[2017] UKFTT 0518 (TC)

TC05966

Appeal number: TC/2015/7236

VAT – Exemption – Education – arts 132-134 PVD 2006/112/EC; Group 6 sch 9 VATA 1994 - Sales from campus shops

FIRST-TIER TRIBUNAL
TAX CHAMBER

LOUGHBOROUGH STUDENTS UNION **Appellant**

-and-

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

TRIBUNAL: **Judge Peter Kempster**

Sitting in public at Nottingham on 19 October 2016

Mr Noel Tyler (VATangles VAT Consultancy) for the Appellant

Mr Christopher Shea (HMRC Appeals Unit) for the Respondents

DECISION

1. The Appellant ("LSU") appeals against a decision by the Respondents ("HMRC") dated 14 September 2015 to deny a claim for repayment of output tax for the VAT periods 10/11 to 04/15 in the net amount of £117,334 ("the Disputed Decision"). The Disputed Decision was upheld by formal internal review dated 3 December 2015.

2. The claim relates to sales of stationery, art materials and other items by LSU's shops in the relevant periods. LSU contends that these sales were exempt supplies for VAT purposes, and had previously been erroneously treated as standard rated.

Agreed Facts

3. Loughborough University ("the University") was established in 1966 by Royal Charter, which states "There shall be a Students' Union of the University." The Statutes of the University state: "There shall be a Students' Union of the University and Ordinances shall prescribe the constitution, functions, privileges and other matters relating to such Union." LSU is an entity separate from the University, and is separately VAT-registered. LSU is also the Union for students from two other educational establishments: Loughborough College (a further education college) and RNIB Vocational College.

4. Clause 2(a) of LSU's Constitution states LSU's objects:

> "OBJECTS & POWERS
>
> The Union's objects are the advancement of education of Students at Loughborough University, Loughborough College and the RNIS Vocational College (Loughborough) for the public benefit by:
>
> i) enriching and enhancing the educational experience of its members as people as well as intellects, and in particular to providing opportunities for members to develop their personal maturity, leadership, and communications and other skills.
>
> ii) acting as the principal body representing its members' views and interests within their institutions, to the local community and nationally.
>
> iii) enhancing the student community and student well being providing social, cultural. sporting and recreational activities and forums for discussions and debate.
>
> iv) to ensure that students experiencing problems with student life can get the support and help they need and seek to minimize the likelihood of these problems occurring."

5. Clause 2(b) states LSU's powers, including:

> "To further its objects, but not to further any other purpose, the Union may:
>
> …
>
> (xiv) raise funds and invite and receive contributions from any person provided that the Union shall not carry out any taxable trading activities in raising funds
>
> …
>
> xxv) trade in the course of carrying out any of its objects
>
> …"

6. LSU operates a range of commercial activities on the campuses of the University and Loughborough College, mainly bars and catering but also four retail outlets: the shop in LSU's headquarters on the University campus, another (called Purple Onion) on the University's campus village, and two (recently consolidated into one) on the College campus. The shops are open at least five days per week during term time. Although most of the customers are students, there is no restriction on others using the shops; there is no distinction at point of sale between student and nonstudent sales. One of the College campus shops sells art materials.

Law

7. Articles 132 to 134 of the Principal VAT Directive (2006/112/EC) provide (so far as relevant):

> "*Exemptions for certain activities in the public interest*
>
> **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;
>
> …
>
> **Article 133**

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

(a) the bodies in question must not systematically aim to make a profit, and any surpluses nevertheless arising must not be distributed, but must be assigned to the continuance or improvement of the services supplied;

(b) those bodies must be managed and administered on an essentially voluntary basis by persons who have no direct or indirect interest, either themselves or through intermediaries, in the results of the activities concerned;

(c) those bodies must charge prices which are approved by the public authorities or which do not exceed such approved prices or, in respect of those services not subject to approval, prices lower than those charged for similar services by commercial enterprises subject to VAT;

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

…

Article 134

The supply of goods or services shall not be granted exemption, as provided for in points … (i), … of Article 132(1), in the following cases:

(a) where the supply is not essential to the transactions exempted;

(b) where the basic purpose of the supply is to obtain additional income for the body in question through transactions which are in direct competition with those of commercial enterprises subject to VAT."

8. Section 31(1) VAT Act 1994 provides that "A supply of goods or services is an exempt supply if it is of a description for the time being specified in Schedule 9 …". Schedule 9 provides (so far as relevant):

"**Group 6 — Education**

Item No

1 The provision by an eligible body of—

(*a*) education; … ; or

(*c*) vocational training.

…

4 The supply of any goods or services (other than examination services) which are closely related to a supply of a description falling within item 1 (the principal supply) by or to the eligible body making the principal supply provided—

(*a*) the goods or services are for the direct use of the pupil, student or trainee (as the case may be) receiving the principal supply; and

(*b*) where the supply is to the eligible body making the principal supply, it is made by another eligible body.

…

NOTES

(1) For the purposes of this Group an "eligible body" is—

…

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

(*c*) an institution (i) falling within section 91(3)(a), (b) or (c) or section 91(5)(b) or (c) of the Further and Higher Education Act 1992; …

(*e*) a body which—

(i) is precluded from distributing and does not distribute any profit it makes; and

(ii) applies any profits made from supplies of a description within this Group to the continuance or improvement of such supplies;

…

Appellant's case

9. Mr Tyler submitted as follows for the Appellant.

10. LSU had to prove:

(1) That LSU is a body entitled to the education exemption in art 132; and

(2) That sales by LSU to students of goods such as stationery, art materials and other items are supplies closely related to the provision of education and/or vocational training.

Qualifying body

11. The relevant provision in art 132 is paragraph (1)(i). Article 133 allows member states to apply permitted restrictions in determining eligible bodies. Those EU provisions had been imperfectly transposed into UK domestic legislation – for example, the requirement in Item 4 of Group 6 that the supply must be "by or to the [person] making the principal supply" was not a requirement of the Directive: *Stichting Regionaal Opleidingen Centrum Noord-Kennemerland/West-Friesland (Horizon College) v Staatssecretaris van Financiën* [2008] STC 2145.

12. The University is an eligible body by reason of Note 1(b) to Group 6. The College and the RNIB Vocational College are eligible bodies by reason of Note 1(c)(i) to Group 6. Those three bodies make the principal supplies of education and/or vocational training.

13. Article 133 permitted the UK to restrict eligible bodies, including the condition in art 133(a). Each of the restrictions in art 133 must be applied in full or not at all. That had not been correctly reflected in Note 1(e) to Group 6 (cf Note 2A to Group 10, concerning sporting activities). The UK law was more prescriptive: (i) it stated that as well as the body not distributing any profits, it must also be precluded from distributing any profits; and (ii) its description of what any surplus must be used for was more prescriptive.

