TC03358

Appeal number: TC/2011/02251

VAT – Exemption – Company providing educational courses to students – succession of agreements between company and university – whether supply of educational courses by company exempt – whether courses supplied by eligible body – whether company a college of a university – VATA 1994 Sch 9, Group 6, Item 1, Note (1)(b) – EC Council Directive 2006/112, Art 132(1)(i) – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

SAE EDUCATION LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN CLARK
DR MICHAEL JAMES, MBE

Sitting in public at 45 Bedford Square London WC1B 3DN on 1-4 July, 31 October and 1 November 2013

Melanie Hall QC, instructed by Davenport Lyons, for the Appellant

Sarabjit Singh of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The Appellant ("SEL") appeals against a decision made by the Respondents ("HMRC") concerning supplies of education made by SEL, namely that SEL is not an "eligible body" for the purposes of Group 6 of Schedule 9 to the Value Added Tax Act 1994 ("VATA 1994"), and that its supplies of education are accordingly not exempt supplies for VAT purposes. SEL also appeals against various assessments made in accordance with that decision.

The background facts

2. The evidence consisted of fourteen lever-arched files of documents, including two witness statements given by Professor Leon Zybys Klich. In addition, Professor Klich gave extensive oral evidence. From the evidence we find the following background facts; we consider disputed evidence later in this decision.

3. The initials "SAE" are an acronym for "School of Audio Engineering". SEL is a member of the SAE corporate group, which trades worldwide as "SAE Institute" in the provision of education and training in audio and digital media technologies and production.

The development of SAE's UK operations

4. According to the SAE Institute website, "SAE London opened its doors in 1985". Since that date, the SAE Institute business in the UK has been carried on by a succession of different UK subsidiaries of SAE Technology Group BV ("SAEBV"). On 7 July 1995, SAE Educational Trust Ltd ("SETL") was incorporated as a company limited by guarantee.

5. On 1 January 1996, SETL entered into a Licensing Agreement with SAEBV (then named SAE Nederland BV). This enabled SETL to provide courses in audio engineering, film making, electronic music production and music business. Some of these courses led to a diploma qualification awarded by SAE, and following development of the relationship between SAE Institute and Middlesex University ("MU") as described under the next sub-heading, others led to a degree qualification validated by MU.

6. On 29 April 2009, SEL entered into a licensing agreement with SAE Licensing AG. (No copy of that agreement was included in the evidence.) On 30 April 2009, the licence granted to SETL by SAEBV was terminated. On 1 May 2009, SETL and SEL entered into a "Sale of Business Agreement", under which SETL sold its assets and its business (defined as "the business of operating private colleges for audio engineering and digital film training") for a purchase price specified as £9,208.43. SETL subsequently went into liquidation. From that point onwards, the business has been carried on by SEL.

Development of the relationship with MU

7. Since 1998 SAE Institute has provided education in the UK in collaboration with MU. The relationship between SAE Institute entities and MU has been governed by various agreements between them, as described below.

8. These agreements fall into three categories:

(1) those describing the general nature of the relationship;

(2) those providing for validation of SAE programmes;

(3) those providing for accreditation of SAE.

9. The first agreement between an SAE entity and MU was the 1998 Memorandum of Co-operation, signed and dated 18 January 1998. (We refer to all such Memoranda as "MoCs".) This fell within category (1) above. It stated expressly that it was a legally binding agreement. It provided for BA Honours Recording Arts and BA Honours Multimedia Arts programmes to be taught by the named SAE entity, SAE Technology College ("SAETC"), on a full-time basis at specified campuses as "validated collaborative programmes" of MU. Overall responsibility for the programmes was retained by MU, with day to day direction undertaken by SAETC's Link Director and Programme Co-ordinators.

10. Under the heading "Admissions", the 1998 MoC provided:

> "a) The admission requirements for the programme shall conform to the University's general entrance requirements (or equivalent overseas) and any requirements specific to the programmes agreed at validation or subsequently.
>
> b) Recruitment and admission of students shall be undertaken by the College."

11. Under the heading "Programme Monitoring and Management", it provided:

> "The programme shall be subject to the on-going monitoring and review procedures of the University in order to ensure that the administration, staffing, academic validity of the programme and standards achieved are equivalent to those of the University and that the quality of student experience is consistent with that of University students following similar programmes."

12. Detailed provisions of the 1998 MoC governed the approval of programmes, which SAETC was permitted to launch as soon as any conditions set at validation had been met. The campuses approved to offer the programmes covered by the MoC were London, Munich and Sydney.

13. A further MoC was entered into between "SAE" and MU on 24 March 1999. This related only to the provision of work-based learning courses.

14. With effect from 1 June 2003, a replacement for the 1998 MoC and subsequent annexes was entered into between "SAE Institute" and MU; it covered the validation of three BA Honours Degree programmes.

15. In 2003, a further MoC relating to MA Creative Media Practice was entered into between SAE Institute and MU. This MoC replaced the one signed on 24 March 1999, and took effect from 1 September 2003. The programme offered was initially to be offered at SAE Institute's Byron Bay Centre in Australia.

16. Another agreement entered into in 2003 between MU and SAE Institute was a Partnership Agreement. This was a higher level and broader form of agreement relating to the relationship between SAE and MU, as opposed to the more detailed documentation such as the MoCs dealing with provision for particular programmes. The 2003 Partnership Agreement recorded the intention of the parties to work in partnership to develop, validate and award undergraduate and taught graduate degrees of MU for students of SAE Institute at its Centres world-wide. Each such Centre was to be subject to approval by MU. It was intended that within five years MU would consider an application from SAE Institute for MU accreditation "to validate for itself programmes leading to undergraduate awards of the University". The agreement was subject to review after six years, with the expectation that it would be renewed for a further six years.

17. That Partnership Agreement also provided for the establishment of a Joint Liaison Group consisting at minimum of the Chief Executive of SAE Institute and its Academic Director, and of the Deputy Vice-Chancellor of MU and the MU SAE link manager. Meetings, whether actual or by video link, were required to take place at least twice a year. (We set out under a separate heading the details of various meetings of this group and its successors under later agreements.)

18. The MoC which took effect from 1 April 2007 provided for the validation by MU of three SAE programmes. These were BA (Hons) Applied Multimedia, BA (Hons) Interactive Animation, and BSc (Hons) Games Programming.

19. A further MoC took effect from 1 September 2009; it was annotated as having been signed for SAE Institute by Professor Klich on 12 November 2009, and for MU by Dr Terry Butland, the Deputy Vice-Chancellor (International) of MU, on 3 November 2009. In evidence, Professor Klich described this MoC as the consolidation in a common framework of the programmes previously validated in 1998 and 2007, ie BA/BSc (Hons) Audio Production, BA/BSc (Hons) Digital Film Making, BA/BSc (Hons) Web Development, BA (Hons) Interactive Animation, and BSc (Hons) Games Programming.

20. Paragraph 1(c) of the 2009 MoC provided:

> "In the event that SAE is granted accredited status, as opposed to validated status, at any time during the operation of this agreement, then this agreement will be reviewed within three months from the granting of accreditation in order to ensure effective operation under the provisions of accreditation."

21. With effect from 1 July 2009, SAE Institute and MU entered into a further Partnership Agreement, the 2003 Partnership Agreement having run for a six year period. The 2009 Partnership Agreement indicated the parties' intention that, within

12 months of its commencement date, MU would consider an application from SAE Institute for MU accreditation for SAE to validate for itself programmes leading to undergraduate awards of MU.

22. That agreement provided for twice-yearly meetings of a Steering Group consisting of two senior executives from each partner; extracts from notes of meetings of that group are considered below.

23. On 22 September 2010, Dr Butland for MU and Professor Klich, described as "Director, Academic Affairs, SAE Institute Global Board", signed an Instrument of Accreditation between MU and SAE Institute. This accredited SAE Institute to validate, monitor and review programmes of study leading to taught undergraduate awards of MU in Recording Arts, Film Making, Digital Film Animation, Multimedia Arts and related areas.

24. A further MoC was entered into on the same date, referring to the Instrument of Accreditation, and setting out detailed arrangements for each party to provide the other with relevant reports and documentation in pursuance of the Instrument of Accreditation.

25. With effect from 1 January 2011, a further MoC was entered into between MU and SAE Institute. This provided for the validation of SAE Institute's MA/MSc Professional Practice (Creative Media Industries) Programme. As this was at Masters level, it was not covered by the 2010 Instrument of Accreditation.

26. In August 2011, following a proposal made by Professor Klich to MU on 12 July 2011, "SAE Education, UK" and MU entered into an agreement named the "Special Associate College Agreement" ("SACA"). This recorded that MU and SAE Institute's UK entity had agreed a long-term partnership to strengthen further the degree of collaboration and interdependency in the UK, and:

> "to designate a higher level of integration of SAE-UK operations with those of [MU] to ensure that enrolled students of SAE-UK are in every way possible also considered fully as students of [MU]."

Meetings of the Joint Liaison Group and the Steering Group

27. At an earlier "Joint Progress Review and Planning Conference" meeting in Sydney in February 2002, a group comprising senior representatives of SAE Institute and MU had recorded their recommendation that SAE Institute should be granted "associate college" status; this was left for Michael Bridger, the link director as between SAE Institute and MU, to activate with Ken Goulding of MU, the Deputy Vice-Chancellor of MU.

28. The notes of the meeting of the MU/SAE Institute Joint Liaison Group held on 17 December 2003 record, in relation to the preparation for MU accreditation of SAE, that an audit of MU collaborative provision was to take place in mid-2005 and that further progress towards accreditation would be unwise until (i) the audit had taken place and (ii) the policy of QAA (the Quality Assurance Agency for Higher

Education) had been further clarified. Professor Clive Pascoe of SAE Institute referred to MU accreditation being less of a priority in the context of what he referred to as the recent HEI (Australia) approval.

29. At the meeting of that Group on 3 September 2004, it was noted that in the context of the forthcoming QAA audit of collaborative provision and QAA concerns about accreditation, any progress on the eventual MU accreditation of SAE would be delayed until mid-2005 at the earliest. At the subsequent meeting on 3 May 2005, it was noted that progress with MU accreditation of SAE still depended on the outcome of the (then) current QAA audit; if this was favourable, discussion would be resumed.

30. At the subsequent meeting on 15 June 2006, SAE asked whether their London campus could be given a more official status by MU, such as being made an Associate College. Dr Butland agreed to look into this and related questions. At the following meeting on 17 January 2007, reference to validation was limited to the validation of "the QANTM degrees" (ie degrees from a grouping of Australian colleges); there was no mention of the question of associate college status.

31. The next meeting on 21 June 2007 considered the successful validation of QANTM degrees for three overseas centres, but made clear that such degrees could not yet be offered in London. A note at the end of the meeting note recorded that SAE had raised the question of SAE applying for accreditation by MU, and that one of the MU representatives had said that this should be made crystal clear.

32. The discussion at the meeting on 20 November 2007 included questions of practical management of "the SAE – Middlesex link", but made no other mention of the relationship. At the following meeting on 9 April 2008, under the heading "Managing the Link", a paper prepared by Professor Michael Bridger (Link Director as between SAE and MU) was considered; the note of the meeting referred to "the current mis-match between CLQE requirements and the kind of QA procedures appropriate for SAE as a mature and long-standing partner of the University".

33. At the meeting on 1 July 2009, Dr Butland considered the question of an accreditation relationship with MU. MU had only one accreditation partnership, Oak Hill Theological College. He referred to the timing of any application process involving SAE. The summary of the terms of agreement stated:

> "TB agreed to support SAE's proposal to try for institutional accreditation approval. The intention is to consider an application from the SAE Institute within 12 months from the commencement date of the new agreement."

The notes also recorded the parties' agreement to renew the partnership agreement for another 6 years.

34. The note of the meeting on 22 June 2010 stated:

> "It was agreed that more could be done to raise awareness of SAE as an Associated College of MU, and increase the SAE student's identity with Middlesex".

The VAT dispute

35. During 2008, correspondence and discussions as to the VAT status of SETL occurred between HMRC and SETL and its advisers. As a result of the transfer of SETL's business to SEL on 1 May 2009, HMRC's enquiries were subsequently, but not immediately, re-directed to the status of SEL; HMRC only became aware of the transfer at a later stage. Following further exchanges between the parties, HMRC issued a review decision dated 24 February 2011 upholding an earlier decision by them dated 30 November 2010 that SEL was not an "eligible body" within the meaning of Note 1(e) to Group 6 Sch 9 VATA 1994, and that therefore its supplies of education/training were not exempt from VAT. On 21 March 2011, SEL appealed against HMRC's decision.

36. In addition, HMRC issued the following assessments on SEL. The first, dated 29 July 2011, was for the VAT periods from 1 May 2009 to 28 February 2010. The second, dated 10 August 2011, was for the VAT period 1 March 2010 to 31 May 2010. HMRC also imposed a penalty dated 10 August 2011 in respect of SEL's failure to notify its liability to registration at the proper time.

37. On 23 August 2011, SEL appealed against the penalty assessment. On 29 August 2011, it appealed against the July 2011 assessment. SEL's Notice of Appeal against the August 2011 assessment was dated 30 August 2011.

38. In a letter to HMRC dated 23 August 2011, SEL's accountants raised an additional ground of appeal in relation to the July 2011 assessment, namely that SEL met the requirements of Note 1(b) to Group 6 Sch 9 VATA 1994. In their letter to HMRC dated 30 August 2011, they raised the same additional ground in relation to the August 2011 assessment.

39. On 2 March 2012, a Direction was issued consolidating all four appeals.

40. The July 2011 assessment was initially in the sum of £383,781. The August 2011 assessment was initially in the sum of £475,426. The penalty sum was £38,378. Following receipt by HMRC of further input tax evidence, the two assessments were subsequently reduced. The July 2011 assessment was reduced to £320,412. The August 2011 assessment was reduced to £451,875.

41. On 5 February 2013, HMRC issued a further assessment on SEL in respect of the periods 05/11 to 02/12. The net amount of VAT calculated by HMRC to be due in respect of these periods was £515,470.12; this was subject to the addition of interest. On 6 March 2013 SEL gave Notice of Appeal in respect of this assessment. On 2 May 2013, the Tribunal directed that this further appeal was to be consolidated with the original four appeals.

42. Despite continuing discussions between HMRC and SEL and its advisers, no agreement as to the VAT treatment of SEL's supplies could be reached, and the consolidated appeal proceeded.

The relevant legislation

43. The relevant European law provisions are Articles 131 and 132 of the Principal VAT Directive 2006/112/EC ("PVD"):

> "**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.
>
> **Article 132**
>
> 1. Member States shall exempt the following transactions:
>
> . . .
>
> (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;"

44. The relevant UK provisions are in Group 6 Sch 9 VATA 1994:

> "Item No
>
> **1**
>
> The provision by an eligible body of—
>
> (a) education;
>
> (b) research, where supplied to an eligible body; or
>
> (c) vocational training.

Note 1(b) to Group 6 provides that an "eligible body" for this purpose includes:

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

Arguments for SEL

45. The first part of the hearing preceded the release of the Upper Tribunal's decision in *London College of Computing Limited v Revenue and Customs Commissioners* [2013] UKUT 0404 (TCC), referred to in this decision as "*LCC*". For this reason, Mrs Hall's initial opening of her argument did not take account of that decision, which she dealt with in the course of her legal submissions at the resumed hearing.

46. She referred to Articles 131 and 132 of the PVD. The effect of Article 131 was to place an obligation on the UK to lay down conditions. It should be assumed that the UK had discharged that obligation. Article 132(1)(i) set out the terms of the

exemption. It was appropriate to look at the previous and next sub-paragraphs. The word "shall" at the beginning of Article 132 should be emphasised. Article 132 made a distinction between "supply" and "provision"; the first use of the latter term was in sub-paragraph (c), and it was used in sub-paragraph (i).

47. Mrs Hall commented that the services exempted by sub-paragraphs (g) and (h) were those provided by bodies recognised by member states as being "devoted to" social wellbeing; this was significant in the context of the "fundamental purpose" test. SEL contended that the HMRC view was misplaced; the Council would have made an express reference to fundamental purpose in sub-paragraph (1)(i) if it had intended this to be a requirement.

