



TC02729

Appeal number: TC/2011/05394

VAT – whether services supplied by BBC to Open University exempt under Article 13A(1)(i) Sixth VAT Directive – was BBC body governed by public law? - no – did BBC have educational aim required by Article 13A(1)(i)? - no - was BBC other organisation defined by United Kingdom as having similar educational objects? - yes – held that services supplied by BBC to Open University were exempt under Article 13A(1)(i) Sixth VAT Directive - appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

THE OPEN UNIVERSITY

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE GREG SINFIELD

Sitting in public in London on 21 – 24 January 2013

Paul Lasok QC and Owain Draper, counsel, instructed by KPMG LLP, for the Appellant

Peter Mantle, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This appeal concerns a claim for repayment of VAT charged on supplies of services made by the British Broadcasting Corporation ("the BBC") to the Open University ("the OU") during the period 1 January 1978 to 31 July 1994, excluding supplies made in the VAT period ending 30 September 1981.

2. Between 1 January 1978 and 31 July 1994, the BBC charged and accounted for VAT on supplies of services to the OU. The services consisted of the production and broadcasting of television and radio programmes relating to OU courses. With effect from 1 August 1994, the Respondents ("HMRC") accepted that the services supplied by the BBC to the OU were exempt under item 4 of Group 6 of Schedule 9 to the Value Added Tax Act 1994 ("the VATA94") as services closely related to the provision of education by a university. In 2009, the BBC made a claim under section 80 the VATA94 for repayment of the VAT that it had charged and accounted for on supplies made prior to 1 August 1994. HMRC rejected the claim. This appeal has been brought by the OU as the recipient of the supplies made by the BBC. The BBC has agreed to pay any amount that it receives from HMRC by way of repayment to the OU. If the claim is upheld, the amount repayable, excluding any interest, is just under £21 million.

3. The claim for repayment of VAT charged by the BBC during the period 1 January 1978 to 31 July 1994 is based on the contention that the supplies of services by the BBC during the period were exempt from VAT under Article 13A(1)(i) of the Sixth Council Directive of 17 May 1977 on the harmonisation of the laws of Member States relating to turnover taxes - common system of value added tax: uniform basis of assessment, 77/388/EEC ("the Sixth VAT Directive"). Among other supplies, Article 13A(1)(i) exempted services closely related to university education provided by bodies governed by public law having an educational aim or by other organisations defined by the Member State concerned as having similar objects. HMRC accept that, during the period covered by the claim, the United Kingdom's legislation did not exempt the BBC's services and that Article 13A(1)(i) had direct effect. HMRC maintain, however, that the BBC's services did not fall within Article 13A(1)(i).

4. This matter was previously considered by the VAT Tribunal in *Open University v HM Customs and Excise* [1982] VATTR 29, VAT Decision 1196. HM Customs and Excise (as HMRC then were) issued a ruling that VAT was chargeable on services supplied by the BBC to the OU in respect programmes relating to the OU's courses. The OU lodged an appeal and contended that the services were exempt from VAT. The VAT Tribunal dismissed the appeal. It held that the services of the BBC did not qualify for exemption because the BBC was not itself providing education. The VAT Tribunal's decision was based on the premise that the person making the supply of closely related services must also be supplying education to the students. Following the decision of the Court of Justice of the European Communities (later the Court of Justice of the European Union, together the "ECJ") in Case C-434/05 *Stichting Regionaal Opleidingen Centrum Noord-Kennemerland/West-Friesland (Horizon College) v Staatssecretaris van Financiën* [2008] STC 2145 ("*Horizon*

College"), it became clear that the VAT Tribunal's premise was wrong. Neither party in this appeal now supports the reasoning of the VAT Tribunal in the 1982 case. The result of the appeal, which the OU did not seek to appeal, is, however, binding on the OU and that is the reason why the September 1981 quarter is excluded from the claim which is the subject of this appeal.

5. For the reasons set out below, I have concluded that services supplied by the BBC to the OU during the relevant period fell within Article 13A(1)(i) of the Sixth VAT Directive. Accordingly, the claim for VAT charged and accounted for by the BBC between 1 January 1978 and 31 July 1994, excluding the September 1981 quarter, is upheld and the appeal is allowed.

Law

6. Article 4(5) of the Sixth VAT Directive provides as follows:

"States, regional and local government authorities and other bodies governed by public law shall not be considered taxable persons in respect of the activities, or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with these activities or transactions."

7. During the relevant period, Article 13 of the Sixth VAT Directive provided as follows:

"Article 13 Exemptions within the territory of the country

A. Exemptions for certain activities in the public interest

1. Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any possible evasion, avoidance or abuse:

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

8. I record for completeness that HMRC did not take any point on Article 13A(2) which provided for certain restrictions to the exemption.

9. Article 13A(1)(i) of the Sixth VAT Directive was implemented in the United Kingdom during the relevant period initially by Group 6 of Schedule 5 to the Finance Act 1972 and, from 26 October 1983, by Group 6 of Schedule 6 to the Value Added Tax Act 1983.

10. It is not disputed that the United Kingdom legislation during the period covered by the claim did not implement Article 13A(1)(i) correctly in that it required "closely related" supplies to be provided by the person supplying the education to which they were related. It is common ground that Article 13A(1)(i) had direct effect during the period and this decision does not consider the United Kingdom domestic legislation that applied during the period covered by the claim any further.