14. In the First-tier Tribunal case of *Loughborough Students' Union v HMRC* [2012] UKFTT 331 (TC) part of the dispute had concerned the applicability of the cultural services exemption (Group 13 of sch 9) to various events held for students by LSU. The relevant provision there was Note 2 to Group 13:

> "For the purposes of item 2 "eligible body" means any body (other than a public body) which—
>
> (a) is precluded from distributing, and does not distribute, any profit it makes;
>
> (b) applies any profits made from supplies of a description falling within item 2 to the continuance or improvement of the facilities made available by means of the supplies; and
>
> (c) is managed and administered on a voluntary basis by persons who have no direct or indirect financial interest in its activities."

15. The Tribunal recorded (at [7]): "The respondents conceded that the union qualifies for the exemption so far as Notes 2(a) and 2(b) are concerned." That could

be taken as a finding of fact by the Tribunal that LSU satisfied Notes 2(a) and 2(b) to Group 13.

16. In the current proceedings HMRC accepted that LSU satisfied Note 1(e)(i) to Group 6 ("a body which is precluded from distributing and does not distribute any profit it makes") but contended that LSU did not satisfy Note 1(e)(ii) to Group 6 ("a body which applies any profits made from supplies of a description within this Group to the continuance or improvement of such supplies").

17. LSU – indeed, students' unions generally – could not make a profit. Its finances comprised surpluses on its commercial activities plus membership fees and grants from the parent bodies. The CJEU in *Kennemer Golf & Country Club v Staatssecretaris van Financiën* [2002] STC 502 had concluded that surpluses were distinct from profits. Any surpluses realised by LSU were allocated to the furtherance of its objects.

18. LSU had educational objectives, and also provided education and/or vocational training. The objectives were clear from LSU's constitution and were the advancement of education at the three bodies for the public benefit. Vocational training was defined in Note 3 to Group 6 as including "training, re-training or the provision of work experience for … any voluntary work connected with (i) education, health, safety, or welfare; or (ii) the carrying out of activities of a charitable nature." One of LSU's objectives is (per the Trustees' Report) "Make 'getting involved' in the Union more rewarding and challenging so students develop personally and boost their careers", and the Report stated that in sports there were "over 100 students coaching their peers" and that LSU was "Training 20 students as social media advisers for local businesses". Further, there would be training involved in preparation for adventure activities, the filming and production of TV programmes and magazines, and the training of the student staff who work in the shops, venues and marketing.

19. Thus LSU was a qualifying body under art 132 and also an eligible body under Note 1 to Group 6.

Closely related supplies

20. Article 132(1)(i) exempts "the supply of services and of goods closely related to" the provision of exempt education. The principles to be followed were stated by the Upper Tribunal in *Revenue and Customs Commissioners v Brockenhurst College* [2014] STC 1332, and approved by the Court of Appeal ([2016] STC 2145).

21. Article 134 applied restrictions denying exemption "(a) where the supply is not essential to the transactions exempted; (b) where the basic purpose of the supply is to obtain additional income for the body in question through transactions which are in direct competition with those of commercial enterprises subject to VAT." The art 134 restrictions had not been incorporated into the UK legislation.

22. On the "basic purpose" restriction in art 134(b), to fail this test the overriding purpose of LSU in deciding to sell stationery, art materials etc would have to be to set themselves up as commercial competition to stationers such as Staples. If it were so minded, LSU would not do so through shops on campuses with no easy vehicular access; also, it would operate a marketing and promotional campaign to local businesses. No reasonable businessman in this position would undertake his business in this manner: *Ian Flockton Developments Ltd v Commissioners of Customs and Excise* [1987] STC 394. LSU purchased its goods from NUS Services Limited and would be bound by the rules of that body, which would preclude such overly commercial activity. Further, LSU is a charity and competitive non-mutual trading (unless carried out through a separate subsidiary) would cause regulatory problems; it would also be contrary to LSU's constitution.

23. On the "essential" restriction in art 134(a), the transactions exempted were "the imparting of knowledge, information and instruction with a view to educating and training the recipient" – per Etherton LJ in *Revenue and Customs Commissioners v Open University* [2016] STC 2273 (at [107]). Supplies of art materials were essential to Art students, lab coats to Science students, and stationery to all students.

24. HMRC accepted that catering supplied to students by universities and colleges is exempt, and that was extended by concession to student unions: VAT Notice 709/1 "Catering and take-away food":

> "**2.6 Schools, universities, colleges, etc**
>
> Certain supplies of education, training and research are exempt from VAT. Where an educational institution provides exempt education to its own pupils and students, then the supply of catering they make is also exempt. If the supply of education is non-business, as in the case of a local authority school, free school or academy school, the supply of catering will also be non-business, provided it is made at, or below, cost. See Notice 701/30 Education and vocational training for more information.
>
> Whichever treatment is appropriate it applies to anything provided by way of catering. This includes food supplied at mealtimes and break times from the refectory, canteen or other similar outlet but not items purchased from a university campus shop, as they are not provided by way of catering.
>
> …
>
> You must account for VAT on supplies of catering to staff and visitors (except visiting students).
>
> If you are a student union, supplying catering both on behalf, and with the agreement, of the parent institution, you will need to read section 5.5.

…

5.5 Catering provided by student unions in universities and other higher education establishments

If you are a student union and you are supplying catering (including hot take-away food) to students both on behalf, and with the agreement, of the parent institution, as a concession you can treat your supplies in the same way as the parent institution itself. This means that you can treat your supplies as exempt when made by unions at universities, and other institutions supplying exempt education, and outside the scope of VAT when supplied at further education and sixth form colleges.

This means that most supplies of food and drink made by the union, where the food is sold for consumption in the course of catering (see sections 2 and 3), will be exempt. For example, food and drink sold from canteens, refectories and other catering outlets (excluding bars), plus food and drink sold from vending machines situated in canteens and similar areas.

However, it does not cover food and drink sold from campus shops, bars, tuck shops, other similar outlets and certain vending machines (see 2.4 above). Further the concession does not cover any other goods or services supplied by the student unions."

25. HMRC's stated policy was difficult to justify; why should coffee served in a canteen be exempt but not the same item when purchased from a vending machine? Whether catering supplied to students is closely related to the provision of education should not depend on the venue from which it is supplied. The same analysis should apply to the goods being supplied by the shops. Goods and services which are as necessary for the provision of education or vocational training as the supply of catering, must be closely related to the education. LSU was an eligible body and thus entitled to the exemption; there was no need for concessionary treatment.

26. Paragraph 51600 of HMRC's VAT Education Manual states:

"**Group 6 Item 4 Closely related supplies: goods and services that are not 'closely related' to supplies of education**

The following are examples of goods and services that are taxable in principle unless relief is available elsewhere. It is important to note that this is subject to the overriding principle that supplies of catering by an eligible body to its pupils, students or trainees are closely related:

- supplies to staff (including tutors on summer schools) and to other non-students;

- sales of goods from school shops, campus shops and student bars;

- sales from vending machines - but see paragraph VATEDU52000;
- sales of goods not needed for regular use in class;
- separately charged laundry and other personal services;
- sales of school uniforms and sports clothing;
- admission charges (other than for taking part in sports activities) for example, admission to plays, concerts, dances, sporting venues, exhibitions, museums and zoos;
- administration and management services;
- commission for allowing sales by outside organisations at an educational establishment; and
- sales by a sole proprietor or partnership in connection with private tuition.