48. Sub-paragraph (i) set out a series of categories of education. This was significant when considering the UK domestic provisions; these were not sub-divided but instead referred to an exempt generic category of education. The UK had chosen to give effect to the sub-paragraph through the definition of public bodies. SEL's submission was that the Council obliged member states to discriminate. This route informed the construction applicable to the domestic UK legislation, and the approach to the evidential factual matrix. This was pivotal to SEL's case.

49. Sub-paragraph (l) singled out non-profit-making organisations, whereas this was not the case in relation to the exemption for education in sub-paragraph (i). HMRC appeared to take the view that commercial status debarred an organisation from qualifying for the exemption. This was inconsistent with the Opinion of the Advocate General presented on 20 June 2013 in relation to the *MDDP* case (*Minister Finansów v MDDP Sp z o.o Akademia Biznesu, Sp. komandytowa* (Case C-319/12)), of which Mrs Hall provided an unofficial translation. The essence of this Opinion was that a commercial organisation could not be debarred from the benefit of the exemption.

50. The position in relation to sub-paragraph (m) was similar to that in sub-paragraph (l). Sub-paragraph (n) did not constrain member states by reference to the aims pursued by the public law bodies or cultural bodies mentioned. Mrs Hall contrasted sub-paragraph (i); it referred to "similar objects". This showed the importance of tethering to one or more types of education. Sub-paragraph (p) did not require any particular aim.

51. Article 133 conferred on member states a discretion to make granting of exemption under various sub-paragraphs of Article 132(1) subject to one or more of four conditions. The UK had chosen not to exercise the discretion in Article 133(a). The principal reason why the UK had so chosen was Note 1(e) to Group 6 of Sch 9 VATA 1994; this was a freestanding route to exemption. It did not tether itself to an individual case. There were therefore two routes to exemption, Note 1(b), or 1(e). HMRC could not deny a 1(e) exemption by reference to 1(b). Mrs Hall submitted that it was not open to the Tribunal to construe the EU law in that way.

52. She referred to Article 13(2)(a) of the predecessor Directive, the Sixth Directive (77/388/EC). The domestic legislation concerned supplies of goods or services "in the United Kingdom". Much had been made by HMRC of the fact that SAE Institute

operated elsewhere as well as in the UK. Mrs Hall referred to the UK legislation; the only question concerned the making of supplies of goods or services by SEL in the UK. The UK had not imposed any regulations under primary legislation permitting discrimination against an entity engaged in operations both in and outside the UK.

53. In Group 6 of Sch 9 VATA 1994, the UK had not broken down "education" into separate categories; it was a generic descriptor. SEL's argument was that the respective Directives had been implemented by singling out different bodies. The Notes to Group 6 defined "eligible body" by reference to pieces of legislation; only a certain number of statutes were mentioned.

54. The UK had implemented the university education exemption by using a definition by reference to similarity to an institution. Mrs Hall submitted that the UK, or HMRC, could not use its interpretation to narrow down the exemption beyond that of providing similar objects. HMRC had historically been exercised by absence of an actual degree; to impose such a condition would be inconsistent with Article 132, which required similarity of objects. It was notable that the consideration by the High Court of the case of *Customs and Excise Commrs v School of Finance and Management Ltd* [2001] STC 1690 (referred to in this decision as "*SFM*") had not involved any profound analysis of the European basis for Note 1(b). So far as the factors listed in that case were not consistent with EU law, the Tribunal should not decide SEL's appeal by reference to them.

55. Some of the bodies listed were governed by public law, and some were "similar"; their aim depended on the context.

56. Note (1)(d) was particularly significant: it referred to a public body of a description in Note (5) to Group 7 Sch 9 VATA 1994. Note (1)(d) "nodded" at Article 132 PVD. Mrs Hall referred to s 41(6) VATA 1994 by way of comparison. All the bodies in Note (1) were regarded as similar to the providers of all of the services mentioned in Article 132(1)(i) PVD. No conditions had been attached by the UK; such conditions could only have been applied to bodies not governed by public law.

57. Note (1)(e) to Group 6 Sch 9 VATA 1994 necessarily applied to some bodies governed by public law and some not so governed. The UK mechanism did not fit with the exercise of a discretion and therefore did not amount to such an exercise.

58. Mrs Hall referred to Article 132(2) PVD. This related to Article 132(1)(o). Some of the suppliers of transport services for sick and injured persons were within public law, and some were not.

59. When considering Note (1)(b) to Group 6 Sch 9 VATA 1994, the word "any" should be underlined. The High Court in *SFM* at [21] had accepted that the words "any college" were not tied to those within the Education Acts. Mrs Hall submitted that Notes (1)(a) and (c) should be contrasted with Note (1)(b). Parliament was giving effect to the part of Article 132 PVD which concerned university education. It had chosen this route by which to do so.

60. The importance of this route was twofold. The first question raised was whether SEL was "similar to" a university. The second was whether SEL was providing a university education. It was implicit from the way in which the UK had implemented Article 132 that the body in question must similarly provide for a university education; Notes (1)(a), (c), (d), (e) and (f) did not confer the exemption for such a body. The UK had singled out university education by using the words "a college . . . of such a university".

61. The UK had chosen to define vocational training in Note (3) to Group 6; it had not chosen to do so in the case of *university* education. Mrs Hall referred to *Brutus v Cozens* [1973] AC 854, in which Lord Reid had said:

> "The meaning of an ordinary word of the English language is not a question of law. . . . It is for the tribunal which decides the case to consider, not as law but as fact, whether in the whole circumstances the words of the statute do or do not as a matter of ordinary usage of the English language cover or apply to the facts which have been proved."

The position was similar in relation to Note (4).

62. The first instance Tribunal in *School of Finance and Management* (2001) VAT Decision 17182 ("the *SFM* Tribunal Decision") had reached the same conclusion, that the UK had not chosen to define the notion of a college of a university; it should be noted that this was constrained by Article 132 PVD.

63. The UK's obligations in relation to construction of European legislation, in the context of the principle in *Marleasing*, showed that the UK had taken the view that a college was similar to a university. The UK had satisfied itself that a college must have similar objects to those of a university, ie the provision of university education. The objects must be similar; Mrs Hall commented that Cambridge University was not a body governed by public law.

64. Reference back to the Finance Act 1972 ("FA 1972") showed that the UK had shifted its position in this context. Mrs Hall referred to Group 6 Sch 5 FA 1972 Items 1(a) and (b):

> "1. The provision of education if—
>
> (a) it is provided by a school or university; or
>
> (b) it is of a kind provided by a school or university and is provided otherwise than for profit."

The definition of a university was set out in Note (3):

> "(3) "University" includes a university college and the college, school or hall of a university."

65. The nexus in the current legislation was much looser. The significant reference in Note (1)(b) to Group 6 Sch 9 VATA 1994 was to "college of . . . a university. SEL's case was that it could earn the word "of" in that expression.

66. In *SFM* at [14] the High Court had regarded legislative history as significant. [We should comment that the paragraph cited recorded the arguments put forward on behalf of SFM, and did not specifically comment on those arguments.]

67. Mrs Hall referred to The Education (Listed Bodies) (England) Order 2010 (SI 2010/2614), which listed SAE Education under Sch 1 Part 1 ("Bodies Providing Courses in Preparation for a Degree"). SAE Education was not a legal entity; it was a trading name for a global group involved in the provision of courses delivered through domestic entities in the respective jurisdictions concerned. The only entity in the UK was SEL; this was to be contrasted with the position in Spain.

68. A predecessor Order, The Education (Listed Bodies) (England) Order 2007 (SI 2007/2687), had also referred to SAE Institute, at a time when the UK entity involved was SAE Educational Trust Ltd ("SETL"). The position under the corresponding Order made in 2004 (SI/2004/2753) was similar. The 1999 Order (SI 1999/834) had listed "SAE Technology College (London)".

69. Mrs Hall emphasised that the trading name for the SAE corporate group had changed over the years. The present appeal was concerned only with the UK entity through which courses were provided to students. For the relevant periods, this was SEL. The only issue was whether SEL's supplies were exempt or taxable. In the case of *HIBT Ltd v Revenue and Customs Commissioners* ((2007) VAT Decision 19978) the Tribunal had not been troubled by the difference in the corporate name. Mrs Hall commented that from the perspective of students, their experience was the same whatever the legal entity involved. It had not been specified that the same corporate body had to be involved.

70. The case of *Commissioners for Customs and Excise v Reed Personnel Services Ltd* [1995] STC 588 at 594-595 showed that the contractual position was not determinative of the VAT position. This was significant in considering the validation process; this did not appear from the agreements, which were high-level global agreements not showing details for particular jurisdictions.

71. *Pilgrims Language Courses Ltd v Customs and Excise Commissioners* [1999] STC 874 had been cited in *SFM* and the *HIBT* case. *North of England Zoological Society v Customs and Excise Commissioners* [1999] STC 1027 at 1030*c*, *e*, and *f* reminded those involved in construing the terms of the exemption of the need to regard the educational exemption through the prism of the EU legislation. Mrs Hall submitted that SEL's interpretation did not distort the meaning of the domestic legislation. SEL was not relying on proposition (2) in the passage cited by Carnwath J from Mummery LJ's judgment in the *Civil Service Motoring Association Ltd* case. SEL submitted that HMRC had failed to construe the domestic legislation consistently with the EU legislation, which "took centre stage".

72. SEL argued that HMRC had set the bar too high for it. Mummery LJ's third proposition, that the exemptions were to be interpreted strictly, but that the court should not adopt a construction which was not supported by the wording of the provision in question, raised issues concerning the position of SEL students. HMRC's

approach was not EU compliant, as it did not have regard to the "similar" element of Article 132 PVD. SEL submitted that in the correspondence, HMRC had fallen into a trap in a way not supported by the wording of the provision. The UK had concluded that colleges have similar objects; as shown by Article 132, similarity was all that SEL had to establish. Mrs Hall referred to *Pilgrims* at 1032, third and fourth paragraphs.

73. The *SFM* Tribunal Decision raised comparable issues to those concerning SEL. However, SEL's primary case was that the UK had implemented the PVD, but that there was a question of interpretation. Mrs Hall made comparisons between the matters considered by the Tribunal in the *SFM* Tribunal Decision and SEL's position.

74. As already submitted, the focus in the High Court's consideration of *SFM* had not been on the European aspect. Mrs Hall made detailed submissions based on Burton J's judgment.

75. In *HIBT*, the *SFM* factors had featured very prominently. Mrs Hall submitted that if HIBT had been shown to be entitled to exemption, the same should be the case for SEL. She made detailed comparisons between the factual position of HIBT and that of SEL.

76. Mrs Hall referred to *Revenue and Customs Commissioners v Board of Governors of the Robert Gordon University* [2008] STC 1890 at [25], in respect of the approach to contractual provisions, and [30] as to the need to look at the whole circumstances and not merely the parties' written agreements.

77. *Vodafone 2 v Revenue and Customs Commissioners (No 2)* [2009] STC 1480 at [37] (p 1493*e*) summarised the principles to be followed in construing domestic legislation consistently with Community law obligations. Mrs Hall submitted that, in so far as HMRC sought to add words to EU legislation, these might be impermissible glosses. The decision of the First-tier Tribunal in *Finance & Business Training Ltd v Revenue and Customs Commissioners* [2012] UKFTT 382 (TC) (TC02066), on which HMRC sought to rely, was due to be considered on appeal to the Upper Tribunal later in 2013; it should therefore be regarded with caution pending the decision of the Upper Tribunal.

78. Mrs Hall referred to *The Open University v Revenue and Customs Commissioners* [2013] UKFTT 326 (TC) (TC02729). At [41] the parties' submissions relating to the status of the BBC were set out, and at [46]-[47] Judge Sinfield referred to Sir Andrew Morritt C's analysis, in the case of *University of Cambridge v HMRC* [2009] EWHC 434 (Ch), of EU and domestic decisions concerning the meaning of "body governed by public law". In his decision at [68], Judge Sinfield concluded that the BBC was not a body governed by public law for the purposes of Article 13A(1)(i) of the Sixth VAT Directive (ie the provision replaced by Article 132(1)(i) PVD).

79. In the same case at [88], on the question whether the BBC was an organisation defined by the UK as having similar objects, Judge Sinfield set out OU's alternative contention that the exemption was not precluded from applying in the absence of such

a definition. Mrs Hall submitted that the definition process was not a legislative one, and that it had been discharged in the context of defining a college of a university. Universities could only be providing university education. HMRC might refer to "education" without distinction; this would be wrong. The requirement was to have objects similar to those of the relevant form of educational entity. The *JP Morgan Fleming* case referred to in *The Open University* at [89] recognised the importance of European vires as the key point of the exercise. Direct effect was required only if Note (1)(b) could not be given a correct EU construction. Mrs Hall explained that this point was only being raised in case the Tribunal were to decide that EU compliant construction was not possible.

80. In relation to *The Open University* at [93], the First-tier Tribunal was not looking at a specific type of education (ie university education). Mrs Hall referred to [95]-[96], the latter being very important; Judge Sinfield's conclusion was set out at [97]; this was based on "similar objects". Mrs Hall emphasised that *The Open University* made the all-important distinction between public law and other. At the time of *SFM*, the two were being conflated. As a result, there were dangers in "cutting and pasting" the factors listed in *SFM*.

81. Mrs Hall referred to *Becker v Finanzamt Münster-Innenstadt* [1982] ECR 53; this was only relevant to the question of direct effect, if this was required. SEL reserved its position on this issue.

82. In *Tolsma v Inspecteur der Omsetbelasting Leeuwarden* (Case C-16/93), [1994] STC 509, the CJEU had emphasised at [14] that for a supply of services to be regarded as made for consideration and therefore taxable, there had to be a legal relationship between the provider of the service and the recipient involving mutual performance. Mrs Hall stressed the nature of the supplies made by SEL to students pursuant to a legal relationship. The only issue was whether the supplies were taxable or exempt.

83. The CJEU case of *Blasi v Finanzamt München I* (Case C-346/95), [1998] STC 336, had been cited in *SFM* at [14] and in *HIBT* at [40]. Mrs Hall referred to the CJEU's judgment at [21]. The purpose of Article 132 PVD was to exempt a similar provision; it would be wrong to exclude its application by reference to a higher and tougher standard. The following three paragraphs of *Blasi* showed that organisations whose activities were similar could not be denied the exemption on the basis that their supplies were not identical to those specified in the relevant provision of the PVD. The case concerned derogation, but the principle was the same.

84. Mrs Hall referred to the judgment of the CJEU in *Marks & Spencer plc v Customs and Excise Commissioners* (Case C-62/00), [2003] QB 866 at [27] and [31]. She emphasised the words of the CJEU at [27], which made clear that reliance could also be placed on a directive ". . . where the national measures correctly implementing the directive are not being applied in such a way as to achieve the result sought by it." She made submissions in respect of the interpretation being applied by HMRC. She referred to the judgment at [28] and [31].

85. Mrs Hall made submissions as to fiscal neutrality, based on *JP Morgan Claverhouse Investment Trust plc and another v Revenue and Customs Commissioners* (Case C-363/05), [2008] STC 1180 at [38]-[49]. This was relevant to any attempt by HMRC to discriminate between universities and colleges of universities. As long as a body was a college "of" a university, it was entitled to exemption. It was inappropriate to suggest that the taking of diplomas deprived the body of exemption. It was not neutral to treat universities and colleges differently. She submitted that the effect of *Rank Group plc v Revenue and Customs Commissioners* (Joined Cases C-259/10 and C-260/10), [2012] STC 23, was similar.

Arguments at the resumed hearing

86. Mrs Hall made further legal submissions at the resumed hearing. Other than her submissions relating to the decision of the Upper Tribunal in *LCC*, which we consider later with the parties' submissions on facts and the question of applying what are referred to as the "*SFM* factors", we set out her submissions in the following paragraphs.

87. Mrs Hall re-emphasised the summary in *Vodafone 2* at [37] of the obligation owed by the English courts (and thus on this Tribunal) to construe UK legislation such as Item 1, Group 6 Sch 9 VATA 1994 consistently with EU law. In the present case the relevant EU law comprised principles such as that of legal certainty and the VAT principle of fiscal neutrality, as well as Article 132(1)(i) PVD.

88. She submitted that in consequence it did not matter that, for example, the words "university level education" did not appear in Item 1. Article 132(1)(i) obliged all Member States to exempt a very specific type of education, namely university education, which was quite distinct from children or young people's education, school education, or vocational training or retraining.

