



TC02066

Appeal number: TC/2010/06633

*Education – Exemptions - Value Added Tax Act 1994, Sch 9, Group 6,
Item 1, Note 1(b) - Exemptions - Whether the Appellant is a college of a
university - Whether the Appellant is an eligible body*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

FINANCE & BUSINESS TRAINING LTD

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE ANNE SCOTT, LL.B., NP
MEMBER TYM MARSH, MA, MBA**

Sitting in public at Bedford Square, London on 25 and 26 January 2012

Melanie Hall, QC for the Appellant

**Raymond Hill, instructed by the General Counsel and Solicitor to HM Revenue
and Customs, for the Respondents**

DECISION

1. This is an appeal by Finance and Business Training Limited ("FBT") against a
5 decision by HMRC refusing exemption for FBT's supplies to the University of Wales
("the University"). FBT make other supplies, which both parties agreed were
correctly treated as either exempt (such as those to South Birmingham College) or
standard rated (such as those courses leading to examinations set by professional
accountancy bodies).

10 2. The original decision was dated 7 July 2010 and, in response to a request for a
review of that decision, HMRC issued a letter dated 10 August 2010 confirming that
the original decision was correct. That letter summarised the rationale of the decision
which was that FBT "...is not primarily concerned with the provision of university
15 education, they are not an eligible body and their supplies of education are liable to
VAT at standard rate." The original decision was expressed subtly differently as
being on the basis that "the business is not mainly acting as a college of the University
and hence does not qualify for eligible body status".

3. FBT argue that it is a college of the University and therefore an eligible body
within the meaning of Note 1(b) of Group 6 to Schedule 9 of the VAT Act 1994. It
20 was a matter of agreement that there was no suggestion that it might be an eligible
body in relation to any courses other than those supplied to the University. FBT's
case was that the question of whether or not it was an eligible body should be on a
course by course basis and that the totality of their business did not fall to be
considered in that context.

25 4. Witness statements were lodged by Professor Marc Clement, President and
Former Vice Chancellor of the University and Mr Valery Kisilevsky, Company
Secretary of FBT. Both of these witnesses also gave oral evidence and were cross-
examined by Mr Hill for HMRC but, essentially, there was no material dispute about
the facts in this case.

30 5. FBT is a private limited company incorporated in England and Wales on
18 January 2007 and which registered for Value Added Tax (VAT) with effect from
1 July 2007 in relation to the supply of finance and business training as a private
training provider.

35 6. HMRC visited FBT on 12 February 2010 to conduct a VAT inspection of the
business records and on 3 March 2010 wrote to FBT's representative seeking
supplementary information in regard to courses undertaken in conjunction with *inter*
alia the University. Correspondence between the parties then ensued and, in the
course thereof, it was established that FBT was not on the listed bodies order (ie a list
of institutions which deliver courses leading to a degree awarded by Recognised
40 Bodies such as the University). FBT offered only postgraduate courses to the
University, and therefore because "Organisations that offer postgraduate provisions
are not listed...." it could not be so listed. The Tribunal accepted that it would not be
on that order and the fact that it was not listed was not material.

7. FBT carried on business from Birmingham as a provider of training in finance and business, including marketing, advertising, sales, human resources and accounting. That training comprises university education courses, professional training courses and related activities. Part of its business included the provision to
5 students, who were matriculated with the University, of certain courses covered by a Validation Agreement (see Paragraph 19 below) dated 1 December 2009 between the University and FBT, ("the disputed courses"). These are all postgraduate courses at level 7 of the National Qualifications Framework. Under the guidelines issued by the Quality Assurance Agency (QAA), the University validated programmes are
10 categorised as "university standard". In this instance the disputed courses are five Masters courses in Business Administration (MBA), seven in Marketing (MSc) and four in Finance (also MSc).

8. The University is a federal University founded by Royal Charter in 1893. Until
15 1996 it was composed of colleges but, in the more recent past it has been organised in, what was described by Professor Clement as an evolving system including constituent institutions and more than 100 affiliate institutions, all teaching towards degrees awarded by the University. The University does not deliver teaching other than for a small number of courses in its Centre for Welsh Studies. It does not have a substantive physical campus. Accordingly, many of the student services including,
20 for example the physical library provision, sports facilities, student accommodation etc are not provided to the students by the University but rather by the constituent and affiliate institutions.

9. FBT is an affiliate of London School of Business & Finance ("LSBF") and repeatedly describes it itself as such. It was explained by Mr Kisilevsky that the
25 background to that is that LSBF has a longer track record as a training provider than FBT and has 20 international offices for recruitment and marketing. LSBF and FBT undertake joint marketing of courses and produce joint materials such as the Application Form for Postgraduates (see paragraph 20 below) and the Programme Handbook (see paragraph 22 below). In the former, FBT is described as the
30 Birmingham Campus. Mr Kisilevsky confirmed that, for strategic reasons, FBT was marketed as the Birmingham campus of LSBF. At their request, the University's website refers to "London School of Business and Finance (Birmingham)". FBT itself is not mentioned on the website page which was produced to the Tribunal (at page 39 of FB1 Tab 6). Both companies have a validation relationship with the
35 University for the provision of identical courses, albeit in different places. Professor Clement confirmed that the University sometimes validated what he described as satellite organisations: he viewed FBT as a satellite of LSBF but as an Institution of the University (see paragraph 19(1) below), in its own right, with its own validated provision. In consequence, students who enrol on validated courses offered by FBT
40 are matriculated by the University and are therefore students of both bodies. Students matriculated by the University are entitled to receive their postgraduate degrees at a degree ceremony at the University.

