[2016] UKFTT 444 (TC)

TC05197

Appeal number: TC/2014/2366

VAT: Exemption for welfare services- appellant providing welfare services not regulated by Health and Social Care Act – whether exempt from registration and so within Item 9 Group 7 sch 9 VATA: held No; whether Art 133 to be construed as including the supply: held no; whether Note 9 breached the principle of fiscal neutrality in affording exemption to charities supplying the same services: held Yes.

FIRST-TIER TRIBUNAL
TAX CHAMBER

L I F E SERVICES LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE CHARLES HELLIER
WILLIAM HAARER

Sitting in public at Bristol Magistrates' Court on 19 May 2015 and at Vintry House on 6 June 2016

Tim Brown, counsel, and Peter Baumgardt of Essential VAT Services for the Appellant

Charles Bradley, counsel, and Les Bingham for the Respondents

DECISION

1. This appeal relates to the appellant's supplies of welfare services. The issue is whether they fall to be treated as exempt from VAT under the provisions of Item 9 Group 7 Schedule 9 VAT Act 1994, or under the provisions of Article 132(1)(g) of the Principal VAT Directive.

2. The appeal was heard in two parts. At the first hearing the tribunal was composed of Mr Haarer and Judge Hellier; at the second hearing, the tribunal was, with the consent of the parties, composed of Judge Hellier alone.

3. At the first hearing Mr Baumgardt represented the Appellant and Mr Bingham HMRC. At that hearing the tribunal heard oral evidence from Mr Howley, a director of the appellant, and was addressed on the law by the parties. After that hearing the tribunal concluded that there was one issue which was relevant to the appeal which had not been fully addressed. It therefore released a Direction in which it made findings of fact, set out its conclusions on the matters which had been argued before it, and made directions relating the outstanding issue.

4. This decision incorporates the findings and conclusions in that Direction. The conclusions reached by Mr Haarer and Judge Hellier in the Direction released after the first hearing are described in this decision as findings and conclusions of both of us.

5. At the second hearing some further evidence was admitted. At that hearing Mr Brown represented the Appellant and Mr Bradley HMRC

The Facts

6. There was no dispute about the following facts which are drawn principally from the oral evidence of Mr Howley at the first hearing.

7. The appellant is a limited company which is not a non-profit making organisation.

8. The appellant provides day care services for adults with a broad spectrum of disabilities, principally learning problems. Its clients include those with: severe autism, Down's syndrome, severe behavioural difficulties, learning disabilities, and Crohn's disease.

9. The services are provided at various locations provided by the appellant. The locations may change from day to day during each week. The clients of the appellant are picked up from their houses early in the day and taken to the relevant location, and transported back home at the end of each day. Sometimes some help is provided at the time of pick up or return, but substantially all the appellant's services are provided away from the residences of its clients.

10. While at the appellant's premises the clients engage, with more or less assistance from the appellant's staff depending on the nature of their disability, in a range of activities which vary from day to day and from client to client. These activities include cooking, forms of exercise (walking and swimming and sometimes horse riding often dressed up as games to make them more appealing), help with everyday living (such as learning to turn on a light switch), money skills, social skills, feeding, washing and personal hygiene, oral health, and toileting.

11. Under guidelines which are similar to, and possibly more exacting than, those applied by the Care Quality Commission ("CQC"), Gloucestershire County Council monitors and inspects the appellant's service provision The appellant's outcomes are reviewed regularly by the Adult Social Care Directorate of the Council.

12. On the basis of the evidence of Mr Howley at the first hearing the Direction set out as findings that:

> The services are provided to clients under a formal care plan agreed with the social services department of Gloucestershire County Council. A social worker would have made an assessment of a potential client's needs. The social worker would have contacted the appellant and there would have been a meeting between the appellant, the social worker, the prospective client and his or her carers. It the appellant is found suitable by the social worker and the client, and if the appellant can provide the necessary care, it will be given a contract to support the care plan by providing care and activities on weekdays.
>
> The appellant is approved and registered with Gloucestershire County Council to provide these services on its behalf to the clients and is paid by the council (from a budget held by the client) under a contract between the council, the client and the appellant.

