[2015] UKUT 0048 (TCC)

Case number: TCC-JR/04/2013

VAT- Judicial review- Construction of Business Brief 10/04- Did the claimant comply with BB10/04, alternatively, should BB10/04 be applied retrospectively- No on both counts- Permission to bring Judicial Review proceedings refused

UPPER TRIBUNAL

TAX AND CHANCERY CHAMBER

BETWEEN:

THE QUEEN

ON THE APPLICATION OF
ELS GROUP LIMITED

Claimant

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Defendants

TRIBUNAL: MRS JUSTICE PROUDMAN DBE

Sitting in public at The Rolls Building, Fetter Lane, London EC4A 1NL on 1, 2 and 3 December 2014

Nigel Pleming QC and Hui Ling McCarthy, instructed by Forbes Hall LLP for the claimant

Nicola Shaw QC and Aparna Nathan, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the defendants

DECISION

1. This is an application for permission to bring judicial review proceedings coupled, if permission is granted, with the judicial review proceedings themselves. No point is taken by the defendants ("HMRC") as to the availability of judicial review or the three month time limit and indeed on 22 July 2013 Warren J in the Administrative Court ordered that the matter should proceed in the Upper Tribunal as a judicial review claim in accordance with the Upper Tribunal Rules.

2. The decision sought to be reviewed is the decision of HMRC, for the period March 2007 to March 2008, not to allow an ELS Group company, Education Lecturing Services (trading as Protocol Professional) ("ELS"), to avail itself of an extra-statutory concession in respect of the payment of Value Added Tax on its supplies. The concession is contained in Business Brief 10/04 ("BB10/04") (since withdrawn) which provided as follows,

> "Until Customs have completed their review [a review of the impact of the Conduct of employment Agencies and Employment Business Regulations 2003, that is to say not a review of any particular company's tax affairs], employment bureaux can continue to choose whether to act as an agent or as a principal for VAT purposes, even though the new DTI regulations may mean that they are in reality acting as principals…
>
> VAT will be due only on the commission element of the charge made by employment bureaux that choose to act as agents for VAT purposes. In such cases, work-seekers who are themselves registered for VAT will have to charge VAT to the hirer on the total value of their services. Invoices issued by employment bureaux acting as agents should therefore show the salary element of the charge to the hirer separately from any commission charged.
>
> In summary, until Customs have completed their review, the VAT position of employment bureaux will be as follows:
>
> - … All other employment bureaux that hire out self-employed work-seekers cannot use the staff hire concession. But they can choose whether to act as agents or principals for VAT purposes.
>
> - Employment bureaux that choose to act as agents for VAT purposes account for VAT only on the commission or margin element of their charges to the hirer.
>
> - … Customs will accept that the VAT invoices issued by the employment bureaux will be acceptable as evidence of the choice made as to the status of the bureaux for VAT purposes."

3. There are two grounds for judicial review, success on either of which will result in overall success for ELS:

- First, as to the meaning and application of BB10/04, and in particular as to the means of evidencing any choice made by ELS. It is said that HMRC misinterpreted BB10/04 and misapplied it to the facts. In other words, that the supplies which ELS made between March 2007 and March 2008 fell within the terms of the concession.

- Secondly, and alternatively, that HMRC failed to apply the law correctly and misdirected ELS when HMRC ruled that ELS was making supplies of education, denying ELS the opportunity of making a contemporaneous choice to be taxed as agent during the relevant period. The issue of whether BB10/04 has retrospective application falls into both categories but I propose to treat it as falling wholly within this second category. It is said that ELS should be entitled to apply the concession contained in BB10/04 retrospectively, if necessary by issuing itemised invoices with retrospective effect. In other words, if the claimant fails on the first ground, ELS should be permitted to bring itself within the terms of BB10/04 retrospectively. The basis is that any failure to take advantage of BB10/04 during the relevant period arose as a result of a material misdirection by HMRC as to the nature of the supplies made by the ELS through the members of the VAT Group and/or a misunderstanding caused by HMRC as to the nature of those supplies.