11. At some point prior to the enactment of the VATA94, HMRC conducted a review of the United Kingdom legislation that implemented Article 13A(1)(i). As a result of the review, Group 6 of Schedule 9 to the VATA94 differed from its predecessors in that it introduced the concept of an "eligible body". Eligible body for the purposes of the education exemption in the VATA94 included a public body as defined by note 5 to Group 7 of Schedule 9. Note 5 defined public body to include

"a body which acts under any enactment or instrument for public purposes and not for its own profit and which performs functions similar to those of a government Department or local authority."

12. In 1997, HMRC accepted that the BBC Open University Production Centre was a public body as defined by note 5 and determined that, as from 1 August 1994, the services provided by the BBC to the OU were exempt pursuant to item 4 of Group 6 of Schedule 9 to the VATA94. From that date to the present day, the services supplied by the BBC to the OU have been treated as exempt. HMRC has indicated to the OU that the exemption of the services may be reconsidered following the decision in this appeal.

13. The present appeal therefore solely concerns whether the supplies made by the BBC to the OU during the period 1 January 1978 to 31 July 1994 were exempt under Article 13A(1)(i) of the Sixth VAT Directive.

Issues

14. The parties agreed that whether the services supplied by the BBC to the OU were exempt under Article 13A(1)(i) turns on three issues, namely:

- (1) was the BBC a body governed by public law for the purposes of Article 13A(1)(i); and
- (2) did the BBC have the educational aim required by Article 13A(1)(i); or
- (3) if the BBC was not a body governed by public law with the required educational aim, was it another organisation defined by the United Kingdom as having similar objects?

15. It was common ground that, during the relevant period, the BBC provided, for consideration and subject to VAT, various services to the OU, which was at all material times (and still is) a university. HMRC accepted that the OU had the educational aim required by Article 13A(1)(i). HMRC also accepted that the services supplied by the BBC to the OU during the relevant period were closely related to the university education provided by the OU.

Evidence

16. There was no real dispute between the parties as to the facts, only as to the interpretation to be placed on those facts. Witness statements were produced on behalf of the OU by Mr Andrew Law, Mr Colin Robinson and Sir David Attenborough. The witness statements of Mr Law and Mr Robinson stood as evidence in chief and they were cross-examined (as Mr Peter Mantle, who appeared for HMRC, put it) for clarification. The witness statement of Sir David Attenborough was admitted. There were seven bundles of documents to which both parties referred. On the basis of the evidence, I find the material facts relating to the claim to be as set out below.

Facts

17. The BBC was first established as a limited company in 1922. John Reith, who subsequently became Lord Reith, was the first General Manager (later called Director General) of the BBC. On 31 December 1926, the company was dissolved and its assets were transferred to the BBC constituted under a Royal Charter dated 20 December 1926. The BBC continued in existence by virtue of a succession of Royal Charters.

18. As is well known, Lord Reith stated that the BBC's purpose and duty was to educate, inform and entertain. The BBC had an education director and established an education department from its earliest days. The BBC made its first broadcast for schools in 1924. In 1927, the BBC set up an adult education department. By 1929, schools broadcasts and talks accounted for a total weekly output of about 80 hours.

19. In 1962, the Postmaster General granted the BBC the right to extend its broadcasting hours on television for the purpose of adult education. This led to the formation of a further education television department in the BBC which, in turn, led to the creation of specialist education departments within the BBC that produced 300 new television programmes annually.

20. In March 1963, a Labour Party study group under the chairmanship of Lord Taylor presented a report about the continuing exclusion from higher education of people from lower income groups. It proposed a University of the Air to deliver serious, planned, adult education by radio and television.

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

"... whereas in view of the widespread interest which is thereby and by other evidences shown to be taken by Our Peoples in the broadcasting services and of the great value of such services as means of disseminating information, education and entertainment, We believe it to be in the interests of Our Peoples in the United Kingdom and elsewhere within the British Commonwealth of Nations that the Corporation should continue to provide broadcasting services pursuant to such licences and agreements in that behalf as Our Postmaster

General may from time to time grant to and make with the Corporation."

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

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

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

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

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

30 "The relationship between the University and the BBC will be one of educational partnership, based on mutual confidence. ... The basic principles behind [the partnership] are that the University has the ultimate responsibility for the academic content of course material and the manner in which this material is taught, whilst respecting the BBC's judgment and expert advice on matters relating to the preparation and presentation of the broadcasts. This advice will not be
35 set aside for any but cogent academic reasons."

25. The VAT Tribunal in the earlier appeal by the OU recorded the following facts at pages 33 - 34 of the report:

40 "In February 1966, a Committee appointed by the Government had made a number of recommendations to Parliament concerning a proposal to establish a University which would present its courses through television and radio, programmed learning and audio-visual aids. Whilst that Committee was deliberating, the Government entered into discussions with the broadcasting authorities concerning the arrangements for the television and radio programmes that would form

part of the structure of such a University. A report of the General Advisory Council of the BBC made on the 28th June 1968 indicates the nature of those discussions between the Government and the BBC. It states

5 '8. When the BBC was first approached about participating in the project, it stipulated that it should be regarded as contributing its skills in educational broadcasting as well as its technical and engineering skills. This was agreed by describing the BBC as being in a relationship of "educational partnership". The interpretation of
10 this phrase is obviously crucial and delicate. For, on the one hand, the broadcasts will be, if not the main, at least a most important element in teaching the University's courses, and will certainly be the element that brings the University to the notice of potential students and to the public as a whole. The University must therefore be vitally concerned that the broadcasts project the University's policies, and must be deeply involved in their content and pedagogic method. Moreover, the broadcasts must mesh in with the correspondence courses. This implies a closer and different relationship between the educational producer and the
15 sponsoring body than is found in school or Further Education broadcasting. On the other hand, if, as the BBC would claim and the University appears to accept, successful educational broadcasting involves the use of special talents and skills, the University must secure for its educational partner the degree of freedom and initiative that will allow these to be effectively used. Among these are judgements about what is or is not suitable for broadcast transmission, the way the material should be shaped and presented, and who the outside contributors should be. This involves both academic and broadcasting judgements about which
20 both the BBC member of staff and the University representative may have views. No doubt a harmonious working relationship will be established, but considerable care will be needed in the early days."