13. At the second hearing Mr Howley's further evidence on this topic (which was not contested by HMRC) and consideration of the provisions of the Care Act 2014 revealed that these findings did not give a complete picture of the appellant's activities or as regards the contractual position. The position is this:

> (1) where required so to do by the Care Act 2014 the County Council will assess the needs of an individual in need of care and support and will, under section 26 of that Act, set a budget for the provision of such care and support. In assessing those needs and setting that budget the council will generally consult with the service provider preferred by the individual or his or her carers ;
>
> (2) if the individual or those who care for him or her is able to manage money and certain other conditions are satisfied, the budgeted amount will be paid to him or her or those who care for him or her (section 33 Care Act). In that case where the Appellant provides services it will invoice the individual and be paid by the individual or the person who holds the money. In this case the contract for the Appellant's services will be between the individual and the Appellant although the council will exercise some oversight of the arrangements and the services the Appellant provides;

(3) in other cases and where the individual, or those who care for him or her, is or are unable to deal with money, the council will manage the budget. In that case the appeared that the contract for the Appellant's services would be between the council and the Appellant although there would be some document setting out the individual's needs and the goals for their care which would be signed the Appellant, the council and the carer. The Appellant would invoice the council which would make payment directly;

(4) Mr Howley explained that the Appellant also provided its care services to those in residential homes. These services were provided by agreement with the residential home and invoiced to the home, perhaps being funded directly or indirectly by the individual receiving the care.

14. About 50% of the Appellant's services related to those supplied to individuals in residential homes, 25% to those paid for by individuals or their carers out of the personal budgets paid to them by the council, and 25% to those paid for directly by the local authority.

15. At the second hearing, in response to the directions made by the tribunal following the first hearing Mr Howley:

(i) told us that Gloucestershire County Council supplied similar care services through two projects staffed by their employees, with one of which the Appellant shared facilities, and

(ii) produced print outs of the internet pages of two charities, People in Action and Community Integrated Care. People in Action advertised the provision of Day Opportunities for people with learning difficulties; these included arts and crafts, dance, pottery, cooking and horticulture. Community Integrated Care advertised services to help individuals with a wide range of disabilities to live independently in their own homes.

Other provisions of the Care Act 2014

16. Section 5 of the Act places a duty on the local authority to promote the operation of a market in care services with a view to ensuring that a person needing access to the market has variety of providers to choose from

17. Section 6 requires a local authority to cooperate with such persons as it considers appropriate who provide care and support and in subsection (3) gives "a person who provides services to meet adults' needs for care and support" as an example of such persons.

The Provisions of the VAT Act 1994.

18. The first issue which arose was whether any of the Appellant's supplies fell within Item 9 of Group 7 Schedule 9 VAT Act construing that section in the first place without regard to the provisions of the VAT Directive.

19. Item 9 Group 7 Schedule 9 (Exemption) VATA specifies:

"The supply by -

(a) a charity,

(b) a state-regulated private welfare institution or agency, or

(c) a public body,

of welfare services and of goods supplied in connection with those welfare services."

20. Note (5) provides that:

"In item 9 "public body" means --

(a) a government department within the meaning of section 41 (6);

(b) a local authority;

(c) a body which acts under any enactment or instrument for public purposes and not for its own profit and which performs functions similar to those of a government department or local authority."

21. Note (6) of Group 7 and defines "welfare services" for the purposes of item 9.

22. Note (8) provides that in Group 7 "state-regulated" means -

"approved, licensed, registered or exempted from registration by any Minister or other authority pursuant to a provision of a public general Act, other than a provision that is capable of being brought into effect at different times in relation to different local authority areas."

Discussion: Item 9

23. Mr Bingham rightly accepted that the appellant provided "welfare services" within the meaning of Item 9. The appellant is neither a charity nor a public body. For the purposes of this provision therefore the only issue in this appeal was whether or not the appellant was a "state-regulated private welfare institution".

24. Mr Baumgardt argued that the appellant fell within the definition in Note (8) because it was exempted from registration under the Health and Social Care Act 2008. We therefore turn to the provisions of that Act.

25. Section 1 of that Act provides that there is to be a body known as the Care Quality Commission ("the CQC"). By section 2 of the Act the activities of the CQC include registration under Chapter 2. In Chapter 2, sections 8, 9 and 10 provide, so far as is relevant:

8. "Regulated activity".

(1) In this Part "regulated activity" means an activity of a prescribed kind.

(2) An activity may be prescribed for the purposes of subsection (1) only if -

(a)the activity involves, or is connected with, the provision of health or social care in, or in relation to, England, and

(b) the activity does not involve the carrying on of any establishment or agency within the meaning of the Care Standards Act 2000 (c 14), for which Her Majesty's Chief Inspector of Education, Children's Services and Skills is the registration authority under that Act.

...

9. “Health or social care"

(1) This section has effect for the interpretation of this Part.

... (3) "Social care" includes all forms of personal care and other practical assistance provided for individuals who by reason of age, illness, disability, pregnancy, childbirth dependence on alcohol or drugs, or any other similar circumstances, are in need of such care or other assistance.

…

10. Requirement to register as a service provider

(1) Any person who carries on a regulated activity without being registered under this Chapter in respect of the carrying on that activity is guilty of an offence.

..."

