 'non-business' purposes. On 1 February 2008, CIC's then VAT advisor wrote to HMRC seeking to apply the *Lennartz* mechanism to Phase 1 of the Project. Following correspondence and discussions between HMRC and CIC's advisors, a revised PESM was submitted for approval to HMRC in October 2009, which was formally approved by HMRC on 23 December 2009. On 3 November 2009 CIC made a claim for recovery of input VAT in respect of the Project under the Lennartz mechanism. The claim was in respect of the elements of the buildings that were to be used for what CIC then considered to be "non-business" activities. In December 2009, HMRC made a repayment of £2,087,477 to CIC – being input VAT (including Lennartz input VAT) less accrued output VAT on the deemed supplies arising under Part 15A of the VAT Regulations for the periods 01/09 to 07/09 inclusive. A further repayment of £138,329 was made by HMRC to CIC in November 2010 in respect of input VAT (including Lennartz input VAT) on construction costs, less accrued output VAT on the deemed supplies for the periods 01/10 to 07/10 inclusive. CIC continued to account for output VAT on deemed supplies under Part 15A of the VAT Regulations in respect of the non-business use of the Project buildings thereafter.

The Lennartz Claim

(22) On 23 April 2014, CIC's VAT advisor submitted a net claim in respect of over-declared output VAT for periods 04/10 to 01/14 minus input VAT overclaimed for the periods 04/10 to 07/10 totalling £1,522,277. The basis of the claim was that the provision of education to students was a business activity, irrespective of how it was funded. In consequence no part of the buildings within the scope of the Project put to non-business use, and there was no requirement for CIC to account for deemed output VAT under paragraph 5(4) of Schedule 4, VATA ("Paragraph 5(4)") and Regulation 116E. CIC argued that – subject to the four-year cap – the wrongly declared output VAT was reclaimable. A logical consequence of this claim was that the credit claimed for input VAT under the Lennartz mechanism was also wrongly reclaimed. To the extent that this input VAT fell within the four-year time limited period, it had to be repaid to HMRC. It was for this reason that the claim was netted-off to reflect the small sum of overclaimed input VAT that was still "in time" for adjustment.

Lennartz Assessments

(23) CIC's advisors informed HMRC that CIC would, forthwith, and from period 01/15, not be accounting for deemed Lennartz output tax, but would pay any assessments properly raised by HMRC in respect of the Commissioners' interpretation of the law, although it would appeal against the issuing of any such assessments.

(24) CIC did not account for Lennartz output tax on its VAT return for the Period. HMRC assessed CIC for the Period in the amount of £123,642, as notified in a letter to CIC dated 23 March 2017. Within that amount, £98,965.88 was assessed in respect of Lennartz output tax underdeclared and £24,676.66 was assessed in respect of amounts deducted as input tax which were not due to CIC. The input tax assessments are agreed and are not in issue in this appeal.

(25) The assessment was upheld by HMRC, following, a statutory review, in a review decision letter dated 13 July 2017.

RELEVANT LEGISLATION

4. The legislation, as set out below, is that which was in force during the Period.

Principal VAT Directive – Directive 2006/112/EC ('PVD')

5. Article 2(1) of the PVD provided in material part:

The following transactions shall be subject to VAT:… (c) the supply of services for consideration within the territory of a Member State by a taxable person acting as such;…"

6. Article 9(1) of the PVD provided:

> 'Taxable person' shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.
>
> Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as 'economic activity'. The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity."

7. Article 26(1) of the PVD provided:

> Each of the following transactions shall be treated as a supply of services for consideration:
>
> (a) the use of goods forming part of the assets of a business for the private use of a taxable person or of his staff or, more generally, for purposes other than those of his business, where the VAT on such goods was wholly or partly deductible;
>
> (b) the supply of services carried out free of charge by a taxable person for his private use or for that of his staff or, more generally, for purposes other than those of his business.

8. Article 168 of the PVD provided:

> In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:
>
> (a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person;…

9. Article 173 of the PVD provided:

> 1. In the case of goods or services used by a taxable person both for transactions in respect of which VAT is deductible pursuant to Articles 168, 169 and 170, and for transactions in respect of which VAT is not deductible, only such proportion of the VAT as is attributable to the former transactions shall be deductible.
>
> The deductible proportion shall be determined, in accordance with Articles 174 and 175, for all the transactions carried out by the taxable person.
>
> 2. Member States may take the following measures:
>
> (a) authorise the taxable person to determine a proportion for each sector of his business, provided that separate accounts are kept for each sector;
>
> (b) require the taxable person to determine a proportion for each sector of his business and to keep separate accounts for each sector;
>
> (c) authorise or require the taxable person to make the deduction on the basis of the use made of all or part of the goods and services;

(d) authorise or require the taxable person to make the deduction in accordance with the rule laid down in the first subparagraph of paragraph 1, in respect of all goods and services used for all transactions referred to therein;

(e) provide that, where the VAT which is not deductible by the taxable person is insignificant, it is to be treated as nil.

