



**TC02028**

**Appeal number: TC/2011/00902**

*VALUE ADDED TAX – exemption for the provision of education – whether the appellant was an ‘eligible body’ within item 1, Group 6, Schedule 9, VATA as being a college or institution of a UK university (Note 1(b)) – finding that the arrangements entered into between the appellant and Middlesex University were aimed at constituting the appellant as a college of that university for relevant purposes – but the evidence was such that the Tribunal was unable to find as a fact that sufficient of the appellant’s student body in fact progressed to degree courses at the university – therefore no finding that those arrangements were rendered a reality by the student careers of the appellant’s students, taken as a whole – therefore the Tribunal did not find as a fact that the appellant was a college of that university for relevant purposes – burden of proof on the point in the appeal not discharged by the appellant – appeal dismissed in part*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**LONDON COLLEGE OF COMPUTING LIMITED      Appellant**

**- and -**

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

**TRIBUNAL:    JUDGE JOHN WALTERS QC  
                  MRS ELIZABETH BRIDGE**

**Sitting in public at Bedford Square, London on 10 May 2012**

**M. Murphy, Counsel, for the Appellant**

**Gloria Orimoloye, Advocate, HMRC, for the Respondents**

## DECISION

5 1. The appellant, London College of Computing Limited (“LCC”), made voluntary disclosures dated 15 July 2009 of errors in its VAT returns for VAT periods including the periods 12/06 to 03/09 inclusive. By those voluntary disclosures LCC claimed repayment of VAT of £902,760 in total. The basis of the claim for repayment of VAT was that LCC had at all times made exempt supplies of education, but had incorrectly accounted for VAT thereon.

10 2. The respondents (“HMRC”) enquired into the matter and correspondence between them and LCC ensued. The result was that HMRC refused the claim on the basis that LCC had not made exempt supplies except in relation to the provision of the teaching of English as a foreign language (“EFL”), but in that regard no separate figures had been disclosed in respect of supplies of the teaching of EFL and therefore the  
15 voluntary disclosure could not be processed. This decision was contained in a letter sent by Mrs K Datta, a Higher Officer of HMRC, to Mr David Kohn of LCC dated 24 August 2010.

20 3. On 24 January 2011 LCC appealed against this decision submitting, as grounds for the appeal, that LCC ‘has an articulation agreement from Middlesex University [(“MU”)] and therefore [LCC] is a college of a university and hence it is an eligible body for the purposes of VAT’.

4. It was not clear to us whether the Tribunal had extended the time limit for bringing this appeal, but, as no point was taken by HMRC, we extend the time limit to the extent necessary to allow us to entertain the appeal.

25 5. The legislation relevant to this dispute is contained in item 1 of Group 6 of Schedule 9 to the VAT Act 1994 (“VATA”). By section 31 VATA, supplies of services of a description for the time being specified in Schedule 9 are exempt.

6. Item 1 of Group 6 of Schedule 9, VATA provides, so far as relevant, as follows:

‘The provision by an eligible body of –

30 (a) education ...’

7. Mrs Orimoloye, for HMRC, accepted that all relevant supplies made by LCC came within the description in item 1 of ‘education’. The parties accepted that the only issue for our decision was whether LCC was ‘an eligible body’.

35 8. Note (1) to Group 6 of Schedule 9, VATA provides a comprehensive definition of ‘eligible body’ for the purposes of Group 6. The parties agreed that the only relevant limb of that definition was paragraph (b) of Note (1) which provides that ‘*a United Kingdom university, and any college, institution, school or hall of such a university*’ is an ‘eligible body’.

9. LCC's case is that it was at all relevant times a 'college' of MU. HMRC accept that MU is for relevant purposes a 'United Kingdom university'.

10. No argument was addressed to us on the quantum of any repayment which would be due to LCC if the Tribunal found that it was a 'college' or 'institution' of MU, or on the quantum of any repayment due in relation to LCC's supplies of teaching of EFL. We indicated at the hearing of the appeal that our decision would be a decision in principle on the question of whether LCC was at all relevant times a 'college' of MU – no relevant difference between a 'college' and an 'institution' was suggested to us, and we did not discern any. We therefore approached the issue as one of deciding whether LCC was a 'college' of MU.