26. Section 97(1) provides that “prescribed” means prescribed by regulations.

27. Mr Baumgardt , rightly in our view, says that the effect of section 8 of the Act is that the activity of the appellant "may" be prescribed as a regulated activity.

28. The Health and Social Care Act 2008 (Regulated Activities) Regulations 2010 specifies the activities in Schedule 1 of those regulations as prescribed activities for the purposes of section 8(1) of the Act. Paragraph 1 Schedule 1 prescribes “personal care for disabled persons provided at a place where those persons are living at the time that care is provided”. There is no other potentially relevant provision of Schedule 1. Schedule 2 to the regulations sets out specific exemptions into none of which the appellant’s activity falls.

29. It is clear that the appellant's provision of care does not take place at the clients’ homes. Its activity is therefore not included in the activities prescribed by Schedule 1 of the regulations and is accordingly not a regulated activity for the purposes of section 3 of the Act.

30. Mr Baumgardt argues that any activity which "may" be prescribed under section 8 and is not prescribed, is thereby “exempted” from registration. As a result he says that the appellant is "exempted from registration" for the purposes of Note (8) with the consequence that it is "state-regulated" for the purposes of that Note. Mr Bingham argues that to be exempted from registration there must be a prima facie requirement to be registered.

31. Whilst we accept that as a matter of eventual outcome there is no difference between (i) falling within a regulatory requirement but, by later provision being excepted from it, and (ii) not being subject to that requirement at all, we regard the use of "exempted" in Note (8) as meaning that a person is “exempted” from a requirement where their attributes are such that they satisfy general requirement but are removed from that general requirement as a result of possession of further qualities. In other words that a person is "exempted" only if, without the qualities necessary for the exemption, he would fall within the requirement to be registered.

32. In the appellant's case, although it falls within the categories of those who "may" be registered, its activities do not fall within any of the prescribed activities so that it cannot be "exempted” from registration. It may be described "exempt” from registration under the Act, but "exempted" in our view requires some quality but for the possession of which it would have been required to have been registered.

33. We are comforted in this conclusion by the decision of the tribunal (Lady Mitting) in *Slide & Seek Limited* (TC 3639), where the tribunal considered a similar question and said:

> 27. To fall into the definition, bearing in mind that the Appellant was not actually registered, it would have to have been "exempted from registration". There are two connected reasons why we believe that it was not. First, …the term "exempted from registration" does not refer to organisations that simply have no requirement to be registered, but to organisations that have a requirement to be registered (because they provide care to children) but are exempted from registration due to the specific nature of the care they provided..."

34. We conclude that the appellant does not fall within Note (8) by virtue of being exempted from registration.

35. In correspondence with HMRC the appellant suggested that its registration with Gloucestershire County Council and the council’s monitoring of its performance meant that it fell within Note (8). In the decision against which the appeal is brought HMRC expressed the opinion that a county council could not be included in the list of those with whom registration satisfies Note (8) because it is an administrative body which has many functions in addition to health and welfare. The letter concludes:

> "In short the interpretation was never intended to include county councils and was meant for organisations whose specific sole purpose was health and welfare related".

36. We regard this as a conclusion which is not warranted by Note (8): all the note requires is that the relevant person be registered with an authority pursuant to the provision of a public Act. It does not require the authority to have functions which are limited to health and welfare or not to be an administrative body. So long as there is a relevant public Act pursuant to which the registration or approval is carried out, the requirement is satisfied. The health and welfare requirement lies in the definition of “welfare services” for the purposes of the Item.

37. Nevertheless we were shown no public Act pursuant to which the county council could register or approve the appellant or exempt the appellant from registration. Accordingly it does not seem to us that the approval by or registration with the county council could make the appellant state-registered for the purposes of Item 9.

38. We therefore conclude that the welfare supplies made by the appellant do not fall within Item 9 on a domestic construction of its provisions.

39. We now turn to consider the provisions of the Directive, and whether it requires the appellant's services to be treated as VAT exempt. If it does either Item 9 must be construed, if possible, in a manner which gives effect to that requirement or the appellant may take the benefit of its provisions if they are sufficiently unconditional and precise.

The VAT Directive

40. Article 132 of the Principal VAT Directive 2006/112/EEC provides that:

> "Member States shall exempt the following transactions -- ...
>
> (g) the supply of services and goods closely linked to welfare and social security work, including those supplied by old people's homes, by bodies governed by public law or by other bodies recognised by the Member States concerned as being devoted to social welfare;
>
> (h) the supply of services and goods closely linked to the protection of children and young persons by bodies governed by public law or by other organisations recognised by the Member State concerned as being devoted to social welfare;…"

41. Paragraph (h) is recited not because it is directly applicable in this appeal, but because later in this decision it is contrasted with paragraph (g).