89. Since the entity claiming the exemption need not even be a university, it was clear that the reference to university education could not be limited to education provided by *an institution* (her emphasis) which was recognised in any given Member State or States as a university. A "university" was not an EU concept; Mrs Hall referred to the changes following the 1993 reforms to higher education. Such changes would necessarily vary between Member States.

90. The fact that Article 132(1)(i) left to each Member State the recognition of the entity entitled to claim the exemption for education also supported the proposition that the EU concept of university education was not limited to education provided *by* universities (her emphasis). "University education" could therefore refer only to education which was at a university level or standard. By necessary implication, that standard was higher than the level or standard of education received by children or young people, or that provided by a school.

91. It followed that a construction of a "college of a university" in Note 1(b) which required a college of a university to provide the same education as that provided by

the university of which it was a college, or by universities in general, would not be EU compliant.

92. The same conclusion could be reached by a different route. Article 132(1)(i) obliged Member States to exempt education of a university level or standard when it was provided by bodies governed by public law, if those bodies had the provision of university level education as their aim. Bodies (such as SEL) which could not be so described must still be entitled to claim the exemption for the education which they provided if they had a sufficient nexus with a university. However, the objects of such bodies only needed to be similar to the provision of university level education.

93. It had to be presumed that a "college of a university" under Note 1(b) was regarded by Parliament as being an organisation which had similar objects to bodies governed by public law which had the provision of university level education as their aim. To assess the position of SEL by reference to the question whether what it provided was identical to that provided by MU, or universities in general, was to impose too high a standard.

94. Parliament had chosen not to define "education" or "college" or "university". It had chosen to define other similar concepts such as "a school", "vocational training", "examination services", "youth club" and "public body" at other points within Sch 9 VATA 1994. The concept of a "college of a university" was therefore only constrained by the everyday meaning of such a description and by the EU law context as Mrs Hall had described.

95. It was the provision of university level education, rather than the granting of an award, which was exempt under Article 132. Further, no Article 133 condition had been applied in the UK legislation to the effect that the exemption only applied to the award of a degree. Moreover, it was implicit from Article 132 that university level education could be provided by more than one type of organisation; in addition, universities had their own free-standing exemption under Note 1(b).

96. We deal with Mrs Hall's submissions on questions of fact later in this decision, together with those made by Mr Singh.

Arguments for HMRC

97. Mr Singh referred to Articles 131 and 132(1) PVD. The latter replicated in materially identical form the exemption previously contained in 13A(1) of the Sixth Directive, on which the domestic legislation (ie Item 1 of Group 6 Sch 9 VATA 1994) had been based.

98. The interplay between Article 132(1)(i) and Note 1(b) to Group 6 Sch 9 VATA 1994 had recently been considered by the Upper Tribunal in *LCC*. We consider Mr Singh's submissions on that decision below, together with those of Mrs Hall.

99. The issue in the present appeal was whether SEL was, in the periods covered by the assessments, and in subsequent periods to date, a college of MU. The starting

point in considering that question was the judgment of Burton J in *SFM*. Mr Singh referred to the list of eight features put forward by HMRC in that case, and to the other seven put forward on behalf of the taxpayer involved in that appeal. We consider below the question of the relevance of those factors following the Upper Tribunal's decision in *LCC*.

100. HMRC's overriding submission was that at all times, SEL was not sufficiently integrated with MU so as to be a college of MU.

101. As the majority of Mr Singh's submissions were linked to questions of fact, we consider them below.

Discussion and conclusions

102. Before reviewing the applicable principles, we first consider the parties' submissions on *LCC*. The paragraph numbers referred to in these submissions are those of the Upper Tribunal's decision in *LCC*.

Mrs Hall's submissions on LCC

103. Mrs Hall emphasised that the points of law in that case had been driven by the particular fact pattern in that case; these facts differed from those in SEL's case. The distinction made at [10] between the "aim" of public bodies and the "similar objects" required of other organisations was precisely to which she had referred in her original opening. In relation to [13], the test of the body's "objects" was by reference to objective criteria. On the same basis as she had argued at the July hearing, at [17] Judge Hellier had referred to the exercise by member states of the discretion under Article 132 PVD being circumscribed by its purpose and the principles of equality and neutrality. In the same way, the statement at [18] that in specifying the requirement of "similar objects" in Article 132(1)(i) the PVD was directing attention to the nature or quality of the education provided by the relevant body was as she had originally submitted in opening SEL's case. This was also the position in relation to [20] and [29], and SEL relied in the same way on [36] to [39].

104. In the context of [44] and [45] dealing with the need for the test to apply at the time the determination was made rather than having to look at future events, SEL had made submissions on legal certainty and neutrality. On [47](2) line 20 relating to *SFM*, SEL accepted that the *SFM* factors had to be considered, but certain items in the list were non-EU compliant.

105. Mrs Hall described the fact pattern of *LCC*, as described from [48] onwards, as a "gulf away from" the facts of SEL's case for which the evidence was very substantial. She made submissions as to facts showing differences from the *LCC* findings recorded at [48]-[55] and considered in subsequent paragraphs of Judge Hellier's section of the decision. Judge Hellier's conclusions at [81] and [82] had been predicated on the particular facts.

106. In relation to the different approaches taken by Judge Hellier and Judge Bishopp, as mentioned by the latter at [84] and explained in subsequent paragraphs, Mrs Hall submitted that this was "a distinction without a difference". The comment made at [89] relating to the failure on the part of the First-tier Tribunal to examine the terms of particular contracts did not arise in SEL's case, as SEL was asking for a detailed review of the relevant documentation here. She made further distinctions between the factual position in relation to SEL and that in *LCC* as considered by Judge Bishopp.

107. Mrs Hall stressed that the Upper Tribunal's decision in *LCC* was notable in that the reasoning was anchored in the EU cases. In her submission, it was now clear that it was wrong to follow the *SFM* factors.

Mr Singh's submissions on LCC

108. Mr Singh drew our attention to various paragraphs of *LCC*, and made a number of submissions. By reference to [12] and [16], the term "similar objects" in Article 132 PVD did not require exclusively educational objects, but the more diverse a body's objects, the more difficult it would be for it to qualify as having similar objects. The enquiry into the body's objects could encompass enquiry into what it actually did as an objective indication of the ends to which its actions were directed. The test imposed by the PVD was an objective one, and subjective intention was not necessarily an "object" (*LCC* at [13]).

109. As indicated at [17], Article 132 PVD gave Member States a discretion to define bodies other than those governed by public law whose supplies of education might benefit from exemption. The "similar objects" requirement directed attention to the quality or nature of the education provided by the relevant body; a member state was entitled to require that the nature or quality was of a kind provided by a body which had its aims governed by public law. As shown at [18], [30] and [85], the limitation of the exemption to an entity which was "of" a university was justly directed to that purpose.

110. Showing "similar objects" was one of the facts which had to be established before a body could succeed in showing that it was a college of a university ([86]). Further, satisfying the "similar objects" requirement was not enough by itself; it was also necessary to show that the body was sufficiently integrated with the university ([32] and [92]).

111. The "fundamental purpose" test did not replace the "similar objects" test ([37]), but had something in common with factor (ix) in *SFM* ([38]), which was whether a college had a "similar purpose" to that of the university. If the fundamental purpose of the body was to provide university education, it would satisfy the similar objects condition; if it was not, then the body might not do so ([47](1)).

112. On the question of integration, the link must be sufficiently substantial; it was necessary for a substantial portion of the body's activities to be part of the life of the university and for the university to play a part in the life of the body ([29]). Each must

be involved in the other, and investigation of the strength of the link must encompass both what the body did and how it or its activities were linked with the university ([47](2)).

113. It was not essential for a body's students typically to progress to a degree at the university, but if they did, that might be a fact which might point to integration with the university ([47](3)). HMRC submitted that, conversely, if only a minority of a college's students were studying a course which led to a degree from the university, that would point away from integration.

114. The Upper Tribunal in *LCC* had agreed with the First-tier Tribunal that LCC was not a college of MU. In HMRC's submission, some of the reasons which the Upper Tribunal had given were also reasons why SEL was not a college of MU. (We consider these factual issues below.)

Consideration of the applicable principles

115. Although Judge Hellier and Judge Bishopp agreed on the outcome in *LCC*, they followed what Judge Bishopp described as slightly differing routes in order to arrive at that conclusion. At [84] Judge Bishopp commented:

> "Judge Hellier has said, at para 56 above, that in order to succeed in its appeal to the F-tT LCC needed to demonstrate two things: that it had "similar objects" to a body governed by public law and providing education; and that it was sufficiently integrated with it to be capable of being considered a college of MU. While I agree that both of those things are relevant and important, I am not sure that is the correct way of articulating the test."]

116. In [85] and the first part of [86], he set out his reasons for that view. At the end of [86] he stated:

> "However, the similarity of objects is not, in my view, a discrete test, but only one, albeit perhaps the most important, of the facts the institution must establish if it is to succeed in showing that it is a college of a university. That, as I understand it, is essentially the argument set out by Burton J at [14], and accepted by him at [19] and [20], in *SFM*."

At [87] he continued:

> "The F-tT appreciated (see [7] and [8] of its decision) that the question it had to answer was whether LCC was an "eligible body". It follows from what I have said that I agree that that was the correct and, in the circumstances of this case, the only question. It also recorded, as was undisputed before us, that LCC could properly be regarded as an eligible body only if it could show it was a college of MU."

117. We have recorded Mrs Hall's submission that describing these respective approaches as "slightly differing" amounted to a "distinction without a difference". We are not persuaded that her submission is correct. We construe Judge Bishopp's

comments as amounting to the following. The discretion afforded to Member States by Article 132(1)(i) PVD to recognise bodies other than public law bodies has been appropriately exercised by the UK by extending the scope of the exemption to supplies of education made by various categories of "eligible body"; one of these categories is "a college of a university". A body seeking to bring itself within this category, appropriately construed, must at least show that it shares the university's object of providing university education.

118. Judge Hellier's approach was to propose two requirements, namely "similar objects", and sufficient integration with the relevant university. This approach appears to us to treat the effect of Article 132(1)(i) PVD as separate from the effect of Note (1)(b) Group 6 Sch 9 VATA 1994, rather than to treat the respective provisions as having a combined effect. We prefer the "combined effect" analysis, derived from Judge Bishopp's approach. We accept that the practical consequences may not be that significant, in that the factual enquiry required to establish whether a body is a college of a university will involve weighing similar factors, whether or not any particular factual element is to be treated as having any degree of primacy over any other elements.

119. Mrs Hall submitted that, on the basis of Judge Hellier's analysis in *LCC* at [37], the "fundamental purpose" test in *SFM* had been discredited. We treat this submission with some caution. At [34], Judge Hellier commented in the following terms on *SFM*:

> "[34] In SFM the parties put forward 15 factors as indicators relevant to the question of whether SFM was a college of the University. The VAT tribunal had conducted a detailed weighing of all the factors. Burton J considered that the weighing exercise conducted by the tribunal was the correct approach. He then said:
>
> > 'I conclude that the tribunal was entitled, after weighing up the factors, to be influenced at the end of the day by the fact that the fundamental purpose of [SFM] is to provide education leading to the award of a university degree'."

At [36]-[37], Judge Hellier continued:

> "[36] I note that Burton J said neither that the fundamental purpose was a necessary condition, nor that it was a sufficient condition for SFM to be a college of a university: he said merely that the tribunal was right to be influenced by SFM's fundamental purpose.
>
> [37] The fundamental purpose of the body will illuminate consideration of whether it has "similar objects": if a body's fundamental purpose is the provision of university education it will have "similar objects" to the aims of a public educational institution. But the fundamental purpose test does not replace the "similar objects" test: bodies with other objects may potentially satisfy the "similar objects" test even if they do not have the fundamental purpose of providing education. Thus, the "fundamental purpose" test is not a necessary condition. Further, a body with the fundamental purpose of providing education or even university education may not be sufficiently integrated with the university to be a college of that

> university: the test is therefore not a sufficient condition for eligibility."

120. At [38], Judge Hellier referred to one of the *SFM* factors ("having a similar purpose to that of the university . . .") as "having something in common with the formula for fundamental purpose". At [39] he approved the approach taken by the Tribunal in *Westminster College of Computing Ltd v Revenue and Customs Commissioners* [2012] UKFTT 579 (TC), TC02256 at [38](9) and (10), so far as the "similar objects" question was concerned; the Tribunal had found that the college had the purpose of providing a university level education. However, in *LCC* at [40], Judge Hellier commented:

> "But in relation to the question of whether the body is a college of a university, those bodies whose purpose is that their students are awarded a degree may have a greater connection with the university whose degree is awarded."

121. In addition, Judge Hellier made the following comments in his conclusions on interpretation at [47]:

> ". . . I accept that the body's objects need not be limited to making such supplies but the more diverse its objects the less similar they will be as a whole to the requisite aim.
>
> If the fundamental purpose of the body is to provide education of one of the specified types it will satisfy the similar objects condition; if it is not then it may not do so . . ."

In considering the question whether a body is a college "of" a university and the extent to which it must have a close link to or association with a university, he continued:

> "The investigation of this issue must encompass both what the body does (its activities) and how it or its activities are linked with the university.
>
> Whether this test is satisfied requires consideration of all the relevant facts. Those in the lists considered in SFM and in subsequent decisions are helpful but are neither exhaustive nor need always be relevant.
>
> If the fundamental purpose of the body (determined by objective factors) is to provide a university education, that will not on its own satisfy this test."

122. We have already referred to the analysis in Judge Bishopp's section of the decision at [84]-[86]. At [90], in the course of reviewing the approach taken by the First-tier Tribunal, he commented:

> "It is necessary when conducting such an analysis to recognise that there are several ways in which an institution may be, or become, a college of a university, ranging from formal constitution as a college to something less well-defined. The lack of precise definition was what led to *SFM*, and as Arden LJ said in *University of Leicester*, also at [56], and Judge Hellier has pointed out at paragraph 29 above, the

> relations between colleges and the universities of which they are properly to be regarded as colleges may take a variety of forms, with the consequence that one must consider the circumstances of each case. It follows that Note (1) must be construed pragmatically and, for the reasons I have given at paragraph 86 above, purposively."

We find it implicit in these observations that the process of weighing factors as adopted in *SFM* was considered by the Upper Tribunal to be the appropriate way of dealing with the absence of any precise definition of the expression "a college . . . of . . . a university".

123. At [95] Judge Bishopp found that, in concluding as it had, the First-tier Tribunal had misunderstood the "fundamental purpose" test, or alternatively had applied it incorrectly to the facts before it. His comments carry no suggestion that the test itself should be regarded as in any way open to criticism or question.

124. Thus we conclude that in *LCC*, the Upper Tribunal did not go as far as to discredit the "fundamental purpose" test (or approach) as referred to by Burton J in *SFM*, although it is clear from the Upper Tribunal's comments that care is necessary to ensure that it is applied in the appropriate context.

125. Further, the Upper Tribunal did not consider it inappropriate to refer to the *SFM* factors, although it is clear that a degree of caution should be applied in deciding on the extent to which all or any of them may be relevant.

126. Mrs Hall submitted that the only approach prescribed by the High Court in *SFM* was that each case must be determined on its own facts. Neither *SFM* nor *HIBT* had laid down any prescriptive approach. *SFM* was certainly not authority for the proposition that all the 15 factors must systematically be used, although some of them were both EU compliant and helpful guides. She further submitted that the *LCC* case had confirmed (in Judge Hellier's judgment at [47]) that the 15 factors were neither exhaustive nor need they always be relevant.

127. Mr Singh acknowledged the latter statement by Judge Hellier. However, Mr Singh submitted that the *SFM* factors were a helpful framework under which to consider the evidence in the appeal of the degree of any integration with MU.