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

"The radio and television programmes required by the University and provided by the BBC are to be planned on the basis of an educational partnership between the University and BBC staff. In practice, this
40 partnership will extend over the whole range from the conception of the course to the final production of the programmes. The success of this partnership rests on the recognition by both parties that, while effective education is the overriding objective, and the ultimate responsibility of the University under its Charter, each has a specific professional role to play. The University will prescribe the academic objectives and general character of the broadcasts, in relation to the other component parts of each course, while the BBC will provide the necessary presentation and production skills. In the overlapping area -
45 where the inter-relationship of content and presentation is worked out - a reasonable degree of flexibility on both sides is essential in order to
50

Mr Law and Mr Robinson confirmed that this was what happened. Mr Law's evidence was that he was an academic when he joined the BBC to work at the OUPC and that was the reason that he was recruited. He said that he was trained as a producer at the BBC and at the OUPC. Mr Robinson's evidence was that the majority of producers working in the OUPC had a strong academic background.

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

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

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

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

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

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

36. Clause 1 of the 1983 agreement provided that:

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

37. Clause 2 stated that the OU would provide the OUPC on the OU's campus at Milton Keynes for the use of the BBC. The OUPC was to be developed. The second schedule to the agreement provided that the head of the OUPC would be a BBC employee, appointed under and subject to the usual practices, policies and procedures

of the BBC. The schedule also provided that the Head of the OUPC and members of BBC staff at the centre would be invited by the OU to participate in its affairs and activities.

Approach to the interpretation of exemptions in the Sixth VAT Directive

5 38. It has been held on many occasions by the ECJ and was common ground between the parties that the exemptions in the Sixth VAT Directive have their own independent meaning in Community law and must, therefore, be given a Community definition. The meaning of “education” in Article 13A(1)(i) was considered by the ECJ in *Horizon College* which is discussed further below.

10 39. Further, it is settled law that the exemptions provided for by Article 13A(1)(i) of the Sixth VAT Directive are to be construed strictly but not restrictively. This follows from the basic principle set out in Article 2 of the Sixth VAT Directive that the supply of goods and services shall be subject to VAT, if effected for consideration by a taxable person acting as such, unless expressly exempted.

15 40. The requirement of strict interpretation does not mean that the provisions for exemption must be interpreted restrictively. As Chadwick LJ said in *Expert Witness Institute v Customs and Excise Commissioners* [2001] EWCA Civ 1882, [2002] STC 42 at [17]:

20 "A 'strict' construction is not to be equated, in this context, with a restricted construction. The court must recognise that it is for a supplier, whose supplies would otherwise be taxable, to establish that it comes within the exemption, so that if the court is left in doubt whether a fair interpretation of the words of the exemption covers the supplies in question, the claim to the exemption must be rejected. But the court is not
25 required to reject a claim which does come within a fair interpretation of the words of the exemption because there is another, more restricted, meaning of the words which would exclude the supplies in question."

That passage was endorsed by the Court of Appeal in *Insurancewide.Com Services Ltd v HMRC* [2010] EWCA Civ 422, [2010] STC 1572 at [83].

30 **Issue (1) - Was the BBC a body governed by public law?**

41. Dr Paul Lasok QC, who appeared with Mr Owain Draper for the OU, submitted that the BBC was a body governed by public law, as that phrase is used in Article 13A(1)(i) of the Sixth VAT Directive, during the period 1 January 1978 to 31 July 1994. HMRC contended that the BBC was not such a body.

35 42. The OU submitted that whether the BBC is a body governed by public law depends on its legal status and not what it does. If the proposition is limited to the BBC's legal status for the purposes of the Sixth VAT Directive, I agree and I did not understand HMRC to argue otherwise.

43. There is very little guidance from the ECJ on the meaning of body governed by public law for the purposes of the exemptions despite the fact that the phrase appears several times in Article 13A of the Sixth VAT Directive. Article 4(5) of the Sixth VAT Directive provides that bodies governed by public law are not taxable persons in respect of the activities or transactions in which they engage as public authorities. Article 4(5) has been considered by the ECJ in a number of cases which give some guidance. In Case 235/85 *EC Commission v Netherlands* [1987] ECR 1471 ("*Netherlands*") and Case C-202/90 *Ayuntamiento de Sevilla v Recaudadores de las Zonas Primera y Segunda* [1993] STC 659 ("*Seville*"), the ECJ held that two conditions must be fulfilled in order for the exclusion from the concept of taxable person in Article 4(5) to apply: the activities or transactions must be carried out by a body governed by public law; and they must be carried out by that body acting as a public authority.

44. In *Netherlands*, the issue was whether the official services performed by notaries and bailiffs under Dutch legislation were an economic activity subject to VAT or were excluded from being such an activity on the ground that they were activities or transactions of bodies governed by public law. At [21], the ECJ held that an activity carried on by a private individual is not exempted from VAT merely because it consists in carrying out acts falling within the prerogatives of the public authority. The ECJ concluded that, even assuming that the notaries and bailiffs exercised the powers of a public authority in performing their official services, those services were not excluded from being an economic activity by Article 4(5) of the Sixth VAT Directive. The ECJ stated, at [22], that the reason for its conclusion was that the notaries and bailiffs pursued their activities "not in the form of a body governed by public law, since they are not part of the public administration, but in the form of an independent economic activity carried out in the exercise of a liberal profession."