42. Article 133 permits member states to make the granting of exemption under certain paragraphs of Article 132, which include paragraph (g), to bodies other than those governed by public law subject to one of four conditions (one of which is that the supplier be non profit making). Article 134 provides that a supply shall not be granted exemption within, inter-alia, (g) if it is not essential to the transaction exempted, or where the basic purpose of the supply is to obtain additional income through transactions in competition with commercial enterprises.

Issues of Construction of Art133

43. Mr Baumgardt says that properly understood article 132 does not prescribe the persons by whom a supply must be made before it can be exempt but simply refers to the nature of the supplies. He reads the provisions thus:

> "the supply of services ...closely linked to …welfare, including those supplied by:

(a) old people's homes,

(b) by bodies governed by public law, or

(c) by other bodies recognised by member states etc.

44. In other words so that the suppliers mentioned are examples only which merely elucidate the nature of the supply.

45. That interpretation has some support in the objectives of the exemptions of which the court said in *Kingcrest Associates v C & E Commissioners* [2005] STC 1547:

> "30. In that regard, so far as concerns, first, the objectives pursued by the exemptions under art 13A(1)(g) and (h) of the Sixth Directive, it is clear from that provision that those exemptions, by treating certain supplies of services in the general interest in the social sector more favourably for the purposes of VAT, are intended to reduce the cost of its services and to make them more accessible to the individuals who may benefit from them."

46. However we reject Mr Baumgardt's interpretation of para (g) for the following reasons.

47. First, it gives rise to an interpretation which is inconsistent with the other paragraphs of article 132. Thus (h), (quoted above) clearly limits the exemption to supplies which are made by particular entities. Paras (b), (e), (i), (j), (k), (l), (m), (n), (o), (p), and (q) are similarly clearly restricted to supplies by bodies of a particular nature. That indicates that a restriction on the supplier is not at variance with the objectives of the provisions, and that some such limitation may be consistent with its objectives.

48. Second, the comma before "including" indicates that "including those supplied by old people's homes" merely expands the nature of the services potentially exempted. If Mr Baumgardt were correct, any service supplied by a public body would be exempted which would make the restriction to welfare services otiose.

49. Third, the judgement of the CJEU in *Kingcrest* clearly indicates that the services exempted by (g) are as limited to those supplied by public bodies or those regarded as devoted to social welfare.

50. We therefore reject the argument that the Directive requires any welfare or social service to be exempted. The appellant must be recognised by the State as being devoted to social welfare before exemption may be conferred on its supplies.

The Directive: Fiscal neutrality

51. In *Kingcrest* the CJEU explained that the relevant concept of fiscal neutrality in the context of the examination of the recognition of bodies for the purpose of the exemption in para (g) was that supplies of goods and services which are similar, and which are accordingly in competition with each other, may not be treated differently for VAT purposes.

52. Mr Brown argues that by recognising in Item 9 charities and state regulated welfare institutions, and not recognising the Appellant, the UK had failed to have proper regard to the EU principle of fiscal neutrality or equal treatment.

53. At one stage in the hearings the appellant had argued that the lack of exemption under our reading of Item 9 breached fiscal neutrality because local authority establishments providing the same services were VAT exempt. This argument was not pursued by Mr Brown in the light of the CJEU's judgement in *Finanzamt Steglitz v Ines Zimmerman* Case C-174/11 in which at [53] the Court said that because the Directive itself differentiated between supplies by public bodies and those supplied by other recognised organisations :

> "it is not in relation to bodies governed by public law that the principle of fiscal neutrality requires equal treatment in terms of recognition as "charitable", but in relation to all other organisations, each as compared to the other"

54. Thus Mr Brown argues that it is not in the exemption of councils making the same supply as the Appellant that the UK has breached the principle of fiscal neutrality, but in exempting such supplies by charities and not exempting such supplies by the Appellant.

55. Before turning to the detail of the argument I should address the effect of section 33 VATA and the question of to whom the Appellant's supplies were made.

Section 33 VATA – and to whom were the Appellant's supplies made?

56. Section 33 VATA provides that a local authority may reclaim the VAT on a supply made to it otherwise for the purposes of a business carried on by it.

57. In those cases where the Appellant's supply is to the authority it seems clear to me that it is not for the purpose of a business carried on by the local authority: the local authority is arranging the provision of care in pursuance of its statutory duties, not providing a service for a consideration.

58. Thus in such cases the VAT borne by the final consumer on a supply to a local authority of welfare services from a supplier which falls within Item 9, and whose supplies are exempt will be no more than that borne on an equivalent supply from a person who falls outside Item 9 and charges VAT. (Indeed the VAT borne on a taxable supply may be less than as VAT charged at intermediate stages in the supply chain will be recovered on a taxable end supply but may not be on an exempt supply.)

