

SAE Education Ltd v Commissioners for Her Majesty's Revenue and Customs [2019] UKSC 14

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The Supreme Court's judgment in *SAE* represents the end of a story that can be traced back to at least 2001, and the decision of Burton J in *Customs and Excise Comrs v School of Finance and Management London Ltd* [2001] STC 1960 ('*SFM*'). That case, like *SAE*, concerned whether a body making supplies of higher education was entitled to exemption from VAT under the provisions of the Value Added Tax Act 1994 ('the VAT Act'). In both cases, exemption turned on whether the supplying body could be categorised properly as a 'college of a university' for the purposes of the Act, under the so-called 'education exemption'.

In *SFM*, Burton J applied an 'integration' test to this question, considering 15 factors which were said to be indicative of integration between the provider and the university, and therefore indicated 'college' status. Those factors became known as the '*SFM* factors', and have appeared in decisions of the tribunals and courts since Burton J's judgment. They have not, however, been immune from challenge. In its journey through the tribunals and courts, *SAE* questioned the role of the *SFM* factors in determining college status in this context. The Upper Tribunal modified the role of the factors; the Court of Appeal essentially disposed of them, and imposed a new, stricter test. Ultimately, however, the Supreme Court has given further life to some – but not all – of the *SFM* factors. In its decision, the Supreme Court has formulated a new test, bringing much-needed clarity in what had become a troubled corner of VAT law.

The law

In domestic law, the education exemption is contained in Group 6 of Schedule 9 to the VAT Act, in conjunction with s.31(1). Item 1 in Group 6 provides exemption for,

"The provision by an eligible body of—

(a) education;

(b) research, where supplied to an eligible body; or

(c) vocational training."

The Notes to Group 6 define an 'eligible body' for these purposes as including,

in Note 1(b),

“... a United Kingdom university, and any college, institution, school or hall of such a university...”

Item 1 and Note 1(b) implement article 132(1)(i) of the Principal VAT Directive, 2006/112/EC. The form of the education exemption in art. 123(1)(i) is substantially different to the provision in Group 6. Article 132(1)(i) provides that,

“(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”

The meaning of the phrase ‘college... of... a university’ in Note 1(b), as a matter of domestic interpretation and implementation of EU law, was the fundamental issue before the Supreme Court.

SAE Education Ltd, and the First-tier Tribunal’s decision

The Appellant before the Supreme Court, SAE Education Ltd (‘SEL’), is the UK-arm of the global ‘SAE Institute’. The acronym ‘SAE’ stands for ‘School of Audio Engineering’, and SAE Institute’s expertise lies in the provision of higher education in the fields of audio and digital media technologies. In the UK, SEL provides those courses through campuses in London, Oxford, Liverpool and Glasgow, and it does so in conjunction with Middlesex University (‘MU’).

The nature and closeness of SEL’s relationship with MU was the factual issue before the First-tier Tribunal: was the relationship such that SEL was a college of MU for the purposes of Item 1 of Group 6? After a lengthy assessment of the evidence, and considering the *SFM* factors, the FtT concluded SEL was such a college of MU. It summarised the following factors as those which it considered carried the greatest weight in leading to this conclusion:

“(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."*

The Upper Tribunal, and the Court of Appeal

Both the UT and the Court of Appeal rejected the FtT's approach, and its conclusion. The UT did not dispose of the *SFM* factors entirely, but adopted a multi-step evaluative approach, the first question of which required determining whether the university and potential college had a common understanding of the relationship. If so, the second question was whether they had a common understanding that the undertaking claiming exemption was a college of the university. Only if they did so did the analysis proceed to the third stage, assessment of whether the relationship was sufficiently close to justify the conclusion that the undertaking was a college of the university within the meaning of Note 1(b), which included consideration of the *SFM* factors. The fourth and final step was to consider whether the undertaking supplied university-level education. The UT concluded the FTT had failed properly to take the first and second steps, and that, had it done so, they should have been answered in the negative.

The Court of Appeal's approach was a more significant departure from the approaches of the FtT and UT, and from the *SFM* factors. Patten LJ described the test of whether an undertaking is part of a university as being considerably more "hard edged" than the earlier approaches. He found it was necessary for the undertaking seeking exemption to show that it was a 'constituent part' the university, including demonstrating some legal relationship establishing and confirming the status of the undertaking. As it had not been established that SEL was a part of MU in such a constitutional or structural sense, SEL's appeal was dismissed.