11. We heard oral evidence from Miss Aqsa Azim, who in November 2008 was appointed as LCC's immigration case worker. We also received two witness statements and heard oral evidence from Mr David James Kohn, director of LCC. We also received a witness statement from Officer Datta, who was not able to attend the appeal hearing and accordingly was not cross-examined. In addition each party put in a separate bundle of documents.

#### **The evidence (I) and findings of fact**

12. From the evidence we find the facts as follows.

13. LCC was registered for VAT with effect from 1 April 2006. Mr Kohn had begun work as Director and College Principal of LCC in 2005. He was unaware of the point that LCC could claim that its supplies were exempt from VAT when LCC was registered for VAT. LCC began providing EFL courses in 2009.

14. LCC had (at least) two trading names, 'London College' and 'Bickenhall College of Computing'. These trading names were used at LCC's two campuses respectively. LCC traded as 'London College' from its campus at 23-25 Eastcastle Street, London W1 and as 'Bickenhall College of Computing' from its campus at 126-134 Baker Street, London W1.

15. At an early stage LCC had discussions with MU, which resulted in a letter on MU headed paper and dated 17 July 2006 sent to Mr Kohn by Stephen Burbidge, International Development Manager, School of Computing Science at MU. The text of the letter is as follows:

'Following the meeting of the Accreditation Board of the School of Computing Science in May 2006, it has been agreed that students completing qualifications from both your institutions ([LCC] and Bickenhall College) will be permitted to transfer credits and progress onto our degree programmes.

Several of your Diploma and Higher Diploma programmes were considered for progression, and the pathways and levels of entry are defined in the attached progression pathway table (see table no. 1). The level of entry/pathway offered will be considered on a case by case basis for each application we receive.

In summary, the Diploma and Higher Diploma programmes will exempt a student from one semester (6 months) to three semesters (18 months) of a three year (6 semesters) Computing

Science degree programme at [MU], depending on the combination of modules taken at [LCC] and the overall title gained.

5 This letter confirms that your students will be entitled to progress onto Honours Degree programmes in Computing Science and is in lieu of the formal Articulation Agreement which is being developed at present and which, it is hoped, will be ready for signing in the near future.

Initially I will be acting as the University Link Tutor and will be your main point of contact. I would like to extend a welcome to you as a new partner of [MU] and look forward to working closely with you in the future. If you have any queries about the nature of this link, please do not hesitate to contact me.'

10 16. There are with our papers three formal Articulation Agreements ("AAs") which were signed (on 4 April 2008 by Mr Kohn and on 8 April 2008 by Dr ATD Butland, Deputy Vice-Chancellor of MU and Director of Middlesex International and Marketing). Mr Kohn signed the three AAs respectively as 'Principal, London School of Computer Education, 1-3 Norton Folgate, Liverpool Street, London E1', 'Principal,  
15 [LCC], 23-25 Eastcastle Street London W1' and 'Principal, Bickenhall College of Computing, 126-134 Baker Street, London W1'.

17. The AAs are stated to be between MU and London School of Computer Education', 'London College of Computing' and 'Bickenhall College' respectively. No reference was made in argument to these different AAs, and no reference that we recall was made in the submissions to 'London School of Computer Education'.  
20 However the substantial terms of the three AAs appear to be the same.

18. They are:

- 25 i. The AAs record an agreement between MU and the other party 'concerning the progression of its students ... to University programmes'.
- ii. On successful completion of named Diplomas at LCC/Bickenhall College/London School of Computer Education students would progress onto named MU honours degree programmes.
- 30 iii. The entry point onto the MU programmes would be year 2, 'but students will need to complete one additional (30 credit) module proper to completion of the programme'
- iv. Students would be awarded 'specific pre-accreditation' of '90 credits at level 1 in the School of Computing Science'.
- 35 v. There was an additional condition applicable, which was that students should have certain qualifications in English language.
- vi. Students were required to prepare application forms and submit them to MU at least 3 months before the expected date of transfer to MU. The applications would be processed by MU.

- vii. Students could apply for enrolment for programmes other than those named in the AAs but ‘such applications will be considered on an individual basis’.
- 5      viii. The AAs were based on the current curriculum offered by MU. MU would inform the other parties (LCC/Bickenhall College/London School of Computer Education) about any relevant changes to its programmes.
- ix. The other parties would ensure that their portfolios of course had all the necessary Government licences to operate and that any terms and conditions were met in full.
- 10      x. The other parties would provide MU with transcripts of results of all students applying to MU.
- xi. The AAs were based on the current curricula offered by the other parties. The other parties would notify MU of any changes in advance of their implementation. Changes might require revision of the AAs and the AAs would not continue in effect until consideration of the changes had been made and any revision to the AAs added as an appendix. Additional studies (by students) might be required if the pre-accreditation was no longer fully appropriate to the revised programme.
- 15
- xii. It was expressly stated that: ‘if changes occur without notification, this agreement will not apply to any student taking the changed curriculum’. The other parties were responsible for informing their students about any changes to the curriculum and their consequences for the AAs.
- 20
- xiii. Each of MU and the other parties respectively would appoint a link contact and notify the other of any changes in staff involved. The MU link would maintain an advisory and monitoring role within the establishments of the other parties to ensure continuing compatibility between the programmes/courses involved.
- 25
- xiv. The other parties would provide MU with regular opportunities to meet with their students and brief them about the university and advise students on ‘application procedure and strategy’. ‘Similarly [MU] welcomes visits from representatives of [the other parties] to meet with staff and students’.
- 30
- xv. The other parties undertook to submit any advertising material related to MU to the Regional Director of MU for approval and would not publish unapproved material. There was a reciprocal responsibility on MU in relation to advertising material relating to the other parties.
- 35
- xvi. The AAs would be reviewed during the 2009/2010 academic year and thereafter at 3 year intervals or less should this be requested by a party.

xvii. There were provisions for termination of the AAs and resolution of disputes.

19. The evidence of Mr Kohn and Miss Azim (which was not challenged, and which we accept) was that without agreement with MU or a similar university LCC would never have commenced its business. Without the prospect of a three-year MU degree qualification, LCC's students, most of which were from overseas, would not have secured visas to come and study in the UK. LCC provided its students with a copy of MU's letter dated 17 July 2006 (whose contents are set out above) to be sent by them to the UK Border Agency with their visa applications. The UK Border Agency accepted the relationship between LCC and MU as the basis for granting LCC's students the necessary visas. Furthermore, the content of the LCC courses ties in with the content of the related MU degree courses. We find that LCC students were entitled from the time they were accepted as LCC students to progress to related degree courses at MU, subject to fulfilling the necessary academic conditions, and LCC students were entitled to (and at any rate some did) use the library and other facilities on the MU campus while they were LCC students. The MU campus was not geographically remote from the LCC campuses.

20. The UK Border Agency suspended LCC's 'Tier 4 Licence' to teach overseas students in August 2011. This had the consequence that LCC had to (and did) cease trading. This was because it was reliant on its intake of overseas students. Mr Kohn's and Miss Azim's evidence (which we accept) is that LCC's intake of overseas students was fundamental to its trade and that LCC's link with MU (as demonstrated by the letter of 17 July 2006 and its AA with MU) was fundamental to its ability to take in overseas students, because it was fundamental to the ability of overseas students to obtain the necessary visas to enable them to study at LCC. Mr Kohn states that 'a small part of LCC's resources were taken up by teaching British students, and that only about 5% of those students actually went to MU' and that 'a small minority of the overseas students were not signed up to do an MU degree'. Taking that into account we find that it does not affect the nature of LCC's link to MU as described above.

21. The evidence in respect of the number of students who took LCC's courses and the number of students who progressed to MU from LCC was far from satisfactory.

22. On 9 March 2010, Officer Datta wrote to Mr Kohn asking a series of pertinent questions in relation to LCC's claim. Mr Kohn replied on 13 April 2010. The relevant questions and the answers given were as follows:

Officer Datta: '(5) Please state the total number of students applied and total amount of income received per year: 2006, 2007, 2008, 2009.'

Mr Kohn: 'Question 5). As answer to question the total number of students both full time and part time applied and the best estimate in our records is as follows. Please remember that one student may register for a course two/three times a year and be counted two/three times, whereas a full time student will be counted only once and may be for one year, two year or three year course. Also the

turnover for the College year by year is as stated in the annual accounts:- Period from August 2006 to 31 March 2009 Students 5,700.'

Officer Datta: '(7) Please state number of students attended the classes for the following years: 2006, 2007, 2008, 2009.'

5 Mr Kohn: 'Question 7. We have an overall number of students who attended the classes and some students dropped out before finishing and we do not have a record of the number of students dropping out and not finishing the classes, therefore I list the figures as per answer 5 above. It must be remembered that  
10 refunds were only given in the case of International Students who had their visas rejected. Period from August 2006 to 31 March 2009 Students 5,700'

Officer Datta: '(9) Please state the number of students sit for the exams for the following years: 2006, 2007, 2008, 2009

(10) How many students did pass diploma IT diploma exams? 2006, 2007, 2008, 2009'

15 Mr Kohn: 'Question 9 and 10. No figures are available as students take exams as and when they require and do not always tell us or have to tell us about when they take exams.'

Officer Datta: '(11) How many students applied to [MU]? Please give figures for each year covering 2006 to 2009.'

20 Mr Kohn: 'Question 11. The following students applied to [MU] for BSc in IT. Please remember that the course takes two years. Period to 31<sup>st</sup> March 2009 30 Students.'

Officer Datta: '(12) How many students were accepted/admitted to [MU]? Please give figures for 2006 to 2009.'

25 Mr Kohn: 'Question 12. The following numbers were accepted by [MU]. Period to 31 March 2009 30 Students.'

Officer Datta: '(13) Did [MU] ever offer minimum/maximum number of university places? Please state the number of places for each year covering 2006 to 2009?'

30 Mr Kohn: 'Question 13. [MU] did not offer any minimum or maximum number of university places. It was on a case by case basis for each student.'

Officer Datta: '(14) How many students were given identity cards by [MU]? Please state figures for 2006, 2007, 2008 and 2009?'

35 Mr Kohn: 'Question 14. [MU] must have given ID cards to all our students accepted by them but we are not aware of exact numbers. Also some of our students went to other Universities e.g. Greenwich, South Bank etc. who

accepted them based on the Middlesex criteria but did not report this to us or have any [AA] with us we are not aware of the exact numbers.’

23. The above exchange of letters appears to have been the last correspondence before Officer Datta issued the decision letter dated 24 August 2010 against which the appeal is brought.

#### **HMRC’s decision**

24. The relevant passage of the decision letter reads as follows:

‘You have not put forward any argument as to why LCC should be considered a college of a University. There are agreements with [MU], but the number of students who were accepted is very low. The arrangement does not seem to be substantial and it appears that LCC cannot be acting as mainly a college of a university.’

25. This argument was repeated in HMRC’s Statement of Case in the appeal (dated 26 September 2011). It was expanded (at paragraph 5(viii) and (ix) of the Statement of Case) as follows:

‘[HMRC] consider that [LCC] has not sufficiently demonstrated that it has close academic links to a parent university and is delivering university-level education leading to a qualification. As such LCC does not qualify as an eligible body under Note 1(b). .. for the above reasons the SIB [we assume SFM was meant] and HBIT decisions do not apply in [LCC’s] case.’

26. Reference is made below to the SFM and HBIT decisions (*Customs and Excise Commissioners v School of Finance and Management (London) Ltd* [2001] STC 1690, a decision of Burton J, and *HIBT Ltd v Revenue & Customs* [2007] UKVAT V19978 (a decision of Tribunal Judge Shipwright released on 17 January 2007).

#### **The evidence (II) – evidence on the question of the numbers of LCC’s students and the proportion of them progressing to degree courses at MU**

27. On the question of the number of students who took LCC’s courses and the number of students who progressed to MU from LCC evidence was given by Miss Azim (orally) and by Mr Kohn (in his witness statements and orally) supplementary to that supplied in Mr Kohn’s letter to Officer Datta dated 13 April 2010.

28. In Mr Kohn’s first witness statement (dated 5 December 2011) he said (at paragraph 19):

‘The courses ‘Diploma and Higher Diploma’ had 15 students in the 2007, 59 students in the year 2008, 95 number of students in the year 2009, 42 in the year 2010, 13 in 2011;’

and at paragraph 22:

‘a substantial number of students did embark and complete the initial 2 years of the Higher Diploma [MU] Program with LCC and LSCE, those continued to the final year of the program to achieve a Degree is also high;’

29. In Mr Kohn’s second witness statement (unsigned and undated, but acknowledged by him), he stated (at paragraph 6(k) to (u)):

5           ‘(k) With regard to the figure of 30 actually going on to year 3 at MU, I am not sure how that [HMRC] arrived at that figure. I have spoken to a colleague who used to work at LCC’s marketing department, and he informs me that the figures were than in 2009, 9 students transferred to MU. In 2010 20 students transferred; and in 2011 11 students transferred. He knows this because he took deposits from the students in relation to this. I know for a fact that the figure is an under-estimate. I say this because we collected a deposit from LCC students going on to MU. They would make this deposit in order that they study at MU in the third year. This deposit was of course refundable. However some students decided not to give LCC the deposit, and decided to go straight to MU, and put down the deposit with them. An excellent example of this is student Liza Seeto, whose statement [was before us]. I have been told by Ms Aqsa Azim that she went straight to MU and gave her deposit there. As such, and as I understand it she would not be included in the figure of 30 or 40 if you take our figures for the last three years. How many students there were like Liza Seeto who paid their deposit straight to MU, I simply would not know. If I am pressed to provide a guesstimate as to how many actually did this, I would estimate that a substantial number of eligible students did so.

10           (l) What should also be appreciated is that we were involved in a very competitive environment. Our students were at all times looking for value for money. Unfortunately, but perhaps understandably, our students were poached by other universities. These included South Bank, Greenwich and Northampton University. Having arrived in this country, and having got their feet on the ground, the students would hear of other universities that were charging less than we were, and therefore move to that university and study the same or a similar course.

15           (m) In addition to the above, there is always a drop out rate at any place of study, and so some students would not continue with the course. This, as I say, happens in any university degree course.

20           (n) Beyond the normal drop out rate, in any degree course there will be students who simply do not pass the exams, and therefore could not continue on with their degree.

25           (o) Some students of course change degree course, whilst studying for their initial degree.

              (p) Some students will “degrade”, and delay the finishing of their degree by a year. If they did this, then this might well not be reflected in the MU figures.

30           (q) Some would run out of money, and not be able to continue with the course.

              (r) With overseas students, there are always going to be some students who decide to go back home, for family or personal reasons.

              (s) A small part of LCC’s resources were taken up by teaching British students. Only about 5% of those students actually went to MU.

35           (t) It is also right to say that a small minority of the overseas students were not signed up to do an MU degree.

40           (u) The above, I hope, explains why clearly not every student did in fact go on to study at MU. However I would like to say this. I am proud of the standard taught at LCC. Initially MU sought to monitor us to a far greater extent than was necessary ... However, when it became apparent to MU that we were a college that was involved in teaching our students to a very high standard, then MU sought to oversee us a great deal less. What is more is that students who went to MU achieved very good degrees indeed, and higher grades than the average student on the same degree course.’

30. The statement of Liza Seeto was as follows:

'Re: Confirmation of Education History

5 I am an international student who successfully completed two years of my Higher Diploma leading to BSc Honours in Information Technology program with Bickenhall College; I was then successfully transferred onto [MU] Hendon London Campus for the 3<sup>rd</sup> and final year of my BSc degree.

When I enrolled with [LCC] I enrolled for the Higher Diploma because it was [MU] Degree Course. I knew from the outset that the course was tailored and the syllabus was that of [MU]. This was fantastic for me as I was able to study at College with College prices but in fact be taught a Middlesex Degree Program.

10 During the two years of Higher Diploma leading to Degree Program, I was able to access and use the resources of [MU] that the final year at their campus was not so alien to me. I found this partnership very valuable.

15 I enjoyed my education at Bickenhall College and gained valuable education which enabled me to achieve a 2.1 Degree awarded by [MU] with minimal cost but the quality of education taught remained the same throughout.

I enclose herewith a copy of my Degree Certificate [issued by MU] as confirmation of my degree award.

20 I would highly recommend London College and London School of Computer Education as completing the two very vital years of my degree with them allowed me to gain confidence to complete the final year at university. I signed up to this agreement and I am extremely happy with my choice.