59. It seems to me therefore that to the extent that the Appellant's supplies are to a local authority there can be no breach of the principle of fiscal neutrality; and that such is the case even if in its accounting the local authority fails to adjust the use of the individual's budget by crediting the reclaim, because that omission would relate to the administrative practice of the local authority, not the incidence of VAT.

60. In all three of the types of arrangements for its supplies described above the immediate recipient of what the Appellant does is the individual but the contractual

arrangements for the supply differ. That, in particular in relation to the supplies contracted with the local authority, raises the question of to whom that supply was made for VAT purposes.

61. In *Airtours Holiday Transport Ltd v HMRC* [2016] UKSC 21 the members of the Supreme Court, although differing on the application of the principles in that case, agreed that where the person who pays the supplier is not entitled under the contracts to receive the service then the determination of the recipient of the supply requires a careful and sensitive analysis having regard to the economic reality of the transaction looked at as a whole. (see eg 44-50, 62(i) and 80).

62. It seems to me that where the contract for the provision of the Appellant's services is with the local authority, the economic reality is that the authority receives the supply: it agrees its terms, it receives the fulfilment of its statutory obligations and it pays. Where the contract is with the individual then even though the local authority may exercise some oversight it receives no benefit and the economic reality is that the supply is made to the individual. The same is the case in relation to supplies made in pursuance of contracts with residential homes.

63. Thus as regards some 75% of its supplies (those to individuals and residential homes) there will be VAT borne by the consumer on the supply which would not have been borne had the supplier been a charity. It is to those supplies that the issue of the fiscal neutrality of the UK's provision is relevant.

The Change from "charitable" in Article 13A (1)(g) to "devoted to social welfare Article 132(1)(g)

64. The provisions of Articles 132 to 134 replicate in large part the provisions of Article 13A of the Sixth Directive, but the precise formulation of (g) has changed. Article 13A(1)(g) read:

> "(g) the supply of services and goods closely linked to welfare and social security work, including those supplied by old people's homes, by bodies governed by public law or by other bodies recognised as *charitable* by the member state concerned."

65. The change in wording, which has the effect of assimilating the language of (g) to that in (h), reflects the judgement of the CJEU and the Advocate General's opinion in *Kingcrest Associates v C & E Commissioners* [2005] STC 1547.

66. The Advocate General in *Kingcrest* at [25] explained that most versions of the Directive used a term close to "of a social nature" rather than the English expression "charitable": he regarded the Directive as referring, not to that idea of charity which was reminiscent of private altruistic actions, but rather being of a broader scope which included all policies that support people in need.

67. This approach is reflected in the revised words in article 132, "devoted to social welfare", and it seems to me that the interpretation given to "charitable" in decisions

of the Court in relation to Article 13A(1)(g) are relevant to the understanding of "devoted to social welfare" in Art 132.

The Member State's discretion under Article 132(1)(g)

68. The Court in *Kingcrest* held that "charitable" had an autonomous EU meaning which did not exclude profit-making organisations. The Court did not proceed to define charitable although it held that it was in principle for the national law of each member state to lay down rules according to which recognition might be granted. It recognised that the Directive conferred a discretion on each Member State as to which bodies it recognised as charitable or devoted to social welfare, but said that it was for the national court to examine whether the State had observed the limits of the discretion in applying EU principles. At [52] the Court referred expressly to the principle of equal treatment.

69. An earlier reference to the Court, *Ambulanter Pflegedienst Kugler GmbH v Finanzampt fur Korperschaften* ("*Kugler"),* concerned the situation in which Germany had not in its VAT legislation prescribed a definition or list of persons it recognised for the purposes of Article 13A(1)(g). One of the questions for the Court was whether Kugler could claim the benefit of (g) nevertheless. The German government argued that it could not since no person had been recognised. The Commission argued that this did not exclude the possibility of exemption if the State had in some way recognised a body as "charitable": there was no need for the recognition to be in any particular form let alone by law.

70. The Advocate General agreed, and the Court said that the national authorities would have to determine, in the light in particular of the practice followed by the competent administrative body in analogous situations, the possibility of granting such recognition, and that this would have to be assessed in each case on the basis of all relevant factors.

71. In *Kugler* the appellant was arguing that it was entitled to exemption even though Germany had not specifically prescribed criteria of recognition*; Kingcrest* concerned the reverse situation: it argued that its supplies should not be exempt and that the UK had made Item 9 too wide. The Court recognised the discretion afforded to the Member State, and the need to exercise that discretion in accordance with EU principles:

> "53 In that regard, it follows from the case law that it is for the national authorities, in accordance with Community law and subject to review by the national courts, to take into account, in particular, the existence of specific provisions, be they national or regional, legislative or administrative, or tax or social security provisions, the general interest of the activities of the taxable person concerned, the fact that other taxable persons carrying on the same activities already have similar recognition, and the fact that the cost of supplies in question may be largely met by health insurance schemes or other social security bodies (see *Kugler* paras 57 and 58, and *Dornier* paragraph 72).

