[2015] UKUT 0263 (TCC)
Appeal number: FTC/100/2013

VAT – whether services supplied by BBC to Open University exempt under Article 13A(1)(i) of the Sixth VAT Directive – appeal on law from decision of First-tier Tribunal that services were exempt – was BBC a body governed by public law? – no – did BBC have educational aim required by Article 13A(1)(i)? – yes – was BBC other organisation defined by United Kingdom as having similar objects? – yes – appeal dismissed

UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS

Appellants

-and-

THE OPEN UNIVERSITY

Respondent

TRIBUNAL: MR JUSTICE HENDERSON

Sitting in public at the Rolls Building, London EC4A 1NL on 17, 18 and 19 November 2014

Mr Peter Mantle, instructed by the General Counsel and Solicitor for HMRC, for the Appellants

Mr Paul Lasok QC, instructed by KPMG LLP, for the Respondent

Introduction

1. This is an appeal by the Commissioners for Her Majesty's Revenue and Customs ("HMRC") from a decision ("the Decision") of the Tax Chamber of the First-tier Tribunal (Judge Sinfield, "the FTT"), which was released on 3 June 2013 after a four day hearing in London in January of that year. The appeal is brought with permission granted by Judge Sinfield on 6 August 2013.

2. The case concerns supplies of production and broadcasting services made by the British Broadcasting Corporation ("the BBC") to the Open University ("the OU") during the period of 16 years and seven months from 1 January 1978 until 31 July 1994, but excluding (for reasons which I will explain) the September 1981 quarter. I will call this period "the Appeal Period". With effect from 1 August 1994, HMRC have until recently accepted that the services in question were and are exempt under item 4 of Group 6 of Schedule 9 to the Value Added Tax Act 1994 ("VATA 1994") as services provided by an "eligible body" which are closely related to the provision of education by a university, the "eligible body" for this purpose being the BBC Open University Production Centre. The wording of the exemption in item 4 of Group 6, read with the relevant definitions of "eligible body" in Note (1)(d) to Group 6 and of "public body" in Note (5) to Group 7, differs in significant respects from the wording of the predecessor provisions which were in force during the Appeal Period. However, HMRC have indicated to the OU that the current exemption of the relevant services may be reconsidered following the outcome of the present proceedings.

3. From soon after the introduction of VAT in 1973 until the end of the Appeal Period, the BBC had charged and accounted for VAT on the services which it supplied to the OU. In 2009, the BBC made a claim under section 80 of VATA 1994 for repayment of the VAT which it had charged and accounted for on all supplies made to the OU before 1 August 1994. HMRC rejected the claim, and a review of that decision was then requested by the OU under section 83B of VATA 1994. The request was made by the OU, rather than the BBC, because the OU had paid the VAT charged to it by the BBC, and the BBC had agreed to pass on to the OU any amounts that it recovered from HMRC. By decisions in March and June 2011, HMRC allowed the BBC's claim in relation to the initial period from 1 April 1973 to 28 February 1974, but maintained their rejection of the claim for all subsequent periods. The OU then appealed to the FTT, confining its appeal to supplies made during the Appeal Period.

4. The total amount of allegedly overpaid tax which the BBC sought to recover for the Appeal Period, excluding interest, was £21,059,078. This amount was

reduced by approximately £270,000, when the OU accepted that supplies made during the September 1981 quarter had to be excluded. The reason for this, as the FTT explained in paragraph 4 of the Decision, is that an appeal relating to that quarter had in 1982 been heard and dismissed by the VAT Tribunal. The Tribunal based its decision on a view of the law which, much later, was shown to be incorrect by the decision of the European Court of Justice (the "ECJ") in Case C-434/05, Stichting Regionaal Opleidingen Centrum Noord-Kennemerland/West-Friesland (Horizon College) v Staatssecretaris van Financiën [2007] ECR I-04793, [2008] STC 2145 ("Horizon College"). No appeal was brought by the BBC or the OU from that decision, so it remains binding on the parties as *res judicata*.

5. The Appeal Period began with the entry into force on 1 January 1978 of the Sixth VAT Directive (Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment). Throughout the Appeal Period, Article 13 of the Sixth VAT Directive provided as follows:

> "Article 13 Exemptions within the territory of the country
>
> A. Exemptions for certain activities in the public interest
>
> 1. Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any possible evasion, avoidance or abuse:
>
> …
>
> (i) children's or young people's education, school or university education, vocational training or retraining, including the supply of services and of goods closely related thereto, provided by bodies governed by public law having such as their aim or by other organisations defined by the Member State concerned as having similar objects;
>
> …"

6. I will refer to the exemption contained in Article 13A(1)(i) of the Sixth VAT Directive as "the Education Exemption". Article 13A(2) contained various restrictions which applied to the Education Exemption, but HMRC no longer rely on any of them.

7. It is also relevant to note Article 4(5) of the Sixth VAT Directive, which provided that:

> "States, regional and local government authorities and other bodies governed by public law shall not be considered taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with these activities or transactions.
>
> However, when they engage in such activities or transactions, they shall be considered taxable persons in respect of these activities or transactions where treatment as non-taxable persons would lead to significant distortions of competition.
>
> …
>
> Member states may consider activities of these bodies which are exempt under Article 13 … as activities which they engage in as public authorities."

8. The Education Exemption was implemented in the United Kingdom during the Appeal Period, initially by Group 6 of Schedule 5 to the Finance Act 1972 and then, from 26 October 1983, by Group 6 of Schedule 6 to the Value Added Tax Act 1983. It is common ground that the UK legislation failed to implement the Education Exemption correctly, in that it required "closely related" supplies to be provided by the person supplying the education to which they were related. Accordingly, the BBC's claim was based on the wording of the Education Exemption in the Sixth VAT Directive, which it was conceded had direct effect, and not on the UK legislation.

9. The Education Exemption was framed in such a way that supplies of the specified forms of education or training (including the supply of services and goods "closely related thereto") would be exempt in the UK if they were provided:

   a) by a body governed by public law having such as its aim; or, in the alternative,

b) by another organisation defined by the UK as having similar objects.

10. It has throughout been common ground that at all material times:

a) the OU was a university with the education aim required by the Education Exemption; and

b) the services supplied by the BBC to the OU were "closely related" to the university education provided by the OU.

11. Accordingly, the question whether the services supplied by the BBC to the OU were covered by the Education Exemption turns on the following three issues:

(1) Was the BBC a body governed by public law within the meaning of the Education Exemption?

(2) If so, did the BBC also have the requisite educational aim?

(3) Alternatively, was the BBC another organisation defined by the UK as having similar objects?

12. The FTT decided issues (1) and (2) against the OU, but issue (3) in its favour. The OU's appeal therefore succeeded, albeit only on the alternative basis. HMRC now appeal to the Tax and Chancery Chamber of the Upper Tribunal on issue (3). By its response pursuant to rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the OU opposes HMRC's appeal on issue (3), and also submits, in the alternative, that the FTT should have decided each of issues (1) and (2) in its favour. Accordingly, all three issues are still live. The supplies in question will be exempt if the OU succeeds on both of issues (1) and (2), or (as it did below) on issue (3).

13. I heard argument on the appeal over three days, from 17 to 19 November 2014. Both sides were represented by counsel who had also appeared before the FTT, Mr Peter Mantle for HMRC, and Mr Paul Lasok QC for the OU. I am grateful to both of them for their full and careful arguments on the issues, none of which is easy to determine.

Facts

14. The FTT recorded that there was no real dispute between the parties about the facts, only the interpretation to be placed on them. The witnesses for the OU were Mr Andrew Law, Mr Colin Robinson and Sir David Attenborough. Mr Mantle cross-examined Mr Law and Mr Robinson in order to clarify certain points; Sir David's witness statement was admitted as it stood. There were also seven bundles of documents to which both parties referred.