45. The meaning of body governed by public law was also considered in *Seville*. The case concerned tax collectors appointed by the Commune of Seville who were entitled to retain a percentage of the tax collected on behalf of the Commune as consideration for their services. The Commune argued that the tax collectors were not carrying on an economic activity because they were not acting independently and, even if they were, their activities were the activities or transactions of a public authority and excluded from being an economic activity by Article 4(5) of the Sixth VAT Directive. The ECJ applied *Netherlands* and repeated, at [19], its dictum that "an activity carried on by a private individual is not excluded from the scope of VAT merely because it consists in the performance of acts falling within the prerogatives of the public authority." At [20], the ECJ concluded that "if a commune entrusts the activity of collecting taxes to an independent third party, [the] exclusion from VAT provided for by [Article 4(5)] is not applicable".

46. The High Court considered the meaning of "body governed by public law" in *University of Cambridge v HMRC* [2009] EWHC 434 (Ch), [2009] STC 1288 ("*Cambridge University*"). Sir Andrew Morritt C analysed the decisions of the ECJ in *Netherlands* and *Seville* as well as two other cases that had been considered by the VAT and Duties Tribunal in the case, namely Case C-359/97 *EC Commission v*

5 *United Kingdom* [2000] STC 777, which concerned toll roads and bridges, and Case C-174/06 *Ministero delle Finanze-Ufficio IVA di Milano v CO.GE.P Srl* [2008] STC 2744 which referred to the letting of state-owned property. He concluded, at [38], that the concept of a body governed by public law was a matter of Community law and was not to be determined in accordance with the domestic law of each Member State.

47. At [48] of *Cambridge University*, Sir Andrew Morritt C held that:

10 “The decisions of the European Court of Justice ... establish that 'a body governed by public law' must, as a matter of Community law, be identified as part of the public administration of the relevant member state. Whether or not any particular institution can be so identified is a matter for the national court. The Tribunal considered that the University could not be so identified. In my judgment they were right for the reasons they gave.”

15 48. Sir Andrew Morritt C did not expand on what was meant by “part of the public administration of the ... state” but he confirmed that the VAT and Duties Tribunal was right to conclude that Cambridge University was not a part of the administration of the United Kingdom for the reasons they gave. Those reasons are set out at [76] – [91] of the Tribunal's decision, [2008-09] V & DR 579, VAT Decision 20610.

20 49. At [86] of its decision, the Tribunal held that a body that is:

- (1) carrying out by delegation a public function which could be, and sometimes is, carried out by the State itself;
- (2) entrusted with powers and duties of a public nature in the performance of which it is amenable to judicial review in the English law context; and
- 25 (3) highly regulated by the State and operates within a comprehensive statutory regime

is not thereby a body governed by public law. In my view, the Tribunal was not saying that the characteristics set out above were irrelevant to or inconsistent with being a body governed by public law but that they were not conclusive of such status.

30 50. In [88], the Tribunal held that Cambridge University was not a body governed by public law because the University is a legally independent and autonomous institution; it is self-governing and independent in the management of its affairs. The Tribunal did not consider that the receipt of public funds through the Higher Education Funding Council for England on conditions designed to ensure the
35 implementation of certain government policies could result in the University being part of the public administration.

40 51. The Tribunal concluded, at [91], that a body which is not inherently and by its nature a creature or extension of the State is not part of the public administration and is not a body governed by public law for the purposes of Article 13 of the Sixth Directive.

52. The issue in this case is whether the BBC is a body governed by public law for the purposes of the Sixth VAT Directive. I am bound by the decision of the High Court in *Cambridge University* that, in order to be a body governed by public law, the BBC must, as a matter of EU law, be part of the public administration of the United Kingdom. The phrase was first used by the ECJ in *Netherlands* but it provided no guidance in that case or subsequently as to what is meant by part of the public administration of the member state. If the ECJ in *Netherlands* had intended to limit “body governed by public law” to bodies that are part of the state, regional and local government authorities then it could easily have said so. For that reason, I do not consider that the term “public administration” simply refers to the state, regional and local government authorities in Article 4(5).

53. It may be argued that the cases of *Netherlands* and *Seville* are not entirely on point because they concerned individuals rather than legal persons. The final sentence of [22] of *Netherlands* could be read as saying that the notaries and bailiffs do not carry out their activities in the form of a body governed by public law because they carried out the activities not as employees of the public administration but as independent providers of professional services. The cases of *EC Commission v United Kingdom* and *Ministero delle Finanze-Ufficio IVA di Milano v CO.GE.P Srl*, in which the ECJ applied the reasoning in *Netherlands* and *Seville* to corporate entities, show that the ECJ’s analysis was not restricted to natural persons.

54. It seems to me that “bodies governed by public law” in Article 4(5) embraces not only states, regional and local government authorities but another, undefined, class of public body that can act as a public authority. It is clear from Article 4(5) that a body governed by public law can carry out a range of activities. Article 4(5) contains two distinct conditions. The ECJ cases show that, in order for Article 4(5) to apply, the activities must be carried out by a body governed by public law and they must be carried out by that body acting as a public authority. Both conditions must be fulfilled and, as the ECJ held in *Netherlands* at [21], the fact that a person performs acts falling within the prerogatives of the public authority is not sufficient to make that person a body governed by public law. The ECJ in *Netherlands* focused on the form of the body that carried out the activities rather than the type of activities carried out. I consider that it follows that the specific activities or transactions of a body neither designate nor disqualify it as a body governed by public law. It is the “form” of the entity which determines its status.