…"

27. Again, HMRC's stated policy was difficult to justify; for a Sports Science student (a subject in which Loughborough University was eminent) the supply of sports clothing was closely related to the education. Other points in HMRC's policy were contrary to the guidance given in *Horizon College* and *Brockenhurst College*.

Methodology and quantum

28. LSU had invited HMRC to meet to discuss the claim but HMRC had not done this. LSU accepted that the exemption applied only to supplies of goods made to students. There was a long-standing agreement with HMRC that catering supplies made by LSU were exempt as to 95% as relating to student sales – the same figure had been used for the shop supplies and was considered to be conservative. LSU had adjusted its input tax deduction claimed for the relevant periods. LSU had an agreed special method for its partial exemption calculations.

29. The claim had been allocated to VAT quarters by reference to the number of academic weeks in each period; while that was an approximation, it was sufficiently accurate for these purposes.

Respondents' case

30. Mr Shea submitted as follows for the Respondents.

The goods

31. LSU's claim related to sales "such as sales of stationery and art materials etc". That was insufficiently precise to identify the goods for which exemption was being claimed. The very wide description was not limited to items required for educational course work. While the items might be of assistance to students, there was no evidence as to how they were essential. No evidence has been produced that the goods were sold to students; nor that the goods were used for education.

The supplies

32. The principal supply is that of university education; that is provided by the University (and the two colleges) to the students. LSU does not provide the principal supply. Nor does it provide educational supplies to the University. LSU makes supplies to the students (and the public) – neither of which are eligible bodies. Nor do the students (or the public) provide any principal supply of education.

33. LSU's relationship to the students is of a representative body which facilitates fair access to its members in providing welfare, social, recreational and other similar services directly to students. LSU does not provide education to the students.

34. It was necessary for LSU to have the required educational aim as explained by the Court of Appeal in *Open University*. LSU must make supplies of education in order to qualify for the exemption: *Open University* at [93]. The supply of education must be part of the body's objects "both as a matter of vires and economic and operational reality": *Open University* at [109].

35. The goods must be for the use of the students receiving the education. Supplies to non-students were not eligible; nor were supplies to students for use other than in their education (eg sales of art materials to an Engineering student who uses the materials to pursue a hobby of painting).

36. It was accepted that there was no legal requirement for the goods to be supplied by the same body as provides the education: *Open University* at [9]. However, where the supplies are made by two separate independent entities then that indicated that the supplies may not be closely related.

37. The correct test is whether the supplies of the goods were actually supplied as supplies ancillary to the education: *Horizon College* at [28].

38. There was no evidence that the University determined what goods were required by students to undertake their course work. If the University did not stipulate exactly what goods were required then it was doubtful that the goods were "essential to the" education.

39. It is the supply which must be essential, not the general need or purpose fulfilled by the supply: *Horizon College* at [38].

40. A student making a discretionary purchase from a shop did not meet the criteria. Students could apparently choose the goods they considered they required for their courses, and presumably where they chose to make those purchases. While it was accepted that art students need some art materials, and all students need some stationery, the decision as to which goods to purchase and whether to do so from these shops is a matter for the individual student's discretion.

41. The determination of which goods are essential must be made by the University, not the student or the third party supplier of the goods (LSU).

42. Even if the closely-related test is met, the goods must be supplied by an eligible body. Note 1(e) has two limbs. HMRC accept that the first limb is satisfied by LSU. However, it was not accepted that LSU "applies any profits made from supplies of a description within this Group to the continuance or improvement of such supplies". The earlier LSU case concerned a different exemption and in those circumstances HMRC were prepared to concede that a similar test was satisfied by LSU; that was a concession made to facilitate that separate litigation and not a finding of fact by the Tribunal. HMRC consider that Note 1(e) properly implements art 133(a).

43. *Kennemer* (at Advocate General opinion [61]) supports that not only must surpluses not be distributed but must be assigned to the continuance or improvement of the services supplied. LSU's accounts show that profits were made from the operation of the shops. There was insufficient evidence that the profits were applied as required. The profits appeared to be used for the provision of facilities to LSU's members – not for the purposes of education.

44. Although LSU had a power to carry out education, there was insufficient evidence that it actually provided any education.

45. LSU claimed it was entitled to art 132 by direct effect. *Horizon College* (at [34]) states that the body supplying the closely-related goods must be recognised as a body having similar objects to a body governed by public law with university education as its aim. LSU was not such a body. It is necessary for LSU to show that it supplies education of one of the six kinds set out in art 132(1)(i) to claim direct effect, and supply that education for a consideration. The supply of education is just one of many stated objects in LSU's constitution; there was no evidence if this was done for a consideration; supporting others in providing education was not sufficient.

46. It is not a requirement of the Directive that the supply of the goods must be made to or by the person making the principal supply. That did not allow UK law to be ignored. The condition had to be applied to comply with para 34 of *Horizon College* and ensure that a non-profit making body makes the supplies of education.

Member states must comply with the Directive but the form and method is left to them. Item 4 of Group 6 requires that the educator and the supplier of the closely-related goods are one and the same.

47. Article 134 does not permit exemption for supplies which are not essential. That was not reflected in the UK legislation but the phrase "closely related" in Item 4 is derived directly from art 132. Article 134 must qualify the meaning of a closely linked supply. Thus a conforming construction of "closely related" in Item 4 should be adopted: *Marleasing SA v La Comercial Internacional de Alimentacion SA* (C-106/89) [1990] ECR I-4135, [1992] 1 CMLR 305, and *Horizon College* at [38 to 41].

48. The basic purpose of the shop sales was to obtain additional income for LSU. Article 134 (b) does not permit exemption for supplies where the basic purpose is to obtain additional income from direct competition with commercial enterprises. Identical supplies are available from major chain stores, independent retailers and online suppliers, all of whom make standard rated supplies of stationery and art materials. To allow LSU to exempt its supplies of identical goods would put it at a competitive advantage in the open market. LSU is trading in direct competition with businesses which sell identical or similar goods.

Methodology

49. LSU's calculation of the input tax adjustment consequent on the claimed exemption did not appear to reflect the input tax incurred by LSU on the relevant goods.

50. No justification had been provided for the 5% disallowance as relating, apparently, to non-student sales.

Consideration and Conclusions

Whether LSU is an organisation entitled to the exemption in art 132(1)(i)

51. Article 132(1)(i) requires member states to exempt certain educational supplies "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".

