TC01545

Appeal number: TC/10/04909 &
TC/11/03580

VAT: Place of Supply; Council Directive 2008/8/EC, Article 46 supplies to non-taxable persons, Value Added Tax Act (VATA) 1994, Schedule 4 Part 3 paragraph 10(1) and (2) exceptions relating to supplies not made to relevant business person, Intermediaries: intention to facilitate the making of supplies of sports scholarships by US academic institutions; whether place of supply is US or UK. Appeal Allowed.

FIRST-TIER TRIBUNAL

TAX

FIRSTPOINT (EUROPE) LTD **Appellant**

- and -

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

TRIBUNAL JUDGE: **Mrs G Pritchard, BL., MBA., WS**
Members: **Mr S A Rae, LLB., WS,**
Mr P R Sheppard, F.C.I.S., F.C.I.B., ATII,

Sitting in public at George House, 126 George Street, Edinburgh on Thursday 1 and Friday 2 September 2011

Mr David Small, Advocate, for the Appellant

Mr Ian Artis, Counsel, for the Respondents

DECISION

Introduction

1. Firstpoint (Europe) Ltd (Firstpoint) trades as firstpointusa.com in provision of services intended to secure sports scholarships to US academic institutions. It was subject to two decisions in respect of which it made two appeals TC/2010/04909 (the 2010 appeal) and TC/2011/03580 (the 2011 appeal). The primary issue in both appeals is in respect of the application of the place of supply provisions relating to Firstpoint's services. Firstpoint considers the place of supply of its services to be in the USA and therefore outside the scope of UK VAT. HMRC determined in a decision of 12/03/2010 (the 2010 decision) that the place of supply is in the UK and that VAT should be imposed on Firstpoint's services. The 2011 appeal additionally concerned an adjustment Firstpoint made to their contract with client student athletes to attempt to satisfy what they perceived as a requirement of HMRC contained in the 2010 decision.

The requirement was, it appeared to Firstpoint, that Firstpoint's fee be repayable in the event of the client student athlete not succeeding in obtaining a sports scholarship and academic place to a US academic institution either a university or college which provides tertiary education to the equivalent degree or HND level of UK academic institutions, (which will be referred to as US colleges throughout for convenience).

2. HMRC had agreed on two previous occasions that the services supplied by Firstpoint were outside the scope of UK VAT. The first occasion was in 2006 when a voluntary disclosure had been made and Firstpoint's operations fully explained (the 2006 decision). The second decision was in 2008 following a further VAT visit (the 2008 decision). Till 2010 no VAT had been chargeable on Firstpoint's services. However HMRC had a change of mind as disclosed in the 2010 decision the subject of the 2010 appeal. No evidence was produced to show what caused the change or why the 2006 or 2008 decisions were ever believed to be wrong. Although the Tribunal commented on the lack of evidence from HMRC on this matter no offer of further evidence was made.

3. It was agreed at the outset of the Tribunal when HMRC lodged their Statement of Case in the 2011 appeal on the first morning of the Tribunal on 1 September 2011 that both appeals should be heard together, and that the evidence in one would be the evidence in the other where appropriate. Firstpoint was faced in the 2010 decision with a letter consisting of two A4 pages advising it that VAT was now payable on its services. That was the first decision appealed.

That it became an extremely sophisticated argument of complex proportions became apparent to the Tribunal because no proper consideration of the law had been made when the change of mind occurred. This, given Firstpoint did not receive any proper or clear explanation at the time, was puzzling and disadvantageous for Firstpoint. This business provides employment, trades in a complex market with budding talent of juvenile client student athletes and ambitious parents, and has had severe difficulties to overcome using lawyers, accountants and finally counsel for

representation over two days at a hearing which the Tribunal regrets. HMRC do make mistakes but one which came from a change of mind seems harsh indeed.

4. The law has taken some time to develop on place of supply and has brought into play here some complex case law as well as different timings of the application of the law in relation to the different Representation Agreements, and dates of decision.

5. A number of propositions was made to the Tribunal which it has in fact followed. One of these was that if the Tribunal found in favour of Firstpoint on what came to be described as the "intermediary issue" the Tribunal should stop there and make no determination on the alternative plea in respect of what came to be described as "the ancillary issue". The Tribunal has found in favour of Firstpoint on the "intermediary issue" and has therefore made no determination on the ancillary issue.

6. Although not fully argued in correspondence or in the Statements of Case both representatives in their submissions took issue on the matter of possible separate supplies. As a result of the success on the intermediary issue in respect of the matter of the client student athletes who succeeded in obtaining a place and the client student athletes who did not or who declined offers or who got to the USA and came straight home, again the issue of separate supplies became irrelevant and no determination was required.

7. The Tribunal also determined that the alteration of the Representation Agreement which brought no relief for Firstpoint with HMRC's 2011 decision was not a determining issue for the Tribunal either. Success has been achieved in the first appeal without the second appeal turning on a different issue. The Tribunal therefore found the facts relevant to one, relevant to the other. So far as the law is concerned it changed on 01/01/2011 and could have affected the second appeal if the "ancillary issue" had been in contention as Article 53 of the Council Directive 2006/12/EC was amended on that date by Council Directive 2008/8/EC and the terms of the Finance Act 2009 which amended the VAT Act 1994, altering the legislation on "ancillary services". However since this is not in issue for the Tribunal it was clear that a single decision on the "intermediary issue" would cover both appeals.

8. This decision therefore covers both appeals. Although a Joint Minute on some procedural matters was submitted the Tribunal has opted to deal with these matters as having no objection and to determine the issues as they arise in procedure.

9. There was a bundle of documents produced for the Tribunal. It consists of 3 bound volumes now marked Book 1, 2 and 3. Where reference is made to any page or any section it shall be treated as repeated here. There was no dispute as to the authenticity, the transmission and the receipt of those documents. Copies are accepted as principals.

Preliminary Matters

10. FIRST DECISION: On the motion of Mr Artis for HMRC and with no objection, the Tribunal allowed the lodging of the Statement of Case by HMRC in

TC/2011/03580 so that both the 2010 appeal and 2011 appeal could be dealt with by the Tribunal, and be heard together. All procedural and time requirements for lodging of documents etc were deemed satisfied.

11. SECOND DECISION: In the 2011 appeal at Book 3 of the bundle of documents it was stated in the appeal document that no review of the decision had been offered by HMRC. It was agreed that the opportunity to review is lost by submitting the appeal in terms of the Taxes Management Act 1970 S49 (TMA S49).

12. THIRD DECISION: It was agreed that TC/2011/03580 is as with TC/2010/04909 an appeal under S83(b) Value Added Tax Act (VATA) 1994.

13. FOURTH DECISION: Mr Artis on behalf of HMRC requested leave to lodge late HMRC officer and decision maker and only witness Mr Samuel Rae's written statement updated. He said it had originally been submitted in draft and contained inaccuracies. The Tribunal adjourned to consider the request. The Tribunal decided to allow the new written witness statement which was by Mr Samuel Rae, to be admitted to probation. The contents of the statement were accepted by both parties.

14. FIFTH DECISION: The Chairman of the Tribunal pointed out to both parties the Statement of Case in the 2011 appeal did not conform to the requirements of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 Rule 25(2)(b) as it contained no foundation in law. Mr Artis for HMRC moved amendment to allow reference to VATA 1994 Schedule 4A(14). This was accepted by the Tribunal and the amendment made.

15. SIXTH DECISION: On the evening of the first day of the Hearing both representatives gave the Tribunal outline proposed submissions for the Tribunal to have an opportunity to read these overnight. This was to assist with concluding the Tribunal on the second day reasonably timeously by 5.30 pm. On the second morning the Chairman drew Mr Artis' attention to a motion for expenses contained within his submission which is inappropriate to a standard case in tax matters. He accepted deletion of that motion.

16. SEVENTH DECISION: It was agreed between the parties and adopted by the Tribunal that only law in effect after 01/01/2010 would apply in this decision.

Legislative Framework

Section 6 VATA 1994 – Time of Supply

> *(1) The provisions of this section shall apply……, for determining the time when a supply of goods or services is to be treated as taking place for the purposes of the charge to VAT.*
>
> *(4) If, before the time applicable……, the person making the supply issues a VAT invoice in respect of it or if, before the time applicable……, he receives a payment in respect of it, the supply shall, to the extent covered by the invoice or*

payment, be treated as taking place at the time the invoice is issued or the payment is received.

Section 7A VATA 1994 – Place of Supply of services

(1) This section applies for determining, for the purposes of this Act, the Country in which services are supplied.

(2) A supply of services is to be treated as made –

in a case in which the person to whom the services are supplied is a relevant business person, in the country in which the recipient belongs, and

otherwise, in the country in which the supplier belongs.

(5) Subsection (2) has effect subject to Schedule 4A

(Subsection 5 provides that the general rule is subject to a number of special rules in Schedule 4A). Those which are relevant are

[PART 3: EXCEPTIONS RELATING TO SUPPLIES NOT MADE TO RELEVANT BUSINESS PERSON

Intermediaries

10(1) – A supply of services to which this paragraph applies is to be treated as made in the same country as the supply to which it relates.

(2) This paragraph applies to a supply to a person who is not a relevant business person consisting of the making of arrangements for a supply by or to another person or of any other activity intended to facilitate the making of such a supply.