55. It appears to me that the ECJ in *Netherlands* regarded the states, regional and local government authorities as the public administration of the member state. It follows that other bodies governed by public law, if they are part of the public administration, must refer to bodies that are similar in form to states, regional and local government authorities. In my view, this is why the ECJ in *Netherlands* and *Seville*, as well as the other two cases referred to, excluded the independent providers of services from Article 4(5). Even though they exercised the powers and performed the functions of the states, regional and local government authorities, the notaries, bailiffs and tax collectors did so in the form of an independent economic activity ie as taxable persons. They were not similar to states, regional and local government authorities because they were, in United Kingdom terms, businesses. I conclude that

a body that carries on an independent economic activity cannot be regarded as a body governed by public law in respect of that activity even if the activity is of a type performed by states, regional and local government authorities acting as such.

56. The use of the word “part” in the phrase “part of the public administration” indicates that the body must not be independent of or separate from the public administration of the state or regional and local government authorities. I consider that this means that the body must be within the public administration by reason of organisational or legal relationship. Such relationships may take different forms, eg ownership or employment, but may not be merely commercial. A commercial relationship would indicate that the body was engaged in an independent economic activity and, therefore, was not similar to state, regional and local government authorities.

57. In my view, the term “public administration” refers to a function normally carried out by the state, regional and local government authorities. I consider that the body governed by public law must be concerned with the general administration or management of the state or authority or its interests

58. The OU submitted that the BBC was a creation of the state in that the state established the BBC and determined its constitution, namely the Royal Charters. The Royal Charters provided that the BBC's governors were appointed by the Queen in council and the BBC's funds were paid out of monies provided by Parliament which, through the Postmaster General, could examine the BBC's accounts and require financial information. The OU submitted that the BBC was controlled by the Government through the Royal Charters. The BBC was ultimately responsible to Parliament through the Postmaster General, later the Secretary of State. The OU also contended that the BBC was created was for a public purpose. The public purpose was not simply broadcasting; it was broadcasting information, education and entertainment.

59. Although the BBC's constitution is its Royal Charter which is determined by the Government, I do not consider that the BBC can be described as controlled by the state. As the OU properly acknowledged, the BBC is organisationally and editorially independent of the Government. Independence from the state, regional and local authorities is clearly an important indicator that the body is not part of the public administration of the state but it is not conclusive. It would be surprising if only bodies that were directly controlled by the authorities could be regarded as part of the public administration of the state. In the United Kingdom, many agencies of the Government are operationally independent but they are undoubtedly part of the public administration of the state. I consider, however, that the independence of the BBC is such that it is a strong indicator that the BBC is not part of the public administration of the United Kingdom.

60. The OU submitted that the BBC's role was entirely state-financed in that the BBC was financed either by the OU paying it or by direct subvention by the Government to the BBC under the guarantee given by the Department of Education and Science. I do not consider that the fact that the BBC is reliant for the majority of

its funding on the licence fee which is collected and dispensed by the Government means that it is a body governed by public law. Nor do I accept that the fact that all of the financing of the OUPC comes from the Government either indirectly via the OU or directly under the Department of Education and Science guarantee means that the BBC is part of the public administration of the United Kingdom. Both public and private bodies may receive funding from a variety of sources. Further, the BBC, in common with the University of Cambridge and many other organisations, receives both public and private funding. The ECJ in *Netherlands* and *Seville* did not refer to the source of the payments to the notaries, bailiffs and tax collectors as a factor in determining whether they were bodies governed by public law. In my view, the source and nature of the funding of a body are factors to be taken into consideration in determining whether it is governed by public law but the fact that a body is state-financed is not determinative.

61. The OU also relied on a guide to public bodies published by the Cabinet Office in 2006. At section 7.6, the guide refers to the BBC as a public broadcasting authority. Dr Lasok submitted that the concept of public law has not been harmonised at EU level and that concept differs from one Member State to another. He contended that the guide was a statement by the United Kingdom Government of what constituted a public body. The OU also relied on the fact that the BBC is classified as a public authority for the purposes of the Freedom of Information Act 2000.

62. I do not accept that the concept of a body governed by public law can be determined by reference to the status of a body under national law. The High Court in *Cambridge University* at [38] – [48] authoritatively demonstrated that the concept of a body governed by public law is a matter of Community law and is not to be determined in accordance with the domestic law of each Member State.

63. In my view, the expression “body governed by public law” in Article 13A(1)(i) does not necessarily have the same meaning in Community law as it does in English law. It follows that the Cabinet Office guide and the listing in the Freedom of Information Act are not useful in determining the meaning of body governed by public law for the purposes of the Sixth VAT Directive. The guide represents the Cabinet Office's view of what is a public body for the purposes of United Kingdom law and makes no reference to VAT or Community law. The fact that the BBC was included in the Freedom of Information Act indicates only that it was considered to be a public body for the purposes of that legislation and says nothing about its status for VAT purposes.

64. Article 4(5) of the Sixth VAT Directive also provides that bodies governed by public law shall be considered taxable persons in relation to the activities listed in Annex D to the Directive, provided they are not carried out on such a small scale as to be negligible. Annex D includes transactions of radio and television bodies other than those specified in Article 13A(1)(q). Article 13A(1)(q) exempts activities of public radio and television bodies other than those of a commercial nature. It follows that Annex D contemplates a television body that is governed by public law and engages in transactions of a commercial nature. The OU submitted that the reference in

Annex D to the Sixth VAT Directive showed that radio and television bodies could be bodies governed by public law.