128. We refer to Mrs Hall's submission that some of the *SFM* factors may not be compliant with EU law. In *SFM* at [22], Burton J chose not to carry out a detailed review of the parties' submissions:

> "(ii) Given my conclusions that no words are to be read into note (1)(b), I consider that the tribunal was amply entitled to decide, on the balancing of the 15 features to which I have referred, that, on the facts of this case, SFM was a college of the university. I do not in the event consider that I need to decide which side's arguments as to restrictive construction are the more apt, on the one hand the limitations on the eye of the needle through which all exemptions must pass, and on the other hand the obligation on the member state (subject to any conditions it may impose) to give the exemptions to those providing

> supplies in the public interest, such as education. There would in my judgment be no objection had the United Kingdom imposed a different or more restrictive test, but, given that the test that they have set down is one simply as to whether a particular college is a college of a university, I conclude that the tribunal was entitled, after weighing up the factors, to be influenced at the end of the day by the fact that the 'fundamental purpose of [SFM] is to provide education services leading to the award of a university degree' by the university."

129. Thus there was no detailed analysis of the specific factors in the context of the applicable EU law. We accept Mrs Hall's submission that if any of the factors is shown not to be compliant with EU law, it would be inappropriate to rely on that factor. We consider that this follows from the reasoning of Judge Bishopp in *LCC*, in particular at [86]:

> "It follows from that proposition, married with the structure of the domestic legislation, that if an institution is to bring itself into the class of eligible bodies providing education within the scope of art 132(1)(i) and Group 6 by demonstrating that it is a college of a university within the meaning of Note (1)(b), construed in a manner which is consistent with the Directive, it must show that it shares the university's objects, or at the least the object of providing university education."

In this context, the significant words are ". . . construed in a manner which is consistent with the Directive".

130. The approach taken by the Upper Tribunal in *LCC* was to take account of the *SFM* factors, but with the proviso set out by Judge Hellier at [47] (see above). We consider ourselves required to follow that approach. The process required appears to us to be similar to that described in a different context by Mummery J in *Hall v Lorimer* [1992] STC 599 at p 611, approved on appeal by Nolan LJ ([1994] STC 23 at p 29):

> "In order to decide whether a person carries on business on his own account it is necessary to consider many different aspects of that person's work activity. This is not a mechanical exercise of running through items on a check list to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another. The process involves painting a picture in each individual case."

131. The approach was described by the Tribunal in the following terms in *Finance & Business Training Ltd v Revenue and Customs Commissioners* [2012] UKFTT 382 (TC), TC02066 at [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 . . ."

132. In *Westminster College of Computing Limited*, the Tribunal reviewed the evidence by reference to the 15 *SFM* factors, and set out its findings at [38]. It continued at [39]:

> "As is apparent from the preceding paragraphs, the majority of the factors set out in *School of Finance and Management* lead to the conclusion that the College is not a college or institution of either of the Universities. We agree, however, with the HMRC Information Sheet 3/10 that deciding whether an entity is a college or an institution of a university is not simply a 'tick the box' exercise. The different factors must be weighed in the balance, having regard to the circumstances of the case. Some factors may carry more weight than others. Having considered the various factors, whether the College is a college of the Universities, or one of them, is a matter of impression."

133. In summary, we find that we are required to apply these principles in evaluating the evidence:

(1) The *SFM* factors may be helpful in determining whether a body is a college of a university, but that list of factors is not exhaustive and factors within that list may not always be relevant;

(2) It is necessary to consider the particular circumstances and specific facts of each individual case, which may involve considering factors other than those listed in *SFM*;

(3) In considering any particular factor, it must be determined whether that factor is compliant with EU law. If it is not, that factor must be put aside and not taken into account in reviewing the evidence;

(4) The "fundamental purpose" test does not replace the similar objects test, but has something in common with *SFM* factor (ix) (having a similar purpose to that of the university);

(5) There must be at least some degree of integration of the body with the university concerned;

(6) It is inappropriate to follow a "check list" or "tick box" approach. The cumulative effect of the relevant factors must be assessed to derive an overall impression, weighing the factors in the balance: some factors may carry more weight than others.

Application of these principles to the facts of SEL's case

134. We start by looking at the evidence in the light of the *SFM* factors; at the same time, we consider whether individual factors are or are not compliant with EU law.

135. In carrying out this analysis, we are aware of the consequences for a body such as SEL which has operated on the assumption that its supplies of education have been exempt. If it has been incorrect in making that assumption, any net VAT liability which has arisen in respect of past periods is likely to be a cost falling on that body, in that it will probably be impractical for the body to seek to recover the VAT element from former students. A decision that the body's supplies are not exempt will also have the effect that for future periods, VAT will have to be charged on fees payable by students to that body.

136. As many of the factual issues were initially raised in the course of Mr Singh's argument, we have where appropriate set out his submissions before referring to those of Mrs Hall, who dealt with them in the course of her reply. Despite our adoption of this form of presentation, we emphasise that it has no effect on the burden of proof; it is for SEL to show that it is an "eligible body".

(a) Presence or absence of a foundation document establishing SEL as a part of MU, by way of constitutional link

137. Mrs Hall submitted that in the EU context, a requirement of this nature pursuant to this factor would not be EU compliant. The issue was what a university had recognised as being similar to providing university education. Universities were separate from colleges. Taking such an approach in the light of this factor ignored the method of recognition, and ignored the reference to "other organisations" in Article 132 PVD. The factor was not consistent with Article 132 or Note (1)(b) Group 6 Sch 9 VATA 1994. The degree of latitude was not at large; the keystone was university education, to which separate criteria applied.

138. Another aspect was that both sides in *SFM* had operated under the misapprehension that University of Lincolnshire and Humberside ("ULH") was a body governed by public law. Taking into account the position of Cambridge University (*University of Cambridge v HMRC* [2009] EWHC 434 (Ch), [2009] STC 1288), it was wrong to assume that a university was a body governed by public law.

139. Mrs Hall accepted that there was no foundation document relating to SEL as part of MU. In her submission, this question raised in *SFM* had been a misguided issue for HMRC to raise.

140. She referred to the well-established view in *Reed Personnel Services* that the contractual position was not determinative of the VAT position, which had to be assessed by reference to the objective substance and reality of the arrangements as they in fact took place, by reference to all the facts and circumstances of the case. In this context, the opinions of individuals referred to in Mr Singh's submissions could not be determinative.

141. Mr Singh did not respond specifically to Mrs Hall's submission as to this factor being non-compliant with EU law, but in making detailed submissions on the facts based on this factor, indicated implicitly that in HMRC's view it remained valid to examine whether SEL met this test.

142. In respect of Mrs Hall's submission on the status of universities, we refer to the analysis by the First-tier Tribunal in *The Open University v Revenue and Customs Commissioners* [2013] UKFTT 326 (TC) of Sir Andrew Morritt C's judgment in *University of Cambridge* and the reasons given by the VAT and Duties Tribunal for its decision in that case. The analysis of those reasons is given in *The Open University* at [48]-[51]. We accept that it is appropriate to apply such reasoning to other universities, including MU. At [51] the First-tier Tribunal commented:

> "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."

With the substitution of a reference to Article 132 PVD, we consider that those comments are equally applicable to MU.

143. In terms of Article 132(1)(i) PVD, it follows that if MU itself is not a body governed by public law having the provision of university education as its aim, it must fall within the alternative wording ". . . by other organisations recognised by the Member State concerned as having similar objects".

144. That recognition is afforded by the UK through the initial words of Note (1)(b) Group 9 Sch 6 VATA 1994:

> (1) For the purposes of this Group an "eligible body" is—
>
> (b) a United Kingdom university . . ."

SEL is in a different position, as the recognition by the UK requires it to fall within the alternative words in Note (1)(b):

> "any college, institution, school or hall of such a university".

145. Although we accept Mrs Hall's argument on the "governed by public law" issue, we are not persuaded that this first *SFM* factor is non-EU compliant. In our view, it simply seeks to address what (if any) evidence there may be for some form of link sufficient to establish a body as a college of the university in question.

146. The words used in *SFM*, "part of the University in question", must be construed in the context of the wording of the previous legislation, Group 6 of Schedule 5 to the Finance Act 1972, which exempted the provision of education if it was provided by a school or university, or was of a kind provided by a school or university and was provided otherwise than for profit. Note (3) to that group stated:

> "(3) "University" includes a university college and the college, school or hall of a university."

147. The wording of Note (1)(b) appears to us to be slightly broader in its effect than that of the former Note (3). However, what is under review in the context of this first *SFM* factor is the degree of linkage between the body and university in question. It is clear from *LCC* that there must be a sufficient link to or association with the university for the body to be regarded as integrated with that university. Judge Hellier

referred at [47](2) to the body being called in a loose sense part of the university. At [92], Judge Bishopp referred to the term used in Note (1)(b), college "of" a university, which implied at least some degree of integration. At [90], he commented that there were varying ways in which an institution might be or become a college of a university, ranging from formal constitution as a college to something less well-defined. In the light of the Upper Tribunal's comments, we do not consider it correct to interpret this first *SFM* factor as imposing a specific requirement to produce a document establishing the linkage. What this factor appears to be addressing is whether, as part of the broader picture, there is sufficient evidence of linkage. We have concluded, on the basis of Judge Bishopp's analysis, that the UK has legislated appropriately to comply with the terms of Article 132(1)(i) PVD, enabling recognition of bodies which can satisfy the condition that they are a "college . . . of a university". Our conclusion is that the factor as we interpret it is compliant with EU law.

148. Mr Singh submitted that until the SACA was entered into in 2011, there had been no agreements at all which sought to establish a relationship between MU and, specifically, the UK entity of the SAE Group supplying education in the UK. The 1998 MoC between MU and SAETC did not apply to SAE as an entity, and in the UK it did not apply to the campus in Glasgow, which according to Professor Klich's evidence had been operating since 1990/1991.

149. Our notes of Professor Klich's evidence indicate that he expressed surprise on being shown an appendix to a 2009 MU report of an institutional approval visit to the Glasgow campus; this stated:

> "SAE Glasgow began operations in 1992 and has relocated twice already . . ."

He confirmed in evidence that the 1998 MoC applied only for two courses, and not in relation to the rest of SAE's UK students.

150. For SEL, Mrs Hall emphasised that discussions between SAE Institute and MU had generally been pursued at the higher global level with the Directors of SAE as a worldwide entity, rather than with individuals who were officers of the successive SAE entities in the UK involved in the provision of education within the UK. In evidence, Professor Klich referred to minutes of the February 2002 Conference in Sydney, at which the parties present had recommended that SAE Institute be granted 'associate college' status; Michael Bridger, the MU Link Director, was to activate this with Ken Goulding, the Deputy Vice-Chancellor of MU. In his letter dated 5 March 2002 to Tom Misner, President of the SAE Institute, Ken Goulding acknowledged the progress being made in further strengthening the partnership arrangements between MU and SAE. After referring to a number of matters including readiness to discuss accreditation of SAE to validate for itself undergraduate programmes leading to MU awards, he commented:

> "I am delighted to agree to progress Associate College status for the Institute. I will draft the necessary papers, which will have to be approved by the Academic Board of Board of Governors of the University and their equivalent(s) at SAE. I aim to do this within the

> next few weeks, in the hope it can be agreed in our June round of Committee meetings. Could you please confirm what Committees would consider the proposal within SAE?"

151. Professor Klich was unaware of any formal documentation acknowledging such status for SAE; however, in conversations between him and Dr Butland, this was implicitly assumed. Professor Klich thought that in loose terms, SAE was an associated college at the end of 2008, but accepted that MU's website did not at that stage list SAE as such; he maintained that SAE was certainly known as an associated college at that point, although the paperwork had not been "tidied" to deal with this.

152. In a letter dated 22 January 2012 to Richard Brown of HMRC, Dr Butland stated:

> "[MU] has consistently treated SAE Institute in the United Kingdom (ie SEL) as an associated college since the first partnership agreements, and as a college with accredited status since 13th September 2010; the Instrument of Accreditation was formally signed on 22nd September 2010.
>
> ... SAE Institute is a prestigious and long-standing associate college of MU."

153. In argument, Mr Singh sought to discredit this letter as having been drafted by Professor Klich. The implication was that the views expressed were not those of Dr Butland or MU, but those of Professor Klich and SAE Institute. We do not accept this submission. Dr Butland had a senior role in the governance of MU. We accept that the letter was written relatively close to the point at which he retired from that role, but we do not accept that an individual of such experience and seniority would sign a letter which did not properly reflect his own views as held on behalf of MU.

154. We accept that the "constitutional link" test requires an objective analysis. The subjective views of individuals must therefore be verified as far as possible by reference to other evidence. However, in examining the evidence generally, the views of senior individuals representing the university in question must be given appropriate weight. Less senior representatives, in particular those who were not involved in the negotiations concerning the relationship between the body concerned and the university, are less likely to be able to provide evidence of sufficient weight to demonstrate the true nature of that relationship.

155. In *LCC* at [92], Judge Bishopp considered the nature and degree of integration required for it to be appropriate to treat a college as being "of" a university. After referring to matters of supervision, governance and influence, he added the following comments:

> "There should also, one might think, be some evidence of the recognition by the university of the other institution as a college of itself. I do not see how it can plausibly be argued that an institution such as LCC is, or is to be regarded as, a college of a university which does not acknowledge it as such. There was no evidence before the F-tT of MU's perception. That is not, in itself, fatal; but where, as here,

> there is no hint in the documentary evidence that MU intended that LCC should become a college of itself the task of showing that it did is inevitably rendered more difficult."

156. In the present case, we have been provided with a very substantial amount of information. However, the position concerning the status of the relevant SAE entity is still difficult to establish. Professor Ken Goulding, the Deputy Vice-Chancellor of MU, agreed in his letter dated 5 March 2002 (following the MU/SAE Joint Progress Review and Planning Conference in Sydney in February 2002) to progress SAE's application to become an Associate College; he expressed the hope that it would be agreed in MU's June 2002 round of committee meetings. Despite this, there appears to be no record of SAE's status having been changed at that point.

157. The meeting of the Joint Liaison Group on 17 December 2003 made no mention of Associate College status. Instead, reference was made to preparation for MU accreditation of SAE; Ken Goulding stated that as an audit of MU collaborative provision was to take place in mid-2005, further progress towards accreditation would be unwise until that audit had taken place and the QAA policy had also been further clarified. Professor Clive Pascoe of SAE referred to a recent Australian approval, in the context of which MU accreditation was less of a priority. The subsequent meeting on 3 September 2004 merely referred to the same factors delaying SAE accreditation. The corresponding meeting on 3 May 2005 noted that progress with MU accreditation of SAE still depended on the outcome of the QAA audit; if this was favourable, discussions about preparation for accreditation could be resumed.

158. The minutes of the Joint Liaison Group meeting on 15 June 2006 indicate that SAE referred to its search for a site, possibly in East London. The minutes continued:

> "SAE asked whether their London campus could be given a more official status by MU – such as be made an Associate College. This is partly motivated by a wish to avoid business rates. Currently the campus is set up in the name of [SETL] . . ."

Dr Terry Butland, representing MU, agreed to look into this and the question whether it might be possible to accommodate SAE at Middlesex, possibly as part of a new build at Hendon. No other discussion concerning Associate College status took place at that meeting.

159. SAE's status in relation to MU was not discussed at the SAE Steering Group meeting on 17 January 2007, nor in the main part of the following meeting on 21 June 2007. However, a note was added to the minutes by Patrick Phillips of MU:

> "NB at the end of the meeting [Michael Bridger] [link director between SAE and MU] raised the issue of SAE applying for accreditation by MU and [Margaret House of MU] said this should be made "crystal clear". . ."

160. Neither accreditation nor Associate College status was mentioned at the following meeting on 20 November 2007, or at the subsequent meeting on 9 April 2008. At the meeting on 20 October 2008, Professor Klich referred in general terms to

SAE valuing highly the MU collaboration, and made it clear that he wanted it to thrive.

161. At the SAE and MU Partnership and Strategy meeting on 1 July 2009, Terry Butland and his MU colleagues discussed with Professor Klich and the other SAE representatives the process of attaining an accreditation relationship with MU. Later in the meeting, Terry Butland announced that he would consider an application from SAE for institutional accreditation within the next twelve months. At the following meeting on 27 October 2009, it was noted that SAE was going through the process of getting accreditation from MU. A further meeting the following year would be needed to consider specific additional items of paperwork; the proposal would then proceed to "ASQC" in June 2010.

162. No mention of the subject was made at the meeting on 22 June 2010. At the 20 October 2010 meeting, reference was made to the accreditation process having run smoothly and efficiently.