15. The facts found by the FTT are set out in paragraphs [17] to [37] of the Decision, which is reported at [2013] SFTD 1228, [2013] UK FTT 326 (TC). It is unnecessary for me to reproduce those paragraphs in full, but I will set out enough of them to enable this decision to be read on its own:

> "17. The BBC was first established as a limited company in 1922. John Reith, who subsequently became Lord Reith, was the first General Manager (later called Director General) of the BBC. On 31 December 1926, the company was dissolved and its assets were transferred to the BBC constituted under a Royal Charter dated 20 December 1926. The BBC continued in existence by virtue of a succession of Royal Charters.
>
> 18. As is well known, Lord Reith stated that the BBC's purpose and duty was to educate, inform and entertain. The BBC had an education director and established an education department from its earliest days. The BBC made its first broadcast for schools in 1924. In 1927, the BBC set up an adult education department. By 1929, schools broadcasts and talks accounted for a total weekly output of about 80 hours.
>
> 19. In 1962, the Postmaster General granted the BBC the right to extend its broadcasting hours on television for the purpose of adult education. This led to the formation of a further education television department in the BBC which, in turn, led to the creation of specialist education departments within the BBC that produced 300 new television programmes annually.
>
> 20. In March 1963, a Labour Party study group under the chairmanship of Lord Taylor presented a report about the continuing exclusion from higher education of people from lower income groups. It proposed a University of the Air to deliver serious, planned, adult education by radio and television.

21. The fifth Royal Charter, which was granted to the BBC in 1964, was the one in force during the first part of the period covered by the claim …

22. The first of the objects of the BBC set out in Article 3 of the Charter was "to provide, as public services, broadcasting services …" The eighth object was "to perform services in any part of the world for and on behalf of any Department of the Government of Our United Kingdom …" Article 5 of the Charter provided that the Governors of the BBC are appointed by the Queen in Council.

23. The Prime Minister, Harold Wilson, asked Lord Goodman to consider the technical means of transmitting programmes for the University of the Air. Lord Goodman discussed how the arrangements might work with Sir Hugh Greene, the Director General of the BBC. In a letter dated 29 March 1966 to Lord Goodman, Sir Hugh Greene stated that the BBC had assumed that:

> "… the relationship between the University and the BBC would be one of close partnership between two educational bodies, recognising on the one hand the sovereign authority of the University in setting the degree requirements and the degree courses, and on the other that the BBC will make an educational as well as a technical contribution."

The letter also referred to the possible use of existing BBC adult-education programmes, which had been approved by the Further Education Advisory Council, by the University for its courses.

24. In September 1967, the Government appointed a Planning Committee to work out a comprehensive plan for, what had come to be called, the OU. A report by the Planning Committee in 1969 indicated that the Committee had already decided to contract with the BBC for all production and transmission services, at least during the early years of operation, in order to ensure a high standard of production. The report set out the Planning Committee's view of the nature of the relationship between the OU and the BBC as follows:

> "The relationship between the University and the BBC will be one of educational partnership, based on mutual confidence. …The basic principles behind [the partnership] are that the University has the ultimate responsibility for the academic content of course material and the manner in which this material is taught, whilst respecting the BBC's

judgment and expert advice on matters relating to the preparation and presentation of the broadcasts. This advice will not be set aside for any but cogent academic reasons.

25. [*This paragraph set out further facts found by the VAT Tribunal in 1982, relating to the "educational partnership" between the BBC and the OU*.]

26. The OU opened to its first students in January 1971. The first agreement between the BBC and the OU was entered into on 16 December 1971. Schedule 1 to the 1971 agreement, stated:

> "The radio and television programmes required by the University and provided by the BBC are to be planned on the basis of an educational partnership between the University and BBC staff." [*This was then amplified in the remainder of Schedule 1*]

27. Clause 2 of the 1971 agreement imposed an obligation on the BBC to produce and broadcast programmes relating to the OU's courses. Throughout the relevant period, the BBC operated a specific department for the production and editing of OU programming: the BBC Open University Production Centre ("the OUPC"). The OUPC was located initially at the BBC studios at Alexandra Palace and then, from 1980, on the OU campus at Milton Keynes. The functions of the OUPC involved close co-operation between BBC and OU employees.

28. Clause 3 of the 1971 agreement provided that the BBC would be represented on the course teams. [*Fuller details of course teams were then provided*.]

29. What that actually meant in practice was described in the evidence of Mr Law and Mr Robinson. Mr Law worked for the BBC in the OUPC from 1987 to 2000. He is now employed by the OU. Mr Robinson was employed by the BBC in the OUPC from 1969 to 1996. The course teams comprised both OU and BBC staff. They determined the means by which the course material was to be communicated to the students on the course, i.e. whether it was by print or broadcasting or other means. All members of the course team were generally encouraged to participate. Producers were equal members of the course teams and often contributed much more to a course than just the design and production of broadcasts.

30. The BBC decided from the early days that it should recruit people with good academic knowledge and then train them in

broadcasting techniques rather than rely on people with experience in film, television and radio with no academic background. Mr Law and Mr Robinson confirmed that this was what happened. Mr Law's evidence was that he was an academic when he joined the BBC to work at the OUPC and that was the reason that he was recruited. He said that he was trained as a producer at the BBC and at the OUPC. Mr Robinson's evidence was that the majority of producers working in the OUPC had a strong academic background.

31. Schedule 2 to the 1971 agreement contained copies of correspondence between the Department of Education and Science and the BBC. The OU Planning Committee had accepted the provisional estimates and financial arrangements proposed by the BBC on the assumption that public funds would be made available to the OU for this purpose throughout the period in question. The BBC was concerned that it should not be left out of pocket and sought a commitment from the Government in the form of a guarantee that the BBC would be reimbursed expenditure incurred in relation to the OU. The eventual outcome of the correspondence was that the Department of Education and Science gave an undertaking that allayed the BBC's concerns.

32. The BBC and the OU entered into a second agreement in February 1976 which was simply a continuation of the earlier agreement, with relatively minor modifications and amendments.

33. In 1981, a new Royal Charter was granted to the BBC. The material terms were the same or very similar to the previous Charter. The first objective was, again, to provide broadcasting services as public services.

34. In May 1983, the BBC and the OU entered into a third agreement. The second recital stated that the BBC:

> "… has assisted in the planning and development of the University and has collaborated in the design and preparation of its courses and has had a responsibility for the production, recording and transmission of the broadcast components of such courses."

35. The last recital provided that the OU and the BBC jointly wished to continue and to promote their partnership in the furtherance of the objects of the OU and to that end to collaborate, inter alia, in the production and recording of audio and audio-visual materials.

36. Clause 1 of the 1983 agreement provided that:

> "The working partnership between the [OU] and the [BBC] which has been successfully created and developed in the first years of the [OU]'s operation shall be continued and promoted in the light of that experience and in accordance with the principles of the preceding Agreements, the practices which have been accepted and the spirit of understanding which has evolved"

37. … "

The correct approach to interpretation of exemptions

16. The next section of the Decision (paragraphs [38] to [40]) was headed "Approach to the interpretation of exemptions in the Sixth VAT Directive". There is no dispute about the general principles which should guide courts or tribunals in this area, and both sides accept that the law was correctly stated by the FTT in these paragraphs. They read as follows:

> "38. It has been held on many occasions by the ECJ and was common ground between the parties that the exemptions in the Sixth VAT Directive have their own independent meaning in Community law and must, therefore, be given a Community definition. The meaning of "education" in Article 13A(1)(i) was considered by the ECJ in *Horizon College* which is discussed further below.
>
> 39. Further, it is settled law that the exemptions provided for by Article 13A(1)(i) of the Sixth VAT Directive are to be construed strictly but not restrictively. This follows from the basic principle set out in Article 2 of the Sixth VAT Directive that the supply of goods and services shall be subject to VAT, if effected for consideration by a taxable person acting as such, unless expressly exempted.
>
> 40. The requirement of strict interpretation does not mean that the provisions for exemption must be interpreted restrictively. As Chadwick LJ said in *Expert Witness Institute v Customs and Excise Commissioners* [2001] EWCA Civ 1882, [2002] STC 42 at [17]:
>
> > "A "strict" construction is not to be equated, in this context, with a restricted construction. The court must recognise that it is for a supplier, whose supplies would otherwise be taxable, to establish that it comes within the exemption, so

> that if the court is left in doubt whether a fair interpretation of the words of the exemption covers the supplies in question, the claim to the exemption must be rejected. But the court is not required to reject a claim which does come within a fair interpretation of the words of the exemption because there is another, more restricted, meaning of the words which would exclude the supplies in question."
>
> That passage was endorsed by the Court of Appeal in *Insurancewide.Com Services Ltd v HMRC* [2010] EWCA Civ 422, [2010] STC 1572 at [83]."

Issue (1): was the BBC a body governed by public law?