10. Professor Clement indicated that there are approximately 140 validated
45 institutions ("centres") and those that do not have validation agreements have similar arrangements. There was a lack of clarity, which was not resolved, as to whether FBT

was regarded as an affiliated (30% or more of their students studying at the University of Wales) or accredited (30% or less) institution; in his oral evidence Professor Clement indicated that he thought that it might be the latter but that he could not be sure. An associated body is any organisation offering a degree from the University for a minority of their students. He explained that a Validation Agreement is entered into only after a proposal is received and due diligence done. Thereafter, once a centre has been accredited, the courses are validated and each programme is validated in its own right. The centre (such as FBT in this case) delivers the "learning experience" and the University retains experts to visit and confirm the quality. In that context the QAA has a relationship with the University alone and seeks from it only an assurance that quality is maintained.

11. The University of Wales controls the teaching standards in centres such as FBT, in the sense that it has to be satisfied as to the quality standard, but has no involvement in the management of the centres. FBT design, teach and mark the courses and retain the intellectual property in them.

12. The Validation Unit, at the University Registry, works with the constituent and affiliate institutions.

13. The Joint Board of Studies ("JSB") is the meeting, at least annually, of nominated representatives of FBT (including the Course Director) and representatives of the University, including Moderators (who are academic experts) and External Examiners, to consider reports from the Course Director, approve amendments, if any, to the courses and consider any other matters referred to it by the University's Validation Board or FBT's Academic Board or equivalent. Professor Clement stated that the approval of staff teaching on the courses would have been devolved to the JSB, which would also consider the planning for staff development. Mr Kivilevsky confirmed that.

14. Students can and do transfer between centres particularly where the centres in question have a common award, provided that the academic case is robust and strong. Professor Clement described it as being a similar process as that for students from other Universities who wished to transfer to the University but it was simplified where there was a common award. On the same basis students can transfer to another University if it recognises the course that has been provided. He confirmed that if a centre was no longer able to trade, as has happened elsewhere, the University would wish to honour the commitment, as with all students, and find an alternate learning experience of similar quality, standard and outcome. (In fact that is a provision of the Validation Agreement at 11.1.) In the case of the FBT MBA course, Mr Kisilevsky confirmed that there had been student transfers from other similar courses, perhaps without 100% of the credits, but in general it had proved to be possible.

15. In his witness statement Professor Clement stated, "In providing validated courses, the Appellant acts as a college of the University." He agreed that there was nothing in the Validation Agreement that conferred that status. However, he stated that FBT was a college delivering a learning experience validated by the University so he would describe it as a college of the University.

16. Mr Kisilevsky confirmed that FBT considered that they acted as a college of the University for the validated courses only. FBT marketed themselves only as the providers of validated courses and not as a campus or college of the University in Birmingham because there were students at other centres in Birmingham who were also students of that University and it might be misleading. In any event, FBT had other sources of income other than the validated courses so their marketing had to cover those too. Of course, for the validated courses FBT were wholly dependent on the University validating the courses and awarding degrees.

17. As indicated in paragraph 7 above, FBT do not offer only the disputed courses. Both parties agreed that the supplies to South Birmingham College were properly treated as exempt since the funding came from the Learning Skills Council and are therefore exempt by virtue of Item 5, Group 6 Schedule 9, VAT Act 1994. In addition to those supplies they also provide English courses and courses which include professional accountancy qualifications such as preparatory courses towards examinations of the Association of Chartered Certified Accountants (ACCA), the Association of Accounting Technicians (AAT) and the Chartered Institute of Management Accountants (CIMA). These courses are open to virtually any member of the public, the students are students of FBT and the standard and quality are set by FBT. The fees for these courses have been treated as standard rated for VAT purposes and declared on VAT returns to HMRC.

18. In his witness statement Mr Kisilevsky stated that 51.88% of FBT's revenue in the 2009-10 financial years was derived from the disputed courses and that therefore they formed the majority of FBT's income, as determined by revenues. However, in cross examination, with reference to the very limited financial documentation produced (at Tab 6 pages 148, 149 and 150) which indicated that in 2009 "Degree" style courses accounted for 64% but in 2010 the figure had dropped to 43% (with the professional courses increasing from 33% to 50%, and the English courses from 3% to 7%) he confirmed that the 51.88% was an aggregate figure. There were only two years of figures available and he could not explain the figures in any detail: in particular he was unable to explain the basis of the wording "Based on 40:60 split from FBT ETB 2010 calcs" in the two commentaries on p150. He could only say that the dark shading related to the professional courses and that the deferred income was for fees received in the period for services to be delivered in the next period: he could not explain what part of the light shading in deferred income or in "other income" (which was incidental income such as library fees and cards etc) related to the validated or the English courses since the entries for the English courses were also lightly shaded (as indeed were a number of other items which did not relate to the validated courses). He did however confirm that the entry for sales MBA/MSc at 36.73% of income for 2010 was certainly for the disputed courses. In the light of all of this, the Tribunal was wholly unable to make any findings in fact as to the proportion of FBT's turnover or profit that was represented by the validated courses in 2009 and 2010. However, the Tribunal did find that the disputed courses did not form the majority of the income by revenue for FBT in 2010.