4. Mr Pleming QC and Ms McCarthy appeared for the claimant and Ms Shaw QC and Ms Nathan for the defendants.

Background

5. From the time of its incorporation in 1995 until January 1996 ELS ran the business of supplying, as principal rather than agent, lecturers (whom it called associates) to colleges of further education across the UK. Protocol National Limited ("PNL") was initially set up to provide operational services to ELS. ELS was incorporated as a company limited by guarantee (and thus does not have the word "Limited" in its name) so that it could claim exemption from VAT on the basis that it was an eligible body making exempt supplies of education within Item 1 of Group 6 to Schedule 9 to the Value Added Tax Act 1994 ("VATA"). Schedule 9 provides for exemptions under s. 31 VATA and Group 6 Item 1 covers:

> "The provision by an eligible body of-
> (a) education…"

Group 6 Item 5A (inserted with effect from 1 April 2001 in the form applicable in this case) covers,

> "The provision of education or vocational training and the supply, by the person providing that education or training, of any goods or services essential to that provision, to the extent that the consideration payable is ultimately a charge to funds provided by-
> …the Learning and Skills Council for England…"

6. However as a result of the guidance given by the European Court of Justice in *Kennemer Golf & Country Club v. Staatssecretaris von Financien* (Case C-174/00) [2002] STC 502 HMRC wrote to ELS on 23 December 2005 ruling that ELS, although making supplies of education, did not qualify as "an eligible body" for the purposes of the exemption. It was held in *Kennemer* that the taxing authority should have regard to the entirety of a group in determining whether or not a company within the group was an eligible body and HMRC determined that the profit was being stripped out of ELS by payments to PNL for its operational services so that ELS could not properly be described as non-profit making.

7. It is important to note that HMRC's representative said in this letter when concluding that ELS's supplies were of education,

> "You claim that you are making supplies of education. You have not provided any analysis to support this claim but as we agree on this point, I will merely provide my own analysis below. "

That analysis sets out the control factor specified in Public Notice 700/34: ("the determining factor is that the staff are not contractually employed by the recipient company, but come under the direction of that company") and HMRC go on to say,

> "There is no doubt that Associates are contractually employed by ELS so that moves us to the second consideration; whether or not they come under the direction of the client during their period of assignment. There is no evidence in any material I have seen, or explanations I have been given, that the colleges themselves effectively dictate to the Associates how the tuition should be delivered and what materials they must use…"

8. Because ELS contracted with the colleges as principal there was no contract between the lecturer and the college. Accordingly, as a result of HMRC's finding that ELS was not an eligible body, ELS was required to account for VAT on the entirety of the consideration it received from the colleges including the wages of the lecturers. This meant that ELS's profit margins were lower than the standard rate of VAT.

9. In 2006 ELS decided to restructure the Group, (a) establishing PNL as an employment bureau and (b) PNL taking over provision of supplies of the lecturers to the colleges. It was ELS's intention that ELS would then be able to rely on BB

10/04 and only account for VAT on its own commission: see the minutes of a board meeting of PNL held on 30 January 2006, which state:

> "There was a discussion of the changes being made to the business following the letter received from HMRC concerning the eligible body status of ELS. It was recognised that the business model now being adopted relied on a concession (10/04) from HMRC and that, as such, was more vulnerable to a change in government policy at some time in the future…
>
> A draft letter to be sent by PWC to HMRC, on behalf of the company, was discussed and agreed. The letter set out the structure of the business that would be operated by Protocol National following the review [of] the VAT status of the Group."

10. ELS and PNL contacted the colleges to try to persuade them to enter into a new contract with PNL instead of their existing contracts. The ELS letter explained that, "as a result of the evolving interpretation of VAT regulations", PNL would take over from ELS and start providing staff with effect from 1 February 2006. The PNL letter referred to the ELS letter, enclosed the new terms and conditions and explained that PNL would be treated as agents for VAT purposes and would invoice accordingly. ELS Group personnel followed the letters up by email, phone and, in some cases, personally, setting out the new hourly rates, and that they were now calculated to include VAT on the commission element of the charges. The board minute mentioned above reported that at the time of the meeting:

> "76 of the top 100 client colleges had been spoken to about the changes to the contract and, so far, there had been no serious adverse reaction."

11. PNL's business therefore changed to supplying all the requirements of the colleges directly to them, and if and when the colleges agreed to transfer business to PNL it issued VAT invoices, billing the commission element separately as required by BB10/04. However, for a variety of reasons (I have seen ELS's account of the reasons, including simple apathy, provided by four of the colleges) not all the colleges agreed to move their contracts to PNL. 89 colleges remained with ELS.

