[2020] UKFTT 228 (TC)

TC07714

VALUE ADDED TAX – career coaching services – Chinese students studying in the UK – whether consultancy services or educational supplies Articles 54 and 59 PVD – whether services supplied in the UK – usual place of residence

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/03815

BETWEEN

MANDARIN CONSULTING LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE GUY BRANNAN
MRS JO NEILL

Sitting in public at Taylor House, London on 11 and 12 December 2019

Tarlochan Lall, counsel, instructed by Moore Kingston Smith LLP, Accountants, for the Appellant

Karl Beresford, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

[Amended under Rule 37 of the First-tier Tribunal (Tax Chamber) Rules 2020]

DECISION

INTRODUCTION

1. This appeal is against two VAT assessments issued by the Respondents ("HMRC") against Mandarin Consulting Limited ("Mandarin"). The assessments were issued under section 73(1) Value Added Tax Act 1994 ("VATA") on 6 October 2017 in respect of the under-declaration of output tax of £799,407.19 between the VAT periods of 03/16 to 06/17 and of £628,198.00 in the VAT periods 12/13 to 12/15. Thus, in total, the assessments in dispute amount to £1,251,345.60.

2. Mandarin supplies career coaching and support to students of Chinese origin (the candidates").

3. In short, the first issue in this appeal is whether those supplies should be classified as "the services of consultants" within Article 59 of the Principal VAT Directive 2006/112/EC ("the PVD"), as Mandarin argues, or as "supplies of services … relating to …educational… activities" (within Article 54 of the PVD), as HMRC contend. For simplicity, we shall refer in this decision to "consultancy services" and "educational activities" respectively whilst keeping in mind the actual language of the PVD.

4. The importance of the distinction between consultancy services and educational activities relates to the rules on the place of supply.

5. If the services supplied constitute consultancy services, Mandarin contends that those supplies are outside the scope of UK VAT as the recipients of the supplies do not have their usual residence in the UK. If the services constitute educational activities then they are treated as performed where the activities take place and HMRC argue that the activities take place in the UK and, thus, are within the scope of UK VAT.

6. There is a dispute as to whether the recipients of the supplies are the parents of the students or the students themselves. In the case of the parents, we understood it to be common ground that they usually resided outside the UK. As regards the candidates, Mandarin also argued that they also usually resided outside the UK, being in the UK only for the temporary purpose of education. Thus, regardless of whether the recipients of the services were the candidates or the parents, Mandarin argued that the supplies were outside the scope of VAT. Nonetheless, Mandarin's principal argument was that the supplies were made to the parents on the basis that they were the "economic" purchaser of the services.

7. For simplicity, in this decision, the Court of Justice of the European Union and its predecessor, the European Court of Justice, are referred to as the "CJEU".

THE EVIDENCE AND BURDEN OF PROOF

8. HMRC did not submit any witness evidence of its own.

9. On behalf of Mandarin, the following witnesses submitted witness statements:

   (1) Mr Eric Waley, a director and coach for Mandarin.

   (2) Ms Sarah Olsen, a coach and Deputy Head Coach for Mandarin.

   (3) Mr David Peckham, a director of Mandarin.

   (4) Mr Alan Latham, Global Head of Finance for Mandarin (he joined Mandarin in August 2016).

10. Mr Peckham also gave oral evidence in chief and was (briefly) cross-examined. The other witnesses' evidence was unchallenged and they were not required for cross-examination.

11. It was common ground that the burden of proof, to the usual civil standard (i.e. the balance of probabilities) lay upon Mandarin.

THE EU AND DOMESTIC LEGISLATION

12. It is perhaps useful at the outset to set out the relevant EU and UK domestic legislation. It was common ground that the domestic legislation had to be construed in accordance with the provisions of the PVD. Accordingly, throughout the hearing reference was made primarily to the provisions of the PVD and throughout this decision we shall do likewise.

13. Article 54(1) of the PVD provides as follows:

> "The place of supply of services and ancillary services, relating to cultural, artistic, sporting, scientific, educational, entertainment or similar activities, such as fairs and exhibitions, including the supply of services of the organisers of such activities, supplied to a non-taxable person shall be the place where those activities actually take place."

14. Article 59 of the PVD contains the following provisions:

> "The place of supply of the following services to a non-taxable person who is established or has his permanent address or usually resides outside the Community, shall be the place where that person is established, has his permanent address or usually resides:
>
> (a) transfers and assignments of copyrights, patents, licences, trademarks and similar rights;
>
> (b) advertising services;
>
> (c) the services of consultants, engineers, consultancy firms, lawyers, accountants and other similar services, as well as data processing and the provision of information;
>
> …"

15. With effect from 1 January 2015, Article 59a of the PVD provides:

> "In order to prevent double taxation, non-taxation or distortion of competition, Member States may, with regard to services the place of supply of which is governed by Articles 44, 45, 56, 58 and 59:
>
> (a) consider the place of supply of any or all of those services, if situated within their territory, as being situated outside the Community if the effective use and enjoyment of the services takes place outside the Community;
>
> (b) consider the place of supply of any or all of those services, if situated outside the Community, as being situated within their territory if the effective use and enjoyment of the services takes place within their territory."[1]

16. Article 132(1) of the PVD provides for exemption from VAT in respect of the following services:

> " (*i*) the provision of children's or young people's education, school or university education, vocational training or retraining, including the supply of services and of goods closely related thereto, by bodies governed by public law having such as their aim or by other organisations recognised by the Member State concerned as having similar objects;

[1] Prior to 1 January 2015, Article 59a had a proviso at the end of the provision quoted above which read: "however, this provision shall not apply to the electronically supplied services where those services are rendered to non-taxable persons not established within the Community."

(*j*) tuition given privately by teachers and covering school or university education…."

17. Council Implementing Regulation 282/2011/EU laying down implementing measures for the PVD ("the Implementing Regulation"), which has direct effect, so far as material, provides:

"Article 3

Without prejudice to point (b) of the first paragraph of Article 59a [of the PVD], the supply of the following services is not subject to VAT if the supplier demonstrates that the place of supply determined in accordance with Subsections 3 and 4 of Section V of this Regulation is outside the community:

…

(c) the services listed in Article 59 of [the PVD].

Article 12

For the application of [PVD], the 'permanent address' of a natural person, whether or not a taxable person, shall be the address entered into the population or similar register, or the address indicated by that person to the relevant tax authorities, unless there is evidence that this address does not reflect reality.

Article 13

The place where a natural person 'usually resides', whether or not a taxable person, as referred to in [the PVD] shall be the place where the natural person usually lives as a result of personal and occupational ties.

Where the occupational ties are in a country different from that of the personal ties, or where no occupational ties exist, the place of usual residence shall be determined by personal ties which show close links between the natural person and a place where he is living.

Article 23

…

2. Where, in accordance with Articles 58 and 59 of [the PVD], a supply of services is taxable at the place where the customer is established, or, in the absence of an establishment, where he has his permanent address or usually resides, the supplier shall establish that place based on factual information provided by the customer, and verify that information by normal commercial security measures such as those relating to identity or payment checks.

Article 24

Where services covered by the first subparagraph of Article 56(2) or Articles 58 and 59 of [the PVD] are supplied to a non-taxable person who is established in more than one country or who has his permanent address in one country and his usual residence in another, priority shall be given:

…

(b) in the case of a natural person, to the place where he usually resides, unless there is evidence that the service is used at his permanent address.[2]

[2] Article 24 was substituted by Council Implementing Regulation 1042/2013, EU Article 1(2)(c) with effect from 1 January 2015. Prior to that date Regulation 24 provided: "Where services covered by Articles 58 and 59 of [the PVD] are supplied to a non-taxable person who is established in more than one country or has his permanent address in one country and his usual residence in another, priority shall be given to the place that best ensures taxation at the place of actual consumption when determining the place of supply of those services."

Article 44

Vocational training or retraining services provided under the conditions set out in point (i) of Article 132(1) of Directive 2006/112/EC shall include instruction relating directly to a trade or profession as well as any instruction aimed at acquiring or updating knowledge for vocational purposes. The duration of a vocational training or retraining course shall be irrelevant for this purpose."

18. Paragraph 14A (1) and (2) of Schedule 4A of VATA provide:

"(1) A supply to a person who is not a relevant businessperson of the services to which this paragraph applies is to be treated as made in the country in which the activities concerned actually take place.

(2) This paragraph applies to the provision of –

(a) services relating to cultural, artistic, sporting, scientific, educational, entertainment or similar activities (including fairs and exhibitions), and

(b) ancillary services relating to such activities, including services of organisers of such activities."

19. Paragraph 16(1) and (2)(d) of Schedule 4A of VATA provide:

"(1) A supply consisting of the provision to a person ("the recipient") who –

(a) is not a relevant business person, and

(b) belongs in a country which is not a member state (other than the Isle of Man), of services to which this paragraph applies is to be treated as made in the country in which the recipient belongs.

(2) This paragraph applies to –

….

(d) services of consultants, engineers, consultancy bureaux, lawyers, accountants, and similar services, data processing and provision of information, other than any services relating to land…."

THE FACTS

20. Mandarin was established in 2007 under the name "Mandarin Recruitment Ltd". Initially its main business activity was that of supplying Mandarin-speaking staff but this quickly evolved into the provision of career coaching support to help students of Chinese origin - the candidates - to gain job and internship opportunities in major international commercial organisations.

Mr Peckham's evidence

21. Mr Peckham explained the development of Mandarin's business. He was approached by Ms Carrie Waley, the chief executive of Mandarin, at the beginning of March 2009 initially with a proposal that Mr Peckham should act as a consultant to assist Ms Waley with developing a new business that she was setting up, namely career coaching for Chinese students. In April 2009, Ms Waley offered Mr Peckham shares in the new company and asked him to become a director.

22. Initially, Mandarin focused on four areas: career coaching, recruitment, business consulting and cross-cultural consulting. Mr Peckham said that it quickly became apparent that Mandarin should focus on career coaching rather than the other activities. Career coaching for Chinese students was, Mr Peckham said, an innovative business concept and Mandarin was, and continues to be, the leader internationally.

23. The candidates came mainly from mainland China, as did their parents. Mr Peckham estimated that perhaps one in a hundred would come from other countries in Southeast Asia, Taiwan Singapore and Malaysia.

24. It was common ground that the parents of the candidates were almost exclusively resident and usually resident in China.

25. Mr Peckham could not recall a single candidate who paid for Mandarin's coaching themselves without financial help from his or her family in China. For this reason, Mandarin opened an office in China in 2011. Typically, however, Mandarin found candidates initially by going to universities in the UK. The parents of candidates usually spoke no English. Mr Peckham said that over time, as Mandarin's business in China developed, he would speak to parents via an interpreter and he found that he spent more time talking to parents (who were located in China).

26. Mr Peckham explained that most Chinese families were the product of China's "one child" policy. Therefore the typical Chinese family consisted of one child, two parents and four grandparents. Chinese students entered onto a conveyor-belt system of education. High School exams determined which university the student was able to attend. Then, after four years at a Chinese University, the student might decide to study abroad and typically would be funded by their parents. Candidates would always say to Mandarin: "I'd have to talk to my parents." Mr Peckham said that the parents took the decisions and supplied the funding as regards the services supplied by Mandarin. Mr Peckham described the parents of candidates as typically "pushy parents" anxious to give their children an advantage.

27. Candidates from China studying at British universities were Mandarin's target market.

28. China was, Mr Peckham said, an extremely competitive environment for young people – there were 50 million university students in China and 10 million graduate students, with millions of graduates looking for jobs.

29. Parents and grandparents wanted to give their children the best possible advantage and sought to enable candidates to get jobs with international companies in China. Mr Peckham stated, and his evidence was unchallenged, that none of Madarin's candidates was solely based in the UK, although he was aware of one example where a candidate had settled in the UK having come from China.

30. Mr Peckham stated that the candidates typically came from wealthy families in China, but they had little experience of or exposure to the world beyond the People's Republic of China. The students would have little understanding of how a Western international business worked or what was involved in working for a large multi-national company. For example, the student might have an aspiration to be an investment banker, but have little idea what was involved in working for an investment bank or the type of experience and qualifications that a Western investment bank would look for in an applicant.

31. Mr Peckham said that Mandarin did not teach candidates how to be, for example, an investment banker or an accountant. Instead, there was more focus on soft skills e.g. communication, leadership and ability to work with others. This was very different from the position in China where the approach was more prescriptive and where there was little recognition of the need for soft skills. A coach would ask a candidate what they hoped to be doing in five years and would then coach them on the soft skills needed for that – but, as already mentioned, Mandarin did not attempt to teach them the basics of their profession e.g. law, banking or accounting.

32. Mr Peckham had worked as a coach for Mandarin between 2009 and 2015, but had given few coaching sessions since 2015. During that period, Mandarin had contracts that gave unlimited interview and assessment centre coaching but no personal coaching.

33. It became apparent, Mr Peckham said, that candidates were not taking advantage of unlimited interview coaching and were disappearing without Mandarin knowing the outcome of their job applications. Mandarin concluded that unlimited interview coaching by itself was not producing the desired results. Chinese candidates needed a guiding hand to keep them motivated and to fill in gaps in their knowledge and understanding (which varied from candidate to candidate). Therefore, Mandarin added personal coaching to the packages which provided candidates with access to a highly experienced professional to advise them on all aspects of career planning, job applications and subsequent career development. Mr Peckham's coaching activities had largely finished when Mandarin introduced personal coaching.