The Documentation

19. The Validation Agreement (the “Agreement”), which is at the heart of this case, has, amongst others, the following salient features:-

- (1) In the Preamble, FBT is described as "the Institution".
- 5 (2) In summary, the Recital states that the purpose of the Agreement is to enable the University, by validation, to award the qualification to candidates enrolled on a course within FBT.
- (3) The term of the Agreement is stated to be five years until 2 November 2014 and from year to year thereafter (albeit the subsequent reorganisation of the University may have altered that). Either party can terminate the Agreement, 10 for any reason, on giving six months notice at any time after 3 May 2011.
- (4) The University can terminate the Agreement on 30 days written notice if there are insufficient candidates sourced by FBT. The University can also terminate the Agreement, simply by notice in writing, if (a) FBT fails to 15 provide the University with a transfer showing all candidates commencing or remaining on each course within 30 days of the commencement of each intake of each course, (b) FBT does not pay the University the invoiced fees timeously, (c) FBT breaches the conditions about promotional material, and (d) the University is not satisfied with FBT’s performance.
- 20 (5) The campus where the training is delivered has to be approved by the University.
- (6) The University specifies the minimum qualifications for students and FBT must provide satisfactory supporting evidence timeously. (Accordingly, as 25 Mr Kisilevsky states, FBT cannot accept students on the disputed courses unless they meet the admissions criteria set by the University.)
- (7) FBT undertook to pay the stipulated fees to the University without deduction, set off or counterclaim, irrespective of the student numbers enrolled, and they were obliged to incorporate any additional programmes validated and introduced in the five year period of the Agreement: those fees were on a 30 sliding scale rising from £83,333 in 2009-10 to £500,000 in 2013-14.
- (8) FBT must submit the draft assessment materials (including examination papers) and the names and academic qualifications of proposed Internal Examiners to the University.
- 35 (9) The University has an unfettered discretion to amend the draft assessment materials and/or examination papers and to disqualify any proposed Internal Examiners.
- (10) FBT is obliged to pay the University, on demand, the reasonable costs including air travel, accommodation and daily living expenses of External

Examiners, Moderators or other University personnel required to visit FBT in terms of the Agreement.

- 5 (11) The University has the ultimate responsibility for the academic standard of the "scheme".
- (12) FBT agrees to implement fully the quality assurance procedures of the University.
- (13) The provisions of the Validation Board's Complaint Procedure (of the University) apply to FBT and therefore its students. Students must be made aware of the University's Student Complaint Procedure.
- 10 (14) Changes both to the courses and the employment of teaching staff require the consent of the University.
- (15) The University has absolute discretion and control in regard to any promotional material for the courses.
- (16) FBT cannot bind the University in any way.
- 15 (17) It states clearly at 18.1 that "This agreement constitutes the entire agreement and understanding of the parties..."
- (18) And at 19.1 that:- "This Agreement shall not operate so as to create a partnership, joint venture or relationship of employment or of principal and agent of any kind between the parties."

20 **20. FBT Postgraduate Application Form** (the "form")

- (1) Each of the pages of the 12 page form carries the logos of both FBT and LSBF.
- (2) The first page is the Instructions for Applicants and is headed "Birmingham Campus". The first two lines on that page are "Thank you for your interest in Finance Business Training. We look forward to welcoming you to one of our Postgraduate Programmes at FBT."
- 25
- (3) On page 8 of the form headed Terms and Conditions, LSBF is mentioned in paragraph 3 but all other references are to FBT. There is no reference to the University. The Terms and Conditions page refers only to an "FBT Postgraduate Programme", and there are references throughout that page to FBT in the context of payment of fees, course content, conduct, expulsion etc. The student on signing that page acknowledges that the General Terms and Conditions and FBT Postgraduate programme Key Terms and Conditions have been read and understood and will apply: the website referred to for the full terms and conditions is the FBT website and details of that were not included but are understood to contain the information in the Programme Handbook at paragraph 22 below and therefore have extensive references to the University.
- 30
- 35

- (4) On page 9 of the form, the student is described as "... admitted as a student at FBT".
- (5) The only reference to the University is on the application for Matriculation as a Postgraduate Student, included at the end of the form. It carries the logos of both companies, as on every other page of the form, but then has prominently in the centre of that page the logo and Heading for the University. Mr Kisilevsky stated, and the Tribunal accepted, that the University had insisted on that. It describes when non-graduates might be accepted by the University for matriculation. It states that that form must be returned to the Validation Unit, University of Wales Registry and that "the outcome of an application will be sent to the Institution unless an application has been made independently".