52. In relation to the category "bodies governed by public law", I find that LSU is not such a body. In *Saudaçor Sociedade Gestora de Recursos e Equipamentos da Saúde dos Açores SA v Fazenda Pública* [2016] STC 681 the CJEU held (at [44-45]) that the test for the VAT Directive of whether a body was governed by public law was not the same as that employed for European law on public procurements, and stated:

> "56. As regards, specifically, the first of the two conditions laid down in art 13(1) of that directive, namely the condition that the body be governed by public law, the court has already held that a person which, not being part of the public administration, independently performs acts

> falling within the powers of the public authority cannot be classified as a body governed by public law within the meaning of that provision (see to that effect, inter alia, order in *Mihal* [*Mihal v Danovy úrad Košice V* (Case C-456/07)], para 18 and the case law cited).
>
> 57. The court has also made it clear that the status as a 'body governed by public law' cannot stem from the mere fact that the activity at issue consists in the performance of acts falling within powers conferred by public law (see to that effect, inter alia, order in *Mihal*, para 17 and the case law cited).
>
> 58. Nevertheless, whilst the fact that the body in question has, under the applicable national law, powers conferred by public law is not decisive for the purposes of that classification, it does constitute, in so far as it is an essential characteristic specific to any public authority, a factor of definite importance in determining that the body must be classified as a body governed by public law."

53. That passage was considered by the Court of Appeal in *Revenue and Customs Commissioners v Open University* [2016] STC 2273 at [63-86] where the Chancellor stated (at [84]) "… the relevant and well-established legal principle endorsed by the ECJ … is that a person which, not being part of the public administration, independently performs acts falling within powers of the public authority cannot be classified as a body governed by public law."

54. For the above reasons, I find that LSU is not a body "governed by public law".

55. In relation to the category "other organisations recognised by the Member State concerned as having similar objects", this matter was considered by the CJEU in *Minister Finansów v MDDP sp. z o.o. Akademia Biznesu, sp. Komandytowa* (Case C-319/12). There the Polish law gave a blanket exemption for all education services, and the taxpayer successfully argued: the Polish law was not in accordance with art 132; that art 132 had direct effect; and the taxpayer (who was outside art 132) was entitled to standard rate its supplies. The Court stated:

> "35 Under point (i) of Article 132(1) of the VAT Directive, the supply of educational services referred to is, however, exempt only if those services are provided by educational bodies governed by public law or by other organisations recognised by the Member State concerned as having similar objects. It follows that other organisations, namely, private organisations, must fulfil the condition of pursuing objects similar to those of bodies governed by public law. It is thus clearly apparent from the wording of point (i) of Article 132(1) that it does not permit Member States to grant the supply of the educational services exemption to all private organisations providing such services, by including also those whose objects are not similar to those of bodies governed by public law.

…

37 In so far as point (i) of Article 132(1) of the VAT Directive does not specify the conditions or procedures for defining those similar objects, it is, in principle, for the national law of each Member State to lay down the rules in accordance with which that definition may be granted to such organisations. The Member States have a discretion in that respect (see, to that effect, *Kingscrest Associates and Montecello*, paragraphs 49 and 51; and *Zimmermann*, paragraph 26).

38 Furthermore, it is for the national courts to examine whether the Member States, in imposing such conditions, have observed the limits of their discretion in applying the principles of European Union law, in particular the principle of equal treatment, which, in the field of VAT, takes the form of the principle of fiscal neutrality (see, to that effect, *Kingscrest Associates and Montecello*, paragraph 52; and *L.u.P.*, paragraph 48).

…

50 … point (i) of Article 132(1) of the VAT Directive grants the Member States a certain discretion when defining private organisations which have objects similar to those of bodies governed by public law and which must therefore, in accordance with that article, be exempt from VAT.

51 The Court has, however, already held that the fact that that provision of the VAT Directive laying down an exemption grants the Member States a discretion to establish the beneficiaries thereof does not prevent that provision from being held to be sufficiently precise to be relied upon directly if, according to objective evidence, the supply at issue meets the criteria for that exemption (see, inter alia, *JP Morgan Fleming Claverhouse Investment Trust and The Association of Investment Trust Companies*, paragraphs 60 and 61 and case-law cited).

52 Likewise, where a Member State has exceeded its discretion by exempting supplies or taxable persons with regard to which such an exemption could not objectively be granted under that provision of the VAT Directive, the person concerned may rely directly on that provision so that that exemption is not applied to him.

53 It follows that it is only where the Member State has exceeded its discretion, by defining a taxable person as an organisation with objects similar to those of bodies governed by public law, that that taxable person may then rely on point (i) of Article 132(1) of the VAT Directive in order to contest national legislation and have its services made liable to VAT.

> 54 As was pointed out by the Advocate General in points 70 and 71 of her Opinion, it is for the national court to determine whether the exemption of services supplied by an organisation such as MDDP, in accordance with point (i) of Article 132(1) of the VAT Directive, exceeds the discretion granted to the Polish legislature. It is for that court to examine the object and conditions of MDDP's activity by comparing them with those of Polish bodies governed by public law providing educational services. It follows from the Court's answer to Question 1 that the mere fact that an organisation such as MDDP pursues commercial objects is not sufficient to preclude its having objects similar to those of bodies governed by public law and that its services may therefore be exempted in accordance with that provision.
>
> 55 If the national court were to find that the objects pursued by an organisation such as MDDP cannot be considered to be similar to those pursued by a body governed by public law, MDDP could rely on the fact that national law exempts, in infringement of point (i) of Article 132(1) of the VAT Directive, its professional educational and training services from VAT. In that case, its services would be subject to VAT and MDDP could then claim, to that extent, a right to deduct input VAT in accordance with Polish legislation."

56. From the passage quoted above I take the following points.

(1) The UK has a discretion to lay down in its national law (ie Group 6 of sch 9) the rules in accordance with which the definition of "an organisation having similar objects" may be granted to such organisations.

(2) That discretion does not prevent art 132 from having direct effect, and thus a taxpayer may rely directly on the provisions of art 132.

(3) This Tribunal must examine whether Parliament, in laying down such rules, has observed the limits of its discretion in applying the principles of EU law, in particular the principle of fiscal neutrality.

(4) This Tribunal must examine "the object and conditions of [an organisation's] activity" by comparing them with those of UK bodies governed by public law providing educational services, to determine whether the organisation has objects similar to those of bodies governed by public law.

57. The mechanism employed by the Directive in determining exemption is important.

(1) First, art 132 defines supplies which member states *must* exempt, and if they fail to do so properly then a citizen can rely on the direct effect of art 132 (*MDDP* at [51]). Article 132(1)(i) is mandatory in application to "bodies governed by public law having [education] as their aim" but confers a

discretion on member states to recognise "other organisations … having similar objects".

(2) Second, where (pursuant to art 132(1)(i)) a member state exercises its discretion and recognises certain non-public law bodies, then art 133 *permits* (but does not require) the member state to apply one or more of four stated conditions. Applying (or not applying) one or more of the art 133 conditions does not thereby bring an organisation within art 132 which would not otherwise meet the requirements of art 132. An organisation must first satisfy art 132; then if its home jurisdiction has enacted one or more of the art 133 conditions, the organisation must also satisfy those conditions.