34. When Mr Peckham started coaching in 2009, much of the coaching was carried out face-to-face but this quickly changed because frequently the coach and the candidate were not located in the same place. Since about 2011, when Mandarin started recruiting coaches, all coaching has been conducted over the Internet (by Skype or WeChat) because it was convenient and flexible for coaches and candidates alike.

35. Mr Peckham exhibited to his witness statement a number of different versions of the contracts used by Mandarin with candidates and (from July 2016) their parents. We set out those contracts and Mr Peckham's comments in the Appendix to this decision and that Appendix forms part of our findings of fact.

36. Mr Peckham explained that the purpose of, what he described as, First Step Coaching was to give a candidate foundation knowledge of application requirements through the First Step Documents plus (1) attending a workshop (either in person or by Skype); and (2) as part of the First Step Coaching (but separate from and usually after the initial workshop) the preparation of a CV that would be reviewed by one of Mandarin's coaches and revisited with the candidate in a session with that coach.

37. As regards One to One coaching, this concerned the job application process and involved preparing applications. A maximum of eight applications were reviewed by a coach, by which time the candidates should be able to produce compelling applications by themselves. In addition, it involved preparing for interviews and assessment centre sessions with unlimited interview and assessment centre coaching (until the first job offer was accepted). Mr Peckham said that interview coaching was central to Mandarin's product. In relation to assessment centre coaching, employers' recruitment procedures included an assessment process during which candidates would be assessed, usually over a day, carrying out activities similar to those they would be required to undertake if they became employed.

38. The candidate was assigned a personal coach at or close to the beginning of the entire process. Personal coaching helped the candidate develop skills of general application: the subjects to be covered were decided between the candidate and his or her personal coach. In the case of a Gold Contract, personal coaching was limited to 15 hours. The main difference between the contracts (Gold, Platinum, Diamond and Diamond Plus) was the amount of personal coaching time that was purchased. Personal coaching included professional development coaching and professional insight coaching.

39. Personal coaching was introduced because many candidates would not reach the interview stage and therefore were not able to use interview coaching. Personal coaching helped candidates maintain focus and address the cultural issues that prevented candidates from progressing and assisted candidates generally to overcome difficulties. Dialogue with a

personal coach allowed the candidate to explore career options and develop a clearer view of their future. Furthermore, it allowed candidates to interact with Western professionals.

40. Mr Peckham explained that although a contract expired on the first job offer or first graduate scheme being accepted, unused personal coaching hours could still be taken up by the candidate. For example, once the candidate had started work and they had, say, five hours unused and required coaching on understanding and managing the consequences of cultural differences, Mandarin was obliged to provide that coaching.

41. Interview coaching and assessment centre coaching remained unlimited for internship applications and graduate scheme applications, in the latter case until acceptance of the first offer, subject to the requirement that the contract must be renewed on each anniversary of its commencement.

Mr Waley's evidence

42. In relation to First Step workshops, Mr Waley first started designing and presenting these events in approximately 2012. He presented the workshop in London and Birmingham regularly and also gave the first few to be held in Manchester. However, he continued regularly to present the First Step workshop on Saturdays in London and online.

43. The First Step workshop was the first step of the programme for each candidate. The concept behind the workshop was to form an introduction to candidates of the application process for graduate employment in the UK and in particular to explain the differences between the UK process and what they would expect in China. The intention was to get candidates to adjust their thinking and to begin the cultural shifts that they would need for success. The workshops were regarded as an important part of the programme, particularly as it was likely to be the first piece of coaching that a candidate will receive and will show them the differences between coaching and the more didactic style of teaching that they were used to in China. The structure of the workshop was that of discussion, conversation, question and answer with an emphasis on cultural differences between the UK and China.

44. The workshops were the same for all the programs offered by Mandarin and would usually last between five and six hours. Since 2016, workshops were typically held in London every Saturday and in Manchester and Edinburgh every fortnight on a Saturday. Candidates could attend in person at whichever centre they wished.

45. Mr Waley explained that there were also "online" workshops held as and when required for candidates who were not in the UK or who could not attend one of the centres. These workshops would be held using a Skype group call and were slightly shorter, normally four hours. Mr Waley personally presented nearly all of the online workshops, which tended to take place during the week.

46. For an actual (rather than online) workshop in London, Edinburgh and Manchester, a minimum of four attendees were usually required but if more than 12 candidates wanted to attend then a second workshop for that centre would be arranged. For an online workshop there was a minimum of two attendees and a maximum of five, on account of the Internet bandwidth restrictions in China.

47. The number of attendees varied from week to week. From September to January attendance was likely to be greater than in February to April. In peak times it was often necessary to run two workshops at a time. Mr Waley considered that London tended to have more attendees on a regular basis. Over the summer university vacation, it could be quieter in London, Manchester and Edinburgh, but there were more online workshops because candidates were likely to be at home in China during the summer.

Ms Olsen's evidence

48. Ms Olsen retrained as a coach in 2004/2005 and set up a business offering coaching and consulting. She joined Mandarin in 2015.

49. Ms Olsen said that she conducted interview and assessment centre coaching as well as personal coaching. The content of interview, assessment centre and personal coaching was completely tailored to the individual candidate and was one-to-one and candidate driven. Many candidates asked coaches for coaching on job application skills and career coaching so there were common themes within typical coaching. However, as each candidate might have a different level of ability, the pace and content even for the same broad type of subject matter would differ from one candidate to the next. Ms Olsen briefed new coaches and sometimes saw copies of their coaching notes and she was therefore able to see that what she did aligned broadly with what other coaches did.

50. Coaching sessions for interview and assessment centre coaching last approximately 1.5 hours per session. For personal coaching, one hour sessions were recommended.

51. Ms Olsen conducted all coaching sessions by Skype except for two occasions when Skype had not worked and she had to coach by telephone. It was irrelevant where the candidate was located for any coaching session. The use of Skype for coaching applied to all types of coaching except the optional, face-to-face introductory group workshop. Ms Olsen was aware that some coaches very occasionally met personal coaching candidates on a face-to-face basis although this seemed to be more a social meeting than a coaching session. Candidates and coaches were not matched by location, so invariably the candidate and the coach would be in different locations. For that reason almost all coaching was done by means of Skype or an equivalent medium.

52. Mandarin's coaches were self-employed, working part-time.

53. During the period in 2016 and 2017 covered by this appeal, Ms Olsen had approximately 15 personal coaching candidates, of which about 10 would be active. An active candidate might have one session per week and send a couple of Skype messages or emails a week. Some candidates may use 3 to 4 hours a month of coaching time plus some email time. Some candidates may use up to 6 hours and some candidates did not respond to emails and did not use any sessions or may use some sessions and then stop.

54. Ms Olsen's evidence was that the fundamentals of coaching work had not changed as candidates continue to request coaching to develop their individual skills and strengths such as communication skills, presentation skills, job applications skills etc. The fact that all coaching was tailored to the candidate meant that the coaching was completely flexible. One personal coaching session might focus on a candidate's level of English and how to improve this, another session might focus on a candidate having lost motivation due to an interview failure, another session might focus on what types of jobs to which to apply for next, another session might focus on the candidate's strengths and how to match these to a role and a company's values.

55. Ms Olsen noted that candidates had different ages and abilities. One candidate might be an undergraduate, lacking confidence, needing to improve English and wanting to apply for an internship. Another candidate might have several years of work experience with strong English, be ambitious and want to use coaching to build his or her skills and get a job offer in a top company. Interview and assessment centre coaching varied by candidate. For interview or assessment centre coaching, one candidate may be struggling with a lack of good English vocabulary in their answers, another might have good English but poor pronunciation. As we understood it, coaches did not teach English, or indeed any language skills, but identified

weaknesses in a candidate's English and suggested ways in which those weaknesses could be improved. Yet another candidate, Ms Olsen said, may need help in improving answers in respect of commercial awareness whereas others may be good at group discussions but less strong at writing case study reports and may need coaching on this aspect.

56. Ms Olsen's evidence was that personal coaching often helped candidates to develop skills and strengths needed to be successful in applying for roles and it helped to prepare them for the recruitment process, but was completely flexible and could cover other matters such as stresses from exams. In contrast, interview and assessment centre coaching helps prepare candidates for specific upcoming interviews or assessment centre reviews to which they had been invited and was completely tailored to the candidate, company and role. For personal coaching, the type of issues covered might include career planning, researching, application forms and covering letters, online testing, networking, interview questions (motivation, competency, strength, commercial awareness), preparing for assessment centres. Some of these topics would have been introduced as part of the first-step coaching; however first-step coaching consisted of introductory documents and an optional introductory workshop. Personal coaching involved taking some or all of these subjects to a higher level. In addition, some candidates would also require coaching on subjects such as building underlying business knowledge, cultural differences and other topics such as time management, motivation or English.

57. Ms Olsen noted that interview and assessment centre coaching were more seasonal than personal coaching, with a peak between September and December.

Mr Latham's evidence

58. Mr Latham's evidence gave further information about the candidates. This was based on candidate folders maintained at Mandarin's head office in London. The folders were stored electronically and they contained standard "sign up" information (copy of contract, proof of payment etc.). Where Mandarin had been provided with copies of visas these would also be included in the folders. The folder would also contain copies of any email correspondence between Mandarin and individual candidates, including booking coaching appointments, together with copies of any email communication between the coaches and the candidates, where these were copied to Mandarin.

59. Mr Latham said that the candidates came to the UK under Tier 4 visas which permitted Chinese students to come to the UK either one month before the start date of their course or seven days before their intended date of travel, whichever was later. A Tier 4 visa was described in Home Office guidance as "the students coming to the UK for post-16 education." In order to qualify for a Tier 4 visa it was necessary to have a valid Confirmation of Acceptance for Studies from a fully licensed Tier 4 sponsor (e.g. a UK university). A Tier 4 visa would normally expire four months after the course completion date, so that a candidate would no longer have the right to remain in the UK. A Tier 4 visa may allow a student to work up to a maximum of 20 hours per week. In addition, if a student wished to stay on in the UK to take a further degree a new application for a Tier 4 visa would have to be made.

60. Mr Latham has prepared a spreadsheet listing twelve work folders ("the Sample") in respect of individual candidates which he considered to be a representative random sample. He selected the sample as follows: for each year covered by the appeal, he selected the eighth sale in date order for March, June and October, which were normally three of Mandarin's busiest months for sales. Mr Latham's spreadsheet summarised the interaction between Mandarin and the 12 candidates. Mr Latham also exhibited the contents of each sample folder for each of the 12 candidates. This selection method therefore resulted in three contracts from each year under appeal. No statistical sampling techniques were used in the presentation of these work folders.

61. In addition to the above sample, Mr Latham identified a number of candidates who had informed Mandarin either that they had returned to China or would be doing so shortly. There were six such candidates. In addition, four candidates whom Ms Olsen coached were also selected. In relation to these additional 10 candidates, we did not understand Mr Latham to be suggesting that these were a random representative sample selected by Mr Latham in the same way as the 12 candidates referred to above. We shall refer to the 22 folders as the "Enlarged Sample".

Evidence from the work folders

62. Mr Lall helpfully summarised the details of the work folders exhibited to Mr Latham's and Ms Olsen's witness statements in respect of these candidates in "Annex 2" to his submissions, which we checked against the original exhibits. We have examined the exhibits in respect of all the candidates, but we have paid particular attention to the 12 candidates which Mr Latham said constituted a representative random sample. We cannot, however, accept Mr Latham's statement as to the representative nature of the Sample. The Sample consisted of only 12 folders and we were not given evidence as to the total population size of the sales and are unable to conclude that three contracts per annum for each of the four years under review is of a sufficient size to represent the contracts entered into by Mandarin

63. Typically, the candidates were postgraduate students who came to the UK to study at British universities, usually for a one year Masters degree. There were, however, a few (we could count three i.e. 14% of the Sample) candidates who were studying for three year undergraduate degrees. Of these three, two had spent two years at school in the UK studying for A-levels and two went on to study for a Masters degree. With these exceptions, most of the candidates had previously studied at Chinese universities and a few had previous work experience in China and some had work experience in China during university vacations. There were, however, approximately four candidates i.e. 18% where their educational background was unclear.

64. Most but not all of the candidates in the Sample were applying for jobs at multinational businesses or multinational businesses in various industry sectors. Generally, most of the candidates were, unsurprisingly, putting forward their Chinese and English language skills as an asset. It was frequently unclear exactly what their long-term career aspirations were in geographical terms and whether their job-search was successful. In a small number of cases, it was clear that the candidates were seeking positions in Asia with multinational companies. In one case a candidate obtained a job offer from Huawei in the UK.

65. In most cases, the candidates entered into contracts with Mandarin for the supply of coaching services either whilst they were studying in the UK or shortly after the end of their courses but also while still in the UK. Most of the candidates (we counted 15 being 68% of the Sample) listed a UK address. In a few cases, the contracts were entered into before the start of the candidate's UK university course.