17. The expression "bodies governed by public law" occurs in several of the exemptions in Article 13A of the Sixth VAT Directive. Apart from the Education Exemption, it is to be found in paragraphs (1)(b), (g), (h) and (n), as well as (by reference) in paragraph (1)(o). There appears to be little, if any, case law of the ECJ on the meaning of the expression in any of those contexts, but its meaning in the context of Article 4(5) has been considered by the ECJ on a number of occasions. I have set out the wording of Article 4(5) in paragraph 7 above. It operates as an exception, which is itself qualified or negated in various respects, from the very broad definition of "taxable person" in Article 4(1). The exception extends to "states, regional and local government authorities and other bodies governed by public law … in respect of the activities or transactions in which they engage as public authorities …".

18. It appears to me to be implicit in this wording that:

    (a) the concept of bodies governed by public law includes, but is not confined to, states, regional authorities and local government authorities;

    (b) such bodies engage in at least some of their activities or transactions "as public authorities"; and

    (c) it is only in relation to such activities or transactions that the exception applies.

19. The European case law to which I was referred begins with Case 235/85, EC Commission v Netherlands, [1987] ECR 1471. These were infraction proceedings, in which the Commission sought a declaration that the Netherlands had breached its obligations under the Sixth VAT Directive by failing to subject to VAT the official services performed by notaries and bailiffs. One of the issues considered by the ECJ, in upholding the Commission's application, was whether the exemption in Article 4(5) applied to the relevant services. In order to answer this question, the Court first held that it was necessary to place the exemption in the general context of the common system of VAT. The Court then said:

> "19. As has been stated in connection with the examination of the term "economic activities", the Sixth Directive is characterised by its general scope and by the fact that all exemptions must be expressly provided for and precisely defined.
>
> 20. In that connection it should be observed that Article 4(5) provides an exemption only for bodies governed by public law, and even then only for the activities or transactions in which they engage as public authorities.
>
> 21. It is clear from that provision, when examined in the light of the aims of the directive, that two conditions must be fulfilled in order for the exemption to apply; the activities must be carried out by a body governed by public law and they must be carried out by that body acting as a public authority. This means that bodies governed by public law are not automatically exempted in respect of all the activities in which they engage but only in respect of those which form part of their specific duties as public authorities (see the judgement of 11 July 1985 in Case 107/84 *Commission v Federal Republic of Germany* [1985] ECR 2663) and, secondly, that an activity carried on by a private individual is not exempted from VAT merely because it consists in carrying out acts falling with the prerogatives of the public authority.
>
> 22. Consequently, even assuming that in performing their official services notaries and bailiffs exercise the powers of a public authority by virtue of their appointment to public office, it does not follow that they may enjoy the exemption provided for in Article 4(5). The reason is that they pursue those activities, not in the form of a body governed by public law, since they are not part of the public administration, but in the form of an independent economic activity carried out in the exercise of a liberal profession."

20. Two important points emerge from this judgment. First, the exemption applies only to those activities of a body governed by public law which form part of its specific duties as a public authority. Secondly, the notaries and bailiffs did not themselves provide the relevant services as a body governed by public law, since they were not part of the public administration, but were rather engaged in "an independent economic activity carried out in the exercise of a liberal profession". It appears to be implicit in this reasoning that, in order to qualify for exemption, the activities carried on by a body governed by public law must be ones which it performs in fulfilment of its role as part of the public administration. Such a limitation is in my view hardly surprising, given that the three examples of bodies governed by public law to which Article 4(5) refers clearly all form part of the public administration, namely states and regional and local government authorities.

21. The principles established in the Netherlands case were then applied by the Fifth Chamber of the ECJ in Case C-202/90, Ayuntamiento de Sevilla v Recaudadores de Tributos de las Zonas Primera y Segunda [1991] ECR I-4247, [1993] STC 659. The case concerned zonal tax collectors appointed by the Commune of Seville who were paid for their services in the form of a collection premium. The collectors set up their own offices and recruited their own staff. The issue was whether the collection premiums should bear VAT. The Commune argued that the tax collectors were not carrying on an economic activity, because they were not acting independently, and that their activities were in any event exempted by Article 4(5). These arguments were rejected by the Court.

22. In relation to Article 4(5), the ECJ repeated its standard learning that two conditions must be fulfilled in order for the exemption to apply: the activities must be carried out by a body governed by public law, and they must be carried out by that body acting as a public authority: see paragraph 18 of the judgment. The Court continued:

> "19. With regard to the first of those two conditions, the court has already held in its judgment in *Commission v Netherlands* (at paragraph 21) that an activity carried on by a private individual is not excluded from the scope of VAT merely because it consists in the performance of acts falling within the prerogatives of the public authority.
>
> 20. It follows that, if a commune entrusts the activity of collecting taxes to an independent third party, the exclusion from VAT provided for by [*Article 4(5)*] is not applicable."

23. In Case C-359/97, EC Commission v United Kingdom [2000] ECR I-6355, [2000] STC 777, the Commission sought to compel the UK to levy VAT on toll charges on crossings and bridges. The relevant toll roads and bridges fell

into three categories. Those in the first category were owned and operated by central government; the second category comprised tunnels and bridges operated by local passenger transport authorities; while the third category of crossings and bridges were operated by concessionaires under private finance initiatives ("PFI"). The UK relied on Article 4(5) as a defence to the claim. The defence was rejected by the ECJ. For present purposes, the relevant part of the judgment is at paragraphs 47 to 56. The Court repeated the principles which it had laid down in its earlier case law, including the Netherlands and Seville decisions, before concluding in paragraph 56:

> "In the present case it is common ground that, in the United Kingdom, the activity of providing access to roads on payment of a toll is carried out in certain cases [*i.e. the PFI cases*] not by a body governed by public law but by traders governed by private law. In such cases the exemption provided for by Article 4(5) of the Sixth Directive is not applicable."

24. It is worth noting that the passages quoted by the Court in paragraph 55 of the judgment included paragraph 22 of the Netherlands judgment, where it was held that the notaries and bailiffs failed to qualify for the exemption in Article 4(5) because they pursued their activities "not in the form of a body governed by public law, since they [*were*] not part of the public administration".

25. I now come to the important decision of the High Court (Sir Andrew Morritt C) in Cambridge University v Revenue and Customs Commissioners [2009] EWHC 434 (Ch), [2009] STC 1288 ("Cambridge University"). The issue in that case was whether the University could qualify for payment of VAT at the reduced rate of 5% in respect of supplies of electricity to a building which it had newly constructed for the purposes of its faculty of education. The relevant provisions allowed payment of VAT at the reduced rate in respect of supplies of electricity for "use by a charity otherwise than in the course or furtherance of a business". The University was a charity, but admitted that its provision of higher education was a business activity. The University wished to avoid the consequences of that admission by relying on the successor provision to Article 4(5) of the Sixth VAT Directive, in the same terms, in Article 13 of EC Council Directive 2006/112 ("the 2006 VAT Directive"). The University therefore argued that it was a body governed by public law, that it engaged in its activities or transactions as a public authority, and that such engagement was to be treated for VAT purposes as not carrying on an economic activity. These contentions were rejected by the VAT and Duties Tribunal (see (2008) VAT Decision 20610, [2008-09] V & D R 579) and, on the University's appeal to the High Court, by Sir Andrew Morritt C.

26. The Chancellor began his consideration of the question whether the University was a body governed by public law, within the meaning of Article 13 of the

2006 VAT Directive, by examining the concept of fiscal neutrality and holding that all the sub-paragraphs of the exemption had to be construed in the light of that principle: see [19] to [27]. He next considered whether the concept of "a body governed by public law" is one of EU law, with a separate autonomous meaning. After a full review of the authorities, including the Netherlands and Seville cases and Commission v United Kingdom, he concluded at [38] that the ECJ could not have expressed itself as it did in those cases if the content and attributes of a body governed by public law were matters for the domestic law of each Member State. He considered, and rejected, various arguments to the contrary advanced by the University, before concluding at [48]:

> "It would be inconsistent for such a Directive to have as one of its central concepts a term the meaning of which is to be determined by the national law of member states. It would also be wholly at variance with the principle of fiscal neutrality for the ambit of an exemption to depend on the manner in which each national court interprets that concept. The decisions of the European Court of Justice on which the tribunal relied contradict the proposition for which counsel for the University contends and the decisions on which he relied do not support it. They establish that "a body governed by public law" must, as a matter of Community law, be identified as part of the public administration of the relevant member state. Whether or not any particular institution can be so identified is a matter for the national court. The tribunal considered that the University could not be so identified. In my judgment they were right for the reasons they gave."