5 65. In my view, the fact that Annex D refers to television transactions does not indicate anything about the status of the BBC. All that can be derived from Articles 4(5) and 13A(1)(q) with Annex D is that a television body may be a body governed by public law and it may carry out commercial and non-commercial activities. Those provisions do not state (and the OU did not contend) that television bodies, whether commercial or non-commercial, must be bodies governed by public law. The provisions say nothing about the meaning of "bodies governed by public law" generally.

15 66. As I have already stated, I am bound by the decision of the High Court in *Cambridge University* in considering whether the BBC is part of the public administration of the United Kingdom. The OU accepts that *Cambridge University* is binding on this Tribunal but, in case there is a further appeal, reserved the right to argue that the High Court's conclusion that "a body governed by public law" must, as a matter of Community law, be part of the public administration of the Member State was not correct.

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

35 68. For the reasons set out above, my conclusion on this point is that the BBC is not a part of the public administration of the United Kingdom and, accordingly, is not a body governed by public law for the purposes of Article 13A(1)(i) of the Sixth VAT Directive.

Issue (2) - Did the BBC have the required educational aim?

40 69. Given that I have decided that the BBC is not a body governed by public law for the purposes of Article 13A(1)(i) of the Sixth VAT Directive, it is not strictly necessary for me to consider whether the BBC had the required aim. However, in case I am wrong on that point and also because it is relevant to the question of

whether the BBC had similar objects in issue (3), I turn now to consider whether the BBC had the required educational aim.

70. This raises two questions, namely what aim is required by Article 13A(1)(i) of the Sixth VAT Directive and did the BBC have that aim?

5 71. It was common ground that the term “having such as their aim” in Article 13A(1)(i) refers to the opening words of the article, namely “children’s or young people’s education, school or university education, vocational training or retraining”. Accordingly, the aim required by Article 13A(1)(i) is education at school or university and training.

10 72. The meaning of education in Article 13A(1)(i) of the Sixth VAT Directive was considered by the ECJ in *Horizon College*. The ECJ, at [20], accepted the submissions of the Commission and held that education in Article 13A(1)(i) consists of a combination of elements including those relating to the teacher/student relationship (ie the transfer of knowledge and skills between a teacher and students)
15 and also those which make up the organisational framework of the establishment concerned. The Advocate General (Sharpston) set out the Commission's submissions in more detail at [49] of her opinion as follows:

20 “... as the Commission pointed out at the hearing, the ‘education, vocational training or retraining’ which students receive in an educational establishment is not merely what is provided by teachers from their own knowledge and skills. Rather, it includes the whole framework of facilities, teaching materials, technical resources, educational policy and organisational infrastructure within the specific educational establishment in which those teachers work.”

25 73. In *Horizon College*, the ECJ decided that the term education in Article 13A(1)(i) of the Sixth VAT Directive does not cover the making available, for consideration, of a teacher to an educational establishment but held that such services may be exempt as closely related to education when provided by an organisation defined by the Member state as having education as its aim. In *Horizon College*, the
30 supplier was an educational establishment. The ECJ held, at [33] – [35], that:

“33. However, the benefit of the exemption [for the supply of services closely related to education] provided for under art 13A(1)(i) of the Sixth Directive is subject to certain conditions which stem from that article.

35 34. First, both the principal activity of education and the supply of goods or services which are closely related to that activity must be provided by one of the bodies referred to in art 13A(1)(i) of the Sixth Directive.

40 35. Indeed, as may be seen from the wording of art 13A(1)(i), in order for the making available of teachers for the benefit of the host establishments to be exempted under that provision, it is necessary for the activity to be provided by a body governed by public law that has an educational aim, or by another organisation defined by the member state concerned as having similar objects. As is apparent from the

order for reference and, in particular, from the third question raised, that condition is likely to be satisfied in the main proceedings."

74. In this case, there was no dispute that the BBC provided programmes with educational content to the OU and generally. It was common ground that the services provided by the BBC to the OU were closely related to education. It was also common ground that the fact that a supply of closely related services has some educational value or content is not enough to establish that the supplier has an educational aim. The issue was whether the BBC had the required educational aim.

75. Dr Lasok contended that it was not necessary for the BBC, as a supplier of closely related services, to provide university education in order for the BBC to have the required educational aim. The OU's case was that the BBC had the necessary aim in relation to all forms of education mentioned in the opening words of Article 13A(1)(i), namely:

(1) it had the aim in relation to university education in that it made supplies with the aim that the OU would supply university education; and

(2) it had the aim of providing education and training more generally as distance learning through its programmes on television and radio.

76. The OU also submitted that the requirement that the supplier of closely related services should have an educational aim can be satisfied in either of two ways, namely:

(1) an aim embodied institutionally in the supplier; or

(2) the aim of the supplier when engaging in making the supply

and that the BBC had both types of educational aim.

77. Dr Lasok submitted that the aim of the OUPC was the provision of university education. The integration between the BBC and the OU at the OUPC was such that BBC staff were intimately involved in the provision of university education. The OU contended that the evidence showed that the BBC made a single supply of services to the OU which was an activity that extended from devising courses all the way through production to transmission of the programmes for those courses. The BBC did much more than simply film and broadcast the programmes.

78. Dr Lasok submitted that the evidence showed that the BBC provided a range of schools and adult education programmes. These programmes were not one-off events but were structured courses. The OU contended that the education programming was a form of distance learning which constituted education in the *Horizon College* sense.