58. Turning to the UK domestic legislation (in Group 6), the UK has exercised its art 132(1)(i) discretion in two ways. First, there are some specific descriptions of exempt educational supplies – for example, Item 2 "The supply of private tuition, in a subject ordinarily taught in a school or university, by an individual teacher acting independently of an employer" – it is agreed that those are not relevant to LSU's appeal and so I am not required for the purpose of these proceedings to consider whether those items satisfy the *MDDP* criteria. Secondly, Group 6 creates the concept of "an eligible body", which is defined by Note 1. Note 1 lists, for example, various organisations such as schools within the meaning of the Education Act 1996 (Note 1(a)) and universities (Note 1(b)), and in Note 1(e) includes:

> "(*e*) a body which—
>
> (i) is precluded from distributing and does not distribute any profit it makes; and
>
> (ii) applies any profits made from supplies of a description within this Group to the continuance or improvement of such supplies;"

59. There are two possible ways of fitting Note 1(e) with art 132. The first is that Parliament chose to recognise *any* non-public law body ("a body …") as being within art 132, and then chose to apply (a form of) art 133(a) condition thereon. The alternative is that Parliament intended non-public law organisations with the stated profits restrictions to be the ones it chose to recognise as having objects similar to those of public law education bodies, and the fact that similar restrictions are permitted by art 133 is coincidental.

60. Taking the first interpretation, Note 1(e) fails the *MDDP* criteria. As was the factual case in *MDDP*, a blanket exemption for all bodies providing education services is not compliant with art 132, and that failure cannot be remedied by tacking on the restrictions in (i) and (ii) of Note 1(e). As stated above, applying one or more of the art 133 conditions does not thereby bring an organisation within art 132 which would not otherwise meet the requirements of art 132. On this first interpretation Note 1 (e) does not meet the *MDDP* criteria, and thus LSU is entitled to rely on the

direct effect of art 132 – if the "object and conditions of [LSU's] activity" are similar to the objects of public law education bodies, which is a matter for determination by this Tribunal.

61. In particular on this first interpretation, the restrictions in (i) and (ii) of Note 1(e) do not need to be considered, because they serve only to qualify an unenforceable provision. However, as I heard considerable argument on the point, I should cover the matter of whether the restrictions in (i) and (ii) of Note 1(e) correctly implement art 133(a). The only one of the four conditions permitted by art 133 applied (or purportedly applied) by the UK to education supplies is condition (a), in the form of Note 1(e). For other categories of exempt supplies in art 132, the UK chose various combinations of art 133 conditions – for example, for cultural services (art 132(1)(n)) the UK applied conditions (a), (b) & (d) from art 133 (see Notes 2 & 3 to Group 13 of sch 9). Note 1(e) uses wording slightly different from that in art 133(a) in three respects. First, art 133(a) requires that the body "must not systematically aim to make a profit", while Note 1(e) contains no such requirement. Secondly, Note 1(e) requires that the body "is precluded from distributing … any profit it makes", which is not mentioned in art 133(a). Thirdly, Note 1(e) requires that the body "applies *any profits made from supplies of a description within this Group* to the continuance or improvement of such supplies", while art 133(a) requires that "*any surpluses nevertheless arising* … must be applied to the continuance or improvement of the services supplied". If I was required to determine the point then I would apply the *Marleasing* principle (see *Marleasing SA v La Comercial Internacional de Alimentacion SA* (Case C-106/89) [1990] ECR I-4135, [1992] 1 CMLR 305), which requires a national court of a Member State to interpret the national law in the light and wording of the directive. The principle was examined by Arden LJ in *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2010] STC 1251:

> **"[258] …** [In *Marleasing*] The ECJ held that the national court was required so far as possible under national law to interpret its national law so as to preclude a declaration of nullity in cases other than those prescribed in the directive. In other words, the national court was required to disapply provisions of its national law.
>
> **[259]** The ECJ helpfully commented on the *Marleasing* principle in *Miret v Fondo de Garantía Salarial* (Case C-334/92) [1993] ECR I-6911, para 20 of the judgment:
>
> > '20. Thirdly, it should be borne in mind that when it interprets and applies national law, every national court must presume that the State had the intention of fulfilling entirely the obligations arising from the directive concerned. As the Court held in its judgment in *Case 106/89 Marleasing v La Comercial Internacional de Alimentación* [1990] ECR I-4135, paragraph 8, in applying national law, whether the provisions in question were adopted before or after the directive, the national court

> called upon to interpret it is required to do so, so far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty.'
>
> **[260]** The obligation of our courts to interpret domestic legislation in conformity with Community law if it is possible to do so is a powerful one, requiring the court to go beyond what could be done by way of statutory interpretation where no question of Community law or human rights is involved: see *R (IDT Card Services Ireland Ltd) v Customs and Excise* [2006] EWCA Civ 29, [2006] STC 1252; *Litster v Forth Dry Dock and Engineering Co Ltd* [1989] [All ER 1134, [1990] 1 AC 546. …"

62. Therefore, in those circumstances I would read the restrictions in Note 1(e), so far as possible, to achieve the conditions permitted by art 133(a) but no further.

63. Taking the second interpretation (in [59] above), I consider that Note 1(e) would again fail the *MDDP* criteria. Although the profit restrictions in (i) and (ii) of Note 1(e) are compatible with the objects of public law bodies, they are not sufficient to justify the recognition for art 132(1)(i) of all organisations satisfying them. Many organisations have such profit restrictions – for example most, if not all, registered charities - but that alone does not give them objects similar to public law education bodies. So, again, LSU would be entitled to rely on the direct effect of art 132 – if the "object and conditions of [LSU's] activity" are similar to the objects of public law education bodies, which is a matter for determination by this Tribunal.

64. One of the consequences of the above analysis is that I do not need to determine whether LSU satisfies the profit restrictions in (i) and (ii) of Note 1(e). However, as this Tribunal is the primary fact-finding forum and in case the dispute should go further, I shall make findings on that matter. In *Kennemer Golf & Country Club v Staatssecretaris van Financiën* [2002] STC 502 the dispute related to the exemption of sporting services and one of the points concerned whether a body was "non-profit-making" (art 132(1)(m)). The CJEU drew a distinction between "profits" and "surpluses":

> "24. By its third question, which it is appropriate to examine before the second question owing to its close link to the first question, the national court is asking, essentially, whether art 13A(1)(m) of the Sixth Directive, read together with the first indent of para (2)(a) of that provision, is to be interpreted as meaning that an organisation may be categorised as 'non-profit-making' even if it systematically seeks to achieve surpluses which it then uses for the purposes of the provision of its services.
>
> 25. Whilst the Finnish and United Kingdom governments, and also the Commission, submit that the most important consideration is whether

the organisation in question aims to make a profit and not the fact that it actually makes a profit, even if it does so habitually, the Netherlands government, on the other hand, contends that the VAT exemption should not be granted when profits are made systematically. In its submission, the exemption is applicable only where surpluses are achieved occasionally or merely incidentally.