VATA

10. Section 1 VATA provided in material part:

(1) Value added tax shall be charged, in accordance with the provisions of this Act—

(a) on the supply of goods or services in the United Kingdom (including anything treated as such a supply),…"

11. Section 4 VATA provided:

(1) VAT shall be charged on any supply of goods or services made in the United Kingdom, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him.

(2) A taxable supply is a supply of goods or services made in the United Kingdom other than an exempt supply.

12. The material parts of s 5 VATA provided:

(1) Schedule 4 shall apply for determining what is, or is to be treated as, a supply of goods or a supply of services.

(2) Subject to any provision made by that Schedule and to Treasury orders under subsections (3) to (6) below—

(a) "supply" in this Act includes all forms of supply, but not anything done otherwise than for a consideration;

(b) anything which is not a supply of goods but is done for a consideration (including, if so done, the granting, assignment or surrender of any right) is a supply of services.

13. Matters including input tax and credit for input are addressed in s 24 and s 25 VATA. Section 26 of VATA provided:

(1) The amount of input tax for which a taxable person is entitled to credit at the end of any period shall be so much of the input tax for the period (that is input tax on supplies, acquisitions and importations in the period) as is allowable by or under regulations as being attributable to supplies within subsection (2) below.

(2) The supplies within this subsection are the following supplies made or to be made by the taxable person in the course or furtherance of his business—

(a) taxable supplies;

(b) supplies outside the United Kingdom which would be taxable supplies if made in the United Kingdom;

(c) such other supplies outside the United Kingdom and such exempt supplies as the Treasury may by order specify for the purposes of this subsection.

(3) The Commissioners shall make regulations for securing a fair and reasonable attribution of input tax to supplies within subsection (2) above, and any such regulations may provide for—

(a) determining a proportion by reference to which input tax for any prescribed accounting period is to be provisionally attributed to those supplies;

(b) adjusting, in accordance with a proportion determined in like manner for any longer period comprising two or more prescribed accounting periods or parts thereof, the provisional attribution for any of those periods;

(c) the making of payments in respect of input tax, by the Commissioners to a taxable person (or a person who has been a taxable person) or by a taxable person (or a person who has been a taxable person) to the Commissioners, in cases where events prove inaccurate an estimate on the basis of which an attribution was made; and

(d) preventing input tax on a supply which, under or by virtue of any provision of this Act, a person makes to himself from being allowable as attributable to that supply.

(4) Regulations under subsection (3) above may make different provision for different circumstances and, in particular (but without prejudice to the generality of that subsection) for different descriptions of goods or services; and may contain such incidental, supplementary, consequential and transitional provisions as appear to the Commissioners necessary or expedient.

14. Section 73(1)-(2) VATA provided (as at the date of the Assessment):

(1) Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him.

(2) In any case where, for any prescribed accounting period, there has been paid or credited to any person—

(a) as being a repayment or refund of VAT, or

(b) as being due to him as a VAT credit,

an amount which ought not to have been so paid or credited, or which would not have been so paid or credited had the facts been known or been as they later turn out to be, the Commissioners may assess that amount as being VAT due from him for that period and notify it to him accordingly.

15. Paragraph 5(4) of Schedule 4 to VATA provided in material part:

"(1) … where goods forming part of the assets of a business are transferred or disposed of by or under the directions of the person carrying on the business so as no longer to form part of those assets, whether or not for a consideration, that is a supply by him of goods."

Finance (No.3) Act 2010 ("2010 Act")

16. Paragraph 4 of Schedule 8 to the 2010 Act provided:

"(1) Sub-paragraph (2) applies where—

(a) a person carrying on a business or any of that person's predecessors has been allowed credit under sections 25 and 26 of VATA 1994 for input tax on the basis that the input tax is attributable to a thing done or to be done which is or would be a paragraph 5(4) supply,

(b) some or all of that credit was allowed before 22 January 2010,

(c) disregarding sub-paragraph (2), the thing done or to be done is not or would not be a paragraph 5(4) supply, and

(d) the credit allowed as mentioned in paragraph (a) is not reversed in full.

(2) The thing done or to be done is to be treated for the purposes of VATA 1994 as if it were or would be a paragraph 5(4) supply.

(3) But sub-paragraph (2) does not confer on the person allowed credit as mentioned in sub-paragraph (1)(a) any entitlement to that credit under sections 25 and 26 of that Act.