79. HMRC did not contend that the BBC must have an educational aim as its sole object. Mr Mantle submitted that the BBC must have the aim of providing education in the sense explained by the ECJ in *Horizon College* and that the BBC did not have the aim of providing such education. HMRC contended that if the OU is right then the exemption would apply to any provider of goods or services closely related to education or training.

80. HMRC did not dispute that the BBC's purpose and remit was to inform, educate and entertain. HMRC contended that the BBC has never aimed to provide university education. HMRC accepted that one of the BBC's aims as a public service broadcaster was to provide programmes with educational content, including content aimed at those studying at university. The BBC provided services relating to the production, recording and transmission of television and radio programmes and other audio and audio-visual materials to the OU. Mr Mantle submitted that the fact that the BBC had an aim to provide such services to the OU and an aim to provide educational content to students of the OU (and other universities) did not mean that the BBC had university education as one of its aims.

81. It is clear from [34] of *Horizon College* that the supplier of closely related services must be a body within Article 13A(1)(i) of the Sixth VAT Directive. This means that the supplier must be a body governed by public law that has the required educational aim (or another organisation defined by the Member State as having similar objects). I consider that the aim, or one of the aims, of the supplier of closely related services must be to provide education of a type described in Article 13A(1)(i) of the Sixth VAT Directive. *Horizon College* shows that it is not enough for the provider of closely related services to have the aim that the recipient should provide education. The fact that the OU provides university education in the Article 13A(1)(i) sense does not mean that the BBC, merely by providing services to the OU, has the required educational aim.

82. The requirement to have an educational aim does not, in my view, mean that a supplier of closely related services must supply education of the same type as the recipient of the supply or that it must supply the education to the recipient of the services. In my view, the provision of closely related services by a university to a primary school would still satisfy the condition in Article 13A(1)(i) even though the educational aims of the two entities relate to very different types of education. Specifically, I do not consider that it is necessary for the BBC to supply university education to students generally or to the OU in order to come within the exemption. It is, however, necessary in my view that the supplier of closely related services should have education, in the sense explained by the ECJ in *Horizon College* (because exemptions must be construed strictly), as its aim.

83. Article 13A(1)(i) refers to "children's or young people's education, school or university education, vocational training or retraining". The ECJ in [18] and [19] of *Horizon College* stated that the transfer of knowledge and skills between a teacher and students is an important element of educational activity but is not, by itself, education in the Article 13A(1)(i) sense. The ECJ in [20] of *Horizon College* held that the educational activity in Article 13A(1)(i) refers to a combination of elements. Those elements are the transfer of knowledge and skills between teachers and students as well as the organisational infrastructure in which the teaching takes place.

84. I find that, since its creation, the BBC has had education, in a broad sense, as one of its aims. Throughout its history, the BBC has provided a range of programmes aimed at educating or training persons of different ages. I do not consider, however, that the BBC has provided or ever aimed to provide education in the sense explained

by the ECJ in *Horizon College*. The BBC's educational broadcasts, whether for the OU or more generally, do not provide the necessary combination of teaching and organisational infrastructure within which teachers transfer knowledge and skills to students to constitute education in the *Horizon College* sense. My view is that the BBC provides only a part of the package and its educational broadcasts must always be complemented by the activities and infrastructure of other institutions such as schools, colleges and the OU in order to provide the viewers and listeners with education in the Article 13A(1)(i) sense.

85. My conclusion on this point is that the BBC did not have the required educational aim and, accordingly, did not satisfy the condition in Article 13A(1)(i) of the Sixth VAT Directive.

Issue (3) - Was the BBC an organisation defined by the United Kingdom as having similar objects?

86. The conclusion that the BBC was not a body governed by public law with the required educational aim does not necessarily determine this appeal. Article 13A(1)(i) of the Sixth VAT Directive also exempts the provision of services closely related to education by other organisations defined by the Member State concerned as having similar objects. There is no doubt that the BBC is an "other organisation", ie an entity other than a body governed by public law, for the purposes of Article 13A(1)(i). As stated above, HMRC accepted that the services supplied by the BBC to the OU during the relevant period were closely related to the university education provided by the OU. Accordingly, those supplies would fall within the exemption if the BBC was defined by the United Kingdom as having objects similar to the required educational aim.

87. The OU submitted that the United Kingdom has "defined" the BBC as having "similar objects" (that is, objects similar to the provision of education etc.) by creating the BBC and entrusting it with an educational function or remit.

88. Alternatively, the OU contended that the fact that the United Kingdom has not defined the BBC as having similar objects does not preclude the exemption from applying. Dr Lasok submitted that the language used in Article 13A(1)(i) does not give a Member State discretion to pick and choose what are or are not "organisations ... having similar objects". The function of Member States is simply to identify, in the national legislation implementing the Sixth VAT Directive, organisations falling within that description.

89. In support of his submission, Dr Lasok relied on the interpretation given by the ECJ to the word "defined" in Article 13B(d)(6) of the Sixth VAT Directive, in Case C-363/05 *JP Morgan Fleming Claverhouse Investment Trust plc and another v HMRC* [2007] ECR I-5517, [2008] STC 1180 ("*JP Morgan Fleming*"). The ECJ stated as follows at [40] – [42]:

“40. The United Kingdom government, for its part, argues that a wide interpretation of the words ‘special investment funds’ in art 13B(d)(6)

of the Sixth Directive must necessarily be combined with an interpretation of the phrase ‘as defined by member states’ according to which member states are given a wide discretion to select the funds eligible for the exemption.

5 41. At the outset it must be observed that the task of defining the meaning of the words ‘special investment funds’ does not in any way permit the member states to select certain funds located on their territory and grant them exemption and exclude other funds from that exemption. It follows from para 21 of this judgment that the terms
10 ‘special investment funds’ must be the starting point for the discretion conferred on the member states.