12. During the whole of the relevant period ELS continued to invoice the colleges that remained with it for one lump sum for "Provision of Curriculum Services", expressly stated on the invoice to bear no VAT. This lump sum was increased to correlate with the fee that PNL was charging, that is to say including VAT on the commission element of the charge. Board Minutes of PNL dated 28 March 2006 explain as follows:

> "Sales invoices for February [i.e. 2006] had been divided between [PNL] and ELS depending on whether colleges had signed the new

> contract. Invoices from PNL would account for VAT based on the 10/04 agency methodology. Invoices from ELS would be based on rule 5A or the Empowerment Enterprises case depending on advice being taken on the most appropriate method. A final decision would be required before the submission of the next VAT return due on 30 April 2006."

13. HMRC were told about the change in PNL's business in a letter of 30 January 2006 written by PwC on behalf of PNL, the draft of which was mentioned above. While awaiting a response from HMRC to this letter the Group VAT return was prepared on the basis that (a) where colleges had signed new contracts with PNL the Group was entitled to the benefit of BB10/04, but (b) where colleges had remained with ELS the supplies were of education exempt from VAT. It was believed that the supplies were exempt either because they were made by an eligible body under Item 1 of Group 6 of Schedule 9 to VATA or because they were funded by the Learning and Skills Council under Item 5A. In either case, however, it was assumed that ELS was providing education.

14. On 9 June 2006, HMRC had a meeting with ELS ("Protocol Professional") and by letter dated 10 July 2006 (written to Mr Kevin Downs who was the Finance Director of ELS) HMRC responded, not that ELS was not providing education, but that ELS had,

> "so far failed to demonstrate to the Commissioners any material difference between the supplies of education that were made up to 23 December 2005 by ELS Ltd and the supplies now made by PNL which you purport to be of staff",

refusing PNL the benefit of BB10/04 and inviting ELS to,

> "submit any further information…outlining the different nature of supplies made by PNL to those previously made by ELS".

15. By a letter dated 9 August 2006 PwC (in a letter referring to "our above-named client", ELS,) made a voluntary disclosure to the effect that ELS would, without prejudice to its appeals, account for VAT on the basis that it was not able to claim that it was an eligible body. PwC relied on a report compiled by Tenon Limited ("Tenon") of July 2006 for PNL, assessing the proportion of ELS's supplies that were Learning and Skills funded programmes, that is to say, relying on Item 5A rather than Item 1. On this basis ELS had to pay a further £41,540.68 to HMRC. By letter dated 6 October 2006 HMRC rejected Tenon's method of calculation, requiring a more thorough audit trail and information about the breakdown of students. Negotiation continued into 2007 and PNL provided information requested by HMRC in relation to the ELS Group on at least two separate occasions. It was still being assumed that ELS was providing education.

16. Everything changed with the decision in *Stichting Regionaal Opleidingen Centrum Noord-Kennemerland/West Friesland (Horizon College) v.*

Staatssecretaris van Financiën (Case C-434/05) [2008] STC 2145 ("*Horizon*") in which judgment was given on 14 June 2007.

17. At a meeting on 21 September 2007 (recorded as with "ELS Group Ltd, T/A Protocol Professional"), HMRC referred to *Horizon*, saying that the decision might result in VAT having to be accounted for at the full rate. However HMRC said that they did not have enough information to decide whether or not PNL was making supplies of staff and, specifically, who had direction and control over the lecturers after they had been installed in the colleges. HMRC believed that there was no fundamental difference in supplies between ELS and PNL. HMRC's record of the meeting states,

> "As the ELS Group company making these supplies [i.e. PNL] is acting in exactly the same way as the company said to be making supplies of education [i.e. ELS] (other than a slight change to contractual agreements with client colleges), this claim has caused the issue of the exact nature of the supplies being made to be re-examined. This review has been hindered by 2 issues on which we do not have enough information to inform the decision-making process, both relating to 'direction and control': what does 'direction and control' mean; and who has direction and control of the ELS Visiting Lecturers when they are installed in a client college. The purpose of today's meeting was to: 1 obtain information from ELS about the direction and control that they exert over Visiting Lecturers; 2 jointly, with ELS, select client colleges fro me to visit to discuss direction and control; and 3 to check the basis of the preparation of returns subsequent to the decision issued to them in December 2005 that they are not an eligible body."