163. Apart from the question of internal MU discussions, there is also the issue of public acknowledgment. Despite the history of the discussions concerning Associate College status, as late as 26 September 2010 the MU website list of "UK Academic Partners" did not show SAE under the sub-heading "Associate Colleges". Instead, SAE was listed as one of the "Other UK Partners". Relatively soon after that, by 21 November 2010 the MU website had been changed to show SAE as one of MU's "Associate Colleges".

164. On 22 September 2010, MU and SAE entered into two documents. The first was an "Instrument of Accreditation". Professor Klich explained in evidence that when an institution had worked closely with MU for some time, normally running validated programmes, it might be granted accredited status. Accreditation related to the way in which an institution's programmes were validated as MU programmes. It gave the accredited institution the ability to validate its programmes itself, rather than requiring MU to undertake the validation for each programme. While MU staff would still be involved in the assessment of programmes, the accredited institution ran the validation process. Professor Klich indicated that, to date, only three institutions had become MU accredited institutions. The two currently having this status were SAE and Oak Hill Theological College; a third in Holland had not retained its accredited status and was now only a validated partner.

165. Thus at the point when the MU website did not list SAE as an Associate College, SAE's status had already been advanced to the level of "Accredited Institution". We find that the website was not always kept up to date; the Associate College status was not acknowledged until the website was updated between 26 September and 21 November 2010, and by that stage SAE had achieved accredited status. The latter status was not immediately acknowledged; from copy website details included in the evidence, we are aware that SAE's accredited status was shown in June 2013, shortly before the start of the initial hearing, but there is no evidence to show whether or not that status was acknowledged at an earlier stage. We do not find

the information contained on the MU website to be a definitive record or statement of SAE's status, which therefore has to be ascertained from other records kept by MU.

166. The Minutes of the SAE Institute/MU Business Meeting on 13 July 2011 contain the following item at Agenda Item 3:

> "Following circulation of the "Special Relationship" paper by Zybs Klich of 11-6-2011, it was re-iterated that SAE Institute had already operated as and been listed on MU websites as an "Associate College" of [MU] for some years. However, some clarification was needed as that specific term does not appear formally in any of the agreements to date, and this should be amended accordingly. It was agreed that consistent terminology as an Associate College would be used in future. Action: TB and ZK to ensure consistent usage in documentation."

167. We have seen no evidence to show that there had been an appropriate entry on MU's website before 26 November 2010, but we accept that SAE's status as an Associate College preceded that date; the precise date is unclear. At the time of Ken Goulding's letter dated 5 March 2002, he expected the change in status to be made as a result of the June 2002 committee meetings. However, there is no specific evidence to show an effective date for SAE's attainment of Associated College status, despite the recommendation which had been made at the Sydney conference in February 2002.

168. With one exception, the negotiations as to SAE's status were between "SAE" and MU. The exception was the SACA entered into between SEL and MU. In relation to SEL's predecessor SETL, HMRC asked Mr Postel of SETL about the 1997 MoC. In their letter dated 23 December 2008, they assumed that this MoC had been entered into between SETL and MU. In his reply dated 11 February 2009, Mr Postel stated:

> "All agreements with MU are with SAE Institute which is based in Australia. There are no individual agreements between SETL and MU."

169. In an email message sent to MU in August 2012, after his retirement, Dr Butland stated that MU had had no documentation stating that the business of SETL had been transferred to SEL in April 2009, nor had he been informed orally. He continued:

> "In fact, it was not necessary for SAE to inform [MU]. This is because our agreement was with SAE as a whole, and not with an individual unit in a given country. This will be clear from the Memoranda of Cooperation between SAE and [MU] at that time."

170. Dr Butland then described the relationship between SAE and MU in the light of the SACA:

> "Regarding the second question, SAE has been a partner of [MU] for many years. Their status was enhanced to accredited partner status at the [MU] ASQC meeting on 10 June 2010, following an assessment

> process conducted by MU which started in the early summer of 2009 and featured the first formal assessment meeting on 20 October 2009."

Dr Butland then referred to hearing of the prospective sale of SAE, which was ultimately made to an Australian group named Navitas pursuant to a sale and purchase agreement dated 14 December 2010, and commented:

> "Following that sale, a new agreement between MU and SAE was negotiated. The new agreement was called a Special Associate College Agreement, where the word 'Special' refers to the Agreement rather than Associate College, as SAE was already an Associate College.
>
> . . ."

171. Dr Butland's recollections in stating that MU's agreement was with SAE Institute as a whole rather than the SAE unit in the UK (ie SEL) do not appear to us to be entirely accurate, as the SACA is expressed in clause 2 to be between MU and "SAE Education, UK (hereinafter referred to as SAE-UK)"; all the following operative clauses of the SACA name the SAE party as "SAE-UK". The SACA is therefore the one document expressed to be entered into by the current UK entity, ie SEL; in the same way, the one previous document entered into by the SAE UK entity was the 1998 MoC, between SAETC and MU.

172. Mrs Hall submitted that the agreements between MU and SAE referred to "the SAE Institute", which was not a legal entity, merely a descriptive label for a group of companies and other entities. It was therefore incapable of entering into any meaningful, let alone binding agreement. Professor Klich's evidence was that "SAE Institute" was the name of the corporate group; it was an "umbrella name" for all the SAE legal entities located in various countries worldwide. In respect of the UK, it referred to the organisation licensed to provide the SAE brand in the UK, which at present was SEL.

173. Mr Singh argued that the negotiations carried on in the name of "SAE Institute" were intended to result in legal relations being entered into; he referred to certain obligations involving an indemnity being given by SAE. We accept that there was an intention to enter into legal relations; however, our interpretation of the results of the negotiations is that they were intended to result in legal obligations being undertaken by whichever was the SAE entity operating in the jurisdiction concerned, despite the direct commitment being between the "umbrella organisation" and MU. As a result, we find that the result of the negotiations between SAE Institute and MU was that first SETL, and subsequently SEL, became bound by the terms of the various agreements between SAE and MU so far as operations within the UK were concerned. We also find that the negotiations between SAE and MU were intended to have general international effect, with the arrangements for any particular jurisdiction binding the particular operating subsidiary in that country or area, and (where appropriate) with any obligations being underwritten or undertaken by other companies within the SAE group. We base this view on records of discussions between SAE Institute and MU concerning operations or potential operations in a wide range of countries around the world.

174. In *HIBT* at [15] and the relevant footnote, the VAT and Duties Tribunal did not attach any significance to the fact that the college (HIBT) was described as having been founded in 2000, even though this statement appeared to apply to a previous legal entity rather than HIBT. We interpret the Tribunal's view as being that the change in legal entity was not significant and that continuity was assumed as between predecessor and successor companies. In the same way, we accept that SEL is now covered by the negotiations generally made in the name of "SAE Institute", and that previously the UK entity covered by the SAE Institute's negotiations was SETL.

175. Mr Singh submitted that it was wrong to suggest that the SAE UK entity had always regarded itself as a college of MU and that the SACA simply reflected a reality already in existence. It was important to consider the reason why SETL, SEL's predecessor had been set up. According to a note of a meeting with HMRC in November 2008, SETL's accountant had stated that it had been set up as a non-profit-making body for the "benefits", the principal one being not having to charge VAT. Mr Singh argued that this would have been totally unnecessary if SAE's UK entity had already been a college of MU; supplies would have been exempt in any event. Mr Singh referred to the statement of Mr Postel (the director of SETL) at that meeting, that SETL did not regard itself as a college of MU, and the statements of Michael Bridger that the relationship between SETL and MU was that of two independent partners.

176. We treat the meeting note with some caution, as there is no evidence that it was agreed between the parties. Mrs Hall argued that it had not been correct for the matter to be raised for the first time in this way; the allegation had never been pleaded, it had not appeared in any skeleton argument, nor was Professor Klich given the opportunity to comment on it. As a result, SEL had been denied the right to re-examine, which it would have wished to exercise.

177. Mr Singh also referred to the change made by SEL in its Memorandum and Articles of Association to alter its objects and add a non-distribution clause; these changes had been made in anticipation of SEL taking over the business of SETL as the SAE Institute UK entity. If SEL was a college of MU as it now claimed, there was no reason for it to make these changes. SEL had been seeking exemption as a non-profit-making body, but in his submission this would not have succeeded because (as now accepted on SEL's behalf) it made covert distributions of profit.

178. Whatever the position in relation to the original argument under Note (1)(e) to Group 6 Sch 9 VATA 1994, the crucial question remains whether SEL, in its capacity as the UK entity of the SAE Institute, is a "college of" MU. In testing this, it appears immaterial to us whether SEL or its predecessor ran a single argument, namely that under Note (1)(e), or both that and the argument under Note (1)(b).

179. Mr Singh emphasised the need to produce evidence from a witness on behalf of the university of which the college in question sought to demonstrate that it was a part; he argued that SEL could not succeed in showing that it was a college of MU if no-one from MU was present to confirm that it regarded SEL as a college of MU.

180. He referred to the note of a meeting between HMRC and various MU officers on 26 November 2009. According to this note, the relationship between SAE and MU was the type of collaborative relationship with the greatest distance between MU and its partner, namely "Validated Programmes". Caroline Hinch, described in the HMRC note as "MU – Assistant Academic Registrar for Collaborative Programmers", was asked if SAE could be regarded as a school or college of MU. Her response was that it was regarded as a "partner".

181. For the reasons already mentioned, we treat this note with caution. Again, it does not appear to have been signed by the MU representatives as a correct record of the meeting, although in an exchange of emails, various amendments to other parts of the note were proposed. No revised version of the note was produced to reflect those amendments. As a formal matter, no evidence has been put to us to verify the note. Further, it is not clear to us what degree of seniority the individuals present on behalf of MU had, in comparison to the other MU individuals who were present at the various liaison meetings between MU and SAE. In the course of the meeting, the MU representatives acknowledged that none of those present at the meeting had been involved in the original negotiations with SAE. In addition, this meeting took place in late 2009; other discussions were in progress, and eventually resulted in SAE being formally designated as an associated college and ultimately an accredited institution. We accept Mrs Hall's submission that the process was an incremental one, so that the status of SEL changed over time. In the light of Professor Klich's evidence, we find that the relationship between SAE and MU was ultimately significantly closer than one "with the greatest distance between MU and its partner".

182. Mr Singh referred to the notes of a meeting on 19 July 2012 between Richard Brown and Kevin Tomaschek of HMRC and Melvyn Keen, who had become the Deputy Chief Executive of MU in January 2012, having previously been the Financial Director. Mr Singh submitted that Mr Keen had not stated in that meeting that SEL was a college of MU, nor had he stated this on any other occasion.

183. In the course of his evidence, Professor Klich explained that Melvyn Keen had had a telephone conversation with him the previous week (ie preceding the initial hearing at which Professor Klich gave his evidence). Melvyn Keen had explained that he was embarrassed at the way the notes of the meeting with HMRC had been presented and were being used; his background was financial, and he had had little long-term knowledge of collaborative arrangements.

184. Although Mr Keen did not refer to SEL at the July 2012 meeting, paragraph 12 of the notes, under the hearing "SAE Institute", is as follows:

> "RB asked if all the SAE entities worldwide were colleges of MU. MK said only those that offered MU degrees were. A British university cannot offer degrees in the USA and South Africa. In the USA, for example, SAE will have had to partner with an American university."

On the basis that virtually all relationships between SAE and MU are negotiated at "SAE Institute" level, we find it of no significance that Mr Keen did not refer to the status of SEL as such.

185. Under the heading "Middlesex University's Partners", paragraph 27 of the note stated:

> "RB asked if any of the "international partners" could be regarded as colleges of MU. MK said definitely not. They were institutions in their own right that wanted to offer a British degree."

186. We do not consider that this note assists us with the question whether SEL, as SAE Institute's entity in the UK, is or is not a college of MU.

187. The various versions of the MU "Learning and Quality Enhancement Handbook" contained in the evidence refer under the heading "Associate colleges" to the need for a Memorandum of Association. The 2007-08 version, in looking at what is required for an Associate College proposal, asks: "has a Memorandum of Association been agreed in principle?" The "updated" 2012-13 version exhibited to Professor Klich's witness statement contains the following under that heading:

> "The Associate institution and the University shall agree and sign a legally binding Memorandum of Association which shall be supplemented by Memoranda of Co-operation specific to each taught Programme (or other joint development)."

188. No specific document of this description is contained in the evidence. However, SAE entered into other documentation at around the time when the MU website was altered to show SAE as an Associate College; this was the Instrument of Accreditation dated 22 September 2010. Although the latter document did not relate to associated college status, there must have been some form of acceptance by MU that by this stage (if not before) SAE was an Associate College of MU.

189. A later indication of MU's view as to SAE's status appears from an article in the Oxford Journal newspaper entitled "Prince meets Oxford students on visit to city". This describes the Duke of York's visit to Oxford on 9 February 2012, during which he was guest of honour as SAE Institute opened its world headquarters at Littlemore. The end of the article stated:

> "SAE offers full university degrees through its global partnership with Middlesex University, and vice-chancellor Prof Michael Driscoll said: 'SAE Institute in the UK is a valued Associate College awarding Middlesex University degrees, and we take pride in the achievements of this long-term partnership'."

190. We find that there is some acknowledgment by MU of the status of SAE Institute, and that the entity in the UK which carries that status is SEL. The extent of that acknowledgment is limited, in that SAE has been designated since 2010 (or possibly earlier) as an Associate College, and since September 2010 as an accredited institution. On the basis of the evidence, we find on the balance of probabilities that SAE Institute was regarded informally by MU as an associated college as early as 1 May 2009, the date on which SEL acquired the business of SETL.

(b) Absence of independence

191. Mr Singh submitted that both SEL and MU were independent of each other; SEL was an independent business offering its own courses. He referred to the terms of the 2010 MoC, the MU Student Handbook for 2007/2008, and the MU Handbook for 2011/12. Professor Klich had stated in evidence that SAE was totally dependent on MU to be able to offer degrees in the UK. Mr Singh argued that the position was similar to that in *LCC*; LCC needed MU for its business, but this did not mean that it was integrated with MU. SEL was not "of" MU. He commented that it would always be open to SEL to enter into a collaboration with another university, as SAE and SEL's agreements with MU were all terminable.

192. Mrs Hall questioned whether absence of independence was a criterion not compliant with the PVD. She argued that absence of independence was a neutral point. The MU 2011/12 Handbook had been redrafted after acceptance that the definition of Associate College lacked clarity. The relationship between the SAE Institute entity and MU had been long-standing, and none of the agreements had been terminated.

193. Mrs Hall referred to the 2012/13 MU Handbook pages dealing with Associate Colleges. These stated that the respective institutions would remain independent, each with its own governing body and Academic Board and separate but compatible missions and values. Staff of the associate institution were to be employed by that institution under its conditions of employment. The associate institution was required to agree to develop most of its higher education programmes through MU leading to MU, Edexcel and other awards validated by MU. Students studying wholly or in part in the associate institution on programmes leading to MU awards were normally to be students of MU for most purposes but subject to the Associate College's Code of Disciplinary Practice. Mrs Hall emphasised that the premise of Article 131(1)(i) PVD was that the body in question had to have similar objects to bodies governed by public law having the aim of provision of university education. This was also the premise of the UK legislation.

194. In *SFM*, Burton J confirmed at [16] that SFM did not satisfy this indicator. At [22], when testing the Tribunal's decision, he stated:

> ". . . (i) I do not conclude that the first four factors set out in [16] above, which the commissioners relied upon as necessary pre-conditions of a college being of a university, are indeed such. They are plainly necessary pre-conditions if the question is whether the college is governed by public law and/or within the Education Acts, but on the question as to whether a particular college is a college of a university, I conclude that they are, albeit important features, simply four of the factors to be considered."

195. Thus the status of this factor is that, whether or not the particular body can show that it meets the test, the result of the test is simply one of the cumulative parts of the overall picture. The position is the same for the factors referred to in this decision as (a), (c) and (d).

196. We find that there was a degree of dependence of SAE on MU. Although in theory it would have been possible for SAE to terminate the agreements with MU and enter into arrangements with other universities, there was no suggestion of this being possible in practice. SAE was committed by the terms of the agreements to keep its arrangements with MU exclusive, to the extent that it had not already entered into arrangements with other institutions. At the higher level of the Partnership Agreement entered into in 2009, SAE and MU were committed to keep each other informed and consult about any possible activities having the potential to conflict with the purposes of the Partnership Agreement. The November 2009 MoC, in operation as from September 2009, provided that SAE's ability to offer the validated collaborative programmes to undergraduate students remained subject to "Institutional Approval", ie the approval of MU.