66. After July 2016, all the contracts were in the name of the candidate's parent or parents. In 15 cases (including a number after July 2016) the candidates paid Mandarin's charges directly, although in accordance with Mr Peckham's evidence they will have been funded by their parents. The amounts paid to Mandarin ranged from between £1,800 and £6,800, with the most common payment being £4,800 for the Gold Package. From the evidence, it appears that these amounts were mainly paid up-front by the candidates i.e. before the workshops or coaching commenced.

67. With one exception, there appeared to be no evidence that indicated that the candidates had family ties in the UK. The exception referred to concerned one of Ms Olsen's candidates, who indicated that her family lived in Scotland and who apparently settled in the UK.

68. In the great majority of cases, it seemed to us that the candidates were in the UK when Mandarin supplied its services. It is true that most coaching sessions took place by Skype or its equivalent and that there were very few face-to-face coaching sessions.

69. A few (we counted four) of the candidates' work folders included copies of their Chinese passports. Of these, two candidates also included their UK visas. In addition the folders for four other candidates also included their visas.

70. From the work folders, relating to periods prior to July 2016, it was apparent that Mandarin had no system in place to check where candidates were usually resident. In a number of folders there was a table giving the date on which the candidates signed up, the candidate's surname, given name (and English name (if applicable)), telephone number and email address, university and details of the amount and method of payment of Mandarin's charges. There seemed to be no requirement that a candidate should give identity details such as a passport, visa, details of next of kin etc. In other words, there was no systematic attempt to establish the place of usual residence of the candidates.

71. We should note that only Mr Peckham was cross-examined. The evidence of the other witnesses was unchallenged. Even in the case of Mr Peckham, his evidence was largely unchallenged. Mr Beresford's cross-examination of Mr Peckham was very brief and focused on the question whether before July 2016 there were contracts between the parents and Mandarin.

EDUCATIONAL ACTIVITIES OR CONSULTANCY SERVICES?

Submissions in outline

72. Mr Lall, appearing for Mandarin, argued that the services provided by Mandarin to its candidates were consultancy services and not, as HMRC contended, educational activities.

73. Mr Lall acknowledged there was no definition of educational activity for the purposes of Article 54 of the PVD and there was no directly applicable case law.

74. There was, however, case law on the meaning of school and university education for the purposes of the exemption granted under Article 132(1)(i) and (j) of the PVD. In particular, Mr Lall referred to the decision of the CJEU in *Ingenieurbüro Eulitz GbR Thomas und Marion Eulitz* v *Finanzamt Dresden* [2010] EUECJ C-473/08 ('*Eulitz*'). This case involved the provision by a partner in a civil law partnership of various training courses concerning fire prevention by means of lectures at the Technical University of Dresden to graduate engineers and which led to an examination. The CJEU held that such training could constitute "tuition covering school or university education" for the purpose of what is now Article 132(1)7(j) of the PVD. Mr Lall referred particularly to [29]-[38] of the CJEU's judgment. [3]

75. Mr Lall also referred to [20]-[30] of the recent decision of the CJEU in *A & G Fahrschul-Akademie GmbH v Finanzamt Wolfenbüttel* C-449/17 ("*Fahrschul-Akademie*") in which the

[3] The relevant Article of the 6th Directive provided:

'Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any possible evasion, avoidance or abuse:

…

(i) children's or young people's education, school or university education, vocational training or retraining, including the supply of services and of goods closely related thereto, provided by bodies governed by public law having such as their aim or by other organisations defined by the Member State concerned as having similar objects;

(j) tuition given privately by teachers and covering school or university education…."

CJEU held the concept of 'school or university education', within the meaning of art 132(1)(i) and (j) of the PVD should be interpreted as not covering motor vehicle driving tuition provided by a driving school. The Court said:

76. Mr Lall also referred in particular to the opinion of Advocate General Szpunar at [42] in relation to the question whether tuition for acquiring a driving licence was vocational training (i.e. a form of education):

> "In my view, only an activity which leads to the acquisition of knowledge or skills used exclusively, or primarily, for the purposes of vocational activity, or, possibly, activity targeted specifically at persons intending to acquire specific skills for professional purposes, can be regarded as vocational training. On the other hand, regarding a particular kind of education as vocational training merely because the skills acquired in the course thereof can also be used for professional activity would result in a potentially unlimited extension of that concept. Taking this reasoning to the absurd extreme, acquiring any skill can be necessary in order to exercise, for example, the profession of an instructor of that skill. Therefore, I consider that driving tuition for the acquisition of category B driving licences cannot be regarded as vocational training."

77. Mr Lall submitted that activity which may appear to be educational, because it involved the transfer of knowledge with a view to the development of skills or knowledge, fell outside the meaning of educational activity on the grounds of being specialised so that it did not cover a diversified set of subjects characteristic of school or university education. Moreover, the definition of vocational training in Article 44 of the Implementing Regulation did not cover instruction unless it related directly to a trade or profession.

78. Mr Lall observed that HMRC's public Notice 701/30/17 "Education and vocational training" stated at paragraph 13.2 "counselling and career guidance services are not exempt (under Article 132.1 of the PVD) unless they are a compulsory part of a vocational training package." In Mr Lall's submission HMRC recognised that counselling and career guidance were not vocational or educational in nature.

79. Tuition aimed at enabling candidates to acquire and develop skills for starting, establishing and developing their careers, argued Mr Lall, were general in the sense that they did not cover all subjects characteristic of school or university education and nor were they aimed at any specific trade or profession. On the basis of the decision in *Fahrschul-Akademie* the provision of such tuition or coaching was not educational activity for VAT purposes. Moreover, career coaching could not fall within the scope of Article 54 of the PVD merely by virtue of being an ancillary service. It was necessary for there to be a primary service within Article 54 to which the service was ancillary.

80. Mr Lall submitted that the features of Mandarin's career coaching indicated that to the extent the coaching involved the transfer of knowledge and skills, that information was based on the experience and judgment of the coaches. It may be subjective in nature, rather than involving content of an objective nature which qualified as being an educational activity. The coaching aimed to develop skills and techniques with the aim of career progression. Unlike educational activity, Mandarin's coaching did not involve the transfer of content of any particular subject matter which related to any academic subject or any trade or profession. The coaching was voluntarily acquired at extra expense and was not a compulsory part of activity which was educational in nature.

81. Instead, Mr Lall argued that Mandarin's activity was to provide consultancy for candidates such that advice and guidance was provided and was available for use by the candidate at the candidate's discretion. In Mr Lall's submission, professional advice, such as

law or accountancy, may involve the transfer of knowledge but career coaching lacked distinct knowledge or content.

82. Further, Mr Lall argued that workshops formed an introductory part of the services provided by Mandarin. There was only one workshop on each program and formed a relatively small part of the services provided by Mandarin and it was for the personal coaching, not the workshops, that the customers were paying. Mr Lall submitted that the workshops formed an ancillary part of the services provided by Mandarin.

83. Mr Beresford, appearing for HMRC, argued that the supplies made by Mandarin were educational activities within Article 54 of the PVD and, therefore, the supply was made where the activities actually took place.

84. If, however, it was determined that the supplies were consultancy services under Article 59 of the PVD, then Mr Beresford contended the supplies were made to the candidates themselves (and not to their parents) and that the candidates usually resided in the UK. Accordingly, the supplies were subject to UK VAT.

85. Mr Beresford accepted that there was no case law on the meaning of educational activities for the purposes of Article 54 PVD. Mr Beresford referred to HMRC's published (but non-binding) guidance (VAT Notice 701/30 paragraph 5.1) in which HMRC stated their understanding of the meaning of education to be:

> "a course, class or lesson of instruction or study in any subject, regardless of when and where it takes place and is including lectures, educational seminars, conferences and symposia, holiday, sporting and recreational courses, and distance teaching and associated materials."[4]

86. In addition, Mr Beresford drew our attention to the statement in HMRC's education manual (VATEDU 36100):

> "Education means a course or lesson of instruction or study in any subject, whether or not that subject is normally taught in schools, colleges or universities and regardless of where and when it takes place. Examples are courses of instruction in:
>
> - dance
> - physical training
> - sports
> - flower arranging; or
> - arts and crafts.
>
> The key word is instruction."[5]

87. Next, Mr Beresford referred to the Compact Oxford English Dictionary which defined education as:

> i. The process of teaching or learning;
>
> ii. The theory and practice of teaching; and,
>
> iii. Information about or training in a particular subject.

88. Mr Beresford also referred to the judgment of the CJEU in *Eulitz* at [29]. In addition, Mr Beresford referred us to the decision of the VAT Tribunal in *Phillips v C& E Commissioners*

[4] We note that Notice 701/30 paragraph 5.1 addresses the exemption in Article 132.1(i) and (j) of the PVD.
[5] We note that VATEDU 36100 addresses the exemption in Article 132.1(i) and (j) of the PVD and the corresponding provisions of UK domestic legislation.

(1992) VAT Decision 7444 ("*Phillips*"). In *Phillips* the VAT Tribunal considered whether motorcycle training courses held on and off road cycle track were education for the purposes of the exemption in what is now Article 132.1 of the PVD. The Tribunal said:

> "I endorse the view that education is not a static, except and must change with the changing social values. I too would be reluctant to confine the meaning of education to formal instruction in the classroom."[6]

89. Although Mr Beresford accepted that these cases were not definitive, they illustrated, in his submission, that supplies which aimed to improve or develop a recipient's knowledge or skill can be educational activities and that educational activities did not necessarily need to be carried out in a formal classroom setting.

90. Mr Beresford accepted that there were no direct authorities on the meaning of "consultancy" services for the purposes of Article 59 of the PVD.

91. Therefore, Mr Beresford referred to HMRC's published guidance in VAT Notice 701/30, section 5.3 (which deals with the exemption from VAT in Article 132.1(i) and (j) of the PVD), noting that HMRC considered consultancy was something that assists a business as a whole and not the individual student. The guidance stated:

> "Vocational training covers training or re-training and work experience for:
>
> - paid employment
> - voluntary employment in areas beneficial to the community as a whole, education, health, safety, welfare, and charity work in general
>
> Vocational training occurs where trainees attend courses, conferences, lectures, workshops or seminars and the purpose is to:
>
> - prepare for future employment
> - add to their knowledge to improve their performance in their current work
>
> Vocational training does not occur where (through counselling, business advice or consultancy) the purpose is to improve the working practices and efficiency of an organisation as a whole.

92. Mr Beresford further relied on HMRC's guidance, admittedly relating to vocational training, in VATEDU38200:

> "Services such as consultancy, counselling and business advice, which are designed to improve the working practices and efficiency of an organisation as a whole rather than to enhance the ability of individuals, are not vocational training."

93. This showed, Mr Beresford argued, that it was necessary that the consultancy looked at a business as a whole rather than a single individual.

94. Finally, Mr Beresford referred to the Compact Oxford English Dictionary (3rd edition (Revised) 2008) which offered a definition of consultancy as follows:

> "i. A company giving expert advice in a particular field"

95. Consequently, Mr Beresford submitted that Mandarin's supplies should be characterised as educational activities because they offered a transfer of skills and knowledge to the recipient and offered instruction rather than mere supervision over the actions of the recipient. It was irrelevant when and by what medium the supplies were made by Mandarin. Mr Beresford

[6] It is now hard to see how the actual decision in that case is consistent with *Fahrschul-Akademie.*

argued that the supplies should not be categorised as consultancy services. The supplies in question were designed to improve the skills and knowledge of each individual recipient and not the general efficiency and working practices of an organisation (or by analogy a group or team of students) as a whole.

Discussion: educational activities or consultancy services

96. The rules governing the place of supply differ depending on whether the services in question comprise educational activities or consultancy services. It is, therefore, necessary to establish which category most closely fits the services provided by Mandarin.

97. In this context it is worth noting that the exemption from VAT in relation to education in Article 132 (1)(i) and (j) of the PVD is more specifically worded than the reference to educational activities in Article 54(1). For example, the Article 132(1) wording refers to "school or university education, vocational training" and 'tuition … covering school or university education'. The decisions of the CJEU in *Eulitz* and *Fahrschul-Akademie* focused, to a significant extent, on the type of education or tuition which would be typically provided in schools and universities.