It appears from the note that Michael Davy, of the company which was the 100% shareholder of ELS Group, left the meeting in high dudgeon, saying:

> "it was intolerable that the Commissioners are "changing item 5A". I [Mrs Harrison of HMRC] explained that it is not a question of changing item 5A and that item 5A has never covered supplies closely related to education unless such supplies are made by the same person supplying the education itself; Mr Davy did not appear to understand the distinction…
>
> I made it clear to Philip Harrison [no relation] and Kevin Downs (Michael Davy had left at this point) that the question of direction and control of the Visiting Lecturers in client colleges is crucial to the consideration of the nature of supplies and that all information given in this respect must be accurate and complete."

As a result, four documents were provided and ELS maintained, in the face of close questioning by HMRC on the fourth and fifth pages of the note, that control of the lecturers remained with ELS. It is not therefore correct (subject to the decision in *Horizon*, dealt with below) to say, as Mr Pleming did on the first day

of the hearing, that HMRC could and should have known as early as 21 September 2007 that ELS's supplies were of staff.

18. On 10 December 2007 PNL wrote to HMRC with a paper describing PNL's business and alleging that control of the lecturers was with the majority of the colleges, not with PNL, a submission with which HMRC eventually agreed:

> "On the basis of this paper and taking into account the information gathered during my meetings with the colleges, my conclusion [said Mrs Whitelegge of HMRC] was the services supplied by PNL appeared to be supplies of staff."

19. At a meeting with ELS on 29 February 2008 HMRC pointed out that,

> "a decision could not be made in the case of supplies made under ELS contracts because insufficient information was held about these supplies; all information related to PNL supplies and the colleges visited by IH were all 'PNL' colleges. IH asked at the meeting what ELS thought they were supplying and KD replied that they still believe supplies made by ELS to be supplies of education. He went on to say that this must also be the Commissioners' view because no amendment had been made to their decision to this effect given on 23 December 2005. IH replied that she had notified ELS last year as soon as she became aware of the Horizon College decision (an ECJ ruling) that, in line with that decision, ELS could not supply education and that their supplies must, therefore, be of: services closely related to education, staff; or something else. Until the current enquiries were concluded, however, she would not be able to notify ELS of the Commissioners' decision regarding the nature of these supplies….
>
> It was agreed that ELS will:
>
> Take legal advice on their contractual obligations when making supplies under ELS contracts; and
>
> Arrange for IH to visit a number of 'ELS colleges'."

20. In a letter dated 22 January 2008 (but it is common ground must from internal evidence have been sent in March 2008) written to Mr Harrison at PNL, HMRC ruled that PNL were supplying staff, not education, and could take advantage of BB10/04.

21. In a letter dated 8 April 2008, written by Kevin Downs, PNL answered the questions about the nature of the supplies. In the letter PNL emphasised the lack of difference between the business of PNL and that of ELS and relied on an earlier letter of HMRC of 10 July 2006 to the effect that as there were no differences between the supplies ELS should be in the same position as PNL. The letter was the first time that anyone had said or implied that ELS's supplies were supplies of staff and the attached answers to HMRC's questions about control by

ELS were notably different from those given at the meeting of 21 September 2007 in that the colleges were said to have many more powers.

22. In a letter of 10 April 2008 to ELS Group, HMRC explained why they allowed PNL to take advantage of BB10/14 but said that they did not have sufficient information to be able to make a decision about ELS's supplies. However, the letter also states, importantly, that HMRC,

> "are prepared to accept that the concession in Business Brief 10/04 can be applied retrospectively [but] the terms of the concession will still need to be adhered to. The evidence for the choice of status for VAT purposes is the VAT invoice issued to the customer. We would therefore expect revised invoices to be issued to your customers to evidence this choice if necessary."

23. Mr Harrison on PNL writing paper provided further information about the similarities between the two companies' supplies in a letter dated 26 November 2008, saying,

> "Given HMRC's subsequent confirmation of PNL's eligibility for 10/04 in January 2008, we remain confident that the two operations are indeed the same and accordingly that ELS should be treated under 10/04 for VAT purposes for the relevant period."

24. In an enclosed note from PNL's legal advisers, (plainly also acting for ELS) they said that Clause 9 of the ELS contract, (which obliged ELS to carry out the assignment even if a lecturer became unavailable) did not reflect the agreement of the parties and the commercial reality had superseded the contract in practice.