COUNCIL DIRECTIVE 2008/8/EC

Preamble paragraph (1)

"The realisation of the internal market, globalisation, deregulation and technology change have all combined to create enormous changes in the volume and pattern of trade in services. It is increasingly possible for a number of services to be supplied at a distance. In response, piece-meal steps have been taken to address this over the years and many defined services are in fact at present taxed on the basis of the destination principle".

Preamble paragraph (5)

"Where services are supplied to non-taxable persons, the general rule should continue to be that the place of supply of services is the place where the supplier has established his business".

Preamble paragraph (6)

"In certain circumstances the general rules as regards the place of supply of services for both taxable and non-taxable persons are not applicable and specified exclusions should apply instead. These exclusions should be largely based on existing criteria and reflect the principle of taxation at the place of consumption, while not imposing disproportionate administrative burdens upon certain traders".

Article 46

"The place of supply of service rendered to a non-taxable person by an intermediary acting in the name and on behalf of another person shall be the place where the underlying transaction is supplied in accordance with this Directive".

(This will be referred to throughout the decision as Article 46).

HMRC Guidance

VAT Place of Supply of Services (POSS Manual)

09100 – Intermediary Services: Intermediaries

The term intermediary refers to a person who makes arrangements for or facilitates a supply to be made between two other persons. They can provide services to customers who may be either the suppliers or the recipient of the supply which is being arranged, or to both. Intermediaries may be referred to as brokers, buying or selling agents or go-betweens.

Payments in respect of supplies made by intermediaries are often described as commissions, but this is merely consideration for the services and in no way indicates the type of supply being made.

09300 – Intermediary Services: Identifying the place of supply

To determine the place of supply of the B2C service of an intermediary you must establish exactly what supply is being arranged and the place of supply of that service. The supply by the intermediary will then follow the place of supply of the service being arranged.

VAT Notice 741A Place of Supply of Services – effective from 01/01/2010

2.6 – What does "B2C supplies" mean?

For place of supply of services purposes B2C supplies means supplies to:

- a private individual
- a charity, government department or other body which has no business activities, or
- a 'person' who receives a supply of services wholly for private purposes.

2.4.2 – The B2C General Rule

The B2C general rule for supplies of services is that the supply is made where the supplier belongs.

12. B2C Intermediary Services

The law on B2C intermediary services covered by this section is in the VAT Act Schedule 4A paragraph 10.

12.1. When am I an intermediary for the purposes of this section?

You are an intermediary for the purposes of this section if you act as a third party in arranging, or even simply facilitating the making of supplies. An intermediary arranges supplies between two other parties; a supplier and that supplier's customer. Intermediaries may be referred to as brokers, buying or selling agents, go-betweens, commissionaires or agents acting in their own name (undisclosed agents). Payments for their services are often described as commission.

In this section, your customer is the person to whom you supply your intermediary services. This can be either the supplier or the recipient of the arranged supply (and in some cases may even be both).

Other References

Oxford English Dictionary Volume 7 – Definition of an Intermediary

> *A. adjective 1 – acting or of the nature of action between two persons, parties, etc; serving as a means of interaction; mediatory*
>
> *B. substantive 1 – one who acts between others an intermediate agent; a go-between middleman, mediator.*

Cases referred to

Regina v Montila and others (House of Lords) [2004] 1WLR 3141

Customs & Excise Commissioners v Reed Personnel Services Ltd [1995] STC 588

The Finest Golf Clubs of the World v HMRC [2005] UKVAT V1934

Customs & Excise Commissioners v Johnson [1980] STC 624

Card Protection Plan v Customs & Excise Commissioners (ECJ) (Case C-349/96 [1999] 2 AC 601

Dudda v Finanzamt Bergisch Gladbach (ECJ) (Case-327/94) [1996] STC 1290

Sarsfield v Dixons Group (CA) [1998] STC 938

Staatssecretaris van Financien v Lipjes (ECJ) (Case C-68/03) [2004] STC 1592

Becker v Finanzamt Munster-Innenstadt (ECJ) (Case 8/81) 1982 ECR 53

Apple & Pear Development Council v CEC [1988] STC 221

Highland Council v HMRC 2007 SC 533

Macdonald Resorts Ltd v HMRC [2011] STC 412

Telewest Communications plc v CEC [2005] STC 481

RCC v IDT Card Services Ireland Ltd [2006] STC 1252

CEC v Madgett and Baldwin (t/a Howden Court Hotel) [1998] STC 1189

Marleasing SA v La Comercial Internacional de Alimentacion SA (Case C-106/89) [1990] ECR 4135, ECJ

Findings-in-Fact

17. The findings in fact are drawn in part from the evidence of Mr Andrew Kean, Founder and Managing Director of Firstpoint since 2001, and of Mr Samuel Rae an officer of HMRC and also from their written statements and from written evidence There was a large joint bundle of written evidence, not all of which was legible or relevant but which included the following which were found relevant in both appeals:-

(1) Firstpoint's Representation Agreement (December 2009 version) pages 53-62.

(2) Firstpoint's Representation Agreement (July 2010 version) pages 63-74.

(3) Client Information Booklet – pages 75-138.

(4) Firstpoint's Potential Applicant Brochure – pages 139-162.

Note clean copies were supplied where necessary.

Facts Common to 2010 Appeal and 2011 Appeal

(1) Firstpoint is a private limited company incorporated in Scotland on 14 February 2001 under companies number SC215763. Firstpoint was registered for the purposes of VAT under registration number 842 6761 12 with effect from 1 July 2004 and the registration remains extant. Firstpoint operates from premises at Scottish Legal House, 145 North Street, Glasgow G3 7DA.

(2) Firstpoint's services are set out firstly in short in their VAT registration application form set out at page 32 et seq dated 25 June 2004 namely "to provide help and guidance to people to find sport scholarship in USA" (sic). They are set out more fully in the further information requested by HMRC at page 42 of the bundle as "consultancy providing guidance & advice to students pursuing sports scholarships in the USA – to US colleges & universities". When Firstpoint was

first VAT registered it was supplied with a note to account to the Commissioners of Customs and Excise (now HMRC) for VAT on taxable supplies of their services.

(3) Firstpoint services are supplied under its standard form Representation Agreement but in both cases these services are further explained.

(4) The services in terms of the December 2009 Agreement are:

> "the Services" means consultancy/representation services which will be comprised of calculation of approximate grade point average, research and short-listing of universities and sports programmes in the United States, SAT "mock" papers and advice, NCAA clearinghouse advice, profile creation and production and meeting with a Company consultant to review the above; release of promotional materials to indentified US colleges coaches, regular contact with interested coaches, update releases to coaches and colleges regarding the Client, meeting with the Client to discuss progress, review and filing of all Client/coach communication, review and advice regarding scholarship offers (if any) and, in the event that scholarship offers are received, decision making assistance, assistance with all relevant application forms for university admission and scholarship acceptance; and
>
> - Dedicated Consultant managing file
> - Calculate approximate GPA
> - Creation of online Sporting & Media profile
> - Compliance, Eligibility & Clearing
> - SAT Exam preparation and registration
> - The Clearing Department
> - Bespoke marketing & promotion
> - Negotiation of scholarship offers
> - Admissions assistance
> - US Visa & SEVIS process

(5) The services as described in the July 2010 Agreement are:

> "the Services" means consultancy/representation services which will be comprised of calculation of approximate grade point average, research and short-listing of universities and sports programmes in the United States, SAT "mock" papers and advice, NCAA clearinghouse advice, profile creation and production and meeting with a Company consultant to review the above; release of promotional materials to identified U.S College Coaches, regular contact with interested Coaches, update releases to Coaches and Colleges regarding the Client, meeting with the Client to discuss progress, review and filing of all Client/Coach communication, review and advice regarding Offers of Scholarship and, in the event that Offer(s) of Scholarship are received, decision making assistance, assistance with all relevant application forms for university admission and Scholarship acceptance; and

The FirstPoint USA Service:

- Dedicated Consultant managing file
- Calculate approximate GPA
- Creation of online Sporting & Media profile
- Compliance, Eligibility & Clearing
- SAT Exam preparation
- The Clearing Department
- Bespoke marketing & promotion
- 15-week 'Pre-Scholarship Conditioning, Strength and Fitness Program'
- Negotiation of Scholarship offers
- Admissions assistance
- US Visa & SEVIS process"

The 2010 Agreement also contained at Clause 15 the following provision:

15 – Money Back Guarantee:

The company will agree to refund up to 100% of the Services Fee under deduction of all administration costs and outlays (which proportion to be refunded is to be determined by the Company acting reasonably) in the event that the Client does not receive an Offer of Scholarship by the date of termination of this Agreement (which termination shall be in accordance with Clause 10 hereof), but subject to the following:-

(i) The Client having satisfied in full all conditions pursuant to Clause 5. For the avoidance of doubt, the Client's failure to exercise or unreasonably delay the satisfaction of the conditions contained in Clause 5 will constitute a material breach of the Agreement and the Company shall be entitled to terminate the Agreement with immediate effect and the Company will not be liable for any claim whatsoever under this Clause 15; and

(ii) The Client providing notification in writing to the Company of the Client's claim under this Clause 15 to the Company's Head Office, which at the Commencement Date is Scottish Legal House, 145 North Street, Glasgow, G3 7DA, within 7 days of the date of termination of this Agreement, such notification shall provide full details of the Client's claim.