98. In *Eulitz* the question was whether the services constituted "tuition given privately by teachers and covering school or university education". The case involved the provision by a partner in a civil law partnership of various training courses concerning fire prevention by means of lectures at the Technical University of Dresden to graduate engineers and which led to an examination. The CJEU held that such training could constitute "tuition covering school or university education" for the purpose of what is now Article 132 (1) (j) of the PVD but that, on the facts it was not provided "privately". The CJEU said:

> " 30 As regards in particular the term 'education', it should be borne in mind that the Court has held, in essence, that although the transfer of knowledge and skills between a teacher and students is a particularly important element of educational activity referred to in Article 13A(1)(*i*) of the Sixth Directive, it remains the case that that activity consists of a combination of elements which include, along with those relating to the teacher-student relationship, also those which make up the organisational framework of the establishment concerned (see, to that effect, *Horizon College*[7], paragraphs 18 to 20).
>
> …
>
> 32 However, as stated in paragraph 21 of this judgment, the exemption specified in the latter provision is not, however, specifically directed at 'school or university education' but, in language versions other than the German language version, at a related concept expressed in English as 'tuition … covering' such education. *The word 'tuition' in this context must be understood as encompassing, essentially, the transfer of knowledge and skills between a teacher and pupils or students.*
>
> 33 It follows that although teaching work performed in an education institute is not necessarily, in the absence of any other evidence, 'school or university education' within the meaning of Article 13A(1)(j) of the Sixth Directive, such work could, however, fall under 'tuition given privately by teachers and covering school or university education' within the meaning of that provision, in so far as that work includes, essentially, the transfer of knowledge and skills between a teacher and pupils or students in the context of training for the purpose of carrying out a professional or trade activity."
>
> (*Emphasis added*)

[7] *Horizon College* Case C-434/05 [2007] ECR I-4793

99. In *Fahrschul-Akademie* the question was whether the provision of driving school tuition fell within the meaning of "school or university education" under Article 132(1)(i) and (j). The CJEU decided that the activity in question did not fall within the exemption:

> "20 It must be recalled that Article 132(1)(i) and (j) of that directive contains no definition of the concept of 'school or university education'.
>
> 21 The Court has, however, first, taken the view that the transfer of knowledge and skills between a teacher and students is a particularly important element of educational activity (judgment of 14 June 2007, *Horizon College*, C-434/05, EU:C:2007:343, paragraph 18).
>
> 22 Second, the Court has stated that the concept of 'school or university education', within the meaning of Directive 2006/112, is not limited solely to education which leads to examinations for the purpose of obtaining qualifications or which provides training for the purpose of carrying out a professional or trade activity, but includes other activities which are taught in schools or universities in order to develop pupils' or students' knowledge and skills, provided that those activities are not purely recreational (judgment of 28 January 2010, *Eulitz*, C-473/08, EU:C:2010:47, paragraph 29 and the case-law cited).
>
> 23 In that regard, it must be noted, as the Advocate General observes in point 35 of his Opinion, that, in accordance with that settled case-law, activities which are not purely recreational are likely to be covered by the concept of 'school or university education' as long as the tuition is provided in schools or universities.
>
> 24 Thus, the concept of 'school or university education' within the meaning of Article 132(1)(i) and (j) of Directive 2006/112 covers activities which are different both because of their specific nature and by reason of the framework in which they are carried out (see, to that effect, judgment of 14 June 2007, *Horizon College*, C-434/05, EU:C:2007:343, paragraph 20).
>
> 25 It follows that, as the Advocate General observes in points 13 to 17 of his Opinion, by that concept, the EU legislature intended to refer to a certain type of education system which is common to all the Member States, irrespective of the characteristics particular to each national system.
>
> 26 Consequently, the concept of 'school or university education' for the purposes of the VAT system refers generally to an integrated system for the transfer of knowledge and skills covering a wide and diversified set of subjects, and to the furthering and development of that knowledge and those skills by the pupils and students in the course of their progress and their specialisation in the various constituent stages of that system.
>
> 27 It is in the light of those considerations that the Court must examine whether driving tuition provided by a driving school, such as that of the applicant in the main proceedings, for the purpose of acquiring driving licences for vehicles in categories B and C1 referred to in Article 4(4) of Directive 2006/126 may be covered by the concept of 'school or university education' within the meaning of Article 132(1)(i) and (j) of Directive 2006/112.
>
> 28 In the present case, the applicant in the main proceedings submits that the driving tuition which it provides covers the transfer of both the practical and theoretical knowledge necessary for the purpose of acquiring driving licences for vehicles in categories B and C1 and that the objective of such tuition is not purely recreational, since possession of such licences is liable to meet, inter alia, professional needs. Therefore, the tuition provided for that

> purpose is, it argues, covered by the concept of 'school or university education' referred to in Article 132(1)(i) and (j) of Directive 2006/112.
>
> 29 It should be noted, however, that, even if it covers a range of practical and theoretical knowledge, driving tuition provided in a driving school, such as that at issue in the main proceedings, nevertheless remains specialised tuition which does not amount, in itself, to the transfer of knowledge and skills covering a wide and diversified set of subjects or to their furthering and development which is characteristic of school or university education."

100. Mr Beresford placed particular emphasis on the CJEU's use of the phrase "the transfer of knowledge and skills". This, he said, defined education and, further, when Mandarin's tutors coached their candidates they were transferring their knowledge and skills.

101. We have no hesitation in rejecting the premise upon which Mr Beresford's submission rests. The use of the expression "the transfer of knowledge and skills" was used by the CJEU in the context of "school or university education": see particularly *Fahrschul-Akademie* at [26], above.

102. It seems to us wrong to wrench the phrase "the transfer of knowledge and skills" from the context in which the CJEU used it and to apply it as the definitive indicator of what constitutes educational activities. The phrase, disconnected from its context, is so wide that it would cover almost any form of instruction or tuition and, indeed, would cover the instruction of driving skills considered by the CJEU in *Fahrschul-Akademie*. We respectfully agree in this context with the views expressed by opinion of Advocate General Szpunar at [42] in that case. The wide and almost unrestrained test contended for by HMRC cannot be correct.

103. But what then do the words "educational… activities" mean – no specific meaning being set out in the PVD?

104. First, we think that little assistance can be gained from the other services referred to in Article 54 which lists "services and ancillary services, relating to cultural, artistic, sporting, scientific, educational, entertainment or similar activities, such as fairs and exhibitions". It seems to us that the list is so heterogeneous that it effectively excludes any meaningful application of the *noscitur a sociis* or similar principle of interpretation (i.e. the principle which holds that the meaning of an expression should be determined by considering the words with which it is associated in the context).

105. Secondly, as the CJEU noted in *Fahrschul-Akademie* at [25] in relation to "school or university education", "educational… activities" refers to a concept which is common to all the Member States, irrespective of the characteristics particular to each national system. It follows, therefore, that the concept of educational activities has a common core meaning applicable throughout the EU. In other words, it should be possible to identify in each Member State whether activities constitute educational activities. That suggests to us that the meaning of educational activities is unlikely to be materially different from the scope of the exemption in Article 132(1)(i) and (j) of the PVD. We note that the words "education" and "educational"[8], combined, are used substantively only five times in the PVD – in Articles 53[9] and 54 and in Article 132(1)(i) and (j). We therefore think it unlikely, when construing Article 54 in the

[8] Disregarding references to "physical education".

[9] Article 53 of the PVD provides: "The place of supply of services in respect of admission to cultural, artistic, sporting, scientific, educational, entertainment or similar events, such as fairs and exhibitions, and of ancillary services related to the admission, supplied to a taxable person, shall be the place where those events actually take place." In other words, Article 53 does not apply in the present case but, in any event, uses largely the same words as Article 54..

context of the PVD as a whole, that the phrase "educational… activities" in Article 54 has a materially different meaning from that in Article132(1)(i) and (j).

106. Proceeding on this basis, it seems to us that the services provided by Mandarin do not constitute educational activities but rather "specialised tuition which does not amount, in itself, to the transfer of knowledge and skills covering a wide and diversified set of subjects or to their furthering and development which is characteristic of school or university education."[10] As the evidence demonstrated, virtually all of Mandarin's candidates were either actual, prospective, or recently graduated university students. That those students needed to apply to Mandarin for its assistance in obtaining employment implicitly indicated that the specialist services supplied by Mandarin were not readily available at the educational institutions to which the candidates were to be, were or had been affiliated.

107. Having thus concluded that Mandarin's services were not likely to be educational activities for the purposes of Article 54, it is nonetheless necessary to determine whether they constitute the services of consultants or consultancy firms within Article 59 and it is to this issue that we now turn.

108. The relevant authorities were recently summarised by this Tribunal in *Gray & Farrar International LLP v Revenue & Customs* [2019] UKFTT 684 (TC) (Judge Hellier and Mrs Wilkins) ("*Gray & Farrar*")[11] . Although this decision was included in the bundle of authorities neither party drew our attention to it in any detail. The decision cites the main relevant CJEU authorities and we consider it appropriate, therefore, to quote from it at some length:

> "4. The words of para (c) are essentially identical to those of the third indent of Article 9(2)(e) of the Sixth Directive and fall to be interpreted in the same way.
>
> 5. The first part of para (c) - "the services of consultants ... and other similar services" - was considered, in relation to whether veterinary services fell within those words, by the CJEU in March 1997 in *Maatschap MJM Linthorst* (Case C-167/95) [1997] STC 1287 (" *Linthorst")*, and, in relation to whether the services of an arbitrator fell within them, in September 1997, in *Von Hoffman v Finland* (Case C-145/96) [1997] STC 1321 (" *Hoffman")*. In *Commission v Germany* (Case C-401/06) the Court summarised the conclusions in those cases which are uncontentious in this appeal:
>
> "[30]…Consequently, when interpreting Article 9 of the Sixth Directive, Article 9(1) in no way takes precedence over Article 9(2). In every situation, the question which arises is whether it is covered by one of the instances mentioned in Article 9(2). If not, it falls within the scope of Article 9(1) (see, inter alia, *Dudda*, paragraph 21, and *SPI*, paragraph 16).
>
> "[31] In that regard, it must be stated that the third indent of Article 9(2)(e) of the Sixth Directive refers not to professions, such as those of lawyers, consultants, accountants or engineers, but to services. The Community legislature has used the professions mentioned in that provision as a means of defining the categories of services to which it refers (see *von Hoffmann*, paragraph 15). The expression 'other similar services' refers not to some common feature of the disparate activities mentioned in the third indent of Article 9(2)(e) of the Sixth Directive but to services similar to those of each of those activities, viewed separately. A service must thus be regarded as similar to those of one of the activities mentioned in that provision when they both serve the same purpose (see, to that effect, Case C-167/95 *Linthorst,*

[10] *Fahrschul-Akademie* at [29].
[11] We understand that this decision is currently under appeal to the Upper Tribunal.

Pouwels en Scheres [1997] ECR I-1195, paragraphs 19 to 22, and *von Hoffmann*, paragraphs 20 and 21)."

In other words, for the purposes of this appeal, the question is whether the appellant's services were, or were similar to, the services provided by consultants or consultancy firms….

6. It is also uncontentious that, when addressing the question, the services provided by the Appellant must be compared with services "principally and habitually" provided by a consultant (see [22] *Linthorst* [16]), and that such similarity is achieved when both types of service serve the same purpose.

7. There was also broad agreement (subject to an issue about liberal professions to which we are shall return) that the services that consultants 'principally and habitually supply' consist of the giving of "advice based on a high degree of expertise" (Proudman J at [80] in *American Express v Revenue & Customs Commissioners* [2010] EWHC 120 Ch (" *Amex*")) or "specialist and expert advice by someone with extensive experience/qualifications on the subject" ([68] *Gabbitas Educational Consultants Ltd v HMRC* [2009] UKFTT 325 (TC).

8. Although this was not common ground, we note here that it seems to us that advice given by a person with relevant experience which falls within the domain of that experience is specialist or expert advice. As a result it seems to us that Proudman J's formulation in *Amex* encapsulates the test more concisely, and that there is no need to ask whether the advice itself was in some way specialist or expert.

9. The authorities show that if a service goes beyond, or has material elements which go beyond, the principal and habitual activities of a consultant, such as the provision of management, decision-making (see *Banque Bruxelles Lambert SA v Belgium* (Case-8/03) [2004] STC 1643 at [46]) or administration, the supply of the service is not that of a consultant within para(c) (*Amex* [80]).

10. Finally HMRC did not challenge the approach to para (c) adopted by the VAT tribunal in *Amex* (at [72] of the VAT Tribunal Decision) and approved on appeal by Proudman J at [72] in the High Court judgment, that in order for a supply (including a composite supply) to come within that paragraph it did not have to be shown that it fell within one only of the categories; all that had to be shown was that it fell within one or more of the activities, and thus, for example, a service which comprised both the kinds of services provided by engineers and those provided by accountants would fall within para (c).

109. There was a disagreement between the parties in *Gray & Farrar* whether the services were provided by members of "liberal professions". The Tribunal decided that there was no such limitation and its reasoning and conclusions are set out below:

11. In *Linthorst* the Advocate General (at [21] of his opinion) said that the activities listed in para(c) seemed to him to be "too heterogeneous and lacking in common elements" to permit the identification of a recognisable class. He said that it had been suggested that para(c) intended to establish a genus or class corresponding to the activities of the traditional notion of liberal professions (which he regarded [21] as represented by "social and intellectual prestige" based generally on high intellectual attainment and strict regulation of ethical and professional behaviour), but given the breadth of modern consultancy work that would "strain considerably the language of the indent"; he considered that "no common element other than the unsatisfactory notion of liberal professions" could be identified. He concluded at [22] that "other

similar services" must be "interpreted as only covering those services which are similar - in terms of the concrete aspects of those services actually provided - to any one of the ... expressly listed services."

12. The Court did not appear to agree with the Advocate General's conclusions as to the "unsatisfactory notion" of liberal professions as being the common feature of the listed services, although for different reasons it did concur with his conclusion in relation to the limited meaning of "other similar services", for it said:

"20. It should be noted that the only common feature of the disparate activities mentioned is that they all come within heading of liberal professions. Yet ... if the Community legislature had intended that all activities carried on in an independent manner to be covered by that provision, it would have defined them in general terms."

13. In the first sentence of this paragraph the Court appears to be differing from the Advocate General because it finds a common feature - that of liberal professions. In the second sentence it holds that that common feature - which it appears to equate with activities carried on in an independent manner - does not act so as to give "other similar services" a generic meaning. Although its reason for that conclusion is the choice of drafting rather than the heterogeneity cited by the Advocate General, the conclusion is that only services similar to services of one or other of the listed professions qualify as "other similar services".