27. Consistently with the approach adopted by Sir Andrew Morritt C in Cambridge University, the ECJ had previously held in Case C-498/03, Kingscrest Associates Ltd v Customs and Excise Commissioners [2005] ECR I-04427, [2005] STC 1547, that "according to settled case law" the exemptions contained in Article 13 of the Sixth VAT Directive "have their own independent meaning in Community law and they must therefore be given a Community definition", and that the same "must also be true of the specific conditions laid down for those exemptions to apply": see paragraphs 22 and 23 of the judgment of the Court.

28. Unlike the FTT, the Upper Tribunal is not bound as a matter of precedent by the decision in Cambridge University: see Gilchrist v HMRC [2014] UKUT 169 (TCC), [2014] STC 1713, at [85] to [100]. I feel no doubt, however, that I should follow Cambridge University, both on the need for the concept of a body governed by public law to have an autonomous meaning under EU law, and on the requirement, as part of that autonomous meaning, that the body in question must be identified as forming part of the public administration of the

relevant Member State. I respectfully agree with the reasoning and conclusions of the Chancellor on each of these points.

29. As the FTT rightly said (in the Decision at [48]), Sir Andrew Morritt C did not expand in his judgment on what was meant by "part of the public administration of the … state", but he endorsed the reasons which the VAT Tribunal had given for concluding that the University did not satisfy that test. It is therefore necessary to examine the reasons which led the VAT Tribunal to reach that conclusion.

30. The reasoning of the VAT Tribunal on this question appears sufficiently from the following extracts from its decision:

> "86. We take from these cases the principle that, for Article 13 purposes, an entity, to be a body governed by public law, must be "part of the public administration", in the phrase used in the *Netherlands* case. It is not sufficient that it is carrying out by delegation a public function which could be, and sometimes is, carried out by the State itself. It is not sufficient that it is entrusted with powers and duties of a public nature in the performance of which it is amenable to judicial review in the English law context … It is not sufficient that it is highly regulated by the State and operates within a comprehensive statutory regime. If it is a body which is inherently and by its nature not a creature or extension of the State it is not part of the public administration and is not a body governed by public law for these purposes …
>
> …
>
> 88. The [*University*] is a legally independent and autonomous institution, and this is so notwithstanding that its incorporation, constitution and powers are statute-based. Whilst it can change its constitution and powers only with the consent, and by the direction, of the State, it is self-governing and independent in every way in which it operates and manages its affairs – the evidence of Mr Sykes was quite clear on this point …
>
> 89. The fact that the [*University*] receives State funding from HEFCE … does not, in our view, cause [*it*] to be part of the public administration. In principle, as Mr Lewis explained, such funding is structured through HEFCE so as to maintain the independence of English universities from central government. The "block grant" system of funding for teaching and research preserves the autonomy of the university in managing its teaching and research and providing the education for which it has obtained funding. Funding from HEFCE may come with

> certain conditions some of which are designed to ensure that certain government policies are implemented (most recently and strikingly in relation to the level of fees to be charged to students, and providing fair access), but that in itself cannot result in the university becoming part of the public administration. In any event, funding from HEFCE is, for the [*University*], less than a third of its "academic" income, and any conditions imposed cannot impinge on activities funded from other sources.
>
> 90. Finally the [*University*], like all English universities (including those which receive no State funding) is regulated as regards the use of the title "University" and the use of degree awarding powers for taught and research degrees … Such regulation does not in our view, have the result that the [*University*] is part of the public administration."

31. Having traversed essentially the same legal background as I have in this decision, and without in my judgment committing any error of law, the FTT then considered whether, on the facts, the BBC was a body governed by public law. The discussion runs from paragraphs 52 to 68 of the Decision. Judge Sinfield summarised his conclusions in paragraph 67, as follows:

> "Applying the case-law to the present appeal, I conclude that the BBC is not a body governed by public law. The BBC is not similar to the state or any regional or local authority because it provides the services to the OU for consideration i.e. in the form of an independent economic activity. In entering into an agreement with the OU, the BBC was not acting as part of the public administration of the United Kingdom: it was free to choose whether or not to provide services to the OU and, having chosen to do so, it could agree how it would provide those services and at what cost. Further, the BBC is not a part of the public administration of the United Kingdom. The BBC does not carry out a function of the United Kingdom Government. It does not administer the country or manage its interests. The BBC does not implement policy as an instrument of the Government. The BBC enabled the OU to implement the Government's policy of widening access to university education but the BBC did not itself implement that policy as an instrument of the Government. Some of the BBC's activities may be consistent with or further Government policy but the evidence shows that the BBC engages in those activities because it chooses to do so and not at the direction of the Government."

32. In the course of its discussion, the FTT made the following points:

(1) It is the form of the entity which determines its status, rather than the types of activity which it carries out (paragraph [54]).

(2) If another body governed by public law is to form part of the public administration, it must be similar in form to states, regional and local government authorities (paragraph [55]).

(3) The use of the word "part" in the phrase "part of the public administration" indicates that the body must not be independent of or separate from the public administration of the state or regional and local government authorities. This means that the body must be within the public administration by reason of an organisational or legal relationship. A merely commercial relationship would not suffice, because that would indicate that the body was engaged in an independent economic activity (paragraph [56]).

(4) The OU's submission that the BBC was controlled by the Government through the successive Royal Charters, the content of which was determined by the Government, was rejected. The BBC is "organisationally and editorially independent of the Government". Such independence is not in itself conclusive, but it is "a strong indicator" that the BBC is not part of the public administration of the UK (paragraph [59]).

(5) Similarly, the fact that the BBC is reliant for the majority of its funding on the TV licence fee which is collected by the Government is not determinative, although the source and nature of the funding of a body are factors to be taken into consideration (paragraph [60]).

33. Subject to certain submissions advanced by Mr Lasok on behalf of the OU, which I must now consider, it seems to me that the FTT's conclusion on this issue was clearly correct. Once it is accepted that a body governed by public law has to form part of the public administration, I find it very hard to see how the BBC could reasonably be regarded as satisfying that condition, given that it was deliberately established with full operational and editorial independence. It is illuminating in this context to read the judgments of the Court of Appeal in BBC v Johns [1965] Ch 32, explaining why the BBC was not an instrument of government, and did not come within the class of persons entitled to Crown immunity from taxation: see in particular per Willmer LJ at 61B to 62G, Danckwerts LJ at 74B-D, and Diplock LJ at 80D-82A. As Willmer LJ said at 62G:

> "in my view the BBC was doubtless created an independent body precisely for the reason that it was desired to avoid any suggestion that broadcasting in this country is an instrument of government."

34. Mr Lasok subjected the reasoning and conclusions of the FTT on issue (1) to a sustained attack. It would unduly prolong this decision to deal in detail with each and every one of his arguments, but I will do my best to consider at least the main ones.

35. First, Mr Lasok argued that recourse must be had to domestic law in order to decide whether the BBC is a body governed by public law. He accepts that the concept of "body governed by public law" is one of EU law, but says that in order to determine whether or not a particular body falls within that concept, it is necessary to refer to its status under national law because there is no harmonised EU law concept of "public law". Thus, he submits, the BBC is a body governed by public law for the following main reasons:

(a) it is the UK public sector broadcaster, created by the State with independent status in order to develop and provide broadcasting in the national interest (see the successive Royal Charters);

(b) at all material times, the BBC operated in accordance with a licence granted by, and an agreement made with, the Government (acting through the Postmaster General and later the Secretary of State), under which the BBC was financed by monies provided by Parliament;

(c) under the Royal Charters, the BBC was answerable to the Government for its observance of the Charters, licences, agreements and other stipulations, directions or instructions given by the Government;

(d) the BBC is classified by the Government as a public body (see paragraph 7.6 of the Cabinet Office publication *Public Bodies: A Guide for Departments*);

(e) the BBC is classified as a "public authority" for the purposes of the Freedom of Information Act 2000, by virtue of its inclusion as a "public body" in Part VI of Schedule I to that Act; and

(f) at the material times, the governors of the BBC were appointed by the Crown, and the Chairman and Vice-Chairman were nominated by the Crown.