"54. In addition, it must be recalled that the principle of fiscal neutrality precludes, in particular, treating similar supplies and services, which are thus in competition with each other, differently for VAT purposes (see to that effect, *Kugler*, para 30, and *EC Commission v Germany* [2002] STC 982 ... para 20)."

72. Thus in *Kingcrest* the Court developed the factors which could be considered to include: (i) other regional or administrative provisions, (ii) the general interest, (iii) funding from social security bodies, and (iv) competition with non taxable supplies of a similar nature, and had made reference to fiscal neutrality.

73. In a passage I find helpful the Advocate General said that in exercising its discretion a Member State must observe fiscal neutrality and "have regard to the nature of the activity and the aims for which it is carried on, so that it is classified by reference to predetermined, objective and abstract criteria which take account of the nature of the business, its organisational structure and the manner in which it is conducted."

74. The Court in *Kingcrest* also said in relation to the state regulated condition in Item 9 that the national court could take into account the fact that the UK exemption applied to all organisations registered under the Care Standards Act 2000 which made those organisations subject to restrictions, checks and inspections and rules concerning buildings, equipment and the qualifications of staff (see [57]).

75. In *Kugler* there had been no specific national prescription; in *Kingcrest* the UK had provided one but the taxpayer had argued that in including in Item 9 state-regulated private welfare institutions, the UK had gone beyond the discretion permissible under the Directive by setting its definition too widely. The argument was thus the opposite of that in this appeal which is that by excluding the appellant's supplies from Item 9 the UK wrongly limited the relevant class of suppliers. The argument before the Court in *Finanzamt Steglitz v Ines Zimmerman* Case C-174/11 was that in this appeal..

76. In *Zimmerman* the German legislation contained two provisions relating to the exemption of welfare services. The first exempted welfare services supplied by a body which met a 2/3rds requirement: namely that in 2/3rds of its supplies the cost had been met wholly or mainly by the state or state authorities. The second exempted such services when supplied by 11 organisations officially recognised by regulations permitting recognition of welfare associations and bodies affiliated to welfare associations serving the public interest, and making supplies which benefitted identified beneficiaries at a reduced price. The CJEU was asked (i) whether the 2/3rds condition was permissible under Art 13A, and (ii) whether the principle of fiscal neutrality permitted the distinction between the 11 officially recognised suppliers and those who had to comply with the 2/3rds requirement.

77. In relation to the 2/3rds requirement the Court, which followed the conclusions of the Advocate General said that, having regard to the four *Kugler* factors, in particular the fourth, that the costs of the supplies be met largely by the state or health insurance schemes, the requirement did not in principle go beyond the limits of the State's discretion. But, in answering the second question said that the condition was

precluded by the principle of fiscal neutrality because it applied to some bodies and not others (those on the officially recognised list).

78. The Advocate General said

> "[68] It may be inferred from what the Court said in *L. u P* that compliance with the principle of fiscal neutrality requires, first, that all of the categories of establishments governed by private law referred to in Article 13(A)(1)(g) of the Sixth Directive be subject to the same conditions for the purposes of their recognition for the provision of similar services.
>
> [69] *In fine* it will obviously be for the national court to ascertain whether the national legislation complies with that requirement or whether, on the contrary, it restricts the application of the conditions in question to *certain types* of establishments whilst excluding others."[my later italics].

79. He then noted that the officially recognised bodies were not required to comply with the 2/3rds condition, and thus that the recognition of "certain organisations under Article 13(A)(1)(g) …is not subject to the same conditions as those for services which are similar…".

80. The German government had argued that it should be allowed to apply different rules to different taxable persons, but the Advocate General said that it "followed from principle and case law that, as a general rule, Member States may not apply different rules to different taxable persons." The Directive permitted a distinction to be drawn between public bodies and private ones, but the officially recognised bodies were private bodies ([79], [80]).

81. The Court explained that the relevant concept of fiscal neutrality did not preclude the distinction between pubic and private bodies in the Directive but for private bodies "required equal treatment in terms of recognition as "charitable" , each as compared with the others." Whilst the Directive in Art 13A(2) expressly permitted a State to differentiate between profit making and not for profit organisations, Germany had not availed itself of that option and the distinction between the recognised organisations and other bodies was not saved by that permission ([55] – [59]). The 2/3rds condition was precluded "where that condition is not capable of ensuring equal treatment in relation to the recognition…of the charitable nature" of private bodies.