14. Mr Singh argues that the first sentence of [20] in *Linthorst* limits the scope of the services within para(c) because, by describing the common feature of the service providers as liberal professions, the Court construed those listed providers as limited to those which were liberal professions. Mr Singh says that is a real limitation because in *Christiane Urbing-Adam v Administration de L'enregistrement et domain* (C-267/99) [2003] BTC 5240 (" *Christiane")* at [41] the Court defined liberal professions thus:

"activities which involve a marked intellectual character, require a high-level qualification and are usually subject to clear and strict professional regulation".

15. This argument was accepted by the VAT tribunal in *The Indian Palmist* (2003) VAT Decision 18397. There the tribunal, having said at [20] that it was less clear that the activities listed were in fact liberal professions, nevertheless concluded (without setting out its reasoning) that a "consultant" must fall within that term and that the *Christiane* definition should apply.

16. In *Gabbitas* the tribunal addressed the argument at [63 -67]. There HMRC had relied upon the first sentence of paragraph [20] *Linthorst* (quoted above). The tribunal said: that the issue was not key in *Linthorst*, that the second sentence of paragraph [20] "played down" the first and that the definition given in *Christiane* had been given in the different context of Annex F 2 of the Directive. It concluded that the Court had not restricted the ambit of the listed providers to those of liberal professions. Mr Singh contested this finding.

17. It seems to us that there are four reasons for concluding that the meaning of the listed providers is not to be taken as limited to those which are liberal professions in the sense defined in *Christiane*, but that the Court considered that each of the specified classes of activity was limited to those which were carried on in an "independent" manner.

18. First, *Christiane* was decided in 2001 after both *Linthorst* and *Hoffman* so it is unlikely that the definition given in that case was in the mind of the court in *Linthorst* or *Hoffman*. Whilst the Advocate General in *Linthorst* gave a description of the basis for the social prestige accorded to the “traditional” liberal professions, his description, although similar in parts, was not identical to that of liberal profession in *Chistiane*.

19. *Christiane* was not concerned with para (c) and neither that provision nor *Hoffman* nor *Linthorst* were referred to in the judgement. The case concerned the meaning of liberal professions in Annex F 2 of the then Directive. This described certain services to which reduced rates of VAT could be applied in the following terms:

"services provided by authors, artists, performers, writers and other members of liberal professions ..."

The Court cannot have intended its definition to affect the breadth of para (c).

20. Second, the second sentence of [20] *Linthorst* appears to us to equate liberal professions with activities carried out in an independent manner [1]. That equation with such services also appears in [21]:

"Moreover, if the legislature had intended that provision to cover medical services generally, as an activity typically carried out in an independent manner, it would have included it in the list ..."

that suggests that the Court did not regard the matters the Advocate General had said were features of "traditional" liberal professions as important features of the communality.

21. Third, the Court's own acknowledgement in the first sentence of [21] of the "disparate" listed activities, the legislative notion of activities of both consultants and consultancy bureaux (without any mention of their regulation), and the Advocate General's reference to "traditional" liberal professions (rather than simply liberal professions) in [22], seem to us to indicate that the meaning to be accorded to the Court’s use of the phrase "liberal profession" is capable of being understood as being wide enough to embrace the listed activities rather than limiting the listed activities by reference to liberal professions.

22. Fourth, the description in the first sentence [20] *Linthorst* of the listed services was not necessary for its conclusion or its reasoning. It came to the conclusion that the vets were not consultants, not because veterinary surgery was not a liberal profession, but because vets habitually did more than give advice.

23. It does not seem to us therefore that the purpose of paragraph [20] was to enunciate any limitation on the meaning of the listed suppliers. Rather it was to say that even if there was a common feature of those suppliers it was not the intention of the legislation that merely because a supplier possessed such common features a supply by it would fall within "other similar services".

24. Finally we note that, as the first section of the quote above from paragraph [31] of *Germany* makes clear, what falls within para(c) would not be the services provided by a member of the liberal profession falling within one of the categories (if that were the test) but the services such a person would principally and habitually supply. It is not the status of the supplier which governs the application of para(c) but the nature of the supply. Even if the listed suppliers were limited to those in liberal professions as defined in *Christiane*, the question would be whether the services at issue would be such

> as would be supplied by a person who was a member of the liberal professions listed, not whether they were in fact supplied by such a person.
>
> 25. We conclude that services will fall within para(c) if they are services of the sort which are primarily and habitually supplied by one or more of the specifically listed suppliers and that "consultants" are not limited to persons who are members of the liberal professions but to persons who are in ordinary usage "consultants" and typically act in an independent manner – that is to say are not dependent on, or integrated with, their client.

110. We have carefully reviewed the authorities (domestic and EU) cited by the Tribunal in *Gray & Farrar* and, with one minor exception, we respectfully agree with its reasoning and conclusions.

111. The one exception relates to [22] of the Tribunal's decision. Whilst it is true that the description in the first sentence of [20] in *Linthorst* was not necessary for the CJEU's conclusion, we might add, perhaps as a counsel of perfection, that our understanding is that in relation to the jurisprudence of the CJEU there is no equivalent of the English law distinction in relation to the doctrine of precedent of the concept of *obiter dictum* and the *ratio decidendi* (i.e. that only those reasons that are necessary for the decision are binding) and that, therefore, all parts of a decision of the CJEU are authoritative.

112. Thus, in our view the services that consultants 'principally and habitually supply' consist of the giving of "advice based on a high degree of expertise" (Proudman J at [80] in *American Express v Revenue & Customs Commissioners* [2010] EWHC 120 Ch (" *Amex*")) or of "specialist and expert advice by someone with extensive experience/qualifications on the subject" (at [68] *Gabbitas Educational Consultants Ltd v HMRC* [2009] UKFTT 325 (TC)). Furthermore, we consider that that "consultants" are not limited to persons who are members of the liberal professions but to persons who are in ordinary usage "consultants" and typically act in an independent manner – that is to say are not dependent on, or integrated with, their client. Evaluating the evidence as a whole, we consider that Mandarin satisfied these tests.

113. In this context, we should observe that when a client seeks advice from a consultant (i.e. someone with "a high degree of expertise" in a particular field) the consultant will, in our view, almost invariably transfer some of their knowledge and skill to the client. Thus, for example, a householder seeking advice from an expert on fire safety will be informed of the various measures (location of fire doors, smoke detectors and alarms, escape routes, fire extinguishers etc.) that may be available and recommended to be taken. That will certainly involve the transfer of knowledge and skill – that is the whole point of seeking (and is part and parcel of) the consultant's advice. That is why we consider seeking and obtaining specialist advice from a consultant does not constitute and is different from the supply of education.

114. Proceeding on this basis, we consider that the services provided by Mandarin were consultancy services. The candidates (or, from July 2016, their parents) sought specialist advice from Mandarin on job applications and interviews. It seemed clear from the evidence that the coaches engaged by Mandarin supplied specialist advice to candidates and that they had the requisite expertise to do so.

115. When compared with the category "educational… activities" we consider that the actual services supplied by Mandarin fall much more obviously within the category of "the services of consultants … [and] consultancy firms." There is no set curriculum or course of study and no institutional framework within which Mandarin's coaching was supplied. Instead, the coaching supplied to each candidate was tailor-made to suit the requirements and aspirations of the individual candidate. Moreover, the coaching taught generic skills rather than skills which were directly applicable to the candidate's chosen vocation. Thus, a coach might advise

a candidate as to what working in a law firm or an investment bank might entail and what skills might be required but did not seek to teach the candidate the law or specific aspects of investment banking business. In this sense, the generic skills imparted by Mandarin's coaches were more akin to the driving skills taught in the *Fahrschul-Akademie* case – they were skills of general application.

116. Mr Beresford argued that because the services supplied by Mandarin were designed to improve the skills and knowledge of each individual recipient and not the general efficiency and working practices of an organisation (or by analogy a group or team of students) as a whole, they could not be regarded as the services of a consultant or a consultancy firm. Tailor-made supplies to individuals could not constitute consultancy services.

117. No authority to support this proposition was cited to us other than various extracts from HMRC's published guidance. We see no justification for such an artificial limitation on the meaning of "consultants … [and] consultancy firms" and we have no hesitation in rejecting these unfounded submissions. We should observe that it is unhelpful for HMRC simply to cite its own published practice as an authority in a dispute with a taxpayer. HMRC's practice reflects nothing more than its own view of the law and our firm conclusion in this case is that that view is plainly erroneous or inapplicable.

118. Furthermore, we recall that Article 59 of the PVD determines the place of supply of services in relation to non-taxable persons. Typically non-taxable persons will be private individuals who are not carrying on the business, although the category can also include organisations which are not carrying on a business (e.g. charities and not-for-profit organisations). We see no reason why private individuals should be excluded, as they would be under Mr Beresford's test, from receiving consultancy services within Article 59.

119. We therefore conclude that the services supplied by Mandarin constitute consultancy services for the purposes of Article 59 and not educational activities within Article 54 of the PVD.

TO WHOM WERE MANDARIN'S SERVICES SUPPLIED?

Submissions in outline

120. After July 2016, most of the contracts for the supply of Mandarin's services were with the candidate's parents. Even before that date, where the contracts were with the candidates, Mr Lall argued that the services were, as a matter of economic reality, supplied to the candidate's parents. The parents in reality wanted to procure Mandarin's services for their children – he described them as "pushy parents" – against the background of a highly competitive education system and job market in China. Mr Lall submitted that it was, in almost all cases, the parents, as Mr Peckham's evidence showed, who directly or indirectly funded the payment of Mandarin's fees.

121. Mr Beresford submitted that in most cases payment was made for Mandarin's services from the candidate's bank account. Moreover, VAT was, Mr Beresford contended, a tax on consumption. It was the candidate that consumed and derived the benefit of the supplies made and not the candidate's parent. Any agreement made between the parent and recipient as to who would pay the fees was immaterial.

Discussion of whether Mandarin's services were supplied to the candidate or the parents

122. Essentially, Mr Lall argued that even before July 2016, when Mandarin contracted directly with the candidates, it made its supplies as a matter of economic reality to the parents. After July 2016, in almost every case, Mandarin's contracts were made with the parents and thus, Mr Lall argued, Mandarin made its supplies to the parents and not to the candidates.

123. We therefore turn to consider the relevant case law.

124. The leading authority is the decision in *Airtours Holidays Transport Ltd v Revenue and Customs* [2016] UKSC 21 ("*Airtours*"). That case involved a company, Airtours, that was in financial difficulty. It was decided to appoint PwC to produce a report for various banks. This report was to be used by the banks to assist with their decision whether to extend Airtours' credit facilities. Airtours was party to the agreement and a beneficiary of the outcome as it would benefit by being able to continue to trade if the banks agreed to support the business. Airtours contracted to pay PwC the costs of producing the report, but it was only entitled to a copy of the report in redacted form. The engagement contemplated that the report was being prepared for the banks. The dispute came about because Airtours claimed the VAT on the invoices it received from PwC as input tax. HMRC, however, argued that Airtours had not received a supply of services from PwC – only the banks had received a supply. In the Supreme Court Lord Neuberger (with whom Lords Mance and Hodge agreed, Lords Clark and Carnwath dissenting) decided in favour of HMRC on the basis that the contract, properly construed, did not give Airtours the contractual right to require PwC to produce the report – only the banks could do this. Therefore, the supply was not made to Airtours and therefore Airtours was not entitled to claim input tax on PwC's invoices.

125. Lord Neuberger PSC's judgment cites many of the relevant authorities and we consider it appropriate to cite it at some length:

> "As Lord Reed explained in *Revenue and Customs Comrs v Aimia Coalition Loyalty UK Ltd* [2013] UKSC 15, [2013] STC 784, [2013] 2 All ER 719 (at [66], [67]):
>
> '[66] … the speeches in *Redrow*[12] should not be interpreted in a manner which would conflict with the principle, stated by the Court of Justice in the present case, that consideration of economic realities is a fundamental criterion for the application of VAT … [T]he judgments in *Redrow* cannot have been intended to suggest otherwise. On the contrary, the emphasis placed upon the fact that the estate agents were instructed and paid by *Redrow*, and had no authority to go beyond *Redrow*'s instructions, and upon the fact that the object of the scheme was to promote *Redrow*'s sales, indicates that the House had the economic reality of the scheme clearly in mind. When, therefore … Lord Millett asked ([1999] STC 161 at 171, [1999] 1 WLR 408 at 418), "Did he obtain anything—anything at all—used or to be used for the purposes of his business in return for that payment?", [that question] should be understood as being concerned with a realistic appreciation of the transactions in question.
>
> [67] Reflecting the point just made, it is also necessary to bear in mind that consideration paid in respect of the provision of a supply of goods or services to a third party may sometimes constitute third party consideration for that supply, either in whole or in part. The speeches in *Redrow* should not be understood as excluding that possibility. Economic reality being what it is, commercial businesses do not usually pay suppliers unless they themselves are the recipient of the supply for which they are paying (even if it may involve the provision of goods or services to a third party), but that possibility cannot be excluded a priori. A business may, for example, meet the cost of a supply of which it cannot realistically be regarded as the recipient in order to discharge an obligation owed to the recipient or to a third party. In such a situation, the correct analysis is likely to be that the payment constitutes third party consideration for the supply.'
>
> **[46]** Lord Hope made the same point in para [110] in remarks which are perhaps particularly germane for present purposes:

[12] *Customs and Excise Commrs v Redrow Group plc* [1999] STC 161 at 172

'… I think that Lord Millett went too far ([1999] STC 161 at 171, [1999] 1 WLR 408 at 418) when he said that the question to be asked is whether the taxpayer obtained "anything—anything at all" used or to be used for the purposes of his business in return for that payment. Payment for the mere discharge of an obligation owed to a third party will not, as he may be taken to have suggested, give rise to the right to claim a deduction. A case where the taxpayer pays for a service which consists of the supply of goods or services to a third party requires a more careful and sensitive analysis, having regard to the economic realities of the transaction when looked at as a whole.'