25. HMRC decided in their letter of 9 July 2009 (written to Mr Harrison at PNL) that although the matter was not free from doubt the ELS supplies were more likely to be of staff than of anything else. However, HMRC also stated that they awaited a decision from their policy colleagues on,

> "whether it is necessary for ELS to recalculate accurately the amount of the management fee/commission charged to the colleges in order for ELS to qualify for [BB10/04]".

In other words, HMRC still held the belief that it was possible to apply BB10/04 retrospectively.

26. However by letter dated 14 December 2009 addressed to "The Directors, ELS Group Ltd, Protocol National") HMRC said that the Policy Team:

> "are not prepared to allow retrospective use in this instance. The reason for this is that ELS Ltd did not meet the conditions laid down for the concession to be used, specifically that ELS Ltd did not do anything to indicate, at any time, to its customers that it was acting, or intended to act, as an agent."

27. And despite provision of further information and further submissions at a meeting in March 2010 and by letter dated 16 February 2011 HMRC maintained their position. HMRC said in a letter of 27 May 2011,

> "HMRC's policy is not to allow retrospective use of the concession…The letter should not have been sent out with the incorrect implication that retrospective use of the concession was available and HMRC regrets that this happened. However, HMRC does not believe that ELS took any action (or refrained from taking any action) in reliance on the implied possibility of retrospective use of the concession. That is because by the time the letter was written, ELS' contracts had all been transferred to PNL and ELS had ceased to make supplies to colleges."

28. HMRC gave a final ruling on 21 November 2012 rejecting ELS's application. It is the ruling of 21 November 2012 which is the subject of the judicial review.

Grounds for Review

29. A number of matters of law are common ground. First, that the interpretation of BB10/04 is a matter for the Tribunal but that otherwise the proper legal test in relation to the evaluative judgments made by HMRC is a test of rationality in the light of the evidence available to HMRC at the time they made the decision complained of: *R oao Accenture Services Ltd v. HMRC* [2009] STC 1503 at [33]-[36]. Secondly, that BB10/04 is a "statement formally published by the Revenue to the world", as envisaged by Bingham LJ in *R v. IRC ex parte MFK Underwriting Agencies Ltd* [1990] 1 WLR 1545 and is therefore binding on HMRC in any case falling clearly within its terms. In construing the terms of a concession it should not be read as if it were a statute (see *R oao Greenwich Property Limited v. Customs and Excise Commissioners* [2001] STC 618 at 634 f-g) but, "how, on a fair reading of what was said…[it] would reasonably have been understood by those to whom it was directed": *R oao ABCIFER v. Secretary of State for Defence* [2003] QB 1397 at [56]. A strict construction is not to be equated, in the interpretation of exemptions from tax, with a restricted or restrictive construction: see *Expert Witness Institute v. Customs and Excise Commissioners* [2001] EWCA Civ 1882 at [17] and *Paymex Limited v. Revenue and Customs Commissioners* [2011] SFTD 1028 at [88].

30. Para 1 of Schedule 11 of VATA confers a discretion on HMRC as to the exercise of its powers. That discretion is a wide one, to cover, according to Lord Diplock in *R v. Commissioners of Inland Revenue ex p National Federation of Self-Employed* [1982] AC 617 at 636:

> "the best means of obtaining for the national exchequer from the taxes committed to their charge, the highest net return that is practicable having regard to the staff available to them and the cost of collection".

31. However, the discretion does not extend so wide as to permit HMRC to act contrary to their statutory duty and a managerial discretion to collect tax is not the same as a discretion to refrain from collecting tax that is due: see *IRC v. Bates* [1968] AC 483 and *Vestey v. IRC* [1980] AC 1148. Thus the court can only intervene by judicial review to direct HMRC to abstain from performing their statutory duties if they have acted so unfairly that their conduct amounts to an abuse of power: *R v. Inland Revenue Commissioners, ex p Preston* [1985] AC 835.

32. Another way of putting this is that the test is one of *Wednesbury* unreasonableness, as in *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 KB 223 as further interpreted by Lord Diplock in *Council of Civil Service Unions v. Minister for the Civil Service* [1983] UKHL 6. Thus while the interpretation of BB10/04 is a matter for this Tribunal, evaluative judgments made by HMRC can only be upset on the grounds of irrationality: see *Accenture* at [36].