The Validation Letter

21. The letter (Tab 5 page 35) issued to FBT by the Director of the Validation Unit of the University dated 31 March 2010 and addressed "To whom it may concern" confirms that FBT "has been approved and authorised" to offer three degree programmes which are validated and awarded by the University. Those degrees are described as "full awards of the University of Wales". Further, it states "Students enrolling on these programmes at FBT also register with the University of Wales and receive full recognition and rights as students of the University." It is dated after HMRC had raised concerns as to whether the supplies by FBT should be treated as exempt and it does not confirm the status of FBT as a college of the University.

The Programme Handbook

22. Mr Kisilevsky said that all students were issued with a "student handbook" and cited the example of the Programme Handbook produced by LSBF and FBT for the MBA provision in Birmingham. Some salient features include:-
- (1) The welcome from the Executive Dean of LSBF and FBT thanks the student for choosing FBT and indicates that the programme is "run in partnership with the University of Wales" and that "Our partner University of Wales.....".
 - (2) She also states "As Executive Dean of LSBF and FBT, it gives me great pleasure to welcome you to our school".
 - (3) The programme leader, in his message (at 1.2) talks in the first paragraph of "our MBA programme", then in the second, describes FBT and states that FBT is pleased to be associated with LSBF and in the third paragraph states that "Our MBA programme is validated by the University of Wales."
 - (4) 16.5 Students engaging in "unfair practice....will be subject to University of Wales Unfair Practice Procedure"
 - (5) 16.6 "All assessments are marked in line with University of Wales marking regulations."

- (6) 17.8 "Appeals must be strictly in accordance with the University of Wales Appeals Procedure."
- (7) 22.1 Insofar as Academic Practice is concerned, FBT students must "adhere to the University of Wales.... referencing guidance.." and
- 5 (8) 22.2 For plagiarism the students are referred to the "University of Wales Assessment Regulations"
- (9) 23.2 All appeals against academic decisions are subject to "University of Wales Procedure"
- 10 (10) 23.2 at 1.32 and 1.33 As far as student complaints are concerned, FBT has a defined procedure but when that is exhausted, students will be advised of the "opportunity for external review...." and "may take their case to the University of Wales Complaints Procedure"
- 15 (11) Both the Assignment Cover Sheet and the Dissertation Submission Form are headed up with the logo of FBT only and both include the wording - "I have read and agree to be bound by London School of Business & Finance, Finance and Business Training and University of Wales Regulations and Policies relating to Unfair Practice...."

Other excerpts from this can be found at paragraph 45 below.

23. The Issues

- 20 (1) Both parties were agreed that the Tribunal had to apply Schedule 9 Group 6 to the facts of the case. Accordingly, the substantive issue in this case is whether the supplies made by FBT of the disputed courses are exempt supplies within Group 6 Schedule 9 VAT Act.
- (2) This raises a number of questions including the following:
- 25 (a) Was there a supply of education?
 (b) Was there a supply of University Education?
 (c) Was FBT a college, institution, school, or hall of the University and therefore an eligible body?

30 The Legislation

24. Section 31 of the VAT Act 1994 provides that a supply of goods or services is exempt if it is of a description for the time being specified in Schedule 9, and Group 6 - Education, of that Act and that provides:-

"Item No

- 35 1. The provision by an eligible body of-

- (a) education;
- (b) research where supplied to an eligible body; or
- (c) vocational training."

5 Note 1 to Group 6 states (so far as is relevant to this case):-

"For the purposes of this Group an "eligible body" is - ...

- (b) a United Kingdom university, and any college, institution, school or hall of such a university;"

10 The material parts of the Principal VAT Directive provide as follows:

TITLE IX

EXEMPTIONS

CHAPTER 1

GENERAL PROVISIONS

15 "Article 131

The exemptions provided for in Chapters 2 to 9 shall apply without prejudice to other Community provisions and in accordance with conditions which the Member States shall lay down for the purposes of ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse.

20

Article 132

1. Member States shall exempt the following transaction:

...

(i) The provision of children's or young people's education, school or university education, vocational training or retraining, including the supply of services and of goods closely related thereto, by bodies governed by public law having such as their aim or by other organisations recognised by the Member State concerned as having similar objects;

25

Article 133

Member States may make the granting to bodies other than those governed by public law of each exemption provided for in points....(i) of Article 132(1) subject in each individual case to one or more of the following conditions:

30

...