26. On that point, it must be observed first of all that it is clear from art 13A(1)(m) of the Sixth Directive that an organisation is to be classed as being 'non-profit-making' for the purposes of that provision by having regard to the aim which the organisation pursues, that is to say that the organisation must not have the aim, unlike a 'commercial' undertaking, of achieving profits for its members (see, as regards the exemption provided for in art 13A(1)(n) of the Sixth Directive, the judgment given today in *Customs and Excise Comrs v Zoological Society of London* (Case C-267/00) [2002] STC 521, para 17). The fact that it is the aim of the organisation which is the test of eligibility for the VAT exemption is clearly borne out by most of the other language versions of art 13A(1)(m), in which it is explicit that the organisation in question must not have a profit-making aim (see besides the French version, the German version, 'Gewinnstreben', the Dutch version, 'winst oogmerk', the Italian version, 'senza scopo lucrativo' and the Spanish version, 'sin fin lucrativo').

27. It is for the competent national authorities to determine whether, having regard to the objects of the organisation in question as defined in its constitution, and in the light of the specific facts of the case, an organisation satisfies the requirements enabling it to be categorised as a 'non-profit-making' organisation.

28. Where it is found that this is indeed the case, the fact that an organisation subsequently achieves profits, even if it seeks to make them or makes them systematically, will not affect the original categorisation of the organisation as long as those profits are not distributed to its members as profits. Clearly, art 13A(1)(m) of the Sixth Directive does not prohibit the organisations covered by that provision from finishing their accounting year with a positive balance. Otherwise, as the United Kingdom points out, such organisations would be unable to create reserves to pay for the maintenance of, and future improvements to, their facilities.

29. The referring court is also unsure whether this interpretation can be maintained in cases where the achievement of surpluses is systematically sought by an organisation. It refers in this regard to the first indent of art 13A(2)(a) of the Sixth Directive which would seem to suggest that the VAT exemption is to be disallowed where an organisation systematically seeks to make profits.

30. As far as that provision is concerned, it must be observed at the outset that it lays down an optional condition that the member states are at liberty to impose as an additional condition for the grant of certain exemptions set out in art 13A(1) of the Sixth Directive, amongst which figures the exemption covered by that same provision, under (m), which concerns the present case. The Netherlands legislature seems to require compliance with that optional condition before the benefit of that exemption can be granted.

31. As far as the interpretation of that optional condition is concerned, the Netherlands government maintains that the exemption must be refused where an organisation systematically seeks to achieve surpluses. The Finnish and United Kingdom governments, as well as the Commission, on the other hand, submit that systematic pursuit of profits is not of decisive importance where it is clear from both the circumstances of the case and the kind of activity actually carried on by an organisation that it is acting in accordance with the objects set out in its constitution and that these do not include any profit-making aim.

32. It must be observed, with regard to this point, that the first condition set out in the first indent of art 13A(2)(a) of the Sixth Directive, namely that the organisation in question must not systematically aim to make a profit, clearly refers, in the French version of that provision, to 'profit', whilst the two other conditions set out there, namely that no profits should be distributed and that any profits be assigned to the continuance or improvement of the services that supplied, refer, in the French text, to 'bénéfices'.

33. Although that distinction is not to be found in any of the other language versions of the Sixth Directive, it is borne out by the objective of the provisions contained in art 13A thereof. As the Advocate General points out in paras 57 to 61 of his opinion, it is not profits ('bénéfices'), in the sense of surpluses arising at the end of an accounting year, which preclude categorisation of an organisation as 'non-profit-making', but profit ('profit') in the sense of financial advantages for the organisation's members. Consequently, as the Commission also points out, the condition set out in the first indent of art 13A(2)(a) essentially replicates the criterion of non-profit-making organisation as contained in art 13A(1)(m).

34. The Netherlands government argues that such an interpretation does not take account of the fact that the first indent of art 13A(2)(a) must, as an additional condition, necessarily have a content extending beyond that of the basic provision. In response to that argument, it suffices to observe that that condition does not refer only to art 13A(1)(m) of the Sixth Directive but also to a large number of other compulsory exemptions which have a different content.

> 35. Consequently, the answer to be given to the third question must be that art 13A(1)(m) of the Sixth Directive is to be interpreted as meaning that an organisation may be categorised as 'non-profit-making' even if it systematically seeks to achieve surpluses which it then uses for the purposes of the provision of its services. The first part of the optional condition set out in the first indent of art 13A(2)(a) of the Sixth Directive is to be interpreted in the same way."

65. In evidence were LSU's financial statements ("FS") for the year ended 31 July 2014 (which include prior year comparatives). The income and expenditure statement distinguishes between restricted funds (being funds to be used for specific purposes imposed by donors or which have been raised for particular purposes, such as RAG activities – Note 1.3 to the FS) and unrestricted funds. In relation to the unrestricted funds, the "net incoming resources" comprised (figures rounded):

	£'000s
Membership fees & grants	1,104
Income generating services (bars, entertainments, shops, catering, nursery and car parking)	1,296
Income from student activities (no further description)	1,058
Rents & franchises	204
Total	*3,662*

66. From this was deducted "expenditure on Union activities" (predominantly support services and student activities) of approximately £3,500,000 giving "net income" of approximately £163,000. The figures for the previous year were broadly comparable. The FS show that the "net income" was added to LSU's funds and carried forward.

67. Clause 22 of LSU's Constitution provides:

> "22. LIMITATION ON PRIVATE BENEFITS
>
> The income and property of the Union shall be applied solely towards the promotion of its objects.
>
> Except as provided below no part of the income and property of the Union may be paid or transferred directly or indirectly by way of dividend, bonus or otherwise by way of profit to any Member of the Union. This shall not prevent any payment in good faith by the Union of:
>
> (i) any payments made to any Member in their capacity as a beneficiary of the Union;

> (ii) reasonable and proper remuneration to any Member for any goods or services supplied to the Union provided that if such Member is a Trustee Paragraph 7c)iii shall apply;
>
> (iii) interest on money lent by any Member to the Union at a reasonable and proper rate; and
>
> (iv) any reasonable and proper rent for premises let by any Member to the Union."

68. I also note that LSU is a registered charity, from which fact I infer that LSU is de jure precluded from distributing its income, in the sense of it being paid out to its members.

69. Taking all the above together I conclude and find:

(1) LSU can and does make surpluses.

(2) LSU is precluded from distributing its surpluses made.

(3) Any surpluses arising are not distributed, and are assigned to the continuance or improvements of LSU's activities.

70. Before leaving this point, I believe HMRC's main contention in this regard is that it is not sufficient for LSU's surpluses to be assigned to the continuance or improvement of LSU's activities; rather, HMRC contend, Note 1(e)(ii) and art 133(a) require the application of the surpluses to the continuance or improvement of *education services* supplied by LSU. HMRC contend LSU makes no such supplies and, therefore, cannot satisfy the requirement. I cover that point next in connection with LSU's activities.

71. As stated above, I consider that whichever interpretation of Note 1(e) is adopted, it is necessary to examine the "object and conditions of [LSU's] activity" and determine whether they are similar to the objects of public law education bodies. I consider the correct approach is to examine LSU's objects and activities "both as a matter of vires and economic and operational reality" (*Open University* at [109]).