The First Ground

33. The first ground is about the interpretation of BB10/04. It is that ELS fell within its terms at the relevant time, contending that it made a conscious choice to act as agent in relation to supplies of staff.

34. BB10/04 requires the supplier (a) to choose to act as agent, (b) to make its choice known to the relevant parties and (c) to evidence the choice.

35. It is common ground that the choice required by BB10/04 is not whether to act as an agent under the general law of principal and agent, but whether to act as such for VAT purposes. However the parties disagree about what the position is in the absence of such a choice. HMRC submit that until a choice is made taxation is on the basis of the true legal position. ELS submits that no priority is given to either status on the true interpretation of BB10/04.

36. I do not accept that in the absence of a choice there is no default VAT position. If BB10/04 does not apply, then the taxpayer must be taxed according to the strict legal position. Accordingly, ELS falls to be taxed as principal unless and until it chose to be taxed as agent within BB10/04, thereby creating the VAT fiction that it did so. It is therefore for ELS to show that it did make the choice otherwise its claim under the first ground must fail.

37. ELS relies on four matters in support of its submission that it did choose to be taxed as agent at the relevant time. First, it is said that a choice is shown by ELS having restructured its business with the specific purpose of taking advantage of BB10/04. That choice was exercised in the alternative without prejudice to its argument that its supplies qualified as exempt supplies of education.

38. However, the assertion of alternative choice is unsupported by the evidence. PNL made an alternative claim (in its letter of 21 December 2006) but ELS did not. ELS was already running the alternative claim asserted in the letter from PwC of 9 August 2006 (item 1 as against item 5A) and it would have been open to it to run the third argument that in the event that its supplies did not qualify for exemption they were supplies of staff within BB10/04, but it did not.

39. Secondly the increase in the price charged by ELS is relied on. It decided to increase its prices by the amount of VAT on the commission element, developed a business model to reflect VAT on the margin and maintained accounting records of the VAT on the margin.

40. However, the discussions about the imposition of VAT took place on the assumption that PNL would make the supply. Only those colleges that signed up with PNL were invoiced for the fees plus VAT. The colleges that remained with ELS were invoiced for a single VAT exempt amount, even though that amount was increased by the amount of the VAT.

41. Thirdly, it is said that there is clear evidence of choice in that ELS communicated with the colleges to the effect that it had decided to increase its prices by the amount of the commission element. I have read witness statements from David Beynon, Eva Sinclair and Lee Tombs about this. However although I do not doubt the honesty or general veracity of the witnesses, I do not believe that the colleges understood that ELS was acting as agent or that VAT was payable on the commission element of their fee.

42. The restructuring, the increase in price charged and the communications with the colleges were all effected with the aim of moving ELS's business to PNL. They were therefore all evidence, not of ELS's intention, but of PNL's choice once the move had been made. ELS says that there was an error in that the correspondence and documents should not have referred to PNL but should have referred to ELS instead. It is said that as PNL carried out administration on behalf of ELS, the colleges understood that ELS was acting as agent and would charge VAT on the commission element of its supplies. It is true that the ELS Group included PNL and that many of the personnel of ELS and PNL were the same or, like Ms Sinclair, were employed by PNL but worked for both indiscriminately. However, those 89 colleges who did not accept the invitation to move to PNL were not treated as if they had accepted it because they were not invoiced in the same way. It is therefore impossible to say that the colleges understood that ELS was acting as agent and that VAT was payable on the commission element of their fee when they were not invoiced on that basis. Indeed, if that had been their understanding it is hard to see why the colleges did not query the form of the invoices.

43. Moreover, it was important for ELS to show at that stage that there was a distinction between the two businesses in that PNL did not have control over the lecturers whereas ELS did.

44. Again the fact that ELS maintained accounts and made provision for the VAT that would have been payable on commission is not unequivocal evidence of it having made the requisite choice, even in the alternative. It is merely evidence of it having made an accounting contingency for BB10/04 to be applied retrospectively in the event that its arguments for exemption were rejected.

45. It is important that it was not until the letter of 8 April 2008, after the relevant period, that it was suggested that ELS's supplies were supplies of staff rather than education as explained in HMRC's reply of 10 April 2008. Further, ELS only ever asserted during the relevant period that it acted as principal in relation to its supplies and that it had control over the lecturers. Indeed it submitted all its VAT returns on the basis that it was making exempt supplies of education.