(4) For the purposes of sub-paragraph (1) credit for input tax is "allowed" under sections 25 and 26 of VATA 1994 to the extent that the credit is claimed, and the claim is satisfied by one or more of the following—

(a) the deduction of input tax under section 25(2) of that Act from any output tax that is due to the Commissioners;

(b) a payment by the Commissioners in respect of the credit under section 25(3) of that Act;

(c) the setting off of the credit against a sum payable to the Commissioners, whether under section 81(3) of that Act or section 130 of FA 2008 or otherwise.

(5) In this paragraph—

"paragraph 5(4) supply" means a supply under paragraph 5(4) of Schedule 4 to VATA 1994 (goods held or used for the purposes of a business which are put to private use etc);

"predecessor" has the same meaning as in paragraph 5 of that Schedule.

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

The Value Added Tax Regulations 1995 ("1995 Regulations")

17. Regulation 102 of the 1995 Regulations provided, in material part, as in force from 1 April 2009 to 31 March 2010:

(1) … the Commissioners may approve or direct the use by a taxable person of a method other than that specified in regulation 101.

(1A) A method approved or directed under paragraph (1) above—

(a) shall be in writing,

(b) may attribute input tax which would otherwise fall to be attributed under regulation 103 provided that, where it attributes any such input tax, it shall attribute it all, and

(c) shall identify the supplies in respect of which it attributes input tax by reference to the relevant paragraph or paragraphs of section 26(2) of the Act…

(3) A taxable person using a method as approved or directed to be used by the Commissioners under paragraph (1) above shall continue to use that method unless the Commissioners approve or direct the termination of its use…

(5) Any approval given or direction made under this regulation shall only have effect if it is in writing in the form of a document which identifies itself as being such an approval or direction. …

(9) With effect from 1st April 2007 the Commissioners shall not approve the use of a method under this regulation unless the taxable person has made a declaration to the effect that to the best of his knowledge and belief the method fairly and reasonably represents the extent to which goods or services are used by or are to be used by him in making taxable supplies.

(10) The declaration referred to in paragraph (9) above shall—

(a) be in writing,

(b) be signed by the taxable person or by a person authorised to sign it on his behalf, and

(c) include a statement that the person signing it has taken reasonable steps to ensure that he is in possession of all relevant information.

18. Regulation 116E provided:

… the value of a relevant supply is the amount determined using the formula A

B× (C × U%)

where—

A is the number of months in the prescribed accounting period during which the relevant supply occurs which fall within the economic life of the goods concerned;

B is the number of months of the economic life of the goods concerned or, in the case of an economic life commencing on 1st November 2007 by virtue of regulation 116L, what would have been its duration if it had been determined according to regulation 116C or 116G as appropriate;

C is the full cost of the goods excluding any increase resulting from a supply of goods or services giving rise to a new economic life; and

U% is the extent, expressed as a percentage, to which the goods are put to any private use or used, or made available for use, for non-business purposes as compared with the total use made of the goods during the part of the prescribed accounting period occurring within the economic life of the goods.

DISCUSSION AND CONCLUSION

19. It is common ground that an issue as to whether certain grants received by Further Education Colleges ("FEC") from the SFA and EFA are, for VAT purposes, "consideration" (within the meaning of s 5(6)(a) VATA and Article 2(1) of the PVD) for a supply of services (education and/or vocational training) provided free of charge by the FEC to students (the "Consideration Point").

20. It is also accepted that the Consideration Point was determined against HMRC by the Upper Tribunal in *Colchester Institute Corporation v HMRC* [2020] UKUT 368 (TCC) ("*CIC UT*") at [65] – [89].

21. As Mr Mantle put it in his written argument:

(1) It is common ground that if the relevant supplies of education and/or vocational training were for consideration, they were 'economic activity' within the meaning of Article 9(1) PVD (so 'in the course or furtherance of a business carried on' by CIC

within the meaning of s 4(1) VATA). This position is unchanged from CIC UT (for reference as per CIC UT at [2] and [89]).

(2) If the relevant supplies are economic activity, they are exempt supplies (see CIC UT at [89]). Where the relevant provision of services is supplies for consideration and economic activity, and those supplies are exempt, HMRC accept that there cannot be a deemed supply leading to output tax liability under paragraph 5(4) of Schedule 4 VATA12.

(3) Accordingly, there was, applying the CIC UT on the Consideration Point no basis for the assessment of output tax as part of the Assessment.

22. I am bound by the decision of the Upper Tribunal. It therefore follows that CIC must succeed on the Consideration Point. However, as the appeal against the input tax element was withdrawn, it cannot succeed in its entirety. I therefore allow the appeal in part (ie in relation to the Consideration Point) and reduce the Assessment to £24,676.66

RIGHT TO APPLY FOR PERMISSION TO APPEAL

23. 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.

JOHN BROOKS
TRIBUNAL JUDGE

Release date: 04th MARCH 2024