[47] This approach appears to me to reflect the approach of the Supreme Court in the subsequent case of *WHA Ltd v Revenue and Customs* [2013] UKSC 24, [2013] STC 943, [2013] 2 All ER 907 where at [27], Lord Reed said that '[t]he contractual position is not conclusive of the taxable supplies being made as between the various participants in these arrangements, but it is the most useful starting point'. He then went on in paras [30]–[38] to analyse the series of transactions, and in para [39], he explained that the tribunal had concluded that 'the reality is quite different' from that which the contractual documentation suggested. Effectively, Lord Reed agreed with this, and assessed the VAT consequences by reference to the reality. In other words, as I said in *Secret Hotels2 Ltd (formerly Med Hotels Ltd) v Revenue and Customs Comrs* [2014] UKSC 16, [2014] STC 937, [2014] 2 All ER 685 (at [35]), when assessing the VAT consequences of a particular contractual arrangement, the court should, at least normally, characterise the relationships by reference to the contracts and then consider whether that characterisation is vitiated by [any relevant] facts.

[48] The same approach was adopted by the Court of Justice in paras 39 and 40, where they stated, citing previous judgments, that 'consideration of economic realities is a fundamental criterion for the application of the common system of VAT', and added that that issue involved consideration of 'the nature of the transactions carried out' in the particular case. To much the same effect, in *Tolsma v Inspecteur der Omzetbelasting Leeuwarden* (Case C-16/93) [1994] STC 509, [1994] ECR I-743 (at para 14), the Court of Justice said that 'a supply of services is effected "for consideration" only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance', which it explained as meaning 'the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient'. In the context of the supply of goods, the court made the same point in *Primback Ltd v Customs and Excise Comrs* (Case C-34/99) [2001] STC 803, [2001] ECR I-3833 (at para 25), where it described 'the determining factor' as 'the existence of an agreement between the parties for reciprocal performance, the payment received by the one being the real and effective countervalue for the goods furnished to the other'.

[49] In *Revenue and Customs Comrs v Newey (trading as Ocean Finance)* (Case C-653/11) [2013] STC 2432 (at para 40), the Court of Justice again emphasised that 'that a supply of services is effected "for consideration", within the meaning of art 2(1) of [the Sixth] directive, and hence is taxable, only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient'. In para 41, the court went on to explain that 'the supply of services is therefore objective in nature and applies without regard to the purpose or results of the transactions concerned and without its being necessary for the tax authorities to carry out inquiries to

> determine the intention of the taxable person'. The court then observed in paras 42–43 that 'consideration of economic and commercial realities is a fundamental criterion for the application of the common system of VAT' and that 'the contractual position normally reflects the economic and commercial reality of the transactions'. An exception to the normal rule that the contractual relationship is central was then identified by the court as being where 'those contractual terms constitute a purely artificial arrangement which does not correspond with the economic and commercial reality of the transactions' (para 45).
>
> **[50]** From these domestic and Court of Justice judgments, it appears clear that, where the person who pays the supplier is not entitled under the contractual documentation to receive any services from the supplier, then, unless the documentation does not reflect the economic reality, the payer has no right to reclaim by way of input tax the VAT in respect of the payment to the supplier.

126. The relevant law was recently summarised by Henderson LJ (with whom Patten LJ and Peter Jackson LJ agreed) in *HMRC v Newey (t/a Ocean Finance)* [2018] EWCA Civ 791 ("*Newey*"):

> "38. It has long been established that a supply of services (such as advertising) is effected "for consideration", within the meaning of Article 2(1) of the Sixth Directive, only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, and the remuneration received by the provider of the service constitutes the value actually given in return for the service supplied to the recipient: see the judgment of the CJEU in the present case at paragraph 40, referring to Case C-270/09, *MacDonald Resorts Ltd v Revenue and Customs Commissioners* [2010] ECR I-13179, [2011] STC 412, at paragraph 16 and the case law there cited. It follows that the concept of a supply of services is "objective in nature and applies without regard to the purpose or results of the transactions concerned and without it being necessary for the tax authorities to carry out enquiries to determine the intention of the taxable person": ibid, at paragraph 41.
>
> 39. It does not, however, follow from the requirement for there to be a "legal relationship" between the supplier and the recipient of a supply of services that the relationship must be contractual, or (if it is) that the terms of the contract are necessarily conclusive. As the CJEU put it (again in the present case) at paragraph 42:
>
> "As regards in particular the importance of contractual terms in categorising a transaction as a taxable transaction, it is necessary to bear in mind the case law of the court according to which consideration of economic and commercial realities is a fundamental criterion for the application of the common system of VAT…".
>
> The Court cited as authority for this proposition Joined Cases C-53/09 and C-55/09, *Revenue and Customs Commissioners v Loyalty Management UK Ltd, Baxi Group Ltd v Revenue and Customs Commissioners* [2010] ECR I-9187, [2010] STC 2651, at paragraphs 39 and 40.
>
> 40. Thus the contractual arrangements agreed between the parties cannot, by themselves, be determinative of the VAT analysis, although they will usually provide the starting point, and are likely to be conclusive unless shown to be inconsistent with underlying economic and commercial realities: see *WHA Ltd v Revenue & Customs Commissioners* [2013] UKSC 24, [2013] STC 943, at [27] per Lord Reed JSC, and *Revenue & Customs Commissioners v Airtours*

Holidays Transport Ltd [2016] UKSC 21, [2016] STC 1509, at [47] per Lord Neuberger PSC."

127. We think it may be helpful at the outset if we draw a distinction between two different transactions involving third parties.

128. First, there is the transaction which is often described as "third-party consideration". This is a reference to Article 73 of the PVD (formerly Article 11 of the Sixth Directive), reflected in section 19 VATA, which defines, so far as relevant, the taxable amount as:

> "… In respect of the supply of goods or services … everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party …″

129. Third-party consideration arises in a case where, for example, A agrees with B to supply services to B but A is paid by C.

130. Although Lord Reed in *Aimia* at [67] might be taken to be suggesting that third-party consideration was unusual we respectfully consider it to be (and take notice of the fact that it is) a commonplace. For example, a mortgagee (lender) may frequently require a mortgagor (borrower) to pay any legal costs incurred by the mortgagee in connection with the loan. The solicitor will supply his or her legal services to the mortgagee but will, directly or indirectly, be paid by the mortgagor. In these circumstances it will very often be the case that the solicitor will issue the mortgagor with what is known as a "third-party invoice" i.e. an invoice which is not a VAT invoice (and which states clearly that it is not a VAT invoice) but which requires the mortgagor to pay the mortgagee's legal costs. The mortgagor (if a taxable person) cannot claim an input tax deduction in respect of the third-party invoice on the simple basis that the legal services were not supplied to the mortgagor but to the solicitor's client (the mortgagee). The solicitor will issue a tax invoice to his or her client – the mortgagee.

131. Another example would be a landlord's consent to an assignment of a leasehold interest. If a lessee wishes to assign its lease to a third party, the lease will frequently require it to obtain the landlord's consent to the assignment. Just as frequently the lease will require the lessee to pay the landlord's legal costs incurred in giving that consent. Again, the lessor's solicitor will usually issue a third-party invoice, as described above, to the lessee. Once again, the lessee cannot claim an input deduction in respect of VAT referred to on the third-party invoice because the legal services were not supplied to the lessee but to the lessor (the solicitor's client). As in the preceding example, the solicitor will issue a tax invoice to his or her client – the mortgagee.

132. These are two examples but we could cite many more.[13] This treatment is embodied in a long-standing, and in our view indubitably correct, practice agreed between the Law Society and HMRC stretching back approximately 35 years. In our respectful view, no court should be prepared lightly to overturn such a well-understood and well-founded practice.

133. That common case of third-party consideration must be distinguished from what one might describe as a "three-cornered transaction". A simple three-cornered transaction is also very common in retail transactions and is, in fact, very common in commercial transactions (particularly in finance transactions) in relation to supplies of services.

134. For example, A contracts with a florist (B) for a consideration payable by A to deliver flowers to C. In this case B makes a taxable supply to A for the consideration paid by A even though the flowers are delivered to C. Typically, B (the florist) will deliver its VAT invoice to

[13] See further HMRC's Manual VATSC11534

A – the party with whom it has a contract and who has commissioned the service and who is liable to pay the amount specified in the invoice.

135. Similarly, if A contracts with a wine merchant (B) for a consideration payable by A to deliver a case of wine to C, B delivers its services to A even though the case of wine is delivered to C. Again, the wine merchant will typically deliver its VAT invoice to A.

136. In both these examples, there is a gift made by A to C. That gift is given effect by a taxable supply from B to A even though physical delivery of the goods is from B to C. There is nothing in these simple examples of three-cornered transactions which would suggest that the economic and commercial realities should dictate a different result from the contractual arrangements.

137. It will be immediately apparent that a three-cornered transaction is different from third-party consideration. In the three-cornered transaction there is a contractual relationship between A and B. Pursuant to that contractual relationship, A pays B. Physical delivery of the goods takes place between B and C. In those simple cases, it is clear that the taxable supply is made by B to A.[14] There is no consideration passing between C to B (and there is no contractual relationship between them) and therefore there is no taxable supply.

138. Although these examples of three-cornered transactions concern the supply of goods there is no material difference from the principles applicable to the supply of services. Of course, both the third party consideration and the three-cornered transaction examples given above are simple transactions whereas the case-law (egg *Aimia* and *Airtours*) often involves more complicated ones, but the basic principles are the same. As the authorities clearly hold, each case is fact sensitive and small differences in the facts can affect the VAT result. As Lord Reed said in *Aimia* at [68]:

> "It is also important to bear in mind that decisions about the application of the VAT system are highly dependent upon the factual situations involved. A small modification of the facts can render the legal solution in one case inapplicable to another."

139. Drawing these threads together, in the present case Mandarin entered into contracts directly with candidates until approximately July 2016. According to the evidence, in most cases the candidates paid Mandarin, albeit that the candidates were invariably funded by their parents and that the decisions were effectively taken by the parents.

140. On this basis, as we have said, Mr Lall argued that the services of Mandarin were, as a matter of economic reality, supplied to the parents rather than to the candidates – the parents, of course, being usually resident in China.

141. We do not accept this submission. It seems to us that this is a case where, as Henderson LJ said in *Newey*, the contractual arrangements – although not conclusive – should be the starting point and are likely to be conclusive unless they are inconsistent with the underlying economic and commercial realities.

142. In this case, the mere fact that a candidate's parents might have funded the acquisition of Mandarin's services does not mean that Mandarin supplied its services to the parents. Just as in *Airtours* where it was found that Airtours had no contractual right to require PwC to supply its report (even though it paid PwC's charges), before July 2016 the parents had no contractual right to require that Mandarin supplied its services to their son or daughter. There is nothing unusual or artificial about this. Frequently, students will be supported financially by their

[14] If it were different and the supply was made by B to C, it would be necessary for B to supply C with a VAT invoice (albeit in simplified form in the case of a retail transaction) which would, of course, inform the donee of the gift's value – a conclusion which one might rightly and deeply deplore.

parents (and the evidence was that the candidates typically came from wealthy Chinese families) but that does not mean that the supplies were made to their parents. In the period before July 2016, the position was similar to the examples given above of third-party consideration – the services were supplied by Mandarin to the candidates in pursuance of the contract with the candidates but the cost was borne directly or indirectly (in most cases indirectly) by a third party i.e. the parents. Accordingly, we have decided that prior to July 2016, where Mandarin contracted directly with the candidates, Mandarin made the supply of its services directly to the candidates and not to the parents. That is so, regardless of whether Mandarin was paid directly or indirectly (i.e. via the candidate) by the parents. From July 2016 onwards (recalling that Mandarin had had offices in China from 2011 and increasing contact with the parents) the position was different and, according to the evidence, in almost all cases Mandarin entered into contracts with the parents to coach their child. It seems to us that this changes the position and that now the parents had a direct contractual right to require Mandarin to perform its side of the bargain. There seems to us nothing in this arrangement that is inconsistent with the underlying economic and commercial realities. The parents had an interest in ensuring that their child was given assistance in order to enter into the world of work, bearing in mind the extremely competitive environment for young people in China to which Mr Peckham referred. The parents funded (either directly or indirectly, but again mainly indirectly) the acquisition of Mandarin's services but now had a direct contractual right to require that those services be provided and to receive progress reports. It seems to us that this is a three-cornered transaction which simply recognises and reflects the economic and commercial realities[15] in question – there is nothing artificial about this arrangement. Accordingly, we consider that from July 2016, in cases where Mandarin contracted directly with the parents, it supplied its services to the parents regardless of how payment was made.