36. I am unable to accept this submission, which seems to me to subvert the consistent authority of the ECJ (as recognised by Sir Andrew Morritt C in Cambridge University) to the effect that "body governed by public law" has an autonomous EU law meaning. The matters relied on by Mr Lasok are all matters of domestic law, and as such cannot be determinative. In particular, classification of the BBC as a public body under domestic statutes is in my judgment of little, if any, relevance. Nor, in my view, can the ECJ sensibly have contemplated that recourse must be had to the law of individual Member States in order to ascertain what is meant by "public law". It, too, must be an overriding autonomous concept of EU law, even if the jurisprudence of the ECJ has not yet fleshed it out very far. In my judgment Mr Mantle put it well, when he submitted that the fallacy in the OU's submission on this point is that there is a gap in the EU law concept of body governed by private law, which has to be filled by reference to the status of the body under national law.

37. Secondly, Mr Lasok seeks to play down the significance of the alleged requirement that the BBC was part of the public administration of the UK. He submits that the adoption of that test in the Netherlands case should be confined to situations where a function has been "outsourced" by the State to operators of a more or less private nature. Again, I am unable to accept this submission, which in my view fails to do justice to the reasoning of the ECJ in the Netherlands case and subsequent cases where it has been cited. As I have explained, I regard this requirement as a natural limitation on the scope of the Article 4(5) exemption which flows from the fact that the specified examples of bodies governed by public law (states, and regional and local government authorities) all indubitably form part of the public administration. Further support for this approach may in my judgment be found in the principle of strict construction which applies to the interpretation of exemptions from VAT: see paragraph 16 above. To construe "other bodies governed by public law" as *ejusdem generis* with states and regional and local government authorities seems to me a good example of how that principle should operate in practice.

38. Thirdly, Mr Lasok submits that the meaning of "bodies governed by public law" is elucidated by looking at the various exemptions in Article 13A(1)

where that expression occurs. The exemptions in question cover the following activities: the provision of hospital and medical care; the supply of services and of goods closely linked to welfare and social security work, including those supplied by old peoples' homes; the supply of services and of goods closely linked to the protection of children and young persons; the supply of education and of services and goods closely related thereto; the supply of cultural services and goods closely linked thereto; and the supply of goods and services, by bodies governed by public law carrying on the activities referred to above, in connection with fund-raising events. It must, therefore, be conceptually possible, says Mr Lasok, for a body governed by public law to carry on any of those activities. If there is a requirement that the body in question must form part of the public administration, that concept must be interpreted in a way which sits comfortably with the specified exemptions. Such activities cannot be limited, as the FTT thought (in paragraph [57] of the Decision) to "the general administration or management of the state or authority or its interests", and "public administration" must cover all of the activities referred to in the relevant exemptions.

39. I accept that there is some force in this point, but Mr Mantle had an answer to it. He submitted that, where a body governed by public law does form part of the public administration, it may, apart from its core function of general administration, and management of a state or government authority or its interests, also carry on one or more of the activities listed in the relevant sub-paragraphs of Article 13A(1). It does not follow from this, however, that a supplier of, for example, hospital or medical care, or welfare services, is engaged in "public administration" by supplying them. Nor, by supplying them, does it automatically become "part of the public administration" and a body governed by public law. I agree with this approach, which seems to me to provide a reasonable reconciliation between the principle that a body governed by public law must form part of the public administration, on the one hand, and the activities listed in the exemptions which it is specifically envisaged may be carried on by bodies governed by public law, on the other hand.

40. Fourthly, Mr Lasok relied on a recent decision of the ECJ concerning the Education Exemption which post-dates the hearing before the FTT: Case C-319/12, Minister Finansów v MDDP sp z oo Akademia Biznesu, sp komandytowa, [2014] STC 699 ("MDDP"). This was a case of a rather unusual nature. The taxpayer was a Polish company which organised specialised training courses and conferences in various fields of education and training. The educational services which it provided fell within the scope of a general educational exemption from VAT under the relevant Polish tax law. The taxpayer was not content with this, however, because it wished to be able to deduct input tax, which is only possible where the inputs relate to taxable supplies. The taxpayer therefore argued that the exemption was incompatible with Article 132(1)(i) of the 2006 VAT Directive (which is identically worded

to the Education Exemption in the Sixth VAT Directive). This contention was upheld by the ECJ, which held in answer to the first question referred to it by the Supreme Administrative Court that the Education Exemption:

> "precludes a general exemption of all supplies of educational services, without consideration of the objects pursued by non-public organisations providing those services."

(paragraph 39 of the judgment).

41. In its discussion of this subject, the ECJ described the purposes of the Education Exemption as being "intended to facilitate access to those services by avoiding the increased costs that would result if the services were subject to VAT" (paragraph 26). Mr Mantle submitted, and I would agree, that this is probably the clearest statement to be found in the European case law of the purpose of the Education Exemption. In the light of that purpose, the Court went on to hold that the presence of a profit-making aim is not incompatible with the operation of the exemption (paragraphs 27, 31 and 32). The core of the Court's reasoning then follows, in paragraphs 35 to 38:

> "35. Under [*the Education Exemption*], the supply of educational services referred to is, however, exempt only if those services are provided by educational bodies governed by public law or by other organisations recognised by the Member State concerned as having similar objects. It follows that other organisations, namely, private organisations, must fulfil the condition of pursuing objects similar to those of bodies governed by public law. It is thus clearly apparent from the wording of [*the Education Exemption*] that it does not permit Member States to grant the supply of the educational services exemption to all private organisations providing such services, by including also those whose objects are not similar to those of bodies governed by public law.
>
> 36. Therefore, an exemption, such as that at issue in the main proceedings, which applies generally to all supplies of educational services, whatever the aim pursued by the private organisations providing those services, is incompatible with [*the Education Exemption*], as conceived by the European Union legislature.
>
> 37. In so far as [*the Education Exemption]* does not specify the conditions or procedures for defining those similar objects, it is, in principle, for the national law of each Member State to lay down the rules in accordance with which that definition may be

> granted to such organisations. The Member States have a discretion in that respect …
>
> 38. Furthermore, it is for the national courts to examine whether the Member States, in imposing such conditions, have observed the limits of their discretion in applying the principles of European Union law, in particular the principle of equal treatment, which, in the field of VAT, takes the form of the principle of fiscal neutrality …"

42. Mr Lasok submitted that the ECJ was here drawing a clear distinction between public sector bodies and private sector enterprises, with the former all being treated as bodies governed by public law. On that basis, the BBC would be a body governed by public law because it is a public sector body and not a private organisation. I am again unable to accept this submission. The focus of the case, and of the Court's reasoning, was on the services provided by private organisations, and the extent to which they fell within the Education Exemption. The taxpayer was obviously not a body governed by public law, and the precise meaning of that concept did not arise for consideration. There is no reference in the judgment of the Court, or in the opinion of Advocate General Kokott, to the Netherlands or Seville cases. It is not credible to suppose that the ECJ was intending to depart from its long-established jurisprudence in that area, in favour of a new and vaguely formulated dichotomy between public sector bodies and private organisations.

43. Finally, Mr Lasok sought to draw support for the OU's case from European public procurement law, which contains its own definition of "body governed by public law". That definition is now contained in Article 1(9) of Directive 2004/18/EC ("the Procurement Directive"), as follows:

> "9. "Contracting authorities" means the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or one or several of such bodies governed by public law.
>
> A "body governed by public law" means any body:
>
> (a) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;
>
> (b) having legal personality; and
>
> (c) financed for the most part, by the State, regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half

> of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.
>
> Non-exhaustive lists of bodies and categories of bodies governed by public law which fulfil the criteria referred to in (a), (b) and (c) of the second sub paragraph are set out in Annex III …"

44. The same definition may be found in three earlier Directives which were the precursors of the Procurement Directive, namely Council Directives 92/50/EEC of 18 June 1992, 93/36/EEC of 14 June 1993, and 93/37/EEC of 14 June 1993.

45. Mr Lasok referred me to the decision of the ECJ in Case C-337/06, Bayerischer Rundfunk and Others v GEWA [2007] ECR I-11173, where the issue was whether German public broadcasting authorities fell within the definition of "body governed by public law" in Directive 92/50/EEC. This involved consideration, among other matters, of the way in which the broadcasting bodies were funded by the State. Mr Lasok pointed out that the relevant funding arrangements were not dissimilar to the way in which the BBC is principally funded by the TV licence fee in the UK. He also stressed the fact that the broadcasting authorities enjoyed absolute operational and editorial independence, guaranteed by Article 5(1) of the German Basic Law. As the ECJ said, in paragraph 14 of the judgment:

> "Those bodies are institutions governed by public law, endowed with legal personality and invested with a remit to serve the public interest. They are independent of the State authorities, self-managed and organised in such a way as to exclude any influence by the public authorities. In accordance with the case-law of the highest German courts, those bodies are not part of the structure of the State."

Mr Lasok's point was that the independence of the bodies from the structure of the State, and their operational independence, did not disqualify them from being bodies governed by public law within the meaning of the Procurement Directive.

46. It is important to note that Mr Lasok was not submitting that the definition of "body governed by public law" in the Procurement Directive should simply be read across into the VAT Directives and the Education Exemption. He accepted, for example, that criterion (a) in the Procurement Directive definition is inapt for VAT purposes. He submitted, however, that the criteria contained in sub-paragraph (c) of the definition, including in particular the criterion of State financing, could be applied in the context of VAT, and

pointed strongly to the conclusion that the BBC was a body governed by public law.

47. The argument is at first sight attractive, but in my view it must be rejected. The main reason is that the underlying purposes of the VAT and the Procurement Directives, and the role of the concept of a body governed by public law within them, are very different. The general purpose of the Procurement Directive is to open up public procurement to competition, to further the free movement of goods, freedom to provide services, and freedom of establishment, and to promote non-discrimination and other important EU law principles: see, for example, recital 2 of the Procurement Directive. Contracts fall within the scope of the Procurement Directive only if they are entered into by "contracting authorities", as defined in Article 1(9). Thus there are strong policy reasons for giving a wide interpretation to "body governed by public law" in the context of Article 1(9), and this is reflected in the case law of the ECJ. So, for example, in Case C-373/00, Adolf Truley GmbH v Bestattung Wien GmbH [2003] ECR I-1931, the Court said at paragraph 43 of its judgment:

> "Given the double objective of introducing competition and transparency, the concept of a body governed by public law must be interpreted as having a broad meaning."

48. In the field of VAT, however, the concept of "body governed by public law" is used only in the context of exceptions to the principle of the general application of the tax. Both Article 4(5) of the Sixth VAT Directive, and the relevant exemptions in Article 13A(1), are to be construed strictly. The concept is undefined in the VAT legislation, and nowhere in its existing case law has the ECJ drawn on the definition in the Procurement Directive as throwing any light on the meaning to be attributed to the concept for VAT purposes. On the contrary, the ECJ has developed a separate jurisprudence on the meaning of the concept for VAT. Unless and until the ECJ says that the meaning of the concept in the procurement context should be taken into account in the VAT context, I think it would be wrong for a national court to do so. It is also worth noting that the use of the concept in the VAT legislation pre-dates its introduction into the EU procurement legislation in 1992/93, and that when the Sixth VAT Directive was superseded in 2006, the concept was still left undefined in the 2006 VAT Directive. Furthermore, the definition of "body governed by public law" in the Procurement Directive has been explicitly incorporated by reference into other pieces of European legislation: see, for example, Directive 2012/27/EU, Regulation 1303/2013/EU and Regulation 1698/2005/EC. Thus the absence of such incorporation in the VAT legislation is, in itself, a strong indication that the meaning of the concept for VAT purposes was intended to remain distinct.

49. I should mention, finally, that questions on the interpretation of "body governed by public law" have recently been referred to the ECJ by a Portuguese tribunal in Case C-174/14, Saudaçor, in the context of Article 13(1) of the 2006 VAT Directive. The first question asks whether the concept in the context of the VAT Directive should be interpreted by reference to Article 1(9) of the Procurement Directive. If the reference proceeds to a hearing, therefore, the ECJ will before long have an opportunity to pronounce on this question. Neither side asked me to adjourn the hearing of the present appeal, however, partly because it was still unclear whether the reference would proceed to a hearing, and also because of the time that would inevitably elapse before the ECJ gave its judgment.

50. I believe I have now covered the main submissions advanced by Mr Lasok. They do not cause me to modify my initial conclusion, that the FTT was correct to hold that the BBC was not a body governed by public law within the meaning of the Education Exemption. I consider that the FTT directed itself correctly on the authorities, and that its conclusion on the application of the relevant law to the facts was, at the very lowest, one to which it was fully entitled to come. Mr Lasok had some relatively minor criticisms of parts of the FTT's reasoning, and I should not be taken as necessarily endorsing the whole of it without reservation. But I do not propose to take up time examining these points, because their significance is in my view peripheral, and they do not in my judgment detract from the soundness of the FTT's overall conclusion.

Issue (2): did the BBC have the requisite educational aim?

51. It is common ground that the words "having such as their aim" in the Education Exemption refer back to the opening words of the exemption, namely "children's or young people's education, school or university education, vocational training or retraining". It follows that the requisite aim must be the provision of one or more of the following six types of education: children's education, young people's education, school education, university education, vocational training and vocational retraining.

52. Since the BBC is not a body governed by public law, satisfaction of the requisite aim would not alone suffice to bring it within the Education Exemption in relation to its supplies to the OU. Nevertheless, I propose to consider issue (2) for the same reasons as the FTT did (see paragraph [69] of the Decision): in case I am wrong on issue (1), and because issue (2) is anyway relevant to the question of "similar objects" under issue (3).

53. The leading case on the meaning of "education" in this context is the decision of the ECJ in Horizon College. Horizon College was a teaching establishment

in the Netherlands, which mainly provided secondary and vocational education. It also seconded teachers in its employment to other such establishments, to meet temporary shortages of teaching staff. Under the contract of secondment, the teacher was assigned work by the other (host) establishment, but the teacher's salary continued to be paid by Horizon College, which then claimed the cost back from the host establishment, without taking any profit or charging VAT. The Dutch tax authorities considered that the secondment services provided by Horizon College were not covered by the Education Exemption, and assessed them to VAT accordingly. The first question referred to the ECJ by the Hoge Raad (the Supreme Court of the Netherlands) asked whether the provision of education, within the meaning of the Education Exemption, "includes the making available, for consideration, of a teacher to an educational institution in order that he may temporarily provide teaching services there within the area of responsibility of that educational institution".

54. Advocate General Sharpston thought not. In paragraph 49 of her opinion, she said:

> "When one educational establishment makes teachers available to another such establishment, where they teach the latter's students under its instructions and responsibility, the supply made by the first establishment is not of "education" but of teaching staff. And, as the Commission pointed out at the hearing, the "education, vocational training or retraining" which students receive in an educational establishment is not merely what is provided by teachers from their own knowledge and skills. Rather, it includes the whole framework of facilities, teaching materials, technical resources, educational policy and organisational infrastructure within the specific educational establishment in which those teachers work."

55. The ECJ agreed. After pointing out that there is no definition of the various forms of education covered by the Education Exemption, the Court said:

> "18. Admittedly, as Horizon College essentially submits, the transfer of knowledge and skills between a teacher and students is a particularly important element of educational activity.
>
> 19. However … the fact that such a transfer is taking place is not, by itself, sufficient for the mere supply of a teacher to an educational establishment, for the purpose of carrying out teaching duties under the responsibility of that establishment, to be described as educational activity.
>
> 20. Indeed, as the Commission submitted, in essence, at the hearing, the educational activity referred to in [*the Education*

> *Exemption*] consists of a combination of elements which include, along with those relating to the teacher/student relationship, also those which make up the organisational framework of the establishment concerned."

56. The Court then referred to the terms of the secondment contracts, and continued:

> "22. Accordingly, the making available of a teacher to the host establishment in such circumstances cannot be regarded, of itself, as an activity capable of being covered by the term "education", within the meaning of [*the Education Exemption*]. As the Greek and Netherlands Governments and the Commission essentially contend, the contract concluded between Horizon College, the host establishment and the teacher concerned aims, at most, simply to facilitate the provision of education by the host establishment.
>
> 23. That interpretation is not affected by the circumstance … that the body which makes the teacher available is itself, in common with the host establishment, an educational establishment for the purposes of [*the Education Exemption*]. Where a particular activity is not in itself covered by the term "education", the fact that it is provided by a body governed by public law that has an educational aim, or by another organisation defined by the Member State concerned as having similar objects, cannot alter that analysis."

57. The ECJ adopted the same approach in a case concerning the closely-related exemption in Article 13A(1)(j) of the Sixth VAT Directive (Case C-473/08, Ingenieurburo Eulitz GbR Thomas und Marion Eulitz v Finanzamt Dresden I, [2010] ECR I-0907). In paragraph 30 of its judgment, the Court said:

> "As regards in particular the term "education", it should be borne in mind that the Court has held, in essence, that although the transfer of knowledge and skills between a teacher and students is a particularly important element of educational activity referred to in [*the Education Exemption*], it remains the case that that activity consists of a combination of elements which include, along with those relating to the teacher-student relationship, also those which make up the organisational framework of the establishment concerned (see, to that effect, Horizon College, paragraphs 18 to 20)."

58. The FTT considered that the BBC failed to satisfy the Horizon College test, for reasons which Judge Sinfield summarised in paragraph [84] of the Decision:

> "I find that, since its creation, the BBC has had education, in a broad sense, as one of its aims. Throughout its history, the BBC has provided a range of programmes aimed at educating or training persons of different ages. I do not consider, however, that the BBC has provided or ever aimed to provide education in the sense explained by the ECJ in *Horizon College*. The BBC's educational broadcasts, whether for the OU or more generally, do not provide the necessary combination of teaching and organisational infrastructure within which teachers transfer knowledge and skills to students to constitute education in the *Horizon College* sense. My view is that the BBC provides only a part of the package and its educational broadcasts must always be complemented by the activities and infrastructure of other institutions such as schools, colleges and the OU in order to provide the viewers and listeners with education in the Article 13A(1)(i) sense."

59. Two preliminary points are worth noting. First, the requisite educational aim must be considered in relation to all of the BBC's educational activities, and not merely those which it performed for the OU. Secondly, a supplier of closely related services need not have the same educational aim as the recipient of those services. The FTT gave the example (in paragraph [82] of the Decision) of the provision of closely related services by a university to a primary school. It follows from this, as the FTT correctly said (ibid), that it is not necessary for the BBC to supply university education to students generally, or to the OU, in order to come within the exemption.

60. One of the difficulties with this part of the case is the question whether the Horizon College test is capable of being satisfied by a provider of "distance learning", and (if so) what degree of organisational framework has to be found in order to satisfy the educational aim. It seems clear that the mere provision of course materials with an educational content for use by other educational institutions would not suffice. The position would then be analogous to the secondment of a teacher, as in Horizon College itself, with the object of helping the host institution to perform its own educational functions. If, on the other hand, distance learning materials were provided as self-contained courses, together with appropriate back-up material, in a way that was suitable for home study without the mediation of another educational institution, the position might well be different. The education would then be provided directly, and the lack of a conventional educational infrastructure would not necessarily be fatal. Indeed, if this were not so, bodies such as the OU itself might have difficulty in satisfying the educational aim, but nobody suggests

that to be the case. In short, I consider that it would be a mistake to apply the Horizon College test in a mechanical fashion, and the organisational framework that is required will vary according to the type of education that is being provided.

61. With these points in mind, I turn to the materials relied on in support of the argument that the BBC had the requisite educational aim. Since the days of Lord Reith, education has of course been one of the BBC's central aims, and this is reflected in the Royal Charters. Thus, the third recital in the first Royal Charter of 20 December 1926 refers to "the great value of the [*Broadcasting*] Service as a means of education and entertainment"; while the fifth recital in the preamble to the 1964 Charter refers to "the great value of such services as means of disseminating information, education and entertainment".

62. The BBC's annual reports to Parliament during the Appeal Period gave details of the BBC's activities in educational broadcasting. The relevant parts of these reports were included in the documentary evidence before the FTT, and reference was made to them in the OU's skeleton argument. For example, the 1978 annual report records (at pages 34 to 39) that during the year the BBC had provided more than 140 series of radio and television broadcasts for schools, and more than 100 for people interested in further and adult education, as well as its broadcasts in support of the OU. Fuller details were then set out under headings such as "School Radio", "School Television", "Further Education Radio" and "Further Education Television". A section headed "Supporting Services" stated that:

> "BBC Publications and BBC Enterprises provide supporting services for the BBC's educational broadcasts. BBC Publications produced in the School year 1976/77 about 7 million pieces of material related to school broadcasts (a reduction of 4 million as foreshadowed last year) teacher's notes, pamphlets for the student, filmstrips, wall pictures, pupils' worksheets and so on. For the adult student, BBC Publications produced about 700,000 items to accompany further education series, including gramophone records for the language series, colour slides, and packs of teaching material for group use. Many of these, while closely related to a particular series, had independent value."

63. Furthermore, it is clear from the annual reports that some at least of the BBC's educational programmes were designed for use at home, together with appropriate supporting material. I take this example from the 1980 report, pp 24-25:

> "To assist in the education of the mentally handicapped School and Further Education Television have jointly transmitted a

> series called *Let's Go*. This is for older pupils and young adults who are mentally handicapped and it has had both daytime and evening transmissions so that it can be viewed either in schools and other institutions or at home … The series was supported by a wide range of back-up materials, and each programme was broadcast three times per week to be of maximum benefit to the viewer."

64. The 1981 report discussed (at pp 25-26) the possible transfer of part of the BBC's continuing education output to Radio 4, and said:

> "The output as a whole will continue to cover such areas as modern language courses, inservice training, basic education projects – and a variety of series which are valid as general broadcasts but also suitable as structured contributions to adult education courses … For all programmes there is a well-established system of contact and information for those professionally engaged in adult education, and for many series, publications, cassettes and guidance notes are provided."

65. The 1985 annual report recorded, at p 27, that the year had seen "the appearance of the first BBC software packages specifically designed for school use", and said that:

> "The School Radio department is looking at ways of providing some personal learning packs which are not intended for mediation by a teacher."

The report went on to say (p 28):

> "A major continuing development for School Radio is its link with the use of other resources. As well as an expanding range of computer software, electronic kits are used in connection with broadcasts. Children listening to *Junior Electronics* can, under the broadcaster's guidance, assemble a basic electronic circuit, and secondary pupils can learn from the *Microtechnology* series enough control technology to assemble and operate more complex circuitry … By using all the techniques available to it: drama, documentary, outside broadcast and phone-in, School Radio remains flexible enough to serve the young people in schools and colleges in ways that are appropriate for the 1980s and beyond."

66. I take my final examples from the 1986 report. Emphasis was placed on the use of new information technologies, and other recent developments (p 33):

> "The introduction of night-time transmissions of radio programmes to schools has resulted in some new series being designed for use on cassette primarily for self-study purposes. School Television, on the other hand, has very successfully seized the opportunity of broadcasting a selection of its output for young people at home during the school holidays. And more BBC books, first produced to accompany School Radio and Television series, are now going on sale to a wider public through bookshops."

The section of the report dealing with school radio gave examples of inter-active programmes to which children contributed in various ways, and described a new series of "*Help Yourself*" programmes "for use by the individual student rather than by classes".

67. In the light of this material, I respectfully think the FTT was wrong to conclude that the BBC "provides only a part of the package", and that "its educational broadcasts must always be complemented by the activities and infrastructure of other institutions such as schools, colleges and the OU" (paragraph [84] of the Decision, quoted above). It is true that the bulk of the BBC's educational output, including the programmes which it made for the OU, were designed to be mediated through schools or other educational institutions. Nevertheless, the extensive provision of support material by the BBC for its educational broadcasts meant that in practice the BBC provided much of the framework needed for distance learning, and at least some of its programmes were expressly designed for use at home, without the involvement of teachers and without being tied to any particular curriculum. These were all different ways in which the BBC sought to fulfil the educational aims which have always been central to its activities.

68. In my view it would be unrealistic to say that the BBC did not itself provide education of the types specified in Article 13A(1)(i), but merely enabled or assisted schools and other institutions to do so. The BBC is an educator in its own right, although the means by which it provides education are constrained by its functions as a public service broadcaster. Looking at the BBC's educational output as a whole, I would find it paradoxical to conclude that the BBC did not have an educational aim. The facts of Horizon College could hardly be further removed from those of the present case, and the guidance given by the ECJ in that case must in my view be interpreted and applied with a reasonable degree of flexibility. Adopting that approach, I consider that the BBC not only produced and broadcast educational programmes, but also

provided enough in the way of organisation, support and back-up for those programmes to satisfy the structural element of the Horizon College test.

69. The question remains whether it is open to me to substitute my own view for that of the FTT. I can only interfere with Judge Sinfield's conclusion if I am satisfied that it was erroneous in law. I am also fully conscious of the respect that an appellate court or tribunal should accord to the decision of a specialist tribunal. With some hesitation, I have nevertheless come to the conclusion that this is one of the comparatively rare cases where the Upper Tribunal may properly interfere with what appears at first sight to be a multi-factorial evaluation of the facts by the FTT.

70. In the first place, I think that the FTT took too narrow a view of what Horizon College requires, in the context of distance learning provided by a public sector broadcaster. Secondly, I think the FTT's analysis failed to do justice to the scale and variety of the forms of distance learning provided by the BBC throughout the Appeal Period, as reflected in the annual reports from which I have quoted. Thirdly, this led the FTT to state, wrongly in my view, that the BBC always provided "only a part of the package". Finally, the question is not one which turns in any way on the oral evidence, or on the FTT's assessment of the witnesses. In the light of these considerations, I am satisfied that the FTT's conclusion on this issue is erroneous in law; that there would be no point in my remitting it to the FTT for reconsideration; and that I should re-determine the issue myself, under section 12 of the Tribunals, Courts and Enforcement Act 2007, so as to hold that the BBC did at all material times have the requisite educational aim.

Issue (3): was the BBC another organisation defined by the United Kingdom as having similar objects?

71. The conclusion which I have reached on the second issue greatly simplifies the argument on the crucial third issue. If, as I have held, the BBC had the requisite educational aim under the first limb of the Education Exemption, it must also have satisfied the test (under the alternative limb) of having "similar objects". Indeed, since the relevant objects were the same, the question of similarity does not arise as one which requires separate consideration.

72. In particular, it is unnecessary for me to deal with the elaborate arguments advanced by HMRC attacking the FTT's conclusion that the BBC had "similar objects" to those of a body governed by public law with the requisite educational aim, even though (on the FTT's assessment of issue (2)) the BBC did not itself have such an aim. A major theme of these submissions was that,

read and interpreted in its context, and having due regard to the EU law principles of equal treatment and fiscal neutrality, the requirement of similar objects could in practice only be met if the objects were in substance the same as those of a body governed by public law which had the requisite educational aim under the first limb of the exemption. It is enough to say that, subtle and ingenious though his arguments were, Mr Mantle in my judgment had no satisfactory answer to the basic objection that the alternative limb of the exemption would not have been framed in terms of similarity of objects, if nothing short of substantial identity of objects was contemplated.

73. There can be no doubt that the BBC is an "other organisation" within the meaning of the alternative limb of the exemption, so the only live question under this heading is whether the BBC had been "defined by" the United Kingdom as having the requisite educational aim during the Appeal Period.

74. Before the FTT, the primary submission for the OU on this question was that the United Kingdom had "defined" the BBC as having "similar objects" by creating the BBC and entrusting it with an educational function or remit: see the Decision at [87]. This submission was rejected by the FTT, for the reasons which it gave at [93] to [94]:

> "93. I take the phrase "defined by the Member State concerned as having similar objects" to mean that the Member State, in this case the United Kingdom, has specified that the objects of the organisation shall or must be similar to the required educational aim.
>
> 94. I do not consider that the United Kingdom had defined, by which I mean specified, the objects of the BBC as similar to the required educational aim during the period 1 January 1978 to 31 July 1994. The Royal Charters referred to education in the context of the value of broadcasting as a means of disseminating information, education and entertainment. I consider the reference, which appeared only in the recital, falls a long way short of defining an aim or object of the BBC."

75. Mr Lasok argued before me that this reasoning is erroneous in law. He submits that the recitals to the Royal Charters specified the justification for the *continuance* of the BBC, and set out what was expected of it. The BBC is a continuing body, not a series of different corporations created by each Charter and ceasing to exist on its termination. The Charters continue the existence of a single corporation, on the basis that it should continue to provide broadcasting services as a means of disseminating information, education and entertainment. Had the BBC ceased at any time to provide educational programmes, one of the justifications for its continued existence would have been removed.

76. Furthermore, submits Mr Lasok, the BBC at all material times received funds out of monies provided by Parliament in order to further its purposes under the successive Royal Charters. Educational programming was at all times accepted to be a proper and lawful employment of the monies provided to the BBC by Parliament. The fact that successive Royal Charters and successive Governments have permitted and expected the BBC to continue to provide educational programming shows that the BBC had education as one of its objects.

77. On behalf of HMRC, Mr Mantle submits that the FTT came to the right conclusion on this question. First, he points out that the United Kingdom did, during the relevant period, define certain schools (by reference to the Education Acts) and recognised UK universities as organisations having similar objects for the purposes of the Education Exemption: see, for example, VATA 1983, Group 6, Schedule 6, Notes 2 and 3. The BBC was never defined in this way, however, in the VAT or any other legislation.

78. Secondly, Mr Mantle submits that the establishment and continuation of the BBC by Royal Charters does not constitute the necessary definition. He says that this was the real thrust of paragraph [94] of the Decision, and it would be unfair to read that paragraph as turning on the point that the only reference to education was in the recitals to the Charters. Thirdly, the fact that the BBC lawfully produced educational programmes, and was funded to do so by Parliament, through the TV licence fee, again does not mean that it had been designated by the United Kingdom as having similar objects for the purposes of Article 13A(1)(i).

79. The answer to this question depends, in my view, on what it is that a Member State has to do in order to "define" an organisation as having similar objects for the purposes of the Education Exemption. If the organisation has to be expressly so defined (or specified, or designated – I do not think anything turns on the precise verb which is used) in primary or secondary legislation, then it is clear that the BBC did not qualify. But to restrict the test in this way would in my judgment be to confine it too narrowly. In principle, I can see no good reason why the "definition" should not be effected in any way in which the Member State may lawfully act. In the United Kingdom, for example, one such method could be the establishment of a body by Royal Charter in exercise of the royal prerogative. Nor is it necessary, in my judgment, for the "definition" to be made for the purposes of the Education Exemption, or by reference to the VAT legislation, or at a time when the Education Exemption was in force. What matters is that the Member State should in fact have established and/or designated the organisation in question as one having objects which (viewed objectively) are similar to (or, a fortiori, the same as) the educational aim set out in the Education Exemption.

80. To approach the matter in this way would in my view fully accord with the principle that the Education Exemption is to be construed strictly, but not restrictively: see paragraph [16] above, and the Court of Appeal authority there cited.

81. Adopting this approach, I would accept the submissions made by Mr Lasok. The Royal Charters in force during the Appeal Period were the fifth (granted in 1964) and the sixth (granted in 1981). Each Charter clearly contemplated that the BBC would continue to provide the educational broadcasting services which had formed part of its core aims and activities since the foundation of the BBC in the 1920s. Further, the provision of monies by Parliament to enable the BBC to fulfil its aims shows that its role as an educational broadcaster was endorsed by the legislature. The only reasonable conclusion, in my judgment, is that the United Kingdom, acting through a combination of the royal prerogative and Parliament, had brought about a situation where the BBC was defined by it as an organisation having the requisite educational aim. I respectfully consider that the FTT viewed the question too narrowly in paragraph [94] of the Decision, and therefore erred in law in reaching the opposite conclusion.

82. Finally, I should say that my approach to the question seems to me to accord with the guidance given by the ECJ in paragraphs 37 and 38 of its judgment in MDDP, quoted in paragraph [41] above. The United Kingdom had not at the material time laid down any rules by reference to which organisations are to be "defined" for the purposes of the Education Exemption, so it is necessary to go outside the VAT legislation to see whether the necessary "definition" can be found. I agree with Mr Lasok that the question then becomes one of examining whether or not the Member State has acted in such a way as to identify the organisation concerned as having "similar objects". An analogy may be drawn with the case of Kingscrest, where the question was whether the operation of residential care homes by a partnership fell within the words "other organisations recognised as charitable by the Member State concerned" in Article 13A(1)(g) of the Sixth VAT Directive: see the judgment of the Court at paragraphs 48 to 58, and in particular paragraph 53 which makes it clear that, in the absence of any specified rules according to which recognition may be granted, account must be taken of a wide range of relevant factors.

83. The conclusion which I have reached means that issue (3) must be decided in the OU's favour, and HMRC's appeal from the Decision of the FTT must therefore be dismissed. In the circumstances, it is unnecessary for me to consider the different ground on which the FTT decided issue (3) in favour of the OU, namely that the BBC could rely on the direct effect of the Education Exemption, provided that it satisfied the test of similar objects, despite the discretion afforded to the United Kingdom to define other organisations as

having similar objects. The question is one of some difficulty, and since it is unnecessary to my decision I prefer to leave it unanswered.

Conclusion

84. For the reasons which I have given, HMRC's appeal will be dismissed.

TRIBUNAL JUDGE: MR JUSTICE HENDERSON

RELEASE DATE: 21 May 2015