82. Mr Brown says that the recognition in Item 9 of charities (such a People in Action) does not secure equal treatment of the appellant.

83. Mr Bradley relies on *Finance and Business Training Limited v HMRC* [2016] EWCA Civ 7 ("*FBT"*). That concerned the scope of the exemption for the provision of university education by an 'eligible body', as that term was defined by the UK legislation when viewed in the light of Art 132(1)(i) which required Member States to exempt education supplied by public bodies supplying education and by "organisations recognised by the Member State concerned as having similar objects" to such public bodies. FBT argued that its exclusion from the UK's definition

breached fiscal neutrality. Arden LJ said that a Member State should set the conditions for bodies to be entitled to the exemption, "[h]ow it sets those conditions is a matter for national law.":

> "[54] No one has suggested that Parliament had to use any particular form of words to set those conditions. In my judgement it was therefore open to Parliament to exercise the UK's option by deciding which non- public bodies were to qualify and then including a list of them in the relevant legislation. That is what Parliament has done in Note 1(b)."
>
> "[55] Parliament is obviously constrained by Art 132.1(i) as to what bodies it can include. In those circumstances, it has taken the view that the body must be one which provides education in like manner to a body governed by pubic law, that is, there must be a public interest element in its work. It has decided to draw the line, in the case of universities to those colleges, halls and schools which are integrated into universities and which are therefore imbued with its objects."
>
> "[56] For FBT to show that its exclusion from this group is a breach of fiscal neutrality principle would require it to say that it belongs to *the same class* as those institutions which meet the integration test in Note 1(b). Neither of the tribunals made any finding that would support that conclusion…"

Parliament, she said, had taken a cautious view of who should be a non public body entitled to the exemption, using factors which were neutral, abstract and defined in advance.

84. Mr Bradley argues that in the same way the Appellant has to show it is relevantly similar to the bodies that have been recognised in Note 9 – in the "same class" as Arden LJ put it - in order to show that there had been a breach of fiscal neutrality which entitled its supplies to exemption. Article 132(1)(g) defines the exemption not only by reference to the nature of the supply but also by reference to the nature of the supplier: it must be devoted to social welfare.

85. Mr Bradley accepts that the relevant similarity or class for the purposes of the fiscal neutrality test cannot be determined solely by the definition prescribed by the member state – that would be circular, and there could never be a breach of the principle. But he says that what makes a condition breach fiscal neutrality is if it is irrelevant to the determination of whether the body is devoted to social welfare. He gives as an example a limitation by reference to the legal form of the supplier which would be impermissible as irrelevant to the object of recognising bodies devoted to social welfare.

86. This attractive submission neatly cuts the Gordian knot and may be reconciled with *Zimmerman* if one treats the List of 11 organisations affiliates to welfare associations as potentially including bodies which were not devoted to social welfare. That treatment may be possible if affiliation to a welfare association was a condition which did not ensure such devotion.

87. It seems to me that if a State sets a condition which is related to whether or not a body is devoted to social welfare that limitation on recognition is prima facie

permissible. In the same way a condition that an educational institution be recognised only if it has the same public interest and objects as a university is permissible. But *Zimmerman* (which does not appear to have been considered by the Court of Appeal) shows that if an otherwise permissible condition is coupled with a provision which entitles other bodies to the exemption without satisfying the condition, then the condition taken with the provision breaches the principle of fiscal neutrality. It seems to me that in *FBT* Arden LJ read the condition in Note 1(b) as a condition touching the nature of the objects of the institution and thus potentially open to satisfaction by any body rather than a condition which specified certain bodies (or "certain types" of body) no matter what their objects: on that basis the condition would breach fiscal neutrality only if FBT could show that it had the same objects or was in the same class but not embraced by the words of Note 1(b).

88. For this purpose if recognition is dependent on satisfying only one of two or more conditions then the first question is whether those conditions separately are neutral, abstract, defined in advance and properly directed to the social welfare test. If they are then together they constitute a permissible condition. If one of them does not satisfy that test it may be that it breaches the requirement for fiscal neutrality.

89. On this basis the issue in this appeal is whether the provisions of Note 9 set out a test for "devoted to social welfare" or merely specify certain bodies (or in the words of the Advocate General quoted at [78] above, certain types of body) which are entitled to the exemption. If it is the latter then it is open to the challenge that it breaches fiscal neutrality because it would not satisfy the Advocate General's dictum that "the categories of establishments governed by private law referred to in Article 13(A)(1)(g) of the Sixth Directive be subject to the same conditions for the purposes of their recognition for the provision of similar services".