(6) For the avoidance of doubt the following meanings apply to the abbreviations contained in these Representation Agreements:

- NCAA – National Collegiate Athletics Association.
- GPA means calculation of a US college's academic entry requirement assessment of Grade Point Average, in respect of which Firstpoint's

Managing Director Mr Andrew Kean can calculate an equivalence for US academic standard admitting bodies from the UK examination results such as GCSEs, A Levels, Scottish Highers, Higher National Diplomas etc.

- SAT Exam is a scholastic aptitude test on US "critical reading and math" sections which is required for many of the US Athletics Associations related to the colleges. Firstpoint is the only company outside the US which is permitted to conduct the examinations on behalf of the US colleges in the United Kingdom.

- SEVIS refers to the Student Entry Visa 1-901 Form which is required to be completed for the Department of Homeland Security. That form duly accepted by the Department of Homeland Security is required before a student can actually apply for an entry visa.

(7) The services described above in the VAT application and further information and in both contracts do give a general picture of what is on offer. Further there has already been before any contract is entered into, extensive consultation with many more applicants for Firstpoint services than Firstpoint will ever convert to client student athletes from whom a fee is collected. In respect of direct marketing, only Firstpoint amongst similar UK organisations prepares a Potential Applicant Brochure referred to above. Mr Kean advised and the Tribunal accepted that Firstpoint could have in a year as many as 15,000 approaches from interested parties, (referred to as applicants throughout this decision). Of these, Firstpoint would accept only about 400 in a year. This figure certainly accords with the stated income in the accounts produced to the Tribunal. So the decision to secure Firstpoint services is from the evidence more Firstpoint's than the applicant's.

(8) The criteria for that sift of applicants to becoming a contracted client student athlete is important. It is important because it is necessary for Firstpoint to carry out an effective sift from all the applications since Firstpoint services and also its reputation with the public, with applicants and with the client student athletes and even more so with the US Colleges depends on the success of those client student athletes in obtaining a place and performing over there. Presentation by Firstpoint to sports courses for admittance to sports programs and for scholarship funding and at the same time to the academic authorities in those institutions depends on Firstpoint's assessment of the quality of the students' performance and attainment.

(9) The client is the student athlete. Mr Kean stressed and the Tribunal accepted that the client is student first and athlete second.

(10) The sift is only possible because of Firstpoint's capacity to assess the applicants' likelihood of obtaining a place. As Mr Kean pointed out and the Tribunal accepted, that assessment is simple for a golfer with a very low handicap who is a top academic student with good UK qualifications. He will be keenly sought after by Firstpoint and by many US colleges and by sports coaches. However a very talented client student athlete can go on not only to compete in

the US and internationally as a sportsman but also to qualify academically in say law or medicine.

(11) For the purposes of clarity the Tribunal find that the college system in the US in the field of sports is significantly different from that in the UK. US college sports are a multi-billion dollar business in the USA with income drawn from the attendance at sports events, from sponsorship, from television rights and from endorsements. The sources of income give the colleges the ability to offer full and part sports scholarships to student athletes in many sports. It is a cardinal principle that these athletes are amateurs and remain so. The range and depth of the availability is clearly stated in the Client Information Booklet. There are various different standards of college athletic associations which are again explained in the Client Information Booklet. These national bodies are governed by admission criteria and the right to award scholarships. They are differentiated by academic and sporting eligibility criteria. The benefit for the college is they get a student athlete who will help them achieve sporting success which is highly valued in the USA. It is also however a requirement that academic success is achievable. Students must maintain an academic C-grade average during their scholarship. There are effectively two entry requirements for these sports scholarships namely the sports standard and the academic achievement.

(12) Whereas the sift for someone like a golfer with a low handicap or for a tennis player with a national ranking and a high academic achievement is simple, the position is very different for footballers (UK soccer players) who approach Firstpoint. These applicants may have been signed and coached as amateur schoolboys or schoolgirls with prominent football clubs, some even living away from home from the early teenage years but who are released by the club and not signed for a professional side. Since they still enjoy amateur status which is a pre-requisite for entry to US colleges, assessment by Firstpoint is necessary for Firstpoint before taking them on as client student athletes. They may not be suitable material for presentation to the appropriate bodies. They may not meet the eligibility criteria. That assessment is carried out by Firstpoint from their expertise and 'know-how' and involves assessment of potential and talent through observation by Firstpoint staff at live matches and through an interview with Firstpoint.

(13) Firstpoint interview all applicants, usually with their parents. These interviews are carried out at iconic sporting locations such as Stamford Bridge and Old Trafford.

(14) Four consultants from Firstpoint whose only task is to deal with eligibility of applicants before offering representation establish the applicants' academic achievements or potential and sporting achievements in their respective sports. They can take up references and obtain validation of any times, handicaps or rankings and consider whether they are likely to be successful in achieving a sport scholarship at a US college.

(15) Only after an applicant is deemed very likely to be successful in achieving a sports scholarship is he offered the opportunity of being represented via Firstpoint in all that is to follow. What is intended is that the client student

athlete will, through Firstpoint services obtain a sport scholarship and academic place at a US college.

(16) Only then is the applicant able to convert from being an applicant to a client student athlete by signing the Representation Agreement and gaining access to Firstpoint services. Thereafter the services offered are intended wholly to achieve a successful outcome.

(17) Although the services have already been described in short form in the VAT Registration application, the appeal and in both of the Representation Agreements that does not take account of the effort, energy, experience or time devoted to each client student athlete which is much more fully described in the Client Information Booklet which formed part of the written evidence and is to be treated as repeated here. The Tribunal found it credible and in accordance with Mr Kean's evidence. It does not describe any different services. It simply describes the activities required to be carried out to ensure the client student athlete actually receives those services.

(18) The Tribunal found it remarkable that the Client Information Booklet described its own content which extended to 57 pages of information and 5 pages of glossary as the "bare bones of the scholarship process". It also envisages that the client student athlete will "complete the transition from being a Firstpoint USA (sic) client to big time college athlete". It also advises the client student athlete that Firstpoint will be handling amongst other things "brokering of scholarship offers". All of the language and intent is positive in its intention to obtain US college admittance for the client student athlete with a sports scholarship.

(19) The services are offered to the client in the form of registration for the SAT (Scholastic Aptitude Test) which is the standard test used by over 5,700 US Colleges for admission purposes and is referred to above. Firstpoint have also calculated the grade point averages As explained the results determine which US College will consider the client. This is where Firstpoint's expertise on entry requirements, as gleaned through their experience and knowledge base is relied on by clients. The Tribunal accepted Mr Kean's evidence on an enormous amount of detailed information in that regard with respect for that awareness. In particular we find that the client student athlete on payment in terms of the Representation Agreement enters the Firstpoint world of ensuring so far as possible client student athletes secure an offer of a sports scholarship and academic entry to a US college. All Firstpoint's activities are intended to facilitate that. The place where the education when the client student athlete is engaged has only one intention namely to take place in the USA.

(20) Thereafter the whole purpose and intention of Firstpoint services are to promote the client student athlete, to inform the US colleges of the availability of the client student athlete as student and negotiate with coaches and the academic staff of the US colleges and do everything to achieve a successful outcome for the client student athlete. Communication relating to the sporting and academic achievements go between the client student athlete and Firstpoint and between Firstpoint and the US colleges and reciprocally can go between the colleges and

Firstpoint and Firstpoint and their client. There are frequently occasions when Firstpoint will be approached by a US college coach looking for a particular sportsman at a particular standard in a sport or for instance playing in a particular place in a team. As well as that there is direct contact from the client student athlete to the colleges and the colleges to the client student athlete. In particular the actual application for a sports scholarship and academic place must be signed personally and remitted by the client student athlete since it also contains undertakings with regard to conduct etc. Giving personal undertakings on behalf of its client student athletes would be outwith the power of Firstpoint. Again the offer by the University will be made directly to the client student athlete. The client student athlete is asked to contact Firstpoint if an offer is made as sometimes the offer is for less than 100% scholarship and can be negotiated more advantageously for the client student athlete by Firstpoint with the US Colleges.

(21) The system is complex we were satisfied from Mr Kean's evidence on this matter as he told us that he had been a student athlete himself. He had done all his own applications both sport scholarship and academic and had been awarded a sport scholarship and academic place in the USA but was suspended from his training and learning as he had breached US Visa requirements. He proceeded once that hurdle was cleared and went on to graduate. He pointed out the sort of difficulty a client student athlete even with an accepted offer could face when attempting to make his own arrangements for proceeding with his education in the USA. The Tribunal referred to and consulted the Client Information Booklet for an indication of these complexities which are manifold, and accept its terms.

(22) Although Firstpoint will indicate to their client student athlete which US colleges are most appropriate to them with their skills and qualifications only the client student athlete can as stated sign the paperwork. The final authority to sign or to commit must be the client student athlete's.