197. Clause 5 of the SACA entered into in 2011 provides:

> "SAE Education UK undertakes, as part of this special relationship in the United Kingdom, that it will, as has been the case over the last 14 years, continue to collaborate only with Middlesex University to the exclusion of other possible partners in higher education in the United Kingdom."

198. Although the date of the SACA was considerably later than the date from which HMRC denied exemption to SEL, we are satisfied that clause 5 of the SACA reflected the continuing state of affairs between SAE Institute and MU since SEL took over the business of SETL in 2009.

(c) Financial dependence or independence

199. In *SFM*, the appellant submitted that this indicator was relevant to Note (1)(e) and not to Note (1)(b); in his conclusions at [22] Burton J made no comment on that submission. We therefore examine the position in relation to SEL.

200. Mr Singh submitted that there was no financial dependence between SEL and MU. The 2010 MoC stated at clause 1:

> "The agreement of the Memorandum of Co-operation does not, in any way, affect the independent status of the Institute, which shall retain its own Governing Council, Academic Board and full responsibility for its own financial management."

Clause 5 provided:

> "The Institute shall resource adequately, and without any funding from the University, all programmes of study which lead to awards of the University."

201. He argued that there was no real financial interdependence between SEL and MU, other than that which could always be said to exist when two entities traded with each other. SEL's solicitors had referred in correspondence with HMRC to the financial effects which would have resulted had the relationship between MU and SEL been discontinued, as SEL would not have been in a position to provide

university validated degree courses, and an alternative university partner would have needed to be found. Mr Singh referred to what had happened to SEL's predecessor, SETL, which had been liquidated because it ran into financial difficulties. SEL was an independent commercial partner of MU, expected to be responsible for its own financial affairs.

202. Mrs Hall emphasised that SEL's relationship with MU remained one of financial dependence because of the continuing links with MU.

203. As in *HIBT* at [33](3), we are satisfied that SEL has only one academic partner, namely MU. SEL needs the involvement of MU in order to provide courses of the appropriate standard in order to attract students to pursue those courses. In our view SEL is financially dependent on MU, as Mrs Hall submitted.

(d) Absence of distributable profit

204. Mr Singh commented that if there were an absence of distributable profit, SEL would have continued to argue its status as an eligible body based on it being a non-profit-making body within Note (1)(e). It had not done so; it had abandoned that argument. HMRC contended, for a number of reasons, that there was distributable profit, as SEL made payment to companies within the SAE corporate group. It had been accepted on SEL's behalf that there were covert distributions of profit. He referred to the description of SAE's product by the CEO of the SAE Group in the SAE Magazine 01/13 as being "for profit" education.

205. As SEL no longer relied on Note (1)(e), and as the licensing arrangements appear to counteract possible arguments as to non-profit-making status, we find that its circumstances did not satisfy this indicator.

(e) Entitlement to public funding

206. On the basis that SEL had no entitlement to public funding, Mr Singh argued that it was less likely that a college not entitled to public funding could be said to be "of" a university which was so entitled.

207. Mrs Hall referred to Professor Klich's evidence. He stated that, as a provider of higher education, SAE could and did access government student loans, although the limit (£6,000 per year) was lower than for those available to students of public bodies (£9,000 per year). She argued that it followed from this evidence that SEL's students were entitled to public loans.

208. We accept Professor Klich's evidence, and find that SEL satisfies this indicator.

(f) Permanent links between SEL and MU

209. Mr Singh argued that the collaborative links were not permanent; links made under the agreements could be dissolved without penalty. The 1998, 2003, 2007 and 2009 MoCs provided for termination on 12 months' written notice by either party. In

addition, the 2007 and 2009 MoCs allowed MU to terminate the agreement immediately in extreme circumstances, such as where MU's reputation was threatened. The 2009 MoC also allowed MU to terminate the agreement immediately and without penalty if the SAE Institute was in breach of it. The 2003 Partnership Agreement made provision for dissolution on two years' notice, and the 2009 Partnership Agreement permitted dissolution on one year's notice. The 2011 SACA could be terminated on a year's notice.

210. Mr Singh also referred to the 2010 Instrument of Accreditation. This gave MU the right to withdraw accreditation if it was concerned about quality or standards. The 2010 MoC permitted termination with eighteen months' notice. Accredited status could be lost; Professor Klich had referred to an institution in Holland which had not retained this status and was now only a validated partner. Mr Singh argued that this demonstrated the impermanent nature of accredited status.

211. Mrs Hall referred to the periods of notice in the *HIBT* and *SFM* cases; she contended that these were less than the periods applicable to SAE.

212. We are unable to establish from the published report what the notice period was under the Recognition Agreement in the *HIBT* case; the Tribunal stated that the Agreement ". . . requires a suitably long period of notice to be given" ([33](6)). In the case of *SFM*, Burton J confirmed at [4] that in certain circumstances the memorandum of co-operation (which was never signed) could be terminated on twelve months' written notice, or immediately if either party should "violate" the terms of the agreement.

213. In *SFM*, the institution had had associations with three different universities in five years. In contrast, SAE Institute has had the single association with MU since 1998. We do not view the contractual terms for possible early termination of the respective agreements as an indication of impermanence of the relationship; we are satisfied that SAE's involvement has been of long standing, and there is nothing to suggest that the relationship may not continue in the longer term. The time for which the relationship has lasted suggests a degree of permanence, although in terms of the formal contractual documents, it is reviewed periodically and, up to the present point, replacement documentation has repeatedly been produced to continue the linkage for a further defined term. We find that a better description of the linkage is that it is continuing and long-term rather than permanent.

(g) Physical proximity to the university of which SEL is said to be part

214. Mr Singh submitted that there was no close proximity between the campuses of SEL and MU. He referred to the 1998 MoC, which provided that certain courses were to be taught by SAETC at specified campuses; at the time these were London, Sydney and Munich. In a letter dated 4 October 2001 from MU to SAE in Australia, it was noted that SAE's existing three degree programmes would be offered at Byron Bay in Australia, and that the Vienna Campus of SAE had been approved to offer the three programmes.

215. The 2007 MoC had listed degree centres all over the world; except perhaps for London, none of these degree centres was close to MU. SEL's campuses were all over the country, in London, Oxford, Liverpool and Glasgow. Mr Singh contrasted this with the position of the college in *HIBT*. It operated on a campus of the University of Hertfordshire. SAE did not operate from any campus of MU, but all over the UK and in locations across the world. MU had stated at a meeting on 26 November 2009 that SAE's premises were not regarded as a campus of MU.

216. Mrs Hall stressed in her response that MU provided education to a wide range of students in a large number of locations. In his evidence, Professor Klich had referred to colleges as being involved in a rapidly evolving field.

217. We take into account Professor Klich's evidence on the question of proximity. He explained that, in common with many other universities and their colleges, MU and SAE operated from campuses at different locations. MU operated from campuses in Hendon and Archway, both in North London. SAE operated from London, Oxford, Liverpool and Glasgow. In Berlin the position was different; MU had use of SAE facilities. In Dubai, MU and SAE shared a building and some facilities. The possibility of SAE and MU sharing a UK site had been discussed at a meeting of the SAE-MU Joint Liaison Group on 15 June 2006.

218. In *SFM*, the institution was based in London, and was held to be a college of a university based in Lincolnshire and Humberside. In SEL's case, it has operations in London, which is significantly closer to MU's two campuses; the Oxford campus is also closer than those in *SFM*. The position differs from that in *HIBT*, which was located at the centre of one of the two campuses of the University of Hertfordshire. We accept Professor Klich's evidence as to the frequency of arrangements involving more than one campus for universities and their related colleges. In such circumstances, the campus of a related college would not in our view be described as a campus of the relevant university. We find that SAE's campuses in the UK are separate from those of MU, and two of the SAE campuses are within the same region of the UK as those of MU.

(h) Obligation to offer a minimum number of university places

219. Professor Klich confirmed in his evidence that, in common with other colleges of universities such as *HIBT* and *SFM*, there was no obligation on SAE Institute or SEL to offer a minimum number of university places.

(i) Having a similar purpose to that of MU

220. Mr Singh referred to *LCC*, in which the "similar objects" requirement had not been met because LCC provided courses other than those which led to an MU degree; there had been insufficient evidence that the provision of courses which did carry credits towards such a degree formed a sufficiently substantial part of LCC's activities. Mr Singh submitted that it was necessary to look at the overall picture of the total courses provided.

221. Another reason why the requirement had not been met in *LCC* was that the MU arrangement did not sign students up to a degree; MU merely agreed that those students who obtained specified diplomas would be accepted on to MU's degree courses.

222. He submitted that between 2008 and 2012, only a minority of SAE UK students were registered for MU degrees, as opposed to SAE short courses and SAE diploma courses. On the basis of HMRC's analysis of statistics within the evidence relating to student numbers, he submitted that over 70 per cent of UK SAE students never registered for a MU validated programme.

223. On the basis of Professor Klich's supplementary witness statement, he argued that diplomas had always counted towards MU degrees, but were not validated by MU until August 2011. Before August 2011, it could not be said that SEL's principal activity was to supply university education or closely related services.

224. Mr Singh acknowledged that the position might have changed since August 2011, as even diploma courses were validated by MU from that point and so even diploma courses arguably constituted university education.

225. However, HMRC still maintained that the "similar objects" requirement was not met from August 2011. In theory, a commercial body might have "similar objects" to a public law body which had as its aim the provision of university education. HMRC submitted that SEL did not have a "similar object" to a university's object of providing university education. The core of the SAE business was the successful marketing of "the SAE Concept". In short, SAE believed it had a unique way of delivering creative media education. The licensor, now Navitas, which had become the ultimate parent company of the SAE Group, licensed the SAE Concept out to SAE group companies operating in various countries. Those licensee companies then made supplies of creative media education in those countries under the SAE brand.

226. SEL was a licensee. It paid fees to operate the SAE Concept in the UK. The fees had been set in the agreement with the then licensor SAE Licensing AG at 20 per cent of SEL's turnover; in practice this had been reduced to 15 per cent because there was no advertising fee. Professor Klich had acknowledged in evidence that without the licence, SEL would be completely unable to supply this kind of creative media education. In HMRC's submission, SEL's role was to exploit the SAE Concept in the UK in order to generate fees for the SAE business. SEL did not exist to provide education. It only existed to use the SAE Concept. It could enter into partnership with another Higher Education institution for that purpose instead. The object of SEL to act as a licensee and exploit the SAE Concept in the UK for the benefit of the wider SAE business was not a "similar object" to a university's object of providing university education.

227. We do not consider Mr Singh's reference to Professor Klich's evidence to be entirely accurate. In our notes, we record Professor Klich as having said: "Without the licence, we could not sell the SAE way of doing things." We accept his evidence on this question.

228. For SEL, Mrs Hall referred to the comments of the QAA in its June 2012 Review of SAE Institute UK, which described the relationship between the latter and MU as "strong and collegial". The QAA's Review necessarily accepted that higher education was being provided.

229. The interpretation placed by HMRC on the student numbers statistics was not correct. SEL's primary case was that the diplomas were higher education. Its alternative case was that about 90 per cent of SEL students received higher education or services (the diploma) closely related to higher education.

230. HMRC were incorrect in referring to a university's object of providing university education; the *University of Cambridge* case showed that a university was not governed by public law.

231. SEL did have similar objects to public law providers of higher education, as shown by its Memorandum of Association. As explained in a letter dated 16 December 2010 from SAE Licensing AG:

> "The intellectual property provided by us to SAE operators such as SEL is essential to operate such a school and ensures it has maximum prospects of being a financially successful business . . ."

Enabling SEL to exploit its intellectual property licence was not an end in itself. The exploitation was the means by which SEL was enabled to teach. It was the activity of teaching which was the subject matter of the exemption. It was common ground that the fact that it did so commercially was a permissible feature of an exempt supply. SEL's objects were to provide education. All private education providers had as their ultimate aim the pursuit of profit. Mrs Hall submitted that on HMRC's case, all private higher education providers would be excluded from the exemption.

232. We deal first with the question of the proportion of SEL students receiving higher education. The figures used by Mr Singh were derived from a table of student numbers contained in a document in the evidence entitled "Schedule – SAE-UK Student Numbers". This was an exhibit to Professor Klich's witness statement. In that statement, he referred to "the SAE student experience". As a result of their study at an SAE campus, students could obtain an MU degree. While it was possible to take SAE diploma courses in isolation, they nonetheless counted as credit to MU degrees if the student wished to progress to the second year degree course. In the UK, the only degrees which SAE was able to offer were MU degrees; it was therefore totally dependent on MU to be able to offer degrees, which were the major part of its "core mission".

233. Professor Klich stated in his supplementary witness statement that SAE's diploma courses were, and always had been, university-level courses. They constituted part of the degree material which MU formally recognised in SAE courses. Part of MU's reason for doing so was that it lacked the expertise and experience to provide such courses in these fields itself. Professor Klich considered that if MU were to teach the courses itself, the student experience of the material

covered and the academic standard of the course would be the same: the level of the course content would in no way differ.

234. He explained that before August 2011, the seven diploma courses provided by SAE were not validated by MU as separate awards. They had been assessed by MU as higher education (HE) courses which counted (as they continued to do from August 2011 onwards) for credit towards MU-validated degree programmes. In other words, they were equivalent to MU's own HE programmes.

235. In the UK, the degree qualifications framework consisted of a credit system; a student must complete 360 credits at a range of levels in order to achieve a degree. Before August 2011, SAE diplomas counted for 180 credits towards a degree validated by MU; this was effectively half a full degree. These 180 credit point diploma courses were covered in one year as a result of the SAE intensive teaching mode, whereas equivalent university courses would take one and a half years because UK universities typically had far fewer teaching weeks in the year.

236. As the equivalent of half a degree, it had not possible before August 2011 for the diploma courses to be validated as separate awards by MU, as they did not fit into the UK qualifications framework, under which degree programmes were three-year programmes. There was therefore no MU award recognising "half a degree" for which MU could validate the SAE diploma programmes.

237. SAE had therefore re-designed its programmes to fit into the UK Qualifications Framework, developing exit points from SAE programmes in the UK which allowed students to be awarded Certificates and Diplomas of Higher Education, in accordance with the Framework; a Certificate ("CertHE") required 120 credits, while the Diploma ("DipHE") required 240 credits (corresponding respectively to one-third and two-thirds of a degree). This new structure had allowed CertHE and DipHE courses to be validated by MU as awards since August 2011, corresponding to the first and second years of a degree respectively.

238. The availability of these diploma exit points within degree programmes was beneficial to students, who might choose for a variety of reasons to opt out of the full degree programme. The diploma qualifications were of value in industry and might enable students to find work after having completed the diploma stage. Students who had opted out could also choose to return to SAE at a later stage; if so, their diploma would count as credit, allowing them to continue directly to the later stages of the degree programme.

239. In assessing Professor Klich's evidence concerning the diplomas, we take into account his acknowledgment that, before August 2011, diploma students could not initially register with MU. We also note the response provided to Davenport Lyons by Jennifer George of SAE, in which she stated that before August 2011, students on an SAE diploma course were aware from the very beginning that the diploma would give them access to an MU degree if they chose to complete the second year with SAE. She indicated that from August 2011, students were aware from the very beginning

that they were on an MU approved programme. In cross-examination, Professor Klich stated that the information given by Jennifer George was correct.

240. Although pre-August 2011 diploma students could not register with MU, as the diploma courses were not validated as such, Professor Klich confirmed that aspects of MU's quality assurance, monitoring and review procedures were applicable to the diploma courses providing 180 credit points towards an MU degree.

241. The following information was given in SAE's Student Handbook 2006:

> "Middlesex University, London has validated the BA (Hons) Degrees in Recording Arts, Multimedia Arts and Film Making, and has enabled SAE Institute to deliver these qualifications as a global partner on an exclusive basis . . . The first year of the degree programme is the SAE Diploma, the second year explores subjects at more academic level . . .
>
> University qualification
>
> The BA (Honours) Recording Arts Degree comprises the Audio Engineering Diploma plus a second year of degree level studies. This degree is taught and administered by SAE Institute and validated by Middlesex University, London.
>
> Who awards the degree?
>
> Degree programmes are taught and administered by SAE and validated by Middlesex University, England.
>
> The Qualification is awarded by the University."