42. The interpretation according to which it is for the member states to select the investment funds which are eligible for the exemption and exclude others would negate the significance of the terms ‘special investment funds’ in art 13B(d)(6) whose objective is to prevent
15 discrepancies in the application of VAT to such funds.”

90. The ECJ went on to hold in *JP Morgan Fleming*, at [58] – [61], that Article 13B(d)(6) of the Sixth VAT Directive allowed Member States some discretion, in defining special investment funds, but did not prevent persons concerned from relying
20 directly on that provision where a Member State had not implemented it correctly.

91. The OU contended that, viewed objectively, the BBC has objects that are similar to the provision of education and, accordingly, it falls within Article 13A(1)(i) as an other organisation having similar objects. In this case, Group 6 of Schedule 5 to the Finance Act 1972 and Group 6 of Schedule 6 to the VAT Act 1983
25 designated schools, universities and some other institutions but not the BBC, for the purposes of the education exemption. The OU submitted that, if United Kingdom legislation fails to mention an organisation that may properly be described as "an organisation having similar objects", namely education, then the direct effect of Article 13A(1)(i) may be invoked, as happened in *JP Morgan Fleming*.

92. HMRC submitted that the United Kingdom’s VAT legislation in force in the relevant period defined organisations with similar objects for the purpose of the education exemption. It designated schools and universities defined by reference to the Education Acts. The BBC was not included in those definitions. HMRC
35 contended that, notwithstanding *JP Morgan Fleming*, the United Kingdom had a discretion to recognise or not to recognise the BBC as a body having similar objects to the required educational aim. The United Kingdom did not fail to define “other organisations” for the purpose of the education exemption but had simply not defined the BBC as an “other organisation” for that purpose. The fact that the BBC was the United Kingdom’s public service broadcaster and had an aim to educate, as well as
40 inform and entertain, did not mean that the United Kingdom had defined the BBC as an organisation with similar objects to the required educational aim. HMRC also submitted that the BBC did not have the provision of education, in the *Horizon College* sense, or a similar object as one of its objects.

93. I take the phrase "defined by the Member State concerned as having similar
45 objects" to mean that the Member State, in this case the United Kingdom, has

specified that the objects of the organisation shall or must be similar to the required educational aim.

5 94. I do not consider that the United Kingdom had defined, by which I mean specified, the objects of the BBC as similar to the required educational aim during the period 1 January 1978 to 31 July 1994. The Royal Charters referred to education in the context of the value of broadcasting as a means of disseminating information, education and entertainment. I consider the reference, which appeared only in the recital, falls a long way short of defining an aim or object of the BBC.

10 95. With the introduction of the VATA94, however, HMRC defined other organisations having similar objects for the purposes of the education exemption by reference to note 5 to Group 7 of Schedule 9. Note 5 defined a public body in terms that went beyond states, regional and local government authorities. In 1997, HMRC accepted that the OUPC was such a public body. As there had not been any material change in its constitution, the BBC (of which the OUPC was part) must have been
15 capable of being defined as one of the other organisations having similar objects before the introduction of the VATA94. It follows from *JP Morgan Fleming* that the United Kingdom was not permitted to select certain entities, which had the required objects, as defined organisations for the purposes of the exemption while excluding other entities which had the necessary objects. If the United Kingdom had not
20 implemented Article 13A(1)(i) of the Sixth VAT Directive correctly then the BBC could rely on it directly provided that the BBC had similar objects to the required educational aim.

25 96. I have already concluded that education is one of the aims of the BBC but not education as described by the ECJ in *Horizon College*. Education in the *Horizon College* sense is the required aim of bodies governed by public law but Article 13A(1)(i) only requires other organisations defined by Member States to have "similar objects". That wording suggests that the other organisations can have something other than "children's or young people's education, school or university education, vocational training or retraining" as described by the ECJ in *Horizon College* as their
30 objects. I have found on the evidence that, from its earliest days, the BBC had education as one of its objects. The object was not simply education in a broad sense of information provided to the general public but education aimed specifically at schools and adult further education colleges through targeted programmes designed to supplement the education of the pupils and students provided by the teachers. From
35 the conception of the OU, the BBC also had university education as one of its aims. The BBC's aim was not the provision of education in the *Horizon College* sense by the BBC but I consider that it was close enough to such education to be a similar object. In my view, the BBC had objects similar to the required educational aim.

40 97. My conclusion is that, although it does not provide or aim to provide education in the *Horizon College* sense, the BBC had education of a type similar to that described in Article 13A(1)(i) of the Sixth VAT Directive as one of its objects. I also hold that the BBC can rely on the direct effect of Article 13A(1)(i) for the same reasons as in *JP Morgan Fleming*. In conclusion, I consider that the services supplied by the BBC to the OU during the relevant period were exempt as services closely

related to university education supplied by an organisation, other than a body governed by public law, that had objects similar to the required educational aim under Article 13A(1)(i).

Decision

5 98. For the reasons given above, I hold that the services supplied by the BBC to the OU during the relevant period were exempt under Article 13A(1)(i) of the Sixth VAT Directive. Accordingly, the claim for repayment of amounts charged and accounted for as VAT by the BBC between 1 January 1978 and 31 July 1994, excluding the VAT period ending 30 September 1981, is upheld and the appeal is allowed.

10 **Rights of appeal**

99. 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 under 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
15 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.

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**GREG SINFIELD
TRIBUNAL JUDGE**

RELEASE DATE: 3 June 2013