(23) There may be some client student athletes who have the necessary qualifications and skills or talent who in the period of the representation agreement which is two years from signing do not receive an offer of a place. There may be some who do and who do not take up any offer for some reason or for no reason. There may be some who go through the whole procedure and decide at the airport not to go, or arrive at their destination and turn and come home in 24 hours without taking up any tuition or education in the USA. All of them were however included in Firstpoint's facilitating environment where the intention existed and the services have been provided, to obtain an offer of a US college place or sports scholarship.

(24) No-one can guarantee a US college place for sporting prowess or academic achievement even where a candidate has all the necessary qualifications. In addition an offer can be conditional; it could be made but withdrawn if the conditions are not satisfied.

(25) In pages 138-401 of the written evidence there is covered the sort of work Firstpoint does in offering its services. The evidence along with Mr Kean's discloses and the Tribunal finds that throughout the client student athlete's contract period and often beyond if necessary Firstpoint will be approached by

US sports coaches looking for athletes with particular skills and the necessary academic standard. For instance they might be asked if – in football – they have a prospect of a "good centre half". The US colleges apply strict rules governing bodies such as Firstpoint's contacts and arrangements with coaches. Firstpoint may not contact coaches unnecessarily. They may not pay coaches or pay coaches' expenses. Firstpoint may not be paid by the US colleges. They can and do however advance information about their client student athletes through ensuring the quality of their skill and ensuring that the academic standard meets the requirement of the college. Firstpoint deal with what they refer to as "promotion and clearing". Part of the process is to attain the necessary academic acceptance and confirm the amateur status. This is to show commitment on the part of the client student athlete obviously to save the college wasted costs and efforts offering an opportunity which is not or cannot be taken up. Firstpoint attempts to generate offers commensurate with the client student athletes funding capacity also. Some parents may be willing to part fund but some perhaps cannot. So matching client student athletes to availability is very important. Local knowledge of US colleges and availability of scholarships and places from Firstpoint's contacts in the USA are invaluable to client student athletes. Consultants employed by Firstpoint who have all themselves been former client student athletes are sent to the US to visit colleges to check on current needs and requirements in relation to client student athletes performance and so on. They each spend up to 6 weeks in USA. Firstpoint can deal with approximately 2,500 coaches across USA. Of these 40 are former client student athletes of Firstpoint. Coaches come to the UK and Europe to visit organisations like Firstpoint and other bodies to check on client student athletes' performance, fitness, training, and to meet with and observe client student athletes to confirm the standard of talent/skills the client student athlete has. For this sort of occasion Firstpoint will organise for a coach, a visit to a stadium where Firstpoint has arranged say a football or hockey or other team game to be played by team members who are Firstpoint client student athletes. This service is provided for the interest of both parties. Both the client student athlete and the US colleges are provided with this service.

(26) As well as that Firstpoint keeps abreast of academic requirements and standards. Coaches do not deal with academic admission. If a scholarship is offered, it is conditional on the student obtaining an academic place. That in turn cannot be undertaken unless the client student athlete meets the US Department of Homeland Security requirements. That depends on full funding either from a scholarship or part scholarship and part private resources. It also depends on the offer of an academic place. When all of these are satisfied a Department of Homeland Security form is issued and a student visa can be applied for, for entry to the US. Firstpoint assist all client student athletes with this process.

(27) The Tribunal accept the complexity of the process and that services are provided to the client student athletes and services to the US colleges.

(28) Mr Kean was satisfied and satisfied the Tribunal and the Tribunal finds that it was Firstpoint's intention for all client student athletes signed up to the Representation Agreement to obtain offers. Even at the Tribunal he had

difficulty isolating anyone who did not receive an offer. When cajoled by Mr Artis under cross-examination who went down by diminishing percentages to 1%, he qualified that by saying and the Tribunal finds he would be very surprised and disappointed if no offer was received for a client student athlete. He still hesitated but said it was a possibility. Any client student athlete not receiving an offer would generally have been brought to his attention. The only circumstances in which he had actually required to repay funds was in one case where an offer was received and the parents of the client student athlete did not consider the offer sufficiently recognised their son's talent. Firstpoint had taken the decision they were not prepared to present the particular client student athlete to a higher institution of learning as they considered he was not sufficiently elite. The complaint by the parents was raised a very long time after the event. In his written evidence Mr Kean said and the Tribunal accepts that he believed "there is no legal obligation to guarantee a US college place and scholarship".

(29) Mr Kean also stated that he felt a strong moral obligation to repay the fee if no offer was received. He went on to state "happily I have never had to make good that promise". The Tribunal accepted that a client student athlete who received no offers in the contract period would still be acted for with the same intention as found above. Mr Kean did state and the Tribunal accept that there can be a 2/3 year process before a scholarship offer is received.

(30) Sometimes Firstpoint's promotion of client student athletes has the effect of interesting coaches who have never before looked outside USA for team members for their programmes. Sometimes individuals themselves approach a US college to see if they could be considered and are advised to use Firstpoint's services. Firstpoint get very good feedback from US colleges with regard to their client student athletes but to maintain their high standards Firstpoint introduced in the 2010 Representation Agreement an additional service which was advantageous to both client student athletes and US colleges. Firstpoint had discovered from feedback that sometimes their client student athletes who had achieved scholarship student status in June, had by September when term began in USA become unfit. As a result Firstpoint took advice from the US coaches on a fitness and conditioning programme which they prepared for all their client student athletes. It is computer based and is accessible to all client student athletes on a self help basis but is strongly recommended to them all so they arrive fit and conditioned to start their training when they join the US college.

(31) The Tribunal accepted and finds that although there are many written communications with client student athletes and coaches at the "offer point" in particular Firstpoint can be making negotiations through telephone calls between the US college and the client student athlete on a daily basis. The Tribunal accepted and find that in periods under consideration namely 12/03/10 – 31/12/10 and 01/01/11 until recently, telephone calls had not all been recorded.

(32) All the correspondence provided shows that Firstpoint promote their client student athletes and that US colleges look to Firstpoint for that provision of sufficient information to allow them to consider that client student athlete's potential for their team without necessarily having to see the client student athlete themselves. Where the team game does not allow for any ranking to determine

talent a web access display of the client student athlete's capabilities can be given to coaches along with the type of showcase arrangement at prestigious venues described previously.

(33) In his evidence Mr Kean stated he clearly sees himself as an intermediary. He was quite clear he was not an agent. He knew that HMRC had accepted that position not once only in 2006 but twice as since then there had been a further inspection in 2008. He was puzzled by the HMRC change of mind.

(34) The history of the 2010 decision is that on 14 October 2009 Mr Samuel Rae an officer of HMRC visited Firstpoint's offices at the behest of an HMRC credibility officer in Ayr to make verification of the repayment claim on Firstpoint's return for the VAT quarter ending 30/06/2009. The officer in Ayr had according to Mr Rae raised doubts that Firstpoint's services were outside the scope of UK VAT, and had requested further information. Mr Rae was unable to obtain the information from the only person he met on the premises Mrs Sharon Kean, the book-keeper. He therefore telephoned Mr Kean during the visit and enquired in particular about the percentage of client student athletes who did not achieve placement. Mr Kean advised he did not know but believed it could be very small. Mr Rae was supplied on Mr Kean's instruction with some emails showing the considerable contact Firstpoint had with US colleges and with a particular Representation Agreement with one specific client student athlete. Mr Rae was aware of HMRC's previous decision following the voluntary disclosure in 2006 namely that Firstpoint's services were outside the scope of UK VAT. There is no evidence he went back verbally to Mr Kean that day whilst he was on the premises to say he had not obtained the information he sought, or why he wanted it.

(35) Within HMRC Mr Rae passed the Representation Agreement to the Ayr credibility officer who made a submission to the Policy Unit of HMRC. She was not named at the Tribunal but was referred to as "she". According to Mr Rae she considered the services provided were not outside the scope of UK VAT. The Policy Unit did not immediately accept that submission and asked Mr Rae to obtain further information. He wrote to Firstpoint on 22 October 2009 attempting to obtain the information sought. The letter stated:

> "I refer to the visit which I made to you at the above address on 14 October 2009.
>
> I would be glad if you could supply me with the following to assist me in my consideration of the liability which should apply to your sales:-
>
> a) The proportion of your clients who do not succeed in obtaining a scholarship
>
> b) The file details of an individual client where scholarship was not obtained.
>
> I thank you in advance for your attention to these matters.
>
> If you contact us, please quote your VAT registration number and provide a daytime phone number".

(36) Firstpoint replied on 4 November 2009 as follows:

"Thank you for your letter of 22 October. I am able to provide the following in response to your questions;

(a) As outlined during your visit we do not maintain statistics on the number of clients who do not succeed in obtaining a scholarship as this is not a performance indicator for the business. We outlined that once an individual has been interviewed and assessed (during which time they are simply candidates *not* clients) they are then taken on as clients. Our aim and expectation is that those taken on as clients will be offered scholarships and with few exceptions, this typically happens, sometimes over a period of time as conditions of offers are met (eg educational pre-requisites being met following exam re-sits etc).

(b) I am unable to provide details of an individual client where a scholarship is not taken up for confidentiality reasons, but am happy to outline what a typical file (which will apply in all cases) will include;

- Personal details
- Sporting attributes and assessment
- Academic attributes and assessment
- Aims and aspirations
- Preferences in terms of location and type of scholarship sought
- Sports Footage and Highlights

The client file is built up from information gathered during the candidacy stage and also as the application progresses and opportunities are discussed with clients. The file contains no information connected with the making of 'supplies' for VAT purpose, except a copy of our invoice for agency services which you have seen on your inspection.