46. This is to be contrasted with PNL's position. PNL consistently contended that it made supplies of staff and was therefore entitled to apply BB10/04, issuing invoices in accordance with this contention. I observe that by clause 2 of the contract between PNL and the colleges, PNL specifically agreed to supply staff in the form of the lecturers, such lecturers not to be employees of PNL, whereas clause 1 of ELS's contract provided that it was to supply educational services. Clause 8 of the ELS contract also suggests that ELS would be responsible for providing the courses as well as the lecturers. By contrast, clause 8 of PNL's contract contains a statement of matters for which the colleges were responsible, including times and locations at which assignments were to be delivered, providing accurate information about the nature of the services to be delivered. This provision was not contained in ELS's contract. Clause 10.2 of PNL's contract states that PNL had exercised the choice to act as agent pursuant to BB10/04 and only to charge VAT on the agency commission. The remainder of clause 10 contains other agency provisions which were not included in ELS's contract. There is also in Clause 14 a joint agreement between PNL and the colleges to insure the associate, whereas ELS alone was responsible for insurance. All these matters again suggest that ELS acted as principal, while PNL acted as agent.

47. It is hard to avoid the conclusion that the need to elect as agent did not occur to ELS during the relevant period. In any event its consistent contention that it was supplying education and was acting as principal militates against the contention that it made a conscious choice to act as agent for VAT purposes.

48. BB10/04 provides,

> "Invoices issued by employment bureaux acting as agents should therefore show the salary element of the charge to the hirer separately from any commission charged."

49. It is common ground that ELS, unlike PNL, has never complied with this provision, invoicing for both amounts in one. Mr Pleming submitted that HMRC are attempting to read into BB10/04 restrictive wording which it does not contain, placing too much emphasis on the word "should" and not enough on the word

"acceptable". BB10/04 does not provide, he said, that invoicing is the only, and thus determinative, means of evidencing the choice. There is the possibility of other forms of evidence. Indeed, on 27 May 2011 HMRC wrote a letter saying that they were prepared to accept very basic evidence of ELS's choice in the form of VAT invoices, explaining that as ELS did not issue invoices showing commission separately, "alternative evidence is necessary to demonstrate that ELS had elected to act as an agent."

50. However, it seems to me that the only fair reading of the invoices was that they were submitted as principal rather than agent and on that basis the passage in BB10/04 is in my view clear on an ordinary reading of it. If a company has made the choice to act as agent, its invoices should (subject again to retrospective amendment under Ground 2) show the two charges separately. If the Tribunal is to accept ELS's evidence that it made a choice to act as agent in January 2006 then it should have acted in accordance with that choice. This would require compliance with the provision that it issue invoices in proper form during the relevant period.

51. I am not saying that the invoices are determinative of the question. I agree with Mr Pleming that invoices, although acceptable evidence of choice, are not the only evidence which can be adduced. However, taking into account all the relevant matters, it seems to me that ELS did not make a choice to act as agent in relation to supplies of staff. ELS invoiced its customers for a single VAT-exempt amount and it consistently asserted that it made supplies of education as principal.

The Second Ground: that ELS should be allowed to apply BB10/04 with retrospective effect on the ground that ELS's failure to take advantage of it arose because of a material misdirection by HMRC or a misunderstanding on the part of ELS caused by HMRC

52. ELS's submission is that had a correct clear ruling been given by HMRC on 23 December 2005, ELS would have moved its contracts immediately and gone over to operating its business entirely under BB10/04.

53. ELS's first point is that it transpired from the decision in *Horizon* that ELS could never have been supplying education but that ELS relied on the statement by HMRC to its detriment. HMRC say that it applied *Horizon* correctly to facts provided by ELS which turned out to be incorrect.

54. I therefore have to decide the issue of the scope of *Horizon*. ELS contend that for a supply to be of education it must be made directly to the students and it must therefore always have been obvious to HMRC that it could not be supplying education. HMRC say that this is shown to be incorrect by *R & CC v. Robert Gordon University* [2008] STV 1890 as in that case a supply was made to a subsidiary of the university and that was held to be a supply of education notwithstanding the decision in *Horizon*. Mr Pleming ripostes that *Robert Gordon* