MONCKTON CHAMBERS

SAE EDUCATION LIMITED v THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS – A TURNING TIDE FOR THE UNIVERSITY EDUCATION EXEMPTION?

Appeal No. TC/2011/02251

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On 28 February 2014 the First-tier Tribunal released its Decision allowing SAE Education Ltd.'s appeal against a decision of HMRC. SAE argued that its supplies of educational courses in the fields of audio and digital media technologies were exempt supplies, on the ground that, as a college of Middlesex University, SAE fell within the "university education exemption" contained in Note 1(b), Group 6 of Schedule 9 VATA. Allowing the appeal, the FtT found that SAE, in providing diploma and degree courses, provided university-standard education, and thus had a similar purpose to the University in the provision of university education to students.

The Decision follows a line of cases in which appellants' claims to college status have, by and large, been unsuccessful. SAE's shift from that trend might be viewed as a result of its unique facts, as to which it provides a constructive illustration: there is clear necessity for full and thorough evidence if appellants are to persuade a tribunal of the nature of their supplies of education and the closeness of their relationship with the relevant university. Arguably, however, the FtT's robust analysis and approach to the evidence also disclose shifting sands of a more fundamental nature, both in its assessment of diploma courses and its consideration of the relevant EU law.

In examining whether SAE was a college of Middlesex University for the purposes of the Note 1(b) exemption, the FtT considered itself bound to follow the approach taken in *London College of Computing Ltd v Revenue and Customs Commissioners* [2013] UKUT 404 (TCC) ("*LCC*"), a decision released shortly before the conclusion of SAE's appeal. On that basis, the applicable principles were as follows:

(1) The factors identified in *Customs and Excise Commrs v School of Finance and Management Ltd* [2001] STC 1690 *("SFM")* 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.

Applying those principles, the FtT concluded SAE was a college of Middlesex University. Notably, the FtT followed the approach of earlier cases in considering systematically the 15 factors identified in *SFM*, although it found that not all those factors were satisfied. The absence of foundation documents between SAE and Middlesex University did not preclude a finding of college status, nor did SAE's failure to satisfy the 'absence of distributable profit' and 'obligation to offer a minimum number of university places' indicators. Those latter factors warranted only brief discussion.

On the other hand, the FtT gave extensive consideration to both Middlesex University's own description of its relationship with SAE, and the nature of the education SAE supplied. SAE's supplies of education comprised both degree programmes and diploma courses – the latter of which provided students with credits towards MU degrees, should they choose to continue their studies. Relying on the approach taken in *LCC*, HRMC argued that, based on SAE's student numbers, the majority of its students were enrolled on diploma programmes or short courses, and only a minority completed degree programmes. On that basis, HRMC's position was that SAE could not be considered to have a similar aim or purpose to the University.

The FtT rejected that approach, finding that SAE's diploma programmes, which could be treated as constituting the first half of a degree courses, were not a "stepping stone" to degree programmes but were, in fact, part of them. On that basis, over 90% of the education provided by SAE was higher education of similar character to that provided by Middlesex University, and the FtT therefore concluded that SAE had a similar purpose to that of the University. The FtT considered there was a major distinction between the nature of the diploma programmes offered by SAE and those at issue in *LCC*, which diploma programmes entitled students to admission to degree courses but did not comprise part of a university course.

As to the EU position, the *SAE* Decision is notable both for its extensive discussion of the relevant case law and the introduction of the 'similar objects' test, based on Article 132(1)(i) of the Principal VAT Directive. Pursuant to that provision, the exemption encompasses supplies of education by organisations recognised by Member States as having 'similar objects' to those bodies governed by public law which provide the relevant education. In contrast to the approach taken in earlier cases SAE relied on the 'similar objects' test, arguing that the 'fundamental purpose' test, which had taken prominence in the case law following *SFM*, was incompatible with the EU law.

Following *LCC*, the FtT concluded that the 'fundamental purpose' test had not been entirely discredited, although it was of the view that the test requires careful application. In the fourth principle identified by the FtT, it is described as having something in common with the *SFM* factor of 'similar purpose'. Notably, it was that latter formulation that the FtT applied when considering SAE's evidence.

Further, although it applied the *SFM* factors, the principles the FtT identified included the need to consider whether those factors are EU-law compliant. The FtT was not persuaded that the first and second *SFM* factors (presence or absence of a foundation document, and absence of independence) were non-EU compliant. While it did not directly address the EU-compatibility of the 'absence of distributable profit' indicator, when considering the purpose of SAE the FtT did note the recent decision of the CJEU in Case C-319/12 *MDDP*. In that case, the CJEU held that private organisations that offer educational services for commercial purposes are not excluded from the potential application of the exemption provided in Article 132(1) of the Principal VAT Directive.

Time will tell whether the Decision in *SAE v HMRC* truly represents a turning point in the approach to the university education exemption. In the writer's view, it will at the least make it difficult for future cases to focus exclusively on the *SFM* factors: appellants will be wise to be alert to the need consider those factors in the relevant EU law context. Moreover, and notwithstanding the FtT's view that the fundamental purpose test has not been discredited, the Decision must cast some doubt on the continued application of that test. In *SAE*, at least, it appears subsumed in the arguably less stringent requirement of 'similar purpose' or 'similar objects'.

Melanie Hall QC and Elizabeth Kelsey acted for the Appellant, SAE Education Limited.

The comments made in this case note are wholly personal and do not reflect the views of any other members of Monckton Chambers, its tenants or clients.

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