72. In the LSU's Trustees' Report for the year ended 31 July 2014 under the heading "Structure, governance and management – Constitution" the Trustees state: "LSU is an unincorporated association and a Students Union formed under the Education Act 1994." I was not referred to the Education Act 1994 but I have researched it and it provides:

> "20(1) In this Part a "students' union" means: (a) an association of the generality of students at an establishment to which this Part applies [that includes universities and further education colleges: s21] whose principal purposes include promoting the general interests of its

> members as students; or (b) a representative body (whether an association or not) whose principal purposes include representing the generality of students at an establishment to which this Part applies in academic, disciplinary or other matters relating to the government of the establishment."

73. Clause 2(a) of LSU's Constitution states LSU's objects, as already quoted at [4] above.

74. The Trustees' Report states in the section headed "Objectives and activities – Policies and objectives":

> "LSU's aims arc:
>
> A) To give students opportunities to organise and work on activities, which will develop their communication, leadership, teamwork and other personal skills and abilities, whilst offering them the training and support needed to succeed.
>
> B) Creating and promoting a good social, cultural and sporting life on campus in addition to providing services and facilities that makes the campus a pleasant place to live and work.
>
> C) Making sure that students views and interests ate properly taken into account by the three represented institutions, local community and nationally.
>
> D) Offering advice and practical help to students in the difficulties they face with student life.
>
> These objectives should be pursued without regard to age, race, gender, sexual orientation, disability, ethnic origin, religion or creed, independent of any party political organisation or religious body.
>
> The three represented institutions are Loughborough University, Loughborough College and The Royal National Institute of the Blind (R.N.I.B.) Vocational College.
>
> All currently registered students of these institutions, who have not exercised their rights to opt out, form the membership of the Union.
>
> More information about Loughborough Students Union can be found by visiting our website …"

75. That is all the evidence presented to me. There was no witness statement or oral evidence from any trustee or executive of LSU concerning what LSU does in practice. I accept that LSU's stated primary object is "the advancement of education of students at" the University and the other two bodies, but that does not necessarily mean that the "economic and operational reality" of its activities is that it is providing

educational services. Mr Tyler referred me (see [18] above) to some brief bullet points in the Trustees' Report concerning 100 students involved in sports coaching and 20 students trained as social media advisers, as supportive of his contention that LSU was supplying vocational training services. However, LSU represents around 16,000 students, with 14,803 using its services and 8,541 actively engaged with student activities (per Trustees' Report), so I consider the examples given as not truly representative of the economic and operational reality of LSU's objects and activities. From the evidence available to me I find that LSU's objects and activities are those of a student representative body promoting and supporting the general interests of its members; creating and promoting a good social, cultural and sporting life; and providing appropriate pastoral support for its members. I note that conclusion is consistent with what one would generally expect a good student union to be engaged in. While that is commendable, it does not meet the test of being objects similar to bodies governed by public law having as their aim the provision of university education or vocational training or retraining (art 132 and *MDDP*). Accordingly, I find that LSU is not an organisation entitled to the exemption in art 132(1)(i).

76. That finding is, as was agreed by both parties, sufficient to dispose of the proceedings by requiring dismissal of the appeal. However, in case this dispute proceeds further, and as this Tribunal is the primary fact-finding forum, I do consider below whether, if LSU was an organisation entitled to the exemption in art 132(1)(i), the sales of certain goods from its shops are exempt.

Whether the supplies of goods by the shops are exempt under art 132(1)(i)

77. As stated above, my deliberations in this part of the decision notice are obiter.

78. Article 132 (1)(i) exempts the supply of "goods closely related" to the provision of education by qualifying bodies.

79. The principles to be followed were stated by the Upper Tribunal in *Revenue and Customs Commissioners v Brockenhurst College* [2014] STC 1332, and approved by the Court of Appeal [2016] STC 2145:

> **"[16]** The UT said that, in relation to the exemption for supplies closely related to education, the following are the principles to be derived from the case law:
>
> (1) As a general principle, the exemption must be construed so as to be consistent with its objective and so as to ensure its intended effect (see, for example, *Skatteverket v PFC Clinic AB* (Case C-91/12) [2013] STC 1253, para 23).
>
> (2) An especially narrow interpretation of the exception for activities closely related to a principal exempt supply of education is not appropriate, since the exemption is designed to ensure that the benefits of the principal supply are not hindered by the increased costs of

providing it that would follow if the principal supply, or the closely related activities, were subject to VAT (*EC Commission v Federal Republic of Germany*, para 47).

(3) To be closely related to a principal exempt supply, the service in question must be an ancillary supply, that is one that does not constitute an end in itself, but is a means for better enjoying the principal service supplied (*Horizon College*, paras 28 and 29).

(4) The closely related supply must be essential to attain the objective of the principal supply (art 134(a)). In order to satisfy that requirement, the ancillary supply should be of a nature and quality such that, without it, there could be no assurance that the education from which the students benefit would have an equivalent value (*Horizon College*, para 39).

(5) There is no requirement that the closely related supply be made to the same recipients as the principal supply. To be services closely related to education it is not necessary for those services to be supplied directly to those students (*Horizon College*, para 32)."

80. To the above I would respectfully add a sixth principle: Both the principal supply of education and the ancillary supply of goods or services which are closely related to the principal supply must be provided by bodies referred to in art 132(1)(i): *Horizon College* at [34-35].

81. The UK domestic legislation purportedly importing the exemption for closely related goods or services is Item 4 of Group 6:

> **"4** The supply of any goods or services (other than examination services) which are closely related to a supply of a description falling within item 1 (the principal supply) by or to the eligible body making the principal supply provided—
>
> (*a*) the goods or services are for the direct use of the pupil, student or trainee (as the case may be) receiving the principal supply; and
>
> (*b*) where the supply is to the eligible body making the principal supply, it is made by another eligible body."

82. I consider that Item 4 does not accurately import arts 132-134 for three reasons. First, the Directive does not require that both the principal supply (of education) and the ancillary supply (of closely related goods) should be made by the same person. That is clear from the facts in *Horizon College*, where Horizon supplied teachers to schools; the principal supply of education was made by the schools, while the ancillary supply (of teachers' services) was made by Horizon: per Advocate General Sharpston at [80]:

> "80. First, since the main service to which the supply in issue is closely related is the education provided, not by Horizon College itself but by the intermediary establishment, that education must itself meet the conditions for exemption pursuant to art 13A(1)(i). In particular, it must constitute 'children's or young people's education, school or university education, vocational training or retraining' and it must be 'provided by bodies governed by public law having such as their aim or by other organisations defined by the member state concerned as having similar objects'."