242. In his analysis, Mr Singh took the total number of students enrolled for diplomas and short courses at SAE-UK in the previous academic year (ie, in the first figures, 2008-09). He then took the number of SAE-UK students registering with MU in 2009-10, and expressed this as a percentage of that previous total. For 2009, the percentage on this basis was 18 per cent; for 2010-11, it was 41 per cent, and for 2011-12, 23 per cent.

243. The latter analysis only has validity if diplomas are properly to be characterised as not constituting higher education of university standard and therefore falling to be grouped with the short courses. We accept Professor Klich's evidence in respect of the diplomas. On the basis of that evidence, as well as other documentary evidence, we consider that such a characterisation would be incorrect.

244. For a number of reasons, we find that the diploma courses constitute higher education of university standard. In 2011, SAE applied for educational oversight by the QAA; the review was to be carried out by the end of 2012. The information at the beginning of the application form included the following information:

> "QAA is the designated educational oversight body for higher education institutions and is extending its existing activities to include the review of other organisations offering mainly **higher education** programmes. Such organisations seeking educational oversight by the QAA must:

- be registered at Companies House or be a registered charity
- have the majority of their students studying higher education programmes
- submit a completed application form with supporting documentation and fee by midday on Friday 9 September 2011."

We find that the QAA would not have entertained SAE's application if it had not accepted that the majority of SAE's students in the UK were studying higher education programmes.

245. The higher education student number statistics in the application form show totals for 2008-09, 2009-10 and 2010-11 somewhat in excess of the corresponding statistics in the "Schedule – SAE-UK Student Numbers". In our view, the difference is not sufficiently great to cast doubt either on the information contained in that Schedule or that in the application form. For each year, analysis of the figures contained in the application form shows that the percentage of higher education students, compared with the combined total of higher education and further education students, was in the region of 90 per cent. This broadly accords with Professor Klich's evidence, which was that since 2005-06, well over 90 per cent of the courses provided by SAE had provided credits which led directly to MU university degrees. Professor Klich explained that, as a result of various factors such as multiple intakes during a calendar year, a degree of judgment was always required when collating representative data for academic years.

246. In the QAA Review, "SAE Institute UK" was described by QAA as delivering programmes of study "on behalf of Middlesex University". QAA stated that the focus of all the SAE Institute campuses in the UK was on higher education programmes related to digital media technologies, and referred to SAE Institute as having offered degree programmes in the UK and elsewhere in partnership with MU since 1997.

247. In relation to academic standards, the QAA stated:

> "Management of academic standards, including assessment, marking and moderation, are delegated to the Institute, working closely with the University Accreditation Tutor (who is the University Head of Quality) and within an overarching regulatory framework defined by the University. The staff who met the review team confirmed the considerable strength of support and guidance offered by University subject link tutors to programme teams across all campuses, particularly on assessment, academic regulations and specific curriculum development issues. The strong and collegial relationship with Middlesex University in support of the management of academic standards on a cross-campus basis represents good practice."

The QAA's overall view in respect of academic standards was as follows:

> "The review team has **confidence** in the provider's management of its responsibilities for the standards of the awards it offers on behalf of its awarding body."

248. There appears to us to be a major distinction between the nature of the diploma qualifications for SAE students, and of the diplomas in *LCC*. In *LCC* at [64] Judge Hellier referred to the agreement of MU that students who obtained specified diplomas would be accepted into MU's second or third year degree courses. He commented that there was no evidence before the First-tier Tribunal of any general commitment of its students to pursue those diploma courses. At [94], Judge Bishopp explained the difference between the tuition provided by SFM and that provided by LCC. LCC provided diploma-level tuition to its own students who, on successful completion of the diploma, became entitled to admission to a university course. He contrasted this with the position of SFM:

> "SFM did not offer a diploma which gave access to a degree course, as here, but itself offered the entirety of the course which led to the granting of a degree by the university. The agreements between SFM and the university provided that SFM was to deliver the university's courses. It did so by supplying all of the necessary tuition to students of the university who, on successful completion of the course, were awarded a degree by the university."

249. In SAE's case, it provided the tuition for the diploma courses, as well as the tuition for the remaining elements of the degrees. Before August 2011, SAE diplomas were accepted by MU as credits towards MU degrees, carrying 180 credit points. In the application for QAA oversight, the versions of the five diploma courses up to 2009 were shown as awarded by "SAE Institute/MU" and were annotated: "The SAE Diploma is creditable for 180 credit points into the MU degrees as approved by the University". The 2011 versions of the diplomas showed the awarding body as MU; in the light of this, the credit arrangements did not need to be stated. In addition, MU was shown as the sole awarding body for the 2009 and 2011 versions of the degree courses.

250. In the 2009-10 Annual and Quality Monitoring Report in respect of SAE Institute, which included data for SAE UK Degree Centres, the Chief External Examiner made the following comments:

> "I am satisfied that the standards expected from SAE students for the modules taught within the degree programmes of Recording Arts and Film Making are analogous to those of equivalent degree programmes in other UK institutions . . . Based on experience with similar degree programmes offered by other UK institutions I find that the SAE student work adheres to a very robust and rigorous academic standard."

251. Another indication of the level of education provided by SAE in the UK is that as a provider of higher education, SAE is part of the UCAS clearing system, in the same way as MU.

252. We find that although diploma students within the pre-August 2011 regime were not as such registered with MU, the content and quality of the diploma programmes were subject to monitoring and review by MU as part of the process of validation of the SAE degree courses. We accept Professor Klich's explanation of the reasons for absence of validation of the diploma courses themselves.

253. The position from August 2011 onwards is simpler; the awarding body for all the programmes including the diplomas is MU, and all SAE students (other than those on short courses or "taster" courses) are aware from the commencement of their studies that their study programme is approved by MU.

254. We find that the diploma courses, both before and after August 2011, amounted to education of a university standard. The diploma courses are not merely a "stepping stone" to the MU-validated degree courses provided by SAE, but part of them. Whether a student chooses to stop at the point of achieving a diploma, or to continue through to the degree qualification, does not affect the educational standard of the diploma as a constituent part of the degree course. By analogy, if a student of "University X" were to give up half way through a degree course, this would have no effect on the standard or nature of the education received up to that point; it would remain university education.

255. We find that before August 2011, diploma students did not (and could not) sign up to MU degree courses, as the diplomas were not as such validated by MU. However, the diplomas were treated as constituting the first half of a degree course if the student decided to continue studying with a view to obtaining a degree; at this point, the student would sign up for a degree course. We find that both before and from August 2011, the education provided by SEL for the SAE Institute was education of university standard.

256. From 1998 onwards, there has been provision for validation by MU of SAE Institute courses leading to a degree from MU. The development of the relationship between SAE Institute and MU has resulted in an increasing number of MU-validated programmes provided by SAE; the position from August 2011 has been that most of the programmes have been of validated status.

257. For the above reasons, we do not consider it correct to analyse the student numbers by reference to the number of students enrolled on non-MU validated programmes, at least for the numbers up to August 2011. The diploma courses forming the first year of the degree courses (or capable of doing so) would distort the analysis if they were treated as if they had no connection with MU.

258. In relation to the use of the SAE Concept, we find that this was the means of providing the study programmes, rather than an end in itself. It therefore did not form part of SAE's (or SEL's) purpose of providing education of the relevant standard. We accept Mrs Hall's submission, based on the *MDDP* case, that a commercial organisation cannot be deprived of the benefit of exemption. The judgment of the CJEU given on 28 November 2013 (made available to us after the continued hearing of SEL's appeal) confirms this at [39], but requires consideration of the objects of non-public organisations providing the services in question.

259. On the basis that 90 per cent of the education being provided to SEL's students is higher education of similar character to that provided by MU in respect of its own students, we find that SEL, as the representative entity of SAE Institute in the UK, has

a similar purpose to that of MU, namely the provision of university education to its students.

(j) Providing courses which lead to a degree from MU

260. For the reasons set out under the previous factor, we are satisfied that SAE (through SEL in the UK) provides courses leading to a degree from MU. We accept that not every SAE student goes on to complete a degree, but for diploma students who stop their studies after completing a diploma, the option to continue with degree studies at a later stage is kept open for a number of years.

261. Although Professor Klich referred in his evidence to the listing of SAE under the Education (Listed Bodies) (England) Order 2010, we do not think it appropriate for this to be taken into account, given the comments by Burton J in *SFM* at [22](i) cited above, which indicate that the question whether a college is within the Education Acts is separate from the question whether a college is a college of a university.

(k) Having such courses supervised by MU, and quality standards regulated by MU

262. Under the 2007 MoC, the three respective degree programmes specified were to be reviewed in accordance with MU's validation and review procedures in MU's Learning and Quality Enhancement Handbook. Admissions had to conform to MU's general entrance requirements, and any requirements specific to the programmes. The programmes were subject to the approval and published quality assurance monitoring and review procedures of MU. These procedures were required to ensure that the administration, staffing, academic validity of the programmes and standards achieved were equivalent to those of MU and that the quality of student experience was consistent with that of MU students following similar programmes. MU retained the right to approve and monitor the Programmes Handbook and all advertising and publicity material relating to the programmes; MU also retained the right to require changes to material, with contractual sanctions if such changes were not made within a given period.

263. The 2009 MoC applied to five undergraduate degrees. Its relevant terms were broadly similar to those of the 2007 MoC.

264. Under the Instrument of Accreditation between MU and SAE Institute dated 22 September 2010, MU accredited SAE Institute to validate, monitor and review programmes of study leading to taught undergraduate awards of MU in the relevant subject areas. All such programmes were required to comply with relevant academic regulations of SAE Institute which had been approved by MU. Under the 2010 MoC, MU retained supervisory powers over SAE and required SAE to provide appropriate reports.

265. We are satisfied that, throughout the period covered by SEL's appeals, the degree courses were supervised by MU, which also regulated quality standards either

directly, or (after commencement of accreditation) indirectly but with overall supervisory rights in respect of the degree programmes.

(l) Admitting students as members of MU, with MU identity cards

266. The 2007 MoC contained the following clause:

> **"8. University and Students' Union Membership**
>
> a) In accordance with the statement on University Membership (see the University Regulations), students on this Validated collaborative programme shall be considered members of Middlesex University.
>
> b) Students shall not be entitled to receive University Student ID cards.
>
> c) Students on these Validated collaborative programmes may apply to become Associate members of the Middlesex University Students' Union (MUSU)."

267. The 2009 MoC contained identical wording in Clause 8 a) and b), but had no provision corresponding to Clause 8 c). The 2010 MoC did not contain any specific provision relating to students' membership of MU or to MUSU membership.

268. Professor Klich explained that as a result of the prevailing view of the position of students' unions, SAE did not seek automatic membership of MUSU for the students on its MU degree programmes.

269. The July 2009 version of MU's "Collaborative Students' Entitlement Sheet", which dealt with a number of "frequently asked questions", contained the following question and answer:

> "**Will I receive a Middlesex University student identity card?**
>
> You will not receive a Middlesex University student identity card. However, in order to provide students with a visual indication of the collaboration between our two institutions, the student identity cards issued by our partners for Validated collaborative programmes are entitled to include the following confirmation of their collaboration with the University: "This student is studying for [NAME OF PROGRAMME, eg BSc (Hons) Business Information Systems] leading to a qualification of Middlesex University"."

270. The September 2010 version contained exactly the same wording.

271. The version of the Collaborative Students' Entitlement Sheet dated September 2011 contained different wording. The sub-title to the initial heading on the sheet was "Collaborative Programmes at Accredited Institutions". The wording relating to the above question was;

> "**Will I receive a Middlesex University student identity card?**
>
> You will not receive a Middlesex University student identity card. However, in order to provide students with a visual indication of the collaboration between our two institutions, the student identity cards

> issued by our accredited partners for collaborative programmes are entitled to include the following confirmation of their collaboration with the University: "This student is studying for [NAME OF PROGRAMME, eg BSc (Hons) Business Information Systems] leading to a qualification of Middlesex University"."

272. Each version of the Entitlement Sheet confirms that "you are a full student member of the University".

273. We find that students on the degree programmes were, throughout the periods to which the appeals relate, admitted as members of MU, but that they were not provided with MU student identity cards. Instead, they were provided with identity cards by SAE Institute; these cards confirmed that the students were studying for the relevant programme leading to a qualification of MU, namely the relevant degree for the particular programme on which they were enrolled. The question of student union membership does not appear to us to be relevant to this *SFM* factor; further, Professor Klich stated in evidence that MUSU was an entity separate from MU. We accept his evidence on this issue.

(m) Submitting those students to disciplinary requirements and regulations of MU

274. Under the 1998 MoC, students were subject to the normal rules and regulations of SAETC ". . . except when these are overridden by the provisions of this memorandum". No specific exceptions to this general provision appear in that MoC. The only specific provision in the 2007 MoC was that cases of academic dishonesty were to be subject to the regulations of the "Partner Institution", where such regulations had been approved in advance by the Academic Registry of MU and such arrangement had been approved at either Institutional Approval or Validation. Where these requirements had not been met, cases of academic dishonesty were to be subject to the regulations of MU.

275. The 2009 MoC simply provided that cases of academic dishonesty were to be subject to the regulations of, and to be dealt with by, the "Partner Institution", as approved by the Academic Registry of MU.

276. The 2009 Partnership Agreement did not refer to disciplinary regulations and requirements, nor were these mentioned in the 2010 Instrument of Accreditation. The 2010 MoC stated at clause 7:

> "All students registered with the University shall be regarded as Institute students and subject to Institute regulations for admissions, assessment, appeals, discipline, grievance and other matters. Students shall also be subject to course regulations of the Institute for its taught awards which have been approved by the University."

277. The 2011 SACA stated that "students of SAE-UK in approved higher education courses shall be subject to similar rules and regulations as other MU students operated under specified delegations by SAE-UK as approved by Middlesex University". This provision does not appear to deal with disciplinary matters as such.

278. A section of a 2008 Handbook published by MU headed "Principles and Criteria for Assessing Associate College Proposals" stated:

> "Students studying wholly or in part in the Associate College on Programmes leading to University awards shall normally be students of the University for most purposes (eg. academic regulations; assessment; academic appeals; quality assurance) but shall be subject to the Associated College's Code of Disciplinary Practice."

279. The 2011-12 version of the SAE Institute "Quality Assurance Handbook", the front cover of which describes SAE Institute as "Accredited by Middlesex University", contains a section dealing with SAE Student Discipline Rules. These are specific to SAE, and make no reference to MU; the appeals procedures are to be carried out by SAE, and there is no onward appeal in disciplinary matters to MU or any other entity external to SAE.

280. We find that, although SAE was required by MU to adopt standards laid down by MU, which may be seen as indirectly imposing MU's standards on SAE students, there was no direct submission of SAE students to disciplinary regulations and requirements of MU. SAE's students were subject to SAE's disciplinary regulations and requirements. We do not consider that this particular *SFM* factor deals with anything wider than disciplinary matters; we accept that in various respects, SAE Institute (and therefore SEL) is subject to a wide range of other requirements of MU, but these do not appear to us to be relevant to this specific factor.

(n) Entitling successful students to receive a degree from MU at the MU degree ceremonies

281. The 2007 MoC and the 2009 MoC provided that students receiving a qualification under the terms of the degree programme shall be entitled to attend MU's Graduation Ceremonies and to join MU's Alumni Association. The provision in clause 7 of the 2010 MoC (see above) was more general, but we accept that throughout the period beginning with the 1998 MoC, SAE students have been entitled to receive MU degrees at MU degree ceremonies.

(o) Being described as an associated/affiliated college of MU

282. We have considered this above. In arriving at our findings under heading (a) we have taken into account Burton J's comments in *SFM* at [21]:

> "I note that the words used in note (1) (b) are 'any college'. I accept Mr Hyam's submission that this cannot mean 'any old college', but it does support at least the following: (i) that colleges are not limited to those within the Education Acts; (ii) that an associated or affiliated college is not ruled out."