I trust that you will see that this is all the information required to enable you to assist you in your deliberations". The letter is signed by Mr Kean.

(37) Further correspondence follows from Mr Rae asking Mr Kean to make an analysis as best he could of the success rate of the clients obtaining scholarships. He took the point the process can go on for some time and asked Firstpoint to look at clients taken on between 24 months and 12 months previously to the date of the letter of 16 November 2009 in order to test whether an application was in the end successful or not. Firstpoint was asked to provide specifically a number of clients taken on and the number of those successful. With regard to the second point he asked for a file to be anonymised. In his further reply on 14 December 2009 Mr Kean wrote to Mr Rae:

"Thank you for your letter of 16 November. As you know, I have been happy to provide all the information you have sought to date, but I am surprised that you find it necessary to seek yet more information and am unclear as to how the information sought will help or inform your consideration for our VAT position. We have already clearly outlined the service we perform for clients and you have seen the number of

> charges we have made for our service and these are key components in the question of liability.
>
> Similarly, the confidential contents of a personal client file (which would take considerable resource to 'de-personalise') do not specifically relate to the making of supplies. I am again unclear as to why you regard the file contents as important since we have already outlined the process that clients go through and the contract that they sign. A copy of this agreement can be provided again if required.
>
> I trust that you are able to conclude your considerations based on the full information already provided".

(38) From that reply Mr Kean considered the request encompassed any student who did not get an offer, did not take up an offer or did not stay in the USA once there.

(39) Mr Kean quite clearly was unaware of the potential outcome and also quite clearly considered that his aim and expectation as expressed should satisfy HMRC's enquiries.

(40) In his reply Mr Kean expressed surprise at being asked to undertake the heavy administrative task requested of him which is understandable given the numbers of applicants and client student athletes he had, and the fact that client student athletes are sometimes processed over a period of years. He also raised the query as to why such information was necessary. He was not informed why the information was considered necessary. He was not advised of the credibility check raising the possibility of a change within HMRC as to the interpretation of a statutory provision or the interpretation of the VAT POSS manual. Indeed nothing from HMRC prompted Mr Kean to consider Firstpoint was under threat.

(41) Mr Rae sought further advice from the Policy Unit. This is not disclosed in Mr Rae's subsequent letter of 28 January 2010 to Firstpoint (page 21 of the bundle) which advised Firstpoint in the first instance that Mr Rae had carefully examined the Representation Agreement between Firstpoint and prospective students and further information which Firstpoint had supplied and did not consider that in supplying services to them Firstpoint was acting in an intermediary capacity as explained in Public Notice 741 at Section 11 (for the purposes of this decision the reference is deemed to be Public Notice 741A effective from 01/01/2010 at Section 12). Surprisingly he went on to say that he took this view because the

> "fixed fee of £2495.00 is due by your customers and is payable by them within 14 days of the date of execution of the agreement in order for them to receive your services (paragraphs 1 and 4 of the agreement) irrespective of whether or not you succeed in achieving a placement from them at an American University. If the fee is not paid you can rescind the agreement and you can charge interest if the fee is not paid within the 14 days allowed.
>
> To be acting as an intermediary you must be involved in arranging or facilitating the making of supplies. It is clear there were the occasions where clients do not achieve placements. In such cases the American Universities make no supply to the student and you have not therefore

> arranged any supply. In all cases you are charging clients a flat fee which is not dependent on any supply being arranged.
>
> We therefore consider that your supplies fall under the Business to Consumer General Rules for Supplies of Services (see Notice 741 paragraph 5.3). Since Firstpoint (Europe) Ltd belongs in the UK you must charge VAT at the standard rate on your services".

(42) Following that letter Henderson Loggie, Chartered Accountants through Mr Alan Davis asked by letter dated 12/02/2010 (pages 23/24 of the bundle) for a reconsideration by Mr Rae of his decision and if he was unable to do so requested a local reconsideration by HMRC appeals team.

(43) Henderson Loggie relied on the Representation Agreement which outlined the scope and nature of supply provided. They asserted that Firstpoint acted as an agent or intermediary for their clients in placing them in educational establishments in the United States. They also stressed that even if Firstpoint could not place a candidate within the US educational institution all of the work that they had deployed had been in respect of that prospective supply. Firstpoint did not then seek an alternative placement anywhere else in the world. Henderson Loggie go on to explain that even if an offer was made sometimes a client student athlete did not take it on because there might be changes to the domestic position or conditions may not have been met. Although not giving a foundation in law which applied at that point the terminology follows the terminology of the law at the time namely 12/02/2010 being the Council Directive 2008/8/EC, and VATA 1994 Schedule 4A Part 3 paragraph 10(1) and (2) being the "intermediary" issue. They went to detail what they regarded as the "liability" of the supply namely that the liability in respect of the services falls where the services are physically delivered under the VAT (Place of Supply of Services) Order 1992 referring to legislation which governed that point prior to 01/01/2010. Henderson Loggie also brought in the secondary argument under the legislation relating to "ancillary services". As this was not an issue determined by the Tribunal no further reference is made to any of the correspondence or part of it relating to the "ancillary services issue".

(44) In reply Mr Rae wrote to Henderson Loggie on 12 March 2010 and gave the ruling which came to be the decision appealed against in the 2010 appeal. He stated:

> "I refer to your letter of 12 February 2010 and the points you make have been noted.
>
> I have further considered the position in light of your lines of argument, but I continue to hold the view that the services provided by your client are not those of an intermediary under the VAT (Place of Supply of Services) Order 1999 (sic) (Statutory Instrument 1992/3121, Article 13).
>
> Your client charges a fixed fee to clients regardless of whether or not he succeeds in arranging the education supply in the USA. It is clear from the provisions of the Agreement that the client is required to pay the fee in order to receive Firstpoint's services whether or not the client is ultimately successful obtaining a place at an American university as

> a result of the services provided by Firstpoint. Firstpoint's supply to the client is not therefore directly dependent on any educational supply actually being made……..
>
> Since there is no certainty that an underlying supply of educational services will in fact be made, we cannot accept that Firstpoint can be providing an intermediary service for determining the place of supply for VAT purposes.
>
> Your reference to "residual" costs appears to me to relate to costs where exempt supplies are being made by a taxpayer and certain costs are not wholly attributable to either exempt or taxable income. The provisions for input tax deduction with regards to partial exemption do not appear to me to be relevant in this case.
>
> In conclusion, I must confirm the ruling contained in my letter of 28 January 2010 to your client: we consider that his supplies fall under the business to consumer general rules for supplies of services (see Notice 741, paragraph 5.3). Since Firstpoint (Europe) Ltd belongs in the UK your client must charge VAT at the standard rate on his services.
>
> You have the right to ask for an independent local reconsideration of this decision stating your grounds of appeal within 30 days of the date of issue of this letter.
>
> You may also have the right of appeal to the Independent Taxes Tribunal. Please see factsheet HMRC1 on the HMRC website".

(45) There is reference in that letter to "residual" costs which related to where exempt supplies were being made. This matter was not pursued at the Tribunal or in any other correspondence; again no findings are made in respect of residual costs.

(46) A formal review was requested and in the review letter dated 7 May 2010 Ms Sarah Thomas states that the Policy Unit have issued the Local Compliance Appeals and Reviews office with "unambiguous guidance" in relation to the supplies Firstpoint makes. She indicates that Firstpoint fall within the Business to Customer (B2C) General Rule set out at Notice 741A paragraph 5.3.

(47) Mr Rae's letter of 12 March 2010 was effectively the first "change of mind" letter and Ms Thomas' review was the confirmation of that change of mind. Her letter like Mr Rae's gave no reasons for the change of mind. Firstpoint were simply told that they are not considered to be an intermediary for the purposes of ascertaining the VAT liability of their supplies. No UK or EC law is quoted in her letter neither the previous law which had originally been used nor more appropriately the law applicable from 01/01/2010. No reason for not considering full terms of the legislation is given. Neither letter dealt with 'intention'. The Tribunal found the letters seriously inadequate

(48) The matter of exceptions to the B2C interpretation is first raised in HMRC's first Statement of Case (now amended). In response Henderson Loggie wrote suggesting the law from 01/01/2010 be applied. This was agreed between the parties. The 12 March 2010 letter was appealed (the 2010 Appeal).

(49) After the decision that Mr Kean would be required to charge VAT on Firstpoint's services in an effort to try to meet HMRC's claim that only the matter of not repaying those who did not receive an offer stood between him and having a decision that his services were outside the scope of UK VAT, a change was effected to the Representation Agreement. Whilst the change was being made Mr Kean expanded the 'services' paragraph as indicated above.

(50) Mr Kean gave evidence and the Tribunal finds that although the 'services' bullet points were expanded they still did not fully describe the methodology and resources required to provide them. He described to the Tribunal that he could have in fact filled a page with bullet points. However that was not so much of a concern to us as Firstpoint believed that the services were quite properly described in the Representation Agreement.