I endeavour to attend the Tribunal hearing scheduled for Wednesday 7<sup>th</sup> December 2011 to confirm the contents of my statement.'

25 31. Liza Seeto did not in fact attend the hearing (on 10 May 2012) but we accept the contents of her statement (which was not challenged by HMRC) as evidence of the facts therein.

30 32. A similar statement made by Erkin Rustamov was in our bundle. He completed 2 years of his BSc degree program with London College and went on to complete the final graduation year with MU at their Hendon Campus. He obtained a first class honours degree from MU. Again, we accept the contents of that (unchallenged) statement as true.

35 33. Miss Azim's evidence was that her role was to provide LCC's students with immigration and visa advice. She said (in unchallenged evidence, which we accept) that her work load was very heavy. She worked 40 hours a week and saw 10 or more students each day. She dealt with all the overseas students who applied for visas "in country", that is, while physically in the UK.

40 34. She said that all the students she dealt with went on to MU except for 2 – one went to Northampton University and one to Greenwich University. She said that she thought the students she dealt with were representative of the whole student body and her evidence was that the bulk of LCC's students went on to MU.

35. She explained the reference to '30 students' in Mr Kohn's letter of 13 April 2010 (his answers to Questions 11 and 12) by reference to the fact that students had the choice of paying the deposits for their MU courses to LCC (3 months in advance) or to MU direct (which took deposits later). She explained that it was beneficial for students to pay their deposits direct to MU. The '30 students' referred to had been the ones who had chosen to pay their deposits to LCC and of which LCC had therefore kept a record.

36. She pointed out that Liza Seeto had paid her deposit to MU. She knew this because Ms Seeto had come back to LCC to see Ms Azim (for immigration advice) and had told her so.

37. She said that when LCC's 'Tier 4' licence had been revoked (so that LCC could no longer teach international students), a 60-day grace period had been allowed and all the LCC students affected had been transferred to MU, who had taken them in. No LCC students 'in the pipeline' at the time of the revocation of the 'Tier 4' licence had failed to get a place at MU.

38. Mr Kohn accepted in evidence that the point that the '30 students' were only those students who had paid their deposits to LCC and that others (not included in the '30 students') had paid their deposits directly to MU had not been made clear to Officer Datta. Furthermore the '30 students' referred to had been only those students who had completed 2 years of study at LCC by 31 March 2009.

**The SFM and HBIT decisions (*Customs and Excise Commissioners v School of Finance and Management (London) Ltd* [2001] STC 1690 and *HIBT Ltd v Revenue & Customs* [2007] UKVAT V19978**

39. The Tribunal in *HBIT Ltd* applied Burton J's reasoning in *School of Finance and Management (London) Ltd* ("*SFM*") to the facts in the case before it.

40. Burton J approved the Tribunal's approach in the case before him, in ascertaining whether a particular college was a 'college of a university' within paragraph (b) of Note 1 to Group 6, Schedule 9, VATA, of weighing up the relevant factors and being influenced 'at the end of the day by the fact that the "fundamental purpose of [SFM] is to provide education services leading to the award of a university degree" by the [relevant] university'.

41. In *SFM* Burton J set out (at paragraph [16]) the factors which HMRC in that case urged as relevant indicators in ascertaining whether or not a college was for relevant purposes a 'college of a university', and at paragraph [17] he set out SFM's rival indicators. HMRC listed 15 indicators and SFM 7.

**Discussion, further findings of fact, and Decision in Principle**

42. Mrs Orimoloye submitted that the AAs were 'tidying up arrangements' or 'housekeeping agreements' between LCC and MU rather than MU's acceptance of LCC as a college of MU. We do not accept that submission.

43. We are satisfied that the letter from MU to Mr Kohn dated 17 July 2006 and the subsequent AAs established a legal relationship between LCC and MU sufficient to

constitute LCC (in its manifestations as the London College and Bickenhall College of Computing) as a college of MU within the definition in paragraph (b) of Note 1 to Group 6, Schedule 9, VATA (which we must construe purposively in the context of the general legislative intention to exempt supplies of UK university education),  
5 provided that the arrangements envisaged in that letter and the AAs were as a matter of fact rendered a reality by the student careers of LCC's students, taken as a whole.