(d) The exemptions must not be likely to cause distortion of competition to the disadvantage of commercial enterprises subject to VAT"

25. The Authorities

A bundle of authorities was produced and that included the following cases:-

5 C-259/10 and C-260/10 *Commissioners v The Rank Group plc*

C-473/08 *Eulitz*

C-357/07 *R(on the application of TNT Post UK Ltd) v Commissioners* [2009] STC 1438

C-455/05 *Haderer* [2007] ECR I-4841

10 C-141/00 *Ambulanter Pflegedienst Kugler* [2008] ECR I-6833

Commissioners v University of Leicester Student's Union [2002] STC 147 (hereinafter referred to as the Leicester case)

Customs and Excise Commissioners v School of Finance and Management [2001] STC 1690 (hereinafter referred to as "SFM")

15 *HIBT Limited VTD* 19978 (hereinafter referred to as "HIBT")

C-102/08 *Finanzamt Dusseldorf-Sud v SALIX Grundstucks-Vermietungsgesellschaft mbH & Co Object Offenbach KG*

Pilgrims Language Courses Ltd v Customs and Excise Commissioners [1999] STC 874

20 **Was there a supply of Education**

26. There is no doubt that there was a supply of education.

Was there a supply of University Education?

25 27. There is no doubt that the disputed courses were a supply of university education but that none of the other courses supplied by FBT were university education.

Was FBT a college, institution, school, or hall of the University and therefore an eligible body?

30 28. There are no definitive authorities on the scope of the term an "eligible body" or on Note 1b to Group 6. There was no argument that FBT was a school or hall of the University. It was argued by FBT that it was a college of the University which failing an institution since it is described as such in the Agreement.

29. Both parties relied heavily on the two cases of SFM and HIBT and had done so in their correspondence prior to this appeal.

SFM and HIBT

5 30. The High Court in SFM and the Tribunal in HIBT considered the VAT status of supplies of education made by independent commercial profit making companies in collaboration with a University. That is precisely the issue in this instance since FBT is such a company and the Agreement makes it explicit that FBT was working with the University.

10 31. Both SFM and HIBT were found to be providing university education leading to a qualification and the arrangements in place were considered sufficient for them to meet the description of a college of a university for VAT purposes so that their supplies fell within Note 1(b) of Group 6 (ie they were eligible bodies).

15 32. The Court in SFM concluded that, to determine whether a body is a college of a university, one must look at the nature of the services supplied and the nature of the relationship between that body and the university and the Court identified the factors to be considered (the “SFM Factors”).

VAT Information Sheet 03/10

20 33. HMRC also relied on their VAT Information Sheet 03/10 which was issued in March 2010 indicating their revised VAT treatment following the SFM and HIBT cases.

25 34. The previous policy had been that only companies formally approved by the parent university, as a college, would be recognised as an eligible body. The change in policy was to the effect that in most cases where a company providing education is acting as if it were a college then it would be recognised as an eligible body. That Information Sheet then sets out the 15 SFM factors.

30 35. In addition that Information Sheet states that although each case must be decided on its own facts, which is self evidently the position, in HMRC’s view, there are three key themes that should be present before a company can be treated as an eligible body. HMRC also referred to and relied upon those three themes in their Statement of Case. FBT agreed that the three themes were relevant, but only in regard to the disputed courses. Those themes are:-

35 (1) There must be a close relationship between the University and the registered business. The Tribunal accepted FBT’s argument that the Agreement was evidence of such a relationship in respect of the delivery of the disputed courses.

(2) The registered business must provide University level education leading to a qualification awarded by the ...University: that is precisely what FBT did with the disputed courses.

- (3) If students on the course are registered, enrolled with the parent University, are subject to its rules and regulations, and are awarded qualifications by it, it is likely that the company isan eligible body. The students on the disputed courses meet all of these criteria.

5 Accordingly, the Tribunal finds that FBT meet all three of these “key themes” in relation to the disputed courses only. However, in regard to substantial parts of its business these do not apply. FBT argued that it is a college of the University in relation to the disputed courses but not in relation to any of the other courses that it offers to its students. HMRC argued that the status of FBT cannot be
10 determined solely in regard to the courses supplied to the University and that the nature of all other courses have to be taken into consideration.

SFM factors

36. As indicated above, both parties referred extensively to, and relied on the 15 indicators set out in Paragraphs [16] and [17] of the SFM case and we find the following facts by reference thereto:
15

(1) Presence of a foundation document establishing the college as part of the University

The Agreement does provide a clear link between FBT and the University and demonstrates the formal extent of their relationship, which, of course is
20 restricted to the disputed courses. Nowhere in the Agreement is FBT described as a college of the University although both witnesses described it as such. In fact, as can be seen at paragraph 19(18) above, the Agreement expressly restricts the parties’ relationship to the terms of the contract constituted by the Agreement. As a result of that Agreement, and as set out
25 in the validation letter predicated thereon, the students enrolled with FBT are also registered with the University and have full recognition and rights as students of the University. In that sense, and given FBT’s obligations and the University’s rights in terms of the Agreement, it is the case that the Agreement does establish FBT as an integral part, albeit small in the context
30 of the University, of the University's supply of degree courses. It does not establish it as part of the University *per se*.

FBT is described in the Agreement as the Institution: possibly it is an Institution but, on the same reasoning as in the preceding paragraph, there is
35 nothing in the Agreement that establishes it as an Institution of the University.

In both SFM and HIBT the documentation recognised the companies as an Associate College.