(51) The new contract was submitted to HMRC by Henderson Loggie on 17/02/2011 by letter at Section 6 of the supplementary bundle of evidence Book 3 and covers both appeals. The contract came into effect in July 2010. The principal alteration was what is described as "a money back guarantee". It was suggested that a money back guarantee was not provided simply for satisfying HMRC's requirement but also to make Firstpoint more competitive in the market place since the addition of VAT to its fee made it less competitive. A number of the competitors in the UK are ex-employees of Firstpoint. Henderson Loggie's letter refers to "the para 10(2) argument" which came to be referred to as "the intermediary issue" and particularly stresses the interpretation of the heading "intermediaries". In respect of the legislation at Part 3 of Schedule 4A paragraph 10 they refer to the case of *Regina v Montila* [2004] 1WLR 3141 allowing account in interpreting the acts of Parliament to be taken of such headings. Henderson Loggie stresses and the Tribunal accept that the essence of being an "intermediary" in a commercial sense means an intermediary has significant contact with both sides to a prospective transaction. Henderson Loggie suggests and the Tribunal find that it is consistent with the dictionary definitions and VAT POSS Manual paragraph 09100 and VAT Notice 741(A) paragraph 12.1. Henderson Loggie also comment that being paid by only one side to the transaction is entirely consistent with being an intermediary according the POSS Manual paragraph 09100 and 09300 and VAT Notice 741(A) paragraph 12.1. Henderson Loggie go on further to comment that in the letter of 12 March 2010 HMRC had indicated that Firstpoint was not an intermediary because it received a non-returnable payment upfront and the supply to the client was therefore not dependent on any educational supply being made. They considered that that overlooked the fact VATA 1994 Part 3 Schedule 4A para 10(2) applies to activities intended to facilitate the making of supplies for education not just activities which are actually successful in that facilitation. They quoted *The Finest Golf Clubs of the World v HMRC* [2005] UKVAT V1934 where customers paid fees upfront in the hope that suitable games of golf could be arranged for them. The supplier was held to fall within the previous legislation equivalent to Schedule 4A Part 3 paragraph 10(2) despite the fact that no games might actually be arranged. In relation to the 2011 appeal Henderson Loggie specifically invited HMRC to consider the terms of clause 15 which committed Firstpoint to refund fees under deduction of administration costs in the event of no offers being

received. A hope was expressed that that would meet the concern and enable HMRC to agree that for clients engaged under Representation Agreements containing the money back guarantee Firstpoint falls within Schedule 4A Part 3 paragraph 10(2). They repeat the "ancillary argument" on which no determination was made and came up with a new argument which was the "consultancy argument". In this particular matter they asked HMRC to look at client student athletes of Firstpoint's who are not resident in the UK. They quoted Part 3 paragraph 16 of Schedule 4(A). It is understood that this argument was accepted and no findings are made in relation to that argument either

(52) Mr Rae was again the officer who replied to that letter on 18/03/2011. He was not satisfied that Clause 15 made any difference really because the payment was made "upfront" and therefore when the prospective student paid the fees there was no guarantee the money would be refunded in full if a scholarship was not obtained. This was because there was a deduction in respect of administration charges and that the portion to be refunded would be determined by Firstpoint at the company's discretion. He therefore held that the payment of fees under the new Representation Agreement as under the old does not depend on any "underlying supply of education to a student by an American university being arranged". Notably he does not comment on the intention provision contained in Schedule 4A Part 3 paragraph 10(2). He agreed that Firstpoint were acting as consultants under the consultancy provision and that if the services were supplied to consumers outwith the EC then the services were outside the scope of UK VAT under provisions of Schedule 4A Part 2 paragraph 16.

(53) Firstpoint appealed that 2011 decision contained in the letter of 18/03/2011 HMRC's Statement of Case was accepted to probation on 01/09/2011 the first day of this Tribunal.

Submissions for the Appellant

18. Mr Small actually made two separate written submissions prior to making his verbal submissions. These related to the two appeals the 2010 appeal and the 2011 appeal and related to two different time periods namely for the 2010 appeal the period of 12/03/2010 to 01/07/2010 (the date of the new Representation Agreement) and in the 2011 appeal for the period 01/07/2010 to date.

19. This also covered two different periods of legislation. For the period 01/01/2010 to 01/01/2011 the Finance Act 2009 had amended VATA 1994 to insert Schedule 4A, Place of Supply of Services special rules and containing the general exceptions in Part 3 which included paragraph 4. Paragraph 4 related to services relating to educational or similar activities and ancillary services relating to such activities which the Tribunal has not pursued. It also contained at Part 3 the exceptions relating to supplies not made to a relevant business person under the heading "Intermediaries" paragraph 10. The Finance Act 2009 also went on to make special provision for a change of the legislation quoted immediately above so as to amend it with the amendments coming into force in 2011. The amendment deletes paragraph 4 and substitutes paragraph 14A with the minor alterations in the wording but also dealing

with educational services and ancillary services relating to such activities, on which no decision is made.

20. As well as that he made a substantial submission covering both periods and both the sets of legislation. He also incidentally covered the legislation which had prevailed prior to 1 January 2010. It was acknowledged and not disputed by HMRC that in relation to Schedule 4A for HMRC Mr Artis had prepared a skeleton argument which dealt only with the "intermediation" element where he also distinguished the changes in the law.

21. In light of both sets of submissions and given that the Tribunal has made no decision on the ancillary issue, the Tribunal is satisfied that the law relating to both appeals is VATA 1994 Schedule 4A Part 3 paragraph 10 being UK Legislation implemented following Article 46 of the Council Directive 2008/8/EC.

22. For the Appellant Mr Small submitted that the issue in the appeal is the place of supply of Firstpoint services under the legislation. Firstpoint claims the place of supply law puts the place of supply in the USA and therefore its supplies are outwith the scope of UK VAT which is not chargeable on its services. Mr Small submitted that firstly from the evidence and applying the law from 01/01/2010 namely Schedule 4A VATA 1994 Part 3 paragraph 10 the "Intermediary issue" the appeal should be allowed. He went carefully through the legislation Section 7A VATA 1994 on which there was general agreement that the supplies were to non-relevant business people, Schedule 4A and the "intermediaries" heading for paragraph 10. He asked the Tribunal to take account of *Regina v Montila and others* (House of Lords) [2004] 1WLR 3141 which held that the headings and side notes were as much part of an Act of Parliament as Explanatory Notes, which were admissible aides to construction and expanded at paragraph 31 of that decision which *inter alia* states "they are not debated and are unamendable". It is also discussed at para 34 of the decision which states that "headings are included… for ease of reference… They are there for guidance". Mr Small also submitted that because of the terms of paragraph 10(2) he was not satisfied that the issue of repayment needed to be dealt with in any event. He therefore endorsed the intermediary argument for the 2010 appeal as applying also to the new Representation Agreement, though he considers the pre-scholarship conditioning and fitness programme offered to client student athletes was an addition to the services provided previously to support information received from US college coaches. He considered that that provision reinforced the "intermediary function" and if he had failed with the 2010 appeal on the intermediary issue then that additional service should assist in tipping the balance in his client's favour in the 2011 appeal. Mr Small submitted that his client satisfied any definition of intermediary. He started with the Oxford English Dictionary definition already quoted above. This definition was satisfied as Firstpoint had contact with both sides namely the client student athletes and the US colleges. He accepted that Firstpoint could not sign the actual forms but that was standard practice because of personal undertakings required from the client student athlete to the US college. He considered that what was really important is Firstpoint's intention. He submitted that the definition of services in the Representation Agreement shows how Firstpoint can bring to the client student athlete and to the US colleges a matching of corresponding academic and sporting potential

to academic and sporting requirements. He went fully over the terms of Mr Rae's letter dated 12 March 2010. He also submitted that HMRC's requirement that the matter of the upfront non-returnable nature of the fee was crucial, was not a sound argument as it did not take account of the terms of the legislation namely "the intention to facilitate". He submitted that the intention need not be fulfilled under this point. He submitted that Firstpoint met all the requirements of Schedule 4A Part 3 paragraph 10. Since they fulfilled that statutory function he was satisfied that they must come under the exception to the general rule. In addition he relied on *The Finest Golf Clubs of the World v HMRC* [2005] UKVAT V1934 which held that Article 13 of the VAT (Place of Supply of Services) Order 1992/3121 applied to the place of supply of services by *The Finest Golf Clubs of the World* on the ground that although intermediaries such as caddies or members of golf clubs were used for arranging games and the golf clubs themselves provided the golf, *The Finest Golf Clubs of the World* still fell within the meaning of "making of arrangements for a supply by"… another person even if indirectly. The Tribunal there found the services fell even more clearly into the alternative terms of Article 13 as they were "other activities intended to facilitate the making of such a supply…..". It was also found that no outcome was required to fulfil the terms of the provision. In *The Finest Golf Clubs of the World* as in Firstpoint the members like the client student athletes paid upfront and might or might not achieve the objective. He submitted that HMRCs Public Notice 741A reflects the role an intermediary would play and the likelihood that an intermediary would have been engaged to act for one party or the other. He referred to HMRCs Public Notice 741A which reflected the possibility that "your customer is the person to whom you supply your intermediary services. This can be either the supplier or the recipient of the arranged supply (and may even be both)". In support of this he quoted *The Finest Golf Clubs of the World* already discussed and also *Staatssecretaris van Financien v Lipjes* (ECJ) (Case C-68/03) [2004] STC 1592 which was also on the issue of intermediary. The issue was one of the two questions referred to the ECJ. It held that the provision under the exception in an intermediary transaction fell to be determined within Article 28 and the principal provision of Article 8 in Council Directive 2006/112/EC with regard to the place of supply being deemed where the supplier has established his business.

23. Mr Small submitted that Article 46 actually used the word intermediary. He submitted that where it stated "acting in the name and on behalf of another person" that simply identified that the intermediary could not act as a principal so that the "other person" was simply the non-taxable person ie in this case the client student athlete. He provided the previous legislation which was contained in Article 44 of Council Directive 2006/112/EC which related to the supply of services by intermediaries without identifying a supply to a taxable or a non-taxable person. The result was that it read "the place of supply of services by an intermediary acting in the name and on behalf of another person…." Whereas Article 46 had had the words "rendered to a non-taxable person" dropped in after the place of supply of services and before the words 'by an intermediary'. He submitted that was simply to bring in the reference to the person to whom that particular supply was made. It was his view that it would not mean that in supplying his services to a non-taxable person, an intermediary required to be paid by a third party. In this case that would mean the

colleges in the US. He considered it was simply a clumsy piece of drafting and gave the same result as the previous Article 44.

Submission for HMRC

24. In the course of his submission Mr Artis suggested that payment made for services rendered in advance of completion was an indication that those services were not those of an intermediary. It was pointed out that no evidence had been led on this point and no statutory foundation or case law had been laid in advance of that argument. Although Mr Rae's letter of 28/01/2010 had explained that he took the view that Firstpoint was not an intermediary because "the fixed fee …… is payable within 14 days of the execution of the agreement in order to receive your services", that had not been adduced in evidence as S6 ss(4) VATA 1994 would somehow have required to be displaced, in order for that to be relevant. It was accepted by Mr Artis that there had been no evidence or argument led on the basis of prepayment of services. That submission was not pursued.

25. He did submit that the main argument actually advanced was contained in the original letter of 28 January 2010 where Mr Rae had stated he did not consider Firstpoint was acting as an intermediary because the payment was irrespective of whether or not Firstpoint succeeded in achieving a placement for their client student athletes at an American university or college. Mr Artis also in his submissions consistently suggested that Firstpoint services were not intermediary but were "collateral to supplies" between two other parties.

26. He suggested Mr Kean's Witness Statement at paragraph 5 which stated "services to universities" was a mis-interpretation as there was no consideration for these services. He distinguished *The Finest Golf Clubs of the World* on the basis that there was no written contract in *The Finest Golf Clubs of the World*. He considered Firstpoint had perhaps taken an innocent enough approach to not being taxable but they acted only for one party namely the client student athletes. He submitted that the supply was a basket of rights. He considered no one could know if an offer could be made or where to or when it might come. He distinguished *Staatssecretaris van Financien v Lipjes* (ECJ) (Case C-68/03) [2004] STC 1592 previously referred to because the place where the yacht in that case was purchased was known. He submitted that the determination of the place of supply was critical. When submitting on the definition of intermediary Mr Artis stated that in his view of Firstpoint it might be said that Firstpoint mediate rights and positions but could not "merely be a go-between". He claimed the use of the word as a "*lapsus linguae*" and went on to submit that just "fetching and carrying" was a mere means of communicating and not acting as an intermediary.

27. In respect of Article 46 he also submitted that it prescribed that the intermediary must act in the name and on behalf of another person. The provisions of the UK Legislation must be read in accordance with that of the Council Directive and he used *RCC v IDT Card Services Ireland Ltd* [2006] STC to support that. This was referred to for interpretation of National Law relative to the Council Directives. The issue in *IDT* was that in Ireland phone cards bore VAT and the underlying entitlement to

supply of phone services did not. In the United Kingdom phone cards were regarded as a credit voucher with no VAT and the phone services subject to VAT when consumed. The UK sought to tax the phone consumption occurring in the UK which would involve dis-applying paragraph 3 of Schedule 3A in order to fulfil the terms of the Directive. Mr Artis did not make clear in his submission that he believed the Tribunal should dis-apply the provisions of Schedule 4A Part 3 paragraph 10. He submitted that Firstpoint do not in terms of Article 46 act in the name and on behalf of another person. He quoted *Customs & Excise Commissioners v Reed Personnel Services Ltd* [1995] STC 588 and *Customs & Excise Commissioners v Johnson* [1980] STC 624 to suggest that there was no sense in which Firstpoint in fact acted in name and on behalf of either their client or the US colleges. He submitted also that Firstpoint did not interpose themselves in the dealings between their clients and prospective colleges. He suggested they assist, advise, advertise and promote but do not stand in the chain of dealings so as to alter or affect or otherwise mediate the rights of the parties as against each other. He also referred to the judgment in *Marleasing SA v La Comercial Internacional de Alimentacion SA* (Case C-106/89) [1990] ECR 4135, ECJ so as to account of the preamble to Council Directive 2008/8/EC para (6) which is referred to for its terms.

28. Mr Artis went on to submit that the lack of repayment of funds where no offer was made demonstrated that there was no direct link to a supply of education in the USA. He submitted that the Tribunal were restricted to the contract of services and in identifying the services he asserted that they could be characterised as having two aspects, the first being a straightforward consultancy advice, and the second a direct marketing service based on an online promotional shop window for prospective student athletes. He made much of the fact that only the client could sign documents. He considered the services were direct marketing of the client student athletes. He submitted that all of the services were performed in the UK, principally at Firstpoint's offices in Glasgow. He submitted that Firstpoint do not themselves make arrangements for the supply of services by colleges to students and that the arrangements made for the supply of scholarships and college places are all put in place by the US National College Athletics Authority. On the matter of intermediation although he quoted the legislation and dealt with facilitation he did not directly deal with the matter of intention. He compared Firstpoint to an advertiser or marketer or media provider who does not interpose himself in the dealings between the transacting parties. He considered that Firstpoint's services were more of a sales promotion and persistently used the word collateral to indicate that in his view Firstpoint services had no "added value". He also submitted "it is implicit in the idea of intermediation that the intermediary adds no value to a transaction that does not take place". He submitted that commercially this is reflected as intermediaries are paid by means of commission or other success fees. In order to substantiate that, he submitted there required to be a direct link between the consideration received and the actual supply of services in question. He used the case of *Apple & Pear Development Council v CEC* [1988] STC 221 and drew from that a payment made for services rendered in advance of completion of any transaction was an indication that the services were not those of an intermediary. Mr Artis was also of the view that the question of repayment was not relevant, as when every client student athlete paid no supply was ascertainable.

29. It was his view that it was not possible to characterise the nature of the supply retrospectively by reference to the uses made by the clients of the services available to them. In that regard he quoted *Highland Council v HMRC* [2007] SC533 and *Macdonald Resorts Ltd v HMRC* [2011] STC 412.

30. He submitted that in these circumstances Firstpoint had to be acting for the US college or university to meet the criteria of Article 46.

The Decision TC/2010/04909 and TC/2011/03580

31. The Tribunal allows both appeals. It finds that Firstpoint fulfils the requirements in both appeals in terms of VATA 1994 Part 3 Schedule 4A paragraph 10 and Article 46.

Reasons

32. The Tribunal accepted that Mr Andrew Kean the Managing Director and founder of Firstpoint was credible. The Tribunal was satisfied that the steps HMRC took in re-examining the tax status of Firstpoint following what appeared to the Tribunal to be a "change of mind decision" by the Ayr credibility officer who was not brought to give evidence were not sufficiently robust. HMRC gave Firstpoint no indication of why the subject of their VAT status was being re-examined. They referred the matter to the Policy Unit which apparently gave "unambiguous guidelines". These were not identified clearly to Firstpoint, their agents or to the Tribunal even now. The Tribunal was disappointed not to be told of any policy on the subject of Schedule 4A Part 3 paragraph 10 exclusions. No substantial changes had been made to the Law. The UK Law had been changed to accord with the provisions of EC Directive 2008/8/EC but that appeared to the Tribunal had much more to do with intra community transactions than extra community commercial business such as that transacted by Firstpoint. The preamble made clear the intention of the Directive in respect of exclusions to the standard Place of Supply Law which was that it would be based on existing criteria, and reflect the principle of taxation at the place of consumption.

33. Although the parties had accepted Mr Rae's Witness Statement, the Tribunal did ask to have him called, really to establish how much he understood the point at issue as it appeared to the Tribunal he had only looked briefly at the POSS Manual and not at the terms of Schedule 4A Part 3 paragraph 10(2) or S6 VATA 1994. The Law was not fully addressed anywhere by Mr Rae, by the credibility officer or the reviewing officer in looking at Firstpoint's intention or facilitating role in determining their place of supply. Indeed in the witness box it became very clear to the Tribunal that Mr Rae had done as he was bid to the best of his ability. In his statement he uses the words "I decided" but the Tribunal were not satisfied that was essentially true. He adopted the decision indicated to him by the Policy Unit. He did not at any time indicate even at the Tribunal why the "proportion" of students not receiving offers might have been relevant. Only 1 student would be needed if his argument was relevant. He appeared to consider an actual supply required to take place. The Tribunal might have agreed with that if the legislation stopped at Schedule 4A Part 3 paragraph 10(1). The Tribunal found his evidence weak and inadequate.

34. In the correspondence with Firstpoint HMRC relied on the definition of B2C intermediary services at paragraph 12 of the POSS Manual (Page 434 of the bundle) as their foundation in determining Firstpoint's place of supply as the UK. The Tribunal considered HMRC had not fully considered the legislation in the UK or EC, in respect of the possibility that Firstpoint's services could come into the Schedule 4A Part 3 paragraph 10(2) exception so as to satisfy paragraph 10(1) and thereby not be subject to UK VAT. Firstpoint's intention which was certain through the sift from 15,000 applicants to 400 client student athletes is the single most determining factor in that regard. Had they taken fees from 15,000 to consider the possibility of arranging a supply of sports scholarships and college education in USA it would have been a different consideration.

35. Again the Tribunal were satisfied that the services were clearly defined at the point of payment; in particular noting the declared negotiations which were carried out between the coaches and Firstpoint and passed by Firstpoint to client student athletes, and also the SAT exam Firstpoint are permitted to carry out by and for the US colleges to establish entry requirements for determining which US colleges will consider the client student athletes for entry, according to ranking.

36. The Tribunal did not consider it significant or contradictory to the intermediary role of Firstpoint that client student athletes had to sign the actual application forms or acceptances of offers of a scholarship in place as that included personal undertakings with regard to their personal conduct and ongoing academic effort and achievement whilst at the US colleges.

37. The Tribunal did not consider it necessary for Firstpoint to be paid by both parties in order to be an intermediary.

38. Clearly where an intermediary is involved he must as suggested by Mr Artis be doing more than "fetching and carrying". The Tribunal consider Firstpoint do a lot more than fetching and carrying. They visit universities and colleges, speak to coaches, ascertain academic standards, and put on client showcase games and events for US college coaches all intended to bring together the client student athlete and a US college to secure an offer of a funded sports opportunity and academic study. The sifting exercise is carried out for the benefit of both the client student athlete and the US colleges.

39. In addition after 12/07/2010 they also provide a special fitness and conditioning programme for client student athletes. The Tribunal did not consider that provided more than another small piece in the bigger picture of intermediary services. The Tribunal disagreed with HMRC's view that Firstpoint made no arrangements for a supply of services by colleges to client student athletes. Firstpoint's arrangements which also assist the US colleges ensure the client student athlete can for instance meet US Homeland Defence Security requirements so as to obtain the appropriate Form which is necessary before a US student visa will be issued. Of course Firstpoint do not have control over the issuing of an offer, that lies with coaches and other academic staff nor do they have control over the issue of a Visa, but the Tribunal considered it was stretching the use of the term 'arrangements' in excluding Firstpoint

from being able to meet the terms of Schedule 4A Part 3 paragraph 10 because of that incapacity. HMRC had not put anything like that to Firstpoint in its correspondence either.

40. In his written submission on "intermediation" Mr Artis did not include in his first written paragraph the full terms of para 10(2). He deals only with para 10(1) and follows with the POSS Manual which unfortunately also fails to deal with the issue of 'intention'.

41. He did compare advertisers, direct marketings etc, so as to show Firstpoint are not intermediaries. Indeed in their dealings with applicants the Tribunal would accept that comparison.

42. However given the Oxford English Dictionary definition the Tribunal were satisfied that Firstpoint does indeed stand between client student athletes and US colleges. Although as previously stated Mr Artis used the word collateral as a description of Firstpoint's services he could not define that use when asked to do so by the Tribunal. The Tribunal were left wondering if Firstpoint was meant to be metaphorically simply running alongside the client student athlete during the application process until he got to the college. The other meaning of collateral is guarantee.

43. Does Firstpoint first provide collateral? Did the client student athlete use Firstpoint's services as a guarantee of his place?

44. The client student athlete does not use Firstpoint services as an end in itself. That's what applicants do. A lot of applicants just go away, and are unable to meet the sift criteria, or cannot hope to achieve a full scholarship and cannot be afforded financial support from parents and so forth. They certainly use Firstpoint as an end in itself. But once registered Firstpoint client student athletes have a very real hope and interest in getting to USA on a sports scholarship to a US college. Firstpoint is more than a "collateral service". It cannot however guarantee a place.

45. Mr Artis had suggested it was implicit in intermediation that the intermediary adds no value to a transaction which does not take place. So where an intermediary acts he is usually paid commission from the third party. No commission is payable where no transaction occurs. The Tribunal disagree and consider HMRC may not be up-to-date with modern practice. The days of earning commission such as was possible in a rising economy are gone in many cases. The bargaining power now lies with the purchaser who may shop around and cause increasing costs to intermediaries. The result is that fewer payments for that type of intermediary services are related to a commission based on success. In any event it is only a potential determining factor and is not therefore in today's climate significant or particularly relevant here.

46. The Tribunal did not therefore consider the 'success only' charges to be an essential identifying factor in this case. The Tribunal considered the issue of repayment for lack of success in receiving an offer not relevant to the determination of Firstpoint's status as an intermediary.

47. Firstpoint do meet the criteria of Article 46 of the Council Directive 2008/8/EC in that they act on behalf of client student athletes quite clearly in contacting coaches and US colleges, providing information, gaining information from colleges and generally in all they do. They do not contact US colleges on behalf of anyone not a client student athlete. We therefore disagree with HMRCs submissions on a direct marketing aspect.

48. Where a preliminary ruling was sought on the issue of how the National Legislature had implemented an EU Directive the Tribunal accepted that on the matter of national interpretation the National Law cannot provide an interpretation not provided for by the EU Directives. It did not appear to the Tribunal from its acceptance of Mr Snall's argument of the "slotting in" of the words "non-taxable person" to Article 46 in any way made a provision that an intermediary required to be paid by a third party not his client. Article 46 provides the intermediary services must be supplied to a non-taxable person which is not in issue. As well as that the intermediary must also act in the name of and for another person. The Tribunal took the view that is simply ensuring he cannot act as a principal or undisclosed agent.

In addition in *Marleasing SA v La Comercial Internacional de Alimentacion SA* (Case C-106/89) [1990] ECR 4135, ECJ the Advocate General in his opinion to the Court finds that a provision of a Directive may not be relied upon as such against an individual, when law has been transposed into National Law. The National Law here is of course Schedule 4A Part 3 paragraph 10(1) & (2) which is very helpful as it uses terminology also used in the original National Law the SI 1992 Order, SI 1992/3121. Instead of the Article 46 words "underlying transaction", "supply by or to another person" is used. So although it is implicit that the National Law should comply with and implement the terms of the Directive, it appears to the Tribunal that here the National Law prevails with what is much clearer terminology in implementing Article 46.

49. In addition this Tribunal considered Article 46 was quite clearly reinforcing existing law. In the preamble of Council Directive 2008/8/EC paragraph 6, is states quite clearly the exclusions from the general rule also should reflect the principle of taxation at the point of consumption whilst not imposing disproportionate administrative burdens upon certain traders. In the Tribunal's view in implementing Article 46, the UK legislation at Schedule 4A Part 3 paragraph 10(1) and (2) demonstrates the provision that where services are provided such as those of Firstpoint the place of supply is to be treated as made in the same country as the supply to which it relates. It goes on to provide that place of supply can consist of making of arrangements by or to another person or of any other activity intended to facilitate the making of such a supply.

The Tribunal were satisfied that Firstpoint's supplies fall within para 10(2). They are supplies made to people who are not relevant business people consisting of activities intended to facilitate the making of other supplies. The other supplies are supplies made by US colleges in the USA. Applying all these provisions, therefore Firstpoint's supplies are therefore also made in the USA.

The Tribunal was also satisfied that no actual supply needed to be achieved as 10(2) appeared to be the "mopping up" provision to take account of Article 46 and the preamble.

50. In respect of the characterisation of supply Mr Artis had suggested that this was not clear at the point of payment for the services rendered by Firstpoint. He used *Highland Council* and *Macdonald Resorts* to illustrate his point. Mr Artis had suggested that at the point of payment the client student athlete was only entitled to a basket of future rights. Mr Small had replied that the client student athlete was always entitled to the services which were clearly identified. The Tribunal found the services clearly defined. The Representation Agreements included the intention to facilitate which is not a right but an intention. The Tribunal concluded there was a supply of services and *Highland Council* is not in point. In respect of *Macdonald Resorts* the Tribunal was satisfied that that case concerned identifying the type of service to be supplied in either exchange of points or provision of actual temporary accommodation which was not determined until occupation actually occurred. Again there is dispute in these appeals as to the type of service provided being dependant on a later event. The Tribunal considered *Macdonald Resorts* was not in point, as there is no dispute as to the type of services in the present case.

51. For all of these reason Firstpoint succeed in both appeals.

Expenses

52. Neither party is entitled to expenses in terms of Tribunal Rules relating to a standard case except in certain circumstances on which no motion was put to this Tribunal.

53. 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.

MRS G PRITCHARD, BL., MBA., WS
TRIBUNAL JUDGE

RELEASE DATE: 4 NOVEMBER 2011