44. By this proviso, we echo the concern expressed in Officer Datta's decision letter dated 24 August 2010 that the arrangement between LCC and MU would not 'seem to be substantial' if the number of LCC's students who transferred to MU was very low,  
10 with the consequence that in that case LCC 'cannot be acting as mainly a college of a university', that is, LCC would not, as a matter of fact, realistically be a college of a university for relevant purposes.

45. If it is the case that despite the legal relationship between LCC and MU established by the letter of 17 July 2006 and the AAs (which, we accept, enabled  
15 overseas students to obtain the visas necessary for a 3 year course of university-level educational study), we are not persuaded that LCC's students typically did progress to courses leading to a degree at MU, but instead dropped out, went to a different university or otherwise did not progress to MU as envisaged by the AAs, then we would not conclude that the "fundamental purpose" of [LCC] was, as a matter of fact,  
20 to provide education services *leading to the award of an MU university degree* (our emphasis).

46. We do not regard this approach as one having regard to "purely statistical outcomes" – a phrase taken from Mr Murphy's skeleton argument (paragraph 56), which he amplified orally by referring to "lies, damned lies and statistics". Instead it  
25 is an attempt to assess realistically the function which LCC was fulfilling, against the background of the burden of proof in the appeal, which is on LCC to persuade us on the balance of probabilities that LCC's students did typically progress to courses leading to a degree at MU.

47. The documentary evidence produced was insufficient to discharge this burden of  
30 proof. We saw no copy records or copy registers of LCC or MU which might have shown how many students were accepted by LCC in the relevant periods and how many (or what proportion) progressed to degree courses at MU.

48. The correspondence before us also did not provide evidence to persuade us that LCC had discharged this burden of proof. Mr Kohn's answers in his letter dated 13  
35 April 2010 to the pertinent questions put by Officer Datta in her letter of 9 March 2010 would, on any reasonable reading, have given Officer Datta the impression that something approaching 5,700 students had applied to be taken by LCC in the period from August 2006 to 31 March 2009 and of these 30 applied to and were admitted by MU.

49. The evidence of the witnesses (Mr Kohn and Miss Azim) persuades us that these  
40 stark figures (30 out of 5,700) do not give an accurate picture. In Mr Kohn's first witness statement he said that (in total) 224 students embarked on and completed the

initial 2 years of the Higher Diploma [MU] Program with LCC and LSCE between 2007 and 2011 (inclusive). He added that ‘those continued to the final year of the program [the degree course taught at MU] to achieve a Degree is also high’. We can take this evidence as suggesting that, say, 200 or more students completed the Higher Diploma programme with LCC and progressed to MU in this period.

50. The evidence about the records of those who paid their MU deposits to LCC and the lack of records of those who paid their MU deposits direct to MU does persuade us that the figure of 30 students progressing from LCC to MU is an under-estimate. But as to the extent of the under-estimate, all Mr Kohn was able to say in his second witness statement was: “if I am pressed to provide a guesstimate as to how many actually did this [paid their deposits directly to MU] I would estimate that a substantial number of eligible students did so”. This evidence is inadequate to give us any clear idea of how much of an under-estimate the figure of 30 students represents.

51. Mr Kohn, at paragraph 6(l) to (t) of his second witness statement (set out at [29] above) gave a series of explanations of why students enrolled with LCC would not in fact progress to MU. We conclude accordingly (and we find) that a significant number of the students enrolled with LCC did not progress to MU – but we are unable from this evidence to estimate the proportion of LCC students concerned.

52. The evidence of Liza Seeto’s statement and Erik Rustamov’s statement clearly refers only to their particular cases.

53. The strongest evidence in LCC’s favour on this topic was given orally by Miss Azim. She appeared to us to be an honest and careful witness (we say the same of Mr Kohn).

54. We have accepted (as stated above) her evidence that her work load was very heavy. She saw upwards of 50 students a week to give immigration and visa advice. These were all overseas students seeking advice about applying for visas “in country”. She was able to supply them with a copy of MU’s letter dated 17 July 2006 which would assist them in their visa applications. We find that the total number of LCC’s students in the relevant period must have been in the thousands, though perhaps not as many as 5,700.