(2) Absence of Independence

40 FBT is a wholly independent company. However, there is a link between FBT and the University in relation to the disputed courses and to that extent

the two institutions are interdependent. In relation to the disputed courses, FBT has no independence whatsoever in relation to the matters set out above at paragraph 19 sub-paragraphs (4), (6), (9)-(11) and (13)-(15).

(3) Financial Dependence

5 It was stated in SFM that to be a college there should be financial dependence on the University (and or upon Government funding). In terms of the Agreement FBT is contractually obliged to pay the University substantial fees (see paragraph 19(7) above). The students pay their fees to FBT. FBT is not financially dependent upon the University.

10 **(4) Absence of Distributable Profit**

This is not the case.

(5) Entitlement to Public Funding

FBT is a privately owned limited company and has no entitlement to public funding.

15 **(6) Permanent links with the University**

The Tribunal finds that there are no permanent links with the University. As indicated in paragraph 19(3) and (4) above, although the initial term of the Agreement is five years and it continues from year to year thereafter, the Agreement can be terminated unilaterally for any reason at all on giving six
20 months notice after the expiry of the first 18 months and the University can terminate the Agreement on very little or no notice at any time in a number of eventualities.

(7) Physical proximity to the University of which it is said to be part

The Tribunal accepts that the absence of physical proximity is not in itself
25 fatal but more crucially, as indicated above at paragraph 9 the University website refers to the Birmingham campus of LSBF and there is no reference to FBT *per se*, albeit at FBT and or LSBF's behest. That is a positive distancing by FBT.

(8) Obligation to offer a minimum number of University Places

30 It is explicit in the Agreement that there had to be a minimum of 10 places.

(9) Having a similar purpose to that of the University

As far as the disputed courses are concerned, clearly both institutions have the same purpose, which is the delivery of a university education leading to a degree, but it is limited to that. It is arguable that FBT's purpose in relation
35 to the disputed courses is to sell as many courses as possible in order to

generate profit. A very substantial part of FBT's business had a completely different constituency to that of the University and quite different objectives.

(10) Providing courses which lead to a degree from the University

5 As far as the disputed courses are concerned, that is the case but none of the rest of FBT's business is directed at the achievement of a degree from the University.

(11) Having such courses supervised by the University, and quality standards regulated by the University

10 Undoubtedly, the disputed courses are supervised by, and the quality standards regulated by, the University. That is the primary function of the Validation Agreement. The University has no involvement with any of the other educational courses offered by FBT.

(12) Admitting students as members of the University, with University Identity Cards

15 That is the case for the disputed courses only.

(13) Submitting those students to disciplinary regulations and requirements of the University

That is the case for the disputed courses only.

(14) Entitling successful students to receive a degree from the University at the University degree ceremonies

20

That is the case for the disputed courses only.

(15) Being described as an associate/affiliated college of the University

25 As indicated above the Agreement does not state that FBT is a college of the University. It was clearly viewed by both parties as providing courses to the University but was not defined as a college in formal documentation. The other documentation, such as the University website and the form, described it as the Birmingham campus of LSBF. The oral evidence was that the University viewed FBT as a satellite of LSBF.

30 37. Both parties agreed that an analysis of the SFM factors was not a purely arithmetical exercise but rather that the factors should be weighed, their cumulative effect considered and a conclusion arrived at based on the overall impression. All of the factors have significance. Burton J at [22] in the SFM case stated clearly that a Tribunal is entitled to, and should weigh the 15 factors, but see also paragraph 41 below.

38. There are a number of differences between the facts in FBT and the facts in both SFM and HIBT. Two crucial differences, so far as this case is concerned, are that in neither of those cases did the company in question make supplies to any entity other than the universities in question, although SFM made supplies to three universities in
5 five years, and nor did they make supplies of anything other than university education. Accordingly, an issue for the Tribunal was to consider the extent to which that distinguished this case when considering the SFM factors. Of lesser significance, but noted, are that (a) unlike HIBT which was imbedded in the University campus, the FBT campus was remote from the University, (b) FBT designs the disputed courses
10 and retains the Intellectual Property therein unlike SFM, and (c) the Agreement does not recognise FBT as an associate college unlike both SFM and HIBT.

39. FBT argued that the SFM factors only came into play as far as the disputed courses were concerned ie it only required to be an eligible body in that context. HMRC were equally clear that all supplies fell to be considered. For the reasons set
15 out in the preceding paragraph that was not a matter which was specifically addressed in those cases, since it did not arise.

40. HMRC also argued strenuously that FBT could not at the same time be both a “college” or “institution” of the University and not a “college” or “institution” of the University for the rest of its business.

41. Burton J in the SFM case confirmed that the test, which the United Kingdom has imposed in the legislation, is simply whether a particular college is a college of a university, and that that is done by weighing the factors as described above and, (crucially for this case), then the Tribunal, as in the SFM Tribunal’s case is entitled to be influenced by the “fundamental purpose” of the body in question. Burton J was
20 referred to the Tribunal’s conclusions as to the fundamental purpose of SFM at paragraph 94 of the Tribunal decision (Decision number 17182). That Tribunal found that “the fundamental purpose of [SFM] is to provide education services leading to a university degree”. We are not bound by, but note that at 94(iv), that Tribunal stated explicitly “In our view the everyday understanding of the word ‘college’ would not
25 include it being part of a company providing totally different education services to a different age group.” That is a view with which we agree and which we adopt.
30

What then was the fundamental purpose of FBT?