90. Mr Bradley says that the CJEU clearly recognises that the State has a discretion in the recognition it may afford, and the tribunal must recognise that discretion. If it can be said that any body which is devoted to social welfare is entitled to the exemption that negates the principle of the State's discretion.

91. It seems to me that there are two responses to this argument. First, it is clear that the State retains the absolute discretions set out in Article 133 – to deny the exemption to profit making organisations etc. The breach of fiscal neutrality permitted by such a condition, like the breach caused by the automatic recognition of bodies governed by public law accepted in *Zimmerman* is permissible: fiscal neutrality takes second place to express provision in the Directive (see [50] *Zimmerman*). Second, the a condition may limit the eligible bodies by reference to a criterion which relates to devotion to social welfare: the 2/3rds condition in *Zimmerman* was within the discretion afforded to the State; what caused the problem was the List of 11 officially recognised institutions which did not have to satisfy the otherwise permissible condition.

92. Mr Bradley says that if one examines the UK legislation in the light of the four *Kingcrest* factors then:

(1) There are no relevant statutory provisions which apply to the Appellant. The Health and Social Care Act does not require the Appellant to be registered and whilst the provision of funds is mandated by the Care Act 2014, that act does not govern the activities of the Appellant;

(2) It is accepted that the Appellant's activities have a public interest nature;

(3) The evidence of the activities of the charity People in Action was accepted as evidence that there were other suppliers of similar services which would be exempt;

(4) It was accepted that, save in relation to self funding persons in residential homes the costs of the Appellant's services were met by the State.

But he says that even if three out of four criteria were satisfied, they were not a definitive checklist.

93. In relation to the first factor I observe that its formulation in *Kugler* was broader than a concentration on legal provisions. Administrative practices were specifically mentioned. As I have noted, the Care Act requires local authorities to cooperate with care providers where appropriate, and I accept Mr Howley's evidence that the appellant was registered with the local authority and that in relation to supplies to individuals, the council was involved in setting the terms of the care and inspected the Appellant regularly.

94. Taking those factors together it does not seem to me that if the UK had provided predetermined, abstract, and objective criteria for recognition which encompassed the appellant, it would have acted outside the discretion afforded to it. But there is no obligation on the member state to attribute "charitable status" to any body which makes welfare supplies for, as the Advocate General pointed out in *Kingcrest*, that would convert the exception into a general rule. If Note 9's conditions are permissibly directed to social welfare it is to my mind only if, by breaching the principle of fiscal neutrality, that Note 9 has excluded the appellant's supplies that it can claim exemption under the Directive. If Note 9 was limited to state regulated bodies there would be in the case of the Appellant no possible breach of the principle.

95. In Note 9 the UK provides two ways in which a private body may be recognised: either it must be state regulated or a charity. The state regulated condition appears to me, given in particular the broad hint from the Court in *Kingcrest,* to be permissible. But persons such as the Appellant do not fall within the statutory regulatory regime because they do not supply services at the recipient's home. Thus the only way a private body making such supplies can qualify for exemption is if it is a charity. The question I ask myself is whether this test has "regard to the nature of the activity and the aims for which it is carried on, so that it is classified by reference to predetermined, objective and abstract criteria which take account of the nature of the business, its organisational structure and the manner in which it is conducted."

96. The UK does not appear to have been "cautious" (as Arden LJ described it in *FBT)* in setting the Note 9 condition (when viewed in the light of the newer understanding of the meaning of "charitable"). The condition that a body be a charity

is predetermined, abstract and objective. But a charity is an institution established for charitable purposes and those include: the advancement of science, environmental protection or improvement, the advancement of animal welfare, or the efficiency of the armed services(see section 2(2) (f),(i),(k),and (l)) Charities Act 2006); those purposes do not all seem to me to be to be redolent of social welfare even though they may be for the public benefit. In Mr Bradley's appealing categorisation "charities" in Item 9 includes bodies whose purposes are not relevant to devotion to social welfare. This condition also seems to me not to take account of the organisational structure of the body or the manner in which it conducts its business.

97. It seems to me that although the recognition of charities followed the terms of the original form of the Directive it is, given the meaning given to "charitable" by the CJEU and its reflection in the new term "devoted to social welfare", the recognition of certain bodies entitled to the exemption rather than a test for devotion to social welfare which takes account of the nature of the business and the manner in which it is conducted. The criterion in effect specifies bodies which are entitled to the exemption without regard to devotion to social welfare.

Conclusion

98. I therefore conclude that by recognising charities and not recognising the appellant, Note 9 breaches the principle of fiscal neutrality. As a result I must find that the appellant's supplies of welfare services are exempt and allow the appeal.

Rights of Appeal

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

CHARLES HELLIER
TRIBUNAL JUDGE

RELEASE DATE: 23 JUNE 2016