The overall picture

283. As we have stated, it is necessary to examine the particular facts and circumstances of the relevant case. Comparisons between that case and others may

not necessarily be helpful. Mr Singh submitted that SEL's case was not as strong as that of SFM, which the Upper Tribunal had described in *LCC* as only "a borderline case". He argued that some of the crucial factors which had been found in *SFM* that had led to the finding that SFM was a college of a university were missing in SEL's case.

284. He commented that in *LCC*, the Upper Tribunal had agreed with the First-tier Tribunal that LCC was not a college of MU. Some of the reasons given in that case were also reasons why SEL was not a college of MU.

285. In contrast, Mrs Hall submitted that the question was not whether the present case was close to *SFM* but whether SEL, having regard to all the facts and circumstances of its case, was a college of a university.

286. Mrs Hall accepted that there were some indicators supporting HMRC's case, but argued that overall this Tribunal could comfortably reach a decision for all the periods in question that SEL was providing higher education to students. SEL considered that it had earned the preposition "of" in the Note (1)(b) phrase "college of a university".

287. We find comparisons between the facts of different cases to be of limited help; as Mrs Hall submitted, we are required to find on the basis of the particular facts and circumstances whether SEL is (and has been for the periods in question) a college of MU.

288. We are satisfied that SEL, as the UK arm of the SAE Institute, has been an Associate College of MU since 1 May 2009. The appropriate documentation does not appear to have been entered into, but both SAE and MU have proceeded on the basis of this status having continued for some time. There is a degree of dependence of SAE Institute on MU, and SAE Institute is also financially dependent on MU. SAE does not fulfil the "absence of distributable profit" test. SEL is entitled to public funding, but of a more limited amount. The links between SAE Institute and MU are of a long-term nature, as demonstrated by the length of the relationship; there is no reason to assume that either party would wish to terminate this existing relationship. The operations of SAE and MU are carried out on separate campuses, but two of the SAE campuses are reasonably close to those of MU. SAE is not under an obligation to offer a minimum number of university places. We have found that SAE Institute, and thus SEL, has similar purposes to those of a university. SAE provides courses leading to a degree from MU. Most of SAE's courses are supervised by MU and the quality standards of such courses are regulated by MU. Students are admitted as members of MU, but do not receive MU identity cards as such. The SAE identity cards acknowledge the relationship between SAE and MU. Students are not directly subject to the disciplinary requirements of MU. Students receive their degrees from MU at MU degree ceremonies. SAE Institute has been described by MU as an Associate College, but the extent of MU's acknowledgment of that status was, at least initially, limited.

289. Taking all our findings into account, we consider that there was a substantial degree of integration of SAE Institute within MU, although as a separate commercial entity, SAE inevitably retained elements of separation and independence. A major factor in terms of integration was MU's decision to advance SAE Institute to accredited status. The fact that SAE was one of only three institutions on which such status had been conferred by MU demonstrated the closeness of the relationship between SAE Institute and MU.

290. In argument, Mr Singh sought to suggest that SEL had taken various steps to bolster the argument that it was a college of MU, in order to avoid having to charge VAT. He characterised the process of drafting and entering into the SACA as a self-serving attempt to achieve this.

291. We do not accept Mr Singh's argument on this issue. He referred to Melvyn Keen's comments on the SACA as "a fairly bland document which merely repeated what was in the Accreditation Agreement". Further, Mr Singh stated later in his argument that the SACA "did not fundamentally change the relationship". In our view, if the SACA was of such little effect, it would not have amounted to a sufficient justification for a claim to exemption.

292. We consider that the SACA has to be viewed as a small part of the development of the long-standing relationship between SAE Institute and MU. The extent of that relationship and of the integration of SAE Institute within the MU structure fall to be considered by reference to a much wider range of factors than a single document. We have considered Mr Singh's arguments that there had been a history of SEL and its predecessors seeking to manipulate matters with a view to ensuring availability of VAT exemption. Although those companies and their advisers appear to have considered the VAT position, we do not accept that the development of the SAE-MU relationship can be regarded as a process of seeking VAT exemption.

293. The factors which we consider to carry the greatest weight are:

(1) Status of Associated College, combined from September 2010 with status of Accredited Institution.

(2) Long-term links between SAE Institute and MU. Similar purposes to those of a university, namely the provision of higher education of a university standard.

(3) Courses leading to a degree from MU, such courses being supervised by MU, which regulated their quality standards.

(4) Conferment of degrees by MU, received by SAE students at MU degree ceremonies.

294. On the basis of the substantial evidence presented to us, and of our findings set out above, we find that SEL as the representative of SAE Institute in the UK is, and has been since 1 May 2009, a college of MU.

Submissions made following release of the "FBT" decision

295. Since the resumed hearing, the Upper Tribunal has released its decision in *Finance & Business Training v Revenue and Customs Commissioners* [2013] UKUT 0594 (TCC). For convenience, we refer to that decision as "*FBT*". On 19 December 2013, HMRC sent further brief submissions to the Tribunal office; these were relayed to us on 23 December 2013. We agreed to allow a period of time for SEL to respond; Mrs Hall's submissions were received on 17 January 2014.

296. Mr Singh submitted that the decision of Morgan J in *FBT* was relevant in SEL's case. It was clear from that decision that SEL could not claim that it was an eligible body in relation to some of its activities and not in relation to the remainder of its activities; it was either an eligible body or it was not. For a number of reasons based on the specific facts of SEL's case, HMRC submitted that SEL was not an eligible body at any time.

297. In her response, Mrs Hall summarised the point at issue in *FBT*. This was whether it was possible for an organisation to be an "eligible body" in relation to only some of its activities. The point had not been raised in relation to SEL's appeal because it was SEL's case that it was a college of MU having regard to all of its activities. She distinguished the factual background of FBT from the position in SEL's case.

298. On the basis of the evidence, SEL's case was that it was a college of MU, taking into account all the circumstances and its activities as a whole. The point of law in issue in *FBT* did not therefore arise.

299. HMRC's position appeared to be that SEL only had a sufficiently collegiate relationship with MU in respect of its degree courses, and that, following *FBT*, it could not therefore be a college of MU.

300. In advancing that argument, HMRC were failing to take into account the nature of SEL's diploma courses. Mrs Hall referred to the position of these courses. She commented also that the diploma courses were themselves university-level education, or at the very least were "closely related to" such education, such as to fall within Article 132(1)(i) PVD.

301. It was only if SEL's primary case were to be rejected that the issue would arise as to whether SEL could be considered an eligible body in respect only of its degree programmes. If the Tribunal were to decide to reject that primary case, Mrs Hall set out her submissions:

(1) Contrary to the decisions of the First-tier Tribunal and the Upper Tribunal in *FBT*, SEL submitted that an organisation might be an eligible body in respect of some activities, while simultaneously engaging in other activities in respect of which it was not acting in its capacity as an eligible body and/or was not able to claim the exemption because the service supplied did not fall within its scope. Even Oxbridge colleges, which HMRC accepted were eligible bodies, could not claim exemption for such activities as May Balls and catering services. Further,

the CJEU found in Case 357/07 *R (TNT Post Ltd) v HMRC* [2009] STC 1438 that an operator providing a public postal service might act in more than one capacity; its activities in its capacity as the public postal services would fall within the relevant exemption, but its other activities would not.

(2) Article 132 provided that specified types of education may only be exempt when they were provided by bodies governed by public law having such (namely the specified types of education) as their aim or by other organisations recognised by the Member State concerned as having similar objects. By contrast, Group 6 did not lay down any express requirements with regard to the aims or objects of the various eligible bodies which it listed in Note (1); it simply listed a variety of bodies.

(3) It was common ground that FBT was not a body governed by public law and that it must therefore establish that it is another organisation with objects which were similar to those of public bodies whose aim was the provision of university education. In view of the judgment in *University of Cambridge*, in which it was decided that the university was not a body governed by public law, the identity of the public body by reference to which the similarity of objects must be established was not at all clear.

(4) Despite these potential difficulties, a Directive-compliant interpretation could be applied to Group 6, following the principles in *Vodafone 2* at [37]. To comply with the PVD, Group 6 had to be read in the following way: "*1. The provision by an eligible body of university education by a college of a university which has the provision of university education as its object.*"

(5) Article 132(1)(g) and (h) PVD provided that the recognised bodies for the purposes of the social welfare exemption must be "devoted to" social wellbeing. There was no such requirement with regard to the education exemption.

(6) SEL understood that permission was being sought to appeal the decision of the Upper Tribunal in *FBT*, and that a reference to the CJEU was being sought on the question whether a college could act as a college of a university in relation to only some of its activities. Given the very recent developments in this area, SEL reserved its position as to whether there should be a reference to the CJEU in its own case.

302. One point in HMRC's December submissions concerned the effect of *FBT* on an issue raised at the resumed hearing. Mr Singh had referred to the dates on which SAE's Oxford, Glasgow and Liverpool campuses had become degree centres. Oxford had done so on 8 June 2009. Glasgow had offered one degree course from 16 September 2009, and Liverpool had not offered a degree course until September 2011. Mr Singh had asked how the educational services supplied at the Liverpool campus have been treated as VAT exempt when it had no links at all with any UK university; it had not been an approved centre for offering any MU validated programmes.

303. In her reply at that hearing, Mrs Hall had explained that it was no part of SEL's case that each of its campuses should be regarded as part of a university. All supplies of higher education made by SEL had been treated by SEL as taxable in its assessments. In the same way as the research activities in *EC v Germany* (Case C-

287/00, [2002] STC 982) did not attract the exemption but the supplies of its higher education did, if this Tribunal were to decide against SEL on this point, there was a simple mechanism of adjusting the assessments made on SEL so as to take account of the time when Oxford, Glasgow and Liverpool were not validated as degree centres. This was merely a matter of quantum, not of principle.

304. In HMRC's December submissions, Mr Singh had described the latter suggestion made by Mrs Hall as "an impermissible approach in light of Morgan J's decision in *FBT*". Mr Singh said that it was clear from that decision that SEL could not claim that it was an eligible body in relation to some of its activities and not in relation to the remainder of its activities; it was either an eligible body or it was not.

305. In her January response, Mrs Hall commented on Mr Singh's submission. She argued that it missed the point; SEL's submission had not been an *FBT* type of submission. SEL had simply argued that in keeping with exemption not being available for such services as (for example) catering services, the assessment could be adjusted if necessary to take account of any exemption claimed when certain campuses had not been validated by MU. Nothing in *FBT* affected that submission.

306. Contrary to the suggestion in HMRC's December submissions, the *FBT* case did not in any way undermine SEL's primary case; it was simply not of relevance.

307. Mrs Hall also raised issues in the context of the decision of the CJEU in *MDDP*. We do not attempt to set these out in detail. In the course of her argument, she indicated that if necessary SEL would submit that Group 6 Sch 9 VATA 1994 was ultra vires Article 132 PVD by failing to specify the types of education for which exemption could be claimed. SEL's primary case was that there could be no question of Note (1)(b) being incompatible with Article 132 because it could be interpreted consistently with it by inserting the condition that the education to be provided by a college of a university must be university level education. This was the very basis on which this appeal had been argued by both parties.

308. Mrs Hall indicated that SEL would also submit if necessary, in reliance on *MDDP*, that by failing clearly to identify those organisations with the requisite aims or objects, Group 6 was ultra vires Article 132. She set out information in support of such possible submission.

309. In the event that the domestic legislation was ultra vires, SEL relied on its directly effective right to exemption under Article 132 on the basis that it provided university education, which was one of its objects. Mrs Hall made it clear that SEL did not encourage the Tribunal to find that the domestic legislation was ultra vires; the arguments set out in her submission were advanced for the Tribunal's consideration should it find it necessary to consider the point.

310. Although we had indicated that we did not wish to receive any further submissions once those made on behalf of SEL had been sent to us, HMRC did submit a further response, received on 23 January 2014. In their letter, HMRC indicated that they had no objection to SEL making written submissions in respect of

the *FBT* and *MDDP* cases. However, SEL had made submissions suggesting that the exemption in domestic law under Note (1)(b) to Group 6 Sch 9 VATA 1994 was ultra vires Article 132 PVD, while simultaneously claiming that it did not encourage the Tribunal to find that the domestic legislation was ultra vires.

311. HMRC commented that the submission developed in Mrs Hall's note was presented as if it arose from the decision in *MDDP*, but if SEL wished to argue that domestic legislation breached EU law, there had been nothing to prevent it from doing so in its lengthy oral submissions at the hearing of this appeal. It was not appropriate for SEL to raise an entirely new written submission in written submissions after the hearing when it could have made such a submission at the hearing.

312. HMRC therefore submitted that the Tribunal should not entertain at this stage a proposition that the domestic legislation was ultra vires. If the Tribunal was minded to consider SEL's suggestion that the domestic legislation was ultra vires, HMRC respectfully requested the Tribunal to invite HMRC to make written submissions on the issue, given that they had had no previous opportunity to address such a submission.

Our response to the post-FBT submissions

313. Our finding of fact in relation to SEL's activities is that 90 per cent of the education being provided to SEL's students is higher education of similar character to that provided by MU in respect of its own students. Although the First-tier Tribunal in *Finance & Business Training Ltd v Revenue and Customs Commissioners* [2012] UKFTT 382 (TC) found itself unable to establish the precise proportion of the relevant activities, it is clear that this was much less than the percentage in SEL's case. Our interpretation of the Upper Tribunal's decision in *FBT*, which is binding on this Tribunal, is that it does not go as far as to require 100 per cent of the activities carried on by the organisation in question to be of the same character in order for that organisation to qualify as an eligible body. If the position were otherwise, then any minor level of other activity, however small, would have the effect of disqualifying that organisation from eligible body status.

314. SEL's position as we have found it to be is that nearly all of its activity is such as to establish its claim to exemption under Note (1)(b) of Group 6, Sch 9 VATA 1994. We do not consider that our conclusions as set out above are affected by the decision of the Upper Tribunal in *FBT*.

315. HMRC's December submissions were based on the contention that the majority of SEL's students were on diploma courses not validated by MU and did not go on to register for a MU validated programme. HMRC also contended that the diploma courses were not "university courses".

316. As a result of our contrary findings, we do not consider that SEL's position is affected by the decision of the Upper Tribunal in *FBT*. It follows that the issues raised in response by Mrs Hall in her January submissions do not need to be addressed,

unless for any reason our findings of fact are at any stage overturned on any appeal against our decision.

317. Thus, although we are conscious that there may be various grounds which might be pursued on any appeal for the Appellant in the *FBT* case, we do not think it appropriate to consider these in this decision. Further, if we had concluded that it was necessary to consider the issues raised by Mrs Hall in those submissions, we do not think that it would have been satisfactory to deal with those issues without a further hearing; the points raised were too substantial to be considered merely on the basis of written submissions.

318. In relation to Mrs Hall's submissions that the domestic legislation might be ultra vires Article 132 PVD, we agree with HMRC that it was inappropriate for these to be raised at that stage and in that way. Such issues should have been covered in the normal course of the hearing. Thus if it had proved necessary to pursue the *FBT* issue further, we would not have been prepared to consider them in dealing with the post-hearing submissions.

The conduct of this appeal

319. We find it necessary to comment on the way in which this appeal has been handled. It was listed for a three-day hearing. It is clear from the appeal file that this was based on the parties' time estimates. Very early in the course of the first day, Mrs Hall indicated that the hearing time was likely to be inadequate. We extended our sitting times for each of the three days and, late on the third day, we were able to arrange to sit on the next day for a fourth day. On that fourth day we were able to complete hearing the evidence, following which the parties indicated that they would need one and a half to two days to make their legal submissions. Lack of availability of various individuals meant that the further hearing could not take place until 31 October and 1 November 2013, nearly four months afterwards.

320. Both Mrs Hall and Mr Singh apologised for the inadequacy of the time estimate. Mrs Hall commented that the evidence had not been so substantial at the time that the estimate had been given.

321. In such circumstances, where there is a substantial increase in the amount of the available evidence, parties should consider whether the time estimate should be revised, whether or not this may mean that the hearing may have to be deferred. It would also have been appropriate, given the volume of evidence and the ultimate duration of the hearing, to consider whether a transcript of the hearing might have been necessary. We would have found this to be of considerable advantage.

Disposition

322. We allow SEL's appeal against HMRC's decision to deny exemption and against all the assessments made pursuant to that decision.

Right to apply for permission to appeal

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

JOHN CLARK
TRIBUNAL JUDGE

RELEASE DATE: 28 February 2014