42. Unfortunately that precise wording was not addressed in the course of the Hearing although this Tribunal considers it to be an essential step if we are to follow
35 the dicta of Burton J, which we do.

43. Clearly, FBT is a profit-orientated company that provides a wide number of courses. As indicated in paragraph 10 above, Professor Clements was not sure what percentage of FBT’s students were studying at the University although he thought that it was less than 30% and, as can be seen in paragraph 18 above, Mr Kisilevsky could
40 not clarify the financial figures which had been produced. Accordingly, in regard to the disputed courses, the Tribunal could not make any findings in fact as to the

numbers of students involved or the quantum of the percentage of FBT's gross and, perhaps more pertinently, net income which related to those courses.

44. Whilst the Tribunal accepted that FBT is an affiliate of LSBF, as described in paragraph 9 above, and for the reasons set out in paragraph 16 above did not market themselves as a college of the University, nevertheless we found the information in the Programme Handbook, relied upon by Mr Kisilevsky, and set out at paragraph 22 above very persuasive in considering the fundamental purpose of FBT. That handbook was specifically issued for one of the disputed courses. For the obvious reason that the Agreement specifies the terms and conditions upon which a student on such a course can be matriculated with the University the Handbook makes the repeated references to the processes and procedures of the University (as set out at paragraph 22(4)-(11) above) and of course that does emphasise the link with the University for that course. However, that link is described as a partnership (paragraph 22(1) above), notwithstanding the specific provision in the Agreement that the Agreement could not constitute a partnership. The Tribunal finds it telling that the emphasis in the welcome from the Executive Dean and in the message from the Programme Leader is almost entirely on FBT. The stress is on "our school" and "our MBA". The student has chosen "to learn with FBT". "FBT is an interesting place to study". The only references to the University are in the context of partnership, that the MBA is validated by the University, and that the student will have access to both FBT and the University.

45. When considering the fundamental purpose of FBT the Tribunal also considered the general information about itself, which FBT gave to the students and that is found in sections 2, 3 and 4 of the Handbook.

25 "2. Mission of FBT

FBT's mission is to become the first choice for business education in Europe. Through educating the world's most creative talented and ambitious students, FBT aims to...provide individuals around the globe with an opportunity to achieve academic, personal and professional success. FBT attract over 20,000 quality candidates from over 140 countries worldwide, and continues to experience exponential growth, both on-campus and online, all around the world, while continuing to develop corporate training, partnerships and associations with best-practice organisations globally and

- To prepare students for leadership, excellence and success
- To provide a personal experience for each student...

3. About FBT

35 Finance and Business Training (FBT) is a dynamic higher learning institution delivering highly accredited and specialised business programmes from our main England campuses (in association with London School of Business and Finance) in the heart of London, Manchester and Birmingham and also in other international locations. FBT offers a portfolio of Undergraduate, Master Degrees and Professional qualifications, which are regularly reviewed to offer flexibility in your studies.

40 FBT continues to experience tremendous growth worldwide, with strategic presence in Singapore, Hong Kong, India, Pakistan, Ireland, France, Switzerland, Czech Republic, Russia, Kazakhstan, Colombia, Mexico and Canada. We are really proud of the diverse, multi-cultural environment made up of our academics, staff and students from over 140 countries.

Our Masters programmes are validated by the prestigious University of Wales (U of W). We also offer a range of Double Award programmes in conjunction with the Grenoble Graduate School of Business (GGSB). Our Dual Programmes, for instance, combine an internationally renowned postgraduate degree with a globally recognised professional qualification.

5 From our Patron, ..., to our relationships with leading industry figures, FBT works with those at the forefront of today's global business landscape. Our faculty is made up of academics, accountants and consultants with outstanding professional experience and valuable contacts from leading universities and blue-chip companies and our graduates have been recruited by organisations such as..., to name a few.

10 4. Accreditations

Finance and Business training (FBT) provides a truly exclusive experience, bringing together the best in British educational excellence with prestigious and internationally accredited programmes that are individually tailored and developed within a wide selection of undergraduate, postgraduate and the world's most renowned qualifications."

15 46. In addition, the whole content and ethos of the form (see paragraph 20 above) is very persuasive. The only reference to the University is on the application to matriculate. No degree from any University can be awarded without a student having been matriculated; accordingly that is an essential procedure in any application for postgraduate education leading to a university degree. The course is validated by the
20 University and therefore matriculation is essential. The absence of any other reference in that document to the University and the frequent references to FBT, being a student at FBT and the FBT Postgraduate Programme all speak to a distancing from the University and a focus on FBT.

25 47. In summary, FBT's own documentation in relation to the disputed courses indicates that FBT's fundamental purpose, in that context, was not to act as a college of the University but rather to promote its and LSBF's business objectives.