WHERE WERE MANDARIN'S SERVICES SUPPLIED?

143. We have concluded that Mandarin supplied consultancy services. On this basis, therefore, under Article 59 of the PVD, the place of supply to a non-taxable person who is established or has his permanent address or usually resides outside the EU shall be the place where that person is established, has his permanent address or usually resides.

144. It was common ground that the candidates and their parents were non-taxable persons. It was further common ground that if Mandarin's services were supplied to the parents, they usually resided in China and not in the UK or in the EU.

145. Where, after July 2016, Mandarin entered into contracts directly with the parents and, as we have already discussed, supplied its services directly to the parents the supply will be made in China and, therefore, outside the UK.

146. Where Mandarin entered into contracts with the candidates (mainly before July 2016), the question becomes where the candidates had their permanent address or usually resided and how that question must be established. We now address that issue.

Submissions in outline

147. Mr Lall drew attention to the introductory words of Article 59 of the PVD which read:

> "The place of supply of the following services to a non-taxable person who is established or has his permanent address or usually resides outside the Community, shall be the place where that person is established, has his permanent address or usually resides…"

[15] at [107] in *Aimia* Lord Hodge SCJ indicated that this was a question of fact for the domestic courts.

148. He submitted that the vast majority of candidates had their permanent address or usual residence in China and not in the UK. However, in our opinion the Appellant's records as shown in the The Sample did not sufficiently demonstrate this.

149. Although Mr Lall accepted that there was no directly relevant case-law considering the concept of usual residence, it was identical to the concept of "normal residence" defined in Article 6(1) of Directive 83/183[16]. Mr Lall also referred to the decision of the CJEU in *Alevizos v Igpourgos Ikonomikon* (Case C-392) [2007] All ER (D) 239 at [54]-[57] ("*Alevizos*")[17] and to *Commission v Hellenic Republic* (Case C-9/92) [1997] STC 601) ("*Hellenic Republic*"). From these cases, Mr Lall submitted that the following propositions could be derived:

(1) The criteria for determining the concept of normal residence refer both to a person's occupational and personal ties with a particular place and to the duration of those ties (*Alevizos* at [54]).

(2) Normal residence must be regarded as the place where a person has established his permanent centre of interests (*Alevizos* at [55]).

(3) All relevant facts must be taken into consideration in determining normal residence as the permanent centre of interests of the person concerned (*Alevizos* at [57])

(4) Normal or usual residence is established by reference to facts concerning the relevant person and not by reference to the formalities required to establish the right of residence[18] (*Hellenic Republic* at [32]).

150. Mr Lall also referred to the CJEU's decision in *Rigsadvokaten v Nicolai Christian Ryborg* [1991] EUECJ C-297/89 [1993] STC 680 ("*Ryborg*").

151. Mr Lall noted that Article 13 of the Implementing Regulation provided that where no occupational ties existed, the place of usual residence should be determined by personal ties which show close links between the natural person and the place where he is living. Also, under Article 24(b) of the Implementing Regulation, where a natural person has his permanent address in one country and usual residence in another, priority is given to the place where he usually resides, unless there is evidence that the service is used at his permanent address.

152. Mr Lall submitted that the concept of "normal residence" and "usual residence" were for all practical purposes the same i.e. where a person usually lives because of personal or occupational ties. There was no reason to give the expressions a different meaning. In this context, although the authorities cited above concerned Directives 83/182 and 83/183 (which were concerned with temporary importation of goods) and Customs and Excise Duties (Personal Reliefs for Goods Permanently Imported) Order 2009 (which involved customs duties), there was a common link with Article 59 PVD because all three provisions determined the taxing rights of a member state.

153. Furthermore, the combined effect of the provisions referred to in paragraph 151 above was, according to Mr Lall, that where usual residence was not established in the country in which the candidate was studying and personal ties were to be found in China the location of those personal ties will prevail, especially if there was evidence of use of services in China. Mr

[16] which provided for tax exemptions applicable to permanent imports from a member state of the personal property of individuals.

[17] Mr Lall also referred to the opinion of Advocate General Kokott in *Alevizos* at [62] to the effect that the tests of personal and occupational ties had to be considered cumulatively and at [63] where the Advocate General said "the person must live in the place in question only 'because of personal and occupational ties', which does not preclude him from also having such ties in other places. "

[18] "…transfer of normal residence may be proved by any means, regardless of the formalities required to establish the right of residence." (*Hellenic Republic* at [32])

Lall noted that there was evidence that some of the candidates used Mandarin's services on returning to China.

154. In his submissions Mr Lall presumed that a number of Mandarin's coaches were based in the UK and that some were based outside the UK. In fact, having reviewed the papers before us, it is almost impossible to determine where Mandarin's coaches were based when providing their services. Certainly, it was not clear to us that the coaches were, to any material extent, based outside the UK.

155. Mr Lall submitted that the evidence summarised in Annex 2, derived from the work folders contained in the exhibits to Mr Latham's and Ms Olsen's evidence, overwhelmingly showed that with one exception, the candidates were in the UK as students and they did not have any occupational or personal ties in the UK. Studying at a university did not give the candidates occupational ties in the UK. Only one candidate had personal ties in the UK. The evidence indicated that their personal ties were predominantly in China.

156. With one exception, Mr Lall submitted, none of the candidates could be said to have established their permanent centre of interests in the UK. Even applications for jobs in the UK did not indicate that. First, there was no evidence of the applications having been successful. Even if any were to be successful, there was no evidence of immigration rights to remain in the UK having been obtained and there was no other evidence indicating how the one candidate who secured an offer had established their permanent centre of interests in the UK.

157. The evidence showed, according to Mr Lall, that the candidates usually took up interview coaching shortly before interviews. He argued that this was the essence of the "product" sold by Mandarin. Many of the folders showed that coaching seemed suddenly to stop. With one exception, none of them contains evidence that the candidates secured a job. This supported Mandarin's explanation, Mr Lall said, as to why they had introduced a system of checking with candidates on whether they intended to renew their contracts.

158. Mandarin and the coaches did not keep a record of the whereabouts of the candidate when coaching was provided. Some evidence could be gleaned from the work folders – some candidates appear to be in the UK whilst others had returned to China. Most candidates took up initial coaching while in the UK but there was also evidence that coaching was taken up after returning to China.

159. Mr Lall submitted that in almost all cases it was sufficiently clear that most of the candidates were in the UK for a limited time for the purposes of post-graduate study. The candidates' UK studies were usually preceded by university studies in China. There were four cases of earlier studies in the UK e.g. first degrees and/or schooling for A-levels.

160. Mr Lall accepted that there were examples of candidates taking up interview coaching while in the UK, albeit that there were no examples of candidates having been successful in securing a job. Under the old contracts and the first step coaching under the new contracts, post-July 2016, interview and assessment centre coaching was unlimited until the candidate secured a first job or graduate placement. Mr Lall drew attention to Ms Olsen's evidence that all coaching sessions took place by Skype and that it was irrelevant where the candidate was located.

161. It was, Mr Lall said, common ground that the parents of the candidates had their permanent addresses and usual residence in China or at least outside the UK and the EU. There was no evidence that any of the parents had their permanent address or usual residence in the UK. It was also common ground that the candidates were in the UK via temporary periods permitted by their visas. With one exception, none of the candidates had their usual residence in the UK. The candidates lived in the UK whilst they were studying at UK educational

institutions but their presence in the UK was essentially temporary under the conditions of their entry visas. Mr Lall submitted that this evidence demonstrated that the UK was not the place where they usually lived.

162. Mr Lall argued that all the candidates were students – they had no full-time occupation, trade or profession while in the UK. Any permission that they may have had under their visas to work in the UK was restricted in terms of hours they could work. Mr Peckham's evidence was that the candidates generally came from wealthy families and it was, therefore, unlikely that they would need to work while studying in the UK.

163. The evidence showed, Mr Lall argued, that the candidates had their personal ties (i.e. with their parents and families) outside the UK and predominantly in China. The evidence also indicated that candidates mainly returned to their home country or looked for work in other countries outside the UK and the EU.

164. Thus, in Mr Lall's submission, the effect of Article 59 of the PVD was that the place of supply of Mandarin's services was the location of the candidates' permanent address and usual residence i.e. in China.

165. Mr Beresford submitted that the question whether the candidates had their permanent address or usual residence in the UK was determined by their right or permission to be in the UK.

166. Mr Beresford did not address the authorities cited by Mr Lall but instead referred us to a decision of this Tribunal in *1st Contact Ltd v HMRC* [2012] UKFTT 84 (TC) ("*1st Contact*"). In that case the taxpayer company provided foreign exchange services to young people from Australia, New Zealand and South Africa coming to the UK temporarily for working holidays or overseas experience. The taxpayer argued that its services were provided to persons who "belonged" outside the UK because the "usual place of residence" of its customers was outside the UK. The Tribunal rejected this argument and found that the customers belonged in the UK for VAT purposes. The Tribunal applied the UK rules in relation to "ordinary residence" i.e. a person's abode in a particular country which was adopted voluntarily and for settled purposes as part of the regular order of his or her life for the time being, whether of short or long duration, applying the decision of the House of Lords in *Shah v Barnett London Borough Council* [1983] 1 All ER 226.

167. Mr Beresford's main argument was, however, that in order for the candidates to study in the UK, they had to do so under a Tier 4 visa. The guidance relating to Tier 4 visas demonstrated that the phrase "permission to stay", albeit for a limited period, featured throughout.

168. Thus, Mr Beresford submitted that the candidates were in the UK voluntarily, had permission to be in the UK and, as a result, at the time of receiving the supplies they belonged in the UK (with the evidence indicating that the recipients had been in the UK for more than one year and had UK addresses).

Discussion

169. We accept Mr Lall's basic submission that, in accordance with Article 13 of the Implementing Regulation, the place where the candidates usually resided is the place where they usually live as a result of personal and occupational ties.

170. It seemed to us that Mr Beresford's submission, viz that the candidates' place of usual residence should be determined by their entitlement to reside in the UK under their Tier 4 visas, was simply an application of the wrong test and was entirely unsupported by any authority. Indeed, the decision of the CJEU in *Hellenic Republic* at [32] indicates that Mr Beresford's submission was wrong – normal or usual residence was to be established by reference to facts concerning the relevant person and not by reference to the formalities required to establish the

right of residence. Whether a candidate had an entitlement to reside in the UK under a Tier 4 visa sheds little light as to where a candidate lived as a result of "personal and occupational ties."

171. We further accept Mr Lall's submission that studying in the UK either at school or at university does not represent an occupation. To our minds, an "occupation" clearly envisages a form of employment or business activity in which an individual is engaged. We do not think that following a course at university (or at school) would naturally be considered to be an occupation.

172. Although Directives 83/182 and 83/183, to which Mr Lall referred, deal with an entirely different area of EU taxation, it is instructive (but not in any way decisive) that Article 6(1) of Directive 83/183 and Article 7 (1) of Directive 83/182 specifically excluded attendance at a university or school as implying a transfer of "normal residence."

173. Further, in our view, usual residence does not include temporary residence for a specific and definite period of time, such as attendance at a university degree course. As with "normal residence", "usual residence" (the two concepts appear to us to be virtually identical) seems to us to refer to the place where a person has established his or her permanent centre of interests (*Alevizos* at [55]) and that that place is identified by considering a person's occupational and personal ties.

174. Mr Beresford complained that Mandarin had produced no evidence about the candidates' possible personal ties to the UK e.g. life partners etc. We asked Mr Beresford what evidence he thought would be acceptable on this issue. He was unable to offer a suggestion. Moreover, we observe that although Mandarin's evidence was served in May 2019, no objection to this evidence was raised at any point before the hearing, in cross-examination of Mr Peckham, and, in particular, no objection was raised in HMRC's skeleton argument.

175. In this context, Mr Lall referred to Article 23 of the Implementing Regulation which provides:

> "2. Where, in accordance with Articles 58 and 59 of Directive 2006/112/EC, a supply of services is taxable at the place where the customer is established, or, in the absence of an establishment, where he has his permanent address or usually resides, the supplier shall establish that place based on factual information provided by the customer, and verify that information by normal commercial security measures such as those relating to identity or payment checks."

176. It seems to us that this is the key provision. Article 23, worded in mandatory terms, places the burden on the supplier (i.e. Mandarin) to establish the place where the recipient of the services usually resides. That must be done based on factual information provided by the customer. The supplier must then verify that information. Article 23 is directly applicable (Article 65).

177. In our view, Mandarin did none of this prior to July 2016. It had no system for checking or verifying the usual place of residence of the candidates prior to July 2016. Indeed, Mandarin seemed to be unaware of the importance of asking for that information in the first place. The work folders appeared to us to be fragmentary and incomplete. In five out of twenty-two cases (all pre- July 2016), there was no contract on file. In two cases, the work folders contained both a passport and a visa for the candidate. In two cases, the work folders contained a copy of the candidate's passport and in three other cases a copy of the candidate's visa. However, in all of the cases where there were passport or visa details in the relevant work folders, these concerned contracts entered into by Mandarin with the parents after July 2016. Before that time none of the folders contained passport or visa details. Before July 2016 there was no other personal

information about where the candidate had come from or, for example, who the candidate's next of kin might be. Before July 2016, at the time when a candidate signed their contracts with Mandarin and paid Mandarin's charges, Mandarin did not appear to request any kind of CV from the candidate which might have indicated where the candidate's family ties lay and which might be subject to verification. The CVs on the file seemed to have been supplied subsequently as part of the coaching process. In short, Mandarin simply did not carry out the verification exercise required by Article 23. It was therefore unable to prove that the usual residence of the candidates (before July 2016) was outside the UK.