55. Her evidence relevant to the question of how many of those thousands typically progressed to a degree course at MU was that all the students she dealt with (which must have been many, though obviously not all of LCC’s students concerned) went on to MU except for 2 – one went to Northampton University and one to Greenwich University. She was not cross-examined on this point and we accept her evidence as far as it goes. It will be seen (at [58] below) that we have concluded that it did not go far enough.

56. She also said that she thought that the students she dealt with were representative of the whole student body and that the bulk of LCC’s students went on to MU. First, that is evidence of her surmise that the students she dealt with were representative of the whole student body – not evidence that they were. Secondly, we take her

evidence that the bulk of LCC's students went on to MU, in context, as evidence that her surmise was that such was the case – not evidence that it was the case.

57. Miss Azim also said that when LCC's 'Tier 4' licence was revoked all of LCC's students affected by the removal of LCC's right to teach international students transferred to MU. We accept this evidence and find that such was the fact. However it is not direct evidence that the "fundamental purpose" of [LCC] was to provide education services leading to the award of an MU university degree – it is evidence of the close link between LCC and MU (which we accept that MU's letter of 17 July 2006 and the subsequent AAs established) and of the cooperation between LCC and MU. We do not accept it as proving the fact that over the relevant period LCC's students – or any proportion of them – typically progressed to courses leading to the award of an MU degree.

58. It was LCC's responsibility and obligation in the appeal to adduce the necessary evidence to persuade us that on the balance of probabilities LCC's students did typically progress to courses leading to a degree at MU. Weighing all the evidence referred to in this decision on the question of the numbers of LCC's students and the proportion of them progressing to degree courses at MU, we find that they have not done so. We are not prepared to accept that Miss Azim's oral evidence by itself (although unchallenged) outweighs the other evidence – Mr Kohn's evidence and his correspondence – or makes up for the lack of any documentary evidence from LCC or MU which might have shown directly how many students were accepted by LCC in the relevant periods and how many (or what proportion) progressed to degree courses at MU. Mr Kohn's evidence and his correspondence, taken together, suggest that only a small proportion of LCC's students in the relevant periods progressed to degree courses at MU. And Mr Kohn was, we infer, as director of LCC, in a much better position than Miss Azim, LCC's immigration case worker, to give evidence on the proportion of LCC's students who progressed to take degree courses at MU. In the result, we are left in doubt on a point that is, in our judgment, crucial to LCC's success in the appeal.

59. Although we accept that the arrangements concluded between LCC and MU were aimed at constituting LCC as a college of MU for relevant purposes, we are unable to (and do not) find as a fact that LCC was such a college, because we are not persuaded by the evidence before us that sufficient of LCC's student body in fact progressed to degree courses at MU to enable us to find that those arrangements were rendered realistically substantial by the student careers of LCC's students, taken as a whole. We cannot therefore find as a fact that the "fundamental purpose" of [LCC] was to provide education services leading to the award of an MU university degree.

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5 60. For these reasons we find that LCC was not a ‘college of a university’ within the  
definition of ‘eligible body’ in Note (1)(b) to Group 6 of Schedule 9, VATA – the  
relevant limb of the definition – and accordingly that LCC was not entitled to  
exemption in respect of its supplies of education (other than those of teaching of EFL)  
pursuant to section 31 and item 1 of Group 6 of Schedule 9, VATA. The appeal is  
accordingly dismissed except in so far as the claim for repayment of VAT relates to  
output tax charged in respect of supplies of the teaching of EFL, which HMRC accept  
qualified for exemption pursuant to Note (1)(f) and (2) to Group 6, Schedule 9,  
10 VATA.

15 61. As stated above, this Decision is a decision in principle. We direct the parties to  
use their best endeavours to agree what (if any) amount is repayable by HMRC to  
LCC as representing output VAT charged in respect of supplies of the teaching of  
EFL. If agreement cannot be reached on this point the appeal should be relisted for a  
further hearing before us so that we can make the necessary decision.

20 62. 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 findings of this decision notice.

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**JOHN WALTERS QC**  
**TRIBUNAL JUDGE**

**RELEASE DATE: 16 May 2012**

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