83. That was also the understanding of the Upper Tribunal in *Brockenhurst College* where it discussed *Horizon College*:

> **"[28]** On this basis the court found, at para 30, that the supply of a teacher by one educational establishment to another in order for the teacher temporarily to carry out teaching duties under the responsibility of the host establishment is an activity which can, in principle, be described as a supply of services closely related to education. Where there is a temporary shortage of teachers in some educational establishments, the making available of qualified teachers to those experiencing the shortage will enable students to better enjoy the education provided by the host establishments.
>
> **[29]** The court was not deflected from that conclusion by the fact that there was no direct relationship between Horizon College and the students of the host establishments, nor by the fact that the supply of teachers was an activity that was separate from the teaching provided by Horizon College on its own account (para 31). …"

84. Secondly, the Directive does not require that the closely related supply be made to the same recipients as the principal supply – so it is not necessary for those goods or services to be supplied directly to those students (this is the fifth principle in *Brockenhurst College*).

85. Thirdly, the second restriction in art 134 (no exemption "where the basic purpose of the supply is to obtain additional income for the body in question through transactions which are in direct competition with those of commercial enterprises subject to VAT") is mandatory but has not been imported into Item 4.

86. Given that Item 4 is so far adrift from art 132(1)(i), I must adopt a *Marleasing* approach and the result, I consider, is that LSU is entitled to the direct effect of the closely related goods provision in art 132(1)(i) of the Directive, as interpreted in *Horizon College*. However, I have concluded that LSU does not satisfy the requirements of the closely related goods provision in art 132(1)(i) for four reasons.

87. The first reason is an evidential one. LSU's claim relates to sales "such as sales of stationery and art materials etc". I agree with Mr Shea that that is insufficiently precise to identify the goods for which exemption is being claimed. The

LSU website description of the shop on the University campus (there are similar descriptions for the other shops) is: "The LSU Shop is your local shop on the ground floor of the Students' Union. We are open every day for your convenience, selling tasty & great value meal deals, snacks, confectionery, grocery, household & toiletries, fresh fruit & vegetables, fresh chilled and frozen food, a large range of Oriental food, soft drinks and alcohol. Not forgetting of course, all of the Loughborough University stash & memorabilia, stationery, newspapers & magazines, greetings cards and much more!" The description for the art, craft and design shop is more helpful for LSU in that it states "We have a wide range of art, craft and design and technical drawing materials. Everything you need from drawing to presentation material, whether you're an art's student or an engineer!" However, no attempt has been made by LSU to stipulate particular goods and justify why each is closely related to the educational supplies made by the University (and the other two educational bodies). The evidential burden lies on LSU and I am not satisfied that the goods for which exemption is claimed can be sufficiently identified for application of the tests set out in *Horizon College*.

88. Secondly, the third principle in *Brockenhurst College* is that the goods in question must be an ancillary supply – that is one that does not constitute an end in itself but is a means for better enjoying the principal education supply. I do not see how that can apply to the goods in question here; Mr Shea gave the example of an Engineering student buying art materials for his or her hobby of painting – that is clearly an end in itself and unrelated to the University engineering course. LSU have not proposed how the various uses to which the goods (which as I have already said, are themselves ill-defined) are put should be identified so as to satisfy this test.

89. Thirdly, the fourth principle in *Brockenhurst College* is that the goods in question must be essential to attain the objective of the principal education supply – they must be of a nature and quality such that, without them, there could be no assurance that the education from which the students benefit could have an equivalent value. Again, the lack of definition in identification of the relevant goods makes it difficult for LSU to satisfy this test. For example, what particular items of stationery are essential for a student preparing their coursework on their laptop and submitting their assignments by email?

90. Fourthly, the second restriction in art 134 is a supply of goods cannot be exempt "where the basic purpose of the supply is to obtain additional income for the body in question through transactions which are in direct competition with those of commercial enterprises subject to VAT." It seems to me that is exactly what the LSU shops are doing. I refer again to the descriptions on the website of the shops quoted above. I consider that the motivation for the shops, as well as the bars, entertainments, catering, nursery and car parking referred to in the financial statements, is indeed to obtain additional income for LSU – certainly I had no evidence to the contrary. Further, it was not suggested that the goods were in any way different from those supplied by commercial enterprises subject to VAT. Mr Tyler

submitted that there was no direct competition involved but I had no evidence on that point. Also, I do not gain much assistance from the policy followed by HMRC in relation to supplies of catering; I agree with Mr Tyler that it is difficult to follow the rationale behind some aspects of that policy but I had the impression from Mr Shea that HMRC were not eager to justify or re-examine the catering supplies policy. In relation to the current appeal, the second restriction in art 134 operates to deny exemption for the goods.

Methodology and quantification of the claim

91. Referring again to the role of this Tribunal as the primary fact finding forum, in case this dispute goes further I should comment briefly on the methodology and quantification of the claim.

92. Mr Shea for HMRC asked that any decision I reached should be made as one in principle, on the basis that the figures used by LSU in its claim required further study. Mr Tyler for LSU submitted that the claim had been satisfactorily quantified and HMRC had not accepted invitations to discuss the basis of the claim.

93. The net aggregate claim for repayment of £117,334 comprises overpaid output tax of £132,273 less input tax overclaimed of £14,939 (voluntary disclosure letter dated 30 July 2015). The input tax overclaimed has been calculated as 17% of the "business overhead relating to shop" (ibid).

94. I asked some questions of Mr Tyler concerning the methodology of the claim. I noted that the quantification of the claim, if successful, would depend on at least three factors. First, the identification of what part of the turnover of the shops comprised sales of the goods which LSU maintain are "closely related" goods. I was unclear how that identification had been performed; Mr Tyler (understandably) did not have his detailed working papers at the hearing, so further analysis would be required of that aspect.

95. Second, only goods sold to students could be exempted. Mr Tyler acknowledged that the type of customer (as between students and nonstudents) was not identified at point-of-sale; however, there was a long-standing agreement with HMRC that in relation to catering supplies 95% of sales were to students, so he had used that figure for the shop sales. That would also require further analysis.

96. Thirdly, moving from the output tax to the input tax, it seemed to me that the effect of exempting the relevant sales would be to deny deduction of input tax on the goods sold, so that the starting figure for the net reclaim would be the VAT on the profit margin on those goods. Moving on from the directly attributable VAT, the increase in the exempt outputs would also reduce the residual VAT recoverability (ie that relating to overheads of running the shops) so that the reclaim would be further reduced. Using LSU's figure of £132,273 for the output tax and hypothesising a retail profit margin of, say, 40% would give overclaimed directly attributable VAT of

around £79,364. There would then be a further reduction for the residual overhead input tax – I am not sure where the proposed figure of 17% came from – but even without any consideration of the residual input tax adjustment, the net claim looked to be more in the region of £53,000 compared to the actual claim of over £117,000. Mr Tyler assured me that I had misunderstood the situation as LSU had agreed a special method for its partial exemption. Again, that would require further analysis.

97. For the above reasons, I would respectfully suggest to any higher courts or tribunals that if quantification of the claim is required then the parties, failing agreement, should be granted leave to have that aspect remitted to the First-tier Tribunal for determination.

Decision

98. The appeal is DISMISSED.

99. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it 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.

PETER KEMPSTER
TRIBUNAL JUDGE

RELEASE DATE: 23 JUNE 2017