178. In passing, we might remark that it seemed to us, contrary to Mr Beresford's suggestion, that checking up on boyfriends and girlfriends or other life partners would not be a normal commercial security measure.

179. We were not shown any VAT invoices, which is not surprising because presumably Mandarin believed that its services were outside the scope of VAT. Therefore, absent another tax point, the time of the supply of Mandarin's services to each candidate would be the date of payment (section 6(4) VATA 1994). This would also be the time at which Mandarin would have to decide whether its supplies of services to the individual candidate would be made in the UK or outside the UK i.e. whether the supplies will be subject to UK VAT or not.

180. If that is correct, then it seems to us that, at the time of payment, Mandarin would have had little or minimal information about the personal ties of the candidates with whom they contracted. It simply did not verify the candidates' usual place of residence as Article 23 required it to do.

181. For completeness, we should add, first, that, with respect, we did not derive any assistance from this Tribunal's decision in *1st Contact*. First, that decision dealt with the legislation as it existed prior to the introduction of the Implementing Regulation and did not discuss any of the authorities in relation to "normal residence" referred to above. Secondly, the Tribunal relied on domestic UK concepts of "ordinary residence" which, with respect, we do not regard as an adequate surrogate for the tests contained in the Implementing Regulation. The test of where a person "usually resides" is a matter of EU law and the applicable test must be one based not on domestic authorities drawn from different domestic UK contexts but on EU law principles applicable throughout the EU.

182. Secondly, although many of the candidates' CVs contained UK addresses, these were plainly the addresses at which they lived whilst they were students and were in the UK for the temporary purpose of furthering their education and cannot be regarded as their "permanent address" for the purposes of Article 12 of the Implementing Regulation.

183. Accordingly, we have decided that, prior to July 2016, Mandarin has failed to establish the usual residence of the candidates in the manner required by Article 23 of the Implementing Regulation.

184. Therefore, we allow Mandarin's appeal as regards periods from July 2016 (from which time contracts were systematically entered into with the parents) but dismiss Mandarin's appeal in respect of earlier periods.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

185. 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.

GUY BRANNAN
TRIBUNAL JUDGE

RELEASE DATE: 07 SEPTEMBER 2020

APPENDIX

The contracts

186. Prior to the autumn of 2014, Mandarin provided contracts for different packages. A "comprehensive" package included a group workshop primarily aimed at informing the candidate how to use Mandarin's services and giving information on matters such as the production of a CV and how to deal with applications. One-to-one coaching was primarily used for interview and assessment centre coaching with a small proportion used for the development of the CV and review of the quality of the candidate's applications. The contract was "unlimited in the UK and China" and stated that the candidate was entitled to unlimited interview and assessment centre coaching until they accepted a first graduate scheme offer.

187. An example of a contract for a "comprehensive" package was exhibited to Mr Peckham's witness statement concerning a natural candidate. The agreement was stated 8 October 2013. The contract stated:

> "CAREER COACHING PROGRAMME (CCP)
>
> An agreement between
>
> [Name of the candidate]
>
> And
>
> Mandarin Consulting Limited
>
> Whereby
>
> Mandarin Consulting Limited (MC) is committed to deliver the following areas of coaching services of our Career Coaching Programme
>
> Comprehensive Package – Fee: £[price] (inclusive of VAT)
>
> To include the following services:
>
> 1. Registration
>
> 2. Small group workshop consisting of coaching on the following key areas:
>
> - Effective company and position research
> - How to produce an effective CV and covering letter
> - General online application question answering techniques
> - Career motivation question answering skills
> - Competency question answering skills
> - Approved personalised competency based samples
> - Commercial awareness and critical thinking question answering skills
>
> 3. One to One Coaching:
>
> - Career Strategy Planning and Induction
> - CV Revision & Covering Letter Revision
> - Application Form Revision – unlimited (Online test excluded)

- Interview Coaching – unlimited until the first graduate scheme offer is accepted; unlimited for all internship applications;
- Assessment Centre Coaching – unlimited until the first graduate scheme offer is accepted; unlimited for all internship applications;

Validity of this contract: Unlimited in the UK and in China.

Package	Date signed up	Amount paid	Mandarin Consulting Signature	Candidate Signature
Comprehensive package	8 October 2013	£[Price]	[Signature on behalf of Mandarin]	[Candidate's signature]

188. Under the heading "DISCLAIMERS", the agreement stated: "All fees paid by the candidate are for training and coaching only."

189. From the autumn of 2014, the packages were rebranded into "gold" and "platinum" packages. Mr Peckham's witness statement annexed two specimen contracts – a gold contract and a platinum contract – the former dated 8 June 2016 and the latter dated 6 June 2015.

190. The 8 June 2016 gold contract, which was entered into with the candidate, provided as follows:

"CAREER CONSULTING SERVICES

An agreement between

[name of candidate]

And

Mandarin Consulting International Ltd

Whereby

Mandarin Consulting International Ltd (MC) is committed to deliver the following areas of career consulting services

Gold Package – Fee: £[price]

To include the following services:

1. Registration

2. Small group workshop consisting of coaching on the following key areas:

- How to produce an effective CV and covering letter
- General online application question answering techniques
- Career motivation question answering skills
- Competency question answering skills
- Commercial and answering skills

3. One to One Coaching:

- Ongoing Career Planning
- CV Revision & Covering Letter Revision
- Personalised application answers coaching (six main competency examples will be produced from the coaching)

- Application Form Revision: 8 revisions with further support until the first graduate scheme offer is accepted (Online test excluded)
- Interview Coaching – unlimited until the first graduate scheme offer is accepted; unlimited for all internship applications;
- Assessment Centre Coaching – unlimited until the first graduate scheme offer is accepted; unlimited for all internship applications;

4. Standard documents provided for self-study and references

5. Once a week one to one meeting with native English speaking personal mental for six weeks to discuss progress and receive guidance. Candidates can choose which six consecutive weeks they will use this service.

6. An agreed weekly programme will be set between the mentor and the candidate to control progress.

Validity of this contract: Unlimited until the candidate accepts the first graduate job including a first graduate scheme worldwide. ”

191. The agreement was signed by the candidate, was signed behalf of Mandarin, was dated and recorded the amount paid in Sterling. The agreement stated that it was governed by English law and stated: “All fees paid by the candidate are for consulting services only.”

192. The 6 June 2015 contract (i.e. the platinum package) stated that Mandarin would provide the following services:

“CAREER CONSULTING SERVICES

An agreement between

[name of candidate]

And

Mandarin Consulting International Ltd

Whereby

Mandarin Consulting International Ltd (MC) is committed to deliver the following areas of career consulting services

Platinum Package – Fee: £[price]

To include the following services:

1. Registration

2. Small group workshop consisting of coaching on the following key areas:

- How to produce an effective CV and covering letter
- General online application question answering techniques
- Career motivation question answering skills
- Competency question answering skills
- Commercial awareness and critical thinking question answering skills

3. One to One Coaching:

- Ongoing Career Planning
- CV Revision & Covering Letter Revision
- Personalised application answers coaching (6 main competency examples will be produced from the coaching)

- Application Form Revision: 8 revisions with further support until the first graduate scheme offer is accepted (Online test excluded)
- Interview Coaching – unlimited until the first graduate scheme offer is accepted; unlimited for all internship applications;
- Assessment Centre Coaching – unlimited until the first graduate scheme offer is accepted; unlimited for all internship applications;

4. Standard documents provided for self-study and references.

5. The candidate to be interviewed and assessed by a coach in order to prepare a Candidate Development Plan that will be agreed with the candidate.

6. The candidate Development Plan will include 21-hour sessions with a dedicated coach over a period of time to be specified on the Candidate Development Plan to receive intensive guidance on Western business issues and Western culture in preparation for job applications, interviews and assessment centres. These sessions will require the candidate to carry out work and job-related exercise outside the sessions.

7. The Candidate Development Plan will be used to assess and control the candidate's progress during the course of the 20 coaching sessions and make adjustments to the content of the sessions for the candidate as required.

Validity of this contract: Unlimited until the candidate accepts the first graduate job including a first graduate scheme worldwide."

193. The document was dated, the agreed amount paid was specified and the agreement was signed by the candidate, although on a copy with which we were provided it was not signed by Mandarin. The agreement stated that it was governed by English law and stated: "All fees paid by the candidate are for consulting services only."

194. Thus, comparing the two types of contracts, the initial group workshop, self-study documents and one-to-one coaching (covering interview and assessment coaching) were common to both packages. The platinum package offered further personal coaching and specified 20 one hour sessions of personal coaching. Both contracts also provided for unlimited interview coaching until the candidates secured their first job offer. Interview coaching was, and has continued to be, central to the services offered by Mandarin. In whatever part of the world the candidate applied for jobs, he or she required coaching in how to approach an interview. That was equally true in relation to applying for jobs in China because Mandarin's candidates tended to apply for positions in non-Chinese companies.

195. Early on Mandarin had identified that it had a commercial exposure under its contracts and it created uncertainty over how much coaching candidates were entitled to. Its contracts were amended from around July 2016, at or around the time that Mandarin's new accountants were appointed. Mr Peckham exhibited to his witness statement the sample forms of contract currently in use and which we understood to have been introduced in July 2016. These contracts included a "gold package" contract entered into with the candidate and another gold package contract entered into with the parent (in both English and Chinese), a "platinum package" contract with sample contracts entered into with the candidate or the parents (the parents' version was in Chinese), a "diamond package" contract, with contracts for the candidate or the parents (the version for the parents was in English and Chinese) and, finally, a "diamond plus" package, with sample contracts for the candidate and sample contracts for the parents (in English and Chinese).

196. The basic services to be supplied by Mandarin under these contracts were very similar to those already described in respect of earlier versions of the contracts. There were, however more extensive contractual terms. The contract with the candidate provided as follows:

“CAREER CONSULTING SERVICES

Contract between

[CANDIDATE NAME] (“YOU”)

And

MANDARIN CONSULTING LIMITED (“WE”)

Whereby

We shall deliver the following areas of career consulting services

You are the Candidate who we will coach through our services in the areas below

Residence:

Gold Package

The price of this Gold Package is £[price] plus VAT

First Step Coaching + Personal Application Skills Coaching (15 hours)

Including:

1) First Step Documents

Our Application Guidelines and Program User Manual to be used for the Candidate’s self-study

2) First Step Coaching

a. Small group workshop/digital workshop/webinar conducted by our workshop coaches consisting of coaching on the following key areas:

- An introduction to the differences between Graduate Scheme is and Internships in Western international companies
- Motivation questions on how to answer them
- Competency based questions and the best way to approach them
- General type questions and how to deal with them
- Commercial awareness and what is required to answer this type of question
- How to produce an effective CV and cover letter

b. One to one coaching by one of our designated CV revision coaches:

- One session of CV Revision

3) Follow up One to One Coaching by a Team of Coaches and Specialists:

- Personalised application answers coaching by six typical competency examples
- Application revision: eight sets of application revisions.
- Interview Coaching – unlimited for all internship and Graduate Scheme applications
- Assessment Centre Coaching – unlimited until the first graduate scheme offer is accepted; unlimited for all internship applications

4) Personal Coaching – *Application Skills* Coaching (15 hours);

A personal coach will be assigned to work with you on a Personal Development Plan which is to be designed specifically for the benefit of the

Candidate with further coaching to be delivered on some or all of the topics listed below:

a. Career planning

b. Vacancy research

c. Planning for the interview process

d. Motivation related questions

e. Key competencies question

f. Commercial awareness related questions

g. General questions

h. Business and Social Awareness

i. English Improvement

5) Quarterly reports will be provided to You as to the [sic] Your progress

(Optional) Email Address:…….

By signing this contract you are deemed to give Us instructions to commence the program services immediately.

197. The agreement made provision for signature by the candidate and by Mandarin. As indicated, there were extensive terms and conditions covering over four pages of typed language.

198. The parents' contracts were in Chinese because virtually none of the parents spoke English. The parents' contracts are the same terms as those for the candidates. Before these contracts were introduced in July 2016 the only contracts were, according to Mr Peckham's unchallenged evidence, with the candidates. Since July 2016 "almost all" Mandarin's contracts were made directly with the parents. Although Mandarin still has standard contracts with the candidates, these were rarely used.

199. The parents' contracts stated:

"CAREER CONSULTING SERVICES

Contract between

[PARENT'S Name] ("YOU")

And

MANDARIN CONSULTING LIMITED ("WE")

We shall deliver the following areas of career consulting services

You are the parent of the student [CANDIDATE Name] ("the candidate") who we will coach through our services in the areas below:

Residence:

Gold package

[Price expressed in Sterling]"

200. The agreement provided for Mandarin to provide the services specified in the specimen agreement described above in respect of agreements with the candidate.

201. The agreement then made provision for it to be signed by both Mandarin and the parent(s).