30 48. FBT had a commercial relationship with the University, regulated by the Agreement, and that relationship, although having the potential to have a degree of longevity, was in essence quite short term and certainly had no permanence. FTB and LSBF retained the intellectual property in their courses (unlike SFM). FBT's profile within the University was very low key as a satellite of LSBF.

35 49. The Tribunal found that it was clear from all of the above that the reason that the relationship with the University had been earlier described as one of "partnership" and that the primary focus had been on FBT itself was because, *de facto*, the primary emphasis for the company and its fundamental purpose was far more extensive than the courses delivered for the University. Its focus is on being a higher learning institution delivering business programmes: business education and university education are not synonymous. A substantial part of that delivery of business programmes was not University education and had no links with the University or any
40 other university.

50. The Tribunal finds that the fundamental purpose of FBT, whether looking at the totality of its supplies or even if looking only at the disputed courses, was to provide business education in Europe for profit.

51. At [15] in the SFM case Burton J said “a college of a university must, like the elephant, be recognised, if not defined.” and it is in that context that the SFM factors fall to be weighed. FBT asked the Tribunal to avoid a mechanistic approach and to look to an overall assessment of the facts and circumstances in which the education is provided. Even if the Tribunal looked only at the disputed courses, (which the Tribunal does not accept is the correct approach), the Tribunal does not recognise FBT as a college of the University at the material time.

52. Although the students accepted the grievance, disciplinary, appeal and other procedures imposed by the University in terms of the Agreement, and were students of the University with an entitlement to graduate, if successful, there were numerous other factors which, taken together, lead the Tribunal to find that they were not students attending a college of that University. FBT’s own documentation tells the students that they are students of FBT at the Birmingham campus of LSBF, the assessment and dissertation cover sheets (see paragraph 22(11) above) refer to the University only after references to LSBF and FBT, and, as indicated previously, apart from the references to the University’s procedures the emphasis in the documentation is almost entirely on FBT and LSBF. The students are told that they are studying FBT courses validated by the University and that FBT is working in partnership with the University. Working in partnership is not consistent with being a college or institution of a university.

53. There were approximately 140 validated centres and Professor Clement was clear that all would have had agreements in similar terms to the Agreement: the terms of the Agreement mean that SFM factors 8 and 10-14 are automatically satisfied. In regard to SFM factor 2 where there is absence of independence in regard to the disputed courses only, that would be the case for all of the centres. It was conceded for FBT that validation alone does not confer college status; all 140 centres did not have college status. It was argued for FBT that the provision of a learning experience validated by the University was synonymous with what a college “is”. All 140 centres will have provided a learning experience validated by the University. All will have had to comply with the University’s quality requirements, processes and procedures. There must be much closer links than mere validation if FBT were to be viewed as a college or institution of the University; that point was conceded by Counsel for FBT. The Tribunal does not find that there are closer links.

54. The Tribunal accepts that, paraphrasing LJ Arden in the Leicester case, colleges and institutions come in many different guises and the Tribunal was repeatedly requested by Counsel for FBT to consider substance over form. Not only does the form not speak to FBT being a college or institution of the University but the substance does not either. Much store was put upon Professor Clement stating that FBT was a college because it delivered a validated learning experience. All 140 centres do that in one shape or form and with similar agreements in place: all are not colleges. Professor Clement also viewed FBT as a satellite institution of LSBF; that does not point to FBT being a college of the University. It was stressed for FBT that the scenarios described in paragraph 14 above pointed to a close nexus between the parties. The Tribunal did not accept that, as that is the case for all of the centres.

55. As indicated at paragraph 38 above, a major difference between this case and SFM and HIBT is that the disputed courses were the only supplies of University education and substantial other supplies, which could never be exempt, were also made by FBT. Would that mean that FBT could not both be a college of the University and not be a college for other purposes, as argued by HMRC? In considering the SFM factors and the fundamental purpose of FBT the Tribunal has taken into account both the supply of the disputed courses without reference to the other supplies and also the totality of the supplies. If, looking to the disputed courses only, the Tribunal found in principle that FBT met the criteria to be a college then the impact of the other supplies would fall to be considered.

56. The SFM factors that are met by FBT are all predicated on the Agreement. It is the Tribunal's view that it is the totality of the supplies that fall to be considered when looking to the SFM factors (and the fundamental purpose) but if we are wrong in that, nevertheless FBT does not succeed even in regard to the disputed courses only. For the reasons set out in the preceding paragraphs, the Tribunal is not persuaded that even the SFM factors which are met, looking at the disputed courses only, demonstrate a close enough relationship between the parties to establish that FBT is a college or institution of the University. Clearly, therefore if one looks to the totality of the supplies the links between FBT and the University are even more tenuous. Looking to the entirety of the evidence and weighing the SFM factors in the light of the fundamental purpose of FBT, as found by the Tribunal, FBT was not a college or institution of the University. If it is not a college or institution then it cannot be an eligible body.

57. Accordingly, for all of these reasons, the conditions for exemption in Group 6, Schedule 9 VAT Act are not fulfilled and the appeal fails.

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

35

TRIBUNAL JUDGE

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