The judgment of the Supreme Court

Lord Kitchen, with whom Lord Reed, Lord Sumption, Lord Briggs and Lady Arden agreed, allowed SEL's appeal, and in doing so rejected the approaches of both the Court of Appeal and the Upper Tribunal. The approach outlined by the Court most closely resembled that applied by the FtT, although the approach described by Lord Kitchen is not a simple assessment of the *SFM* factors.

Lord Kitchen's analysis is firmly grounded in the EU law which underpins Note 1(b) to Item 1 of Group 6. The starting point in the interpretation of Note 1(b) must, he observed, be articles 131 to 133 of the Principal VAT Directive. Those

articles make it clear that member states must exempt transactions involving the provision of (among other things) university education, by 'bodies governed by public law having such education as their aim'. Member states must also exempt transactions by other organisations which they have recognised as having 'similar objects' to those bodies governed by public law, which also have education as their aim. The exemption must be construed in a manner which is consistent with the objectives which underpin it, and not in such a way as to deprive it of its intended effects. In the context of university education, that objective is to ensure that access to the higher educational services is not hindered by the increased costs that would result if those services were subject to VAT. In implementing the exemption, member states had a discretion as to which bodies, other than those governed by public law, they would recognise as providing educational services (including university education). That discretion was not unlimited, but required respect of the general principles of EU law, including fiscal neutrality, legal certainty and proportionality.

Noting the wide variety of organisations and structures in the higher education sector, Lord Kitchen found organisations could not be excluded from the scope of the exemption purely on the basis that they provide education as a commercial activity, or do so in a relationship which is not the typical Oxbridge collegiate structure. To do so would undermine the purpose of the exemption, and the principle of fiscal neutrality. The United Kingdom must be taken to have recognised that a college of a university within the meaning of Note 1(b) has similar objects to those of a university which is governed by public law and which provides education to young people. That requires that the analysis focus on the objects of the body in issue, the nature of the educational services that it supplies, and how integrated those services are with those of the university. In Lord's Kitchen's words, "*it is necessary to examine the characteristics of those educational services and the context in which they are delivered rather than the precise nature of the legal and constitutional relationship between the body that provides them and its university.*" The correct approach, then, is one rooted in the objectives of the body and the question of integration, in line with SFM and the FtT's approach.

While finding the FtT's approach had been '*essentially correct*', Lord Kitchen considered the SFM factors did require some refinement. Some of the original factors, he found, are unlikely to be of much assistance. Some five factors, in contrast, are likely to be highly relevant. All, however, '*will depend on the particular circumstances of the case.*' A body may be a college of a university despite the absence of these five factors, and in other cases, the factors identified as unlikely to be of assistance may form a relevant part of the context to the relationship.

With the above caveat in mind, the five factors identified by the Supreme Court

as likely to be highly relevant in determining whether a body is a 'college of a university' for the purposes of Note 1(b) of Group 6 are as follows:

- (i) *whether the body and university have a common understanding that the body is a college of the university;*
- (ii) *whether the body can enrol or matriculate students as students of the university;*
- (iii) *whether those students are generally treated as students of the university during the course of their period of study;*
- (iv) *whether the body provides courses of study which are approved by the university; and*
- (v) *whether the body can in due course present its students for examination for a degree from the university.*

Applying this approach to SEL's case, Lord Kitchen first observed that the analysis of the evidence carried out by the FtT had been '*careful and comprehensive*'. Lord Kitchen identified a number of specific findings, reflecting the presence of the above five factors or similar features. He concluded those findings were supported by sufficient evidence, and there was no proper ground for interfering with them. In sum (and rejecting the UT's criticisms of the FtT's analysis), the factual findings of the FtT were sufficient to justify its conclusion that SEL's activities were integrated into those of MU, and that it shared the objects of MU. The FtT therefore was entitled to find that from May 2009 SEL was a college of MU within the meaning of Note 1(b) to Item 1 of Group 6, and SEL's appeal was allowed.

Comment

The Supreme Court's judgment represents the answer to a question that has been touched upon by repeated tribunals and courts, from the High Court in *SFM* to the Court of Appeal in *Finance and Business Training Ltd v Revenue and Customs Comrs* [2016] EWCA Civ 7 and *Customs and Excise Comrs v University of Leicester Student's Union* [2001] EWCA Civ 1972. In *SAE*, the Supreme Court grabbed head-on with what it means for a body to be a 'college of' a university in the context of the VAT Act. Its approach provides valuable clarity for education providers. It does not represent a sea-change – the answer is still, as it was in *SFM*, rooted in the idea of integration – but it does bring a full appreciation of the objective of the exemption, and the guiding principles of the EU legal order, to the interpretation of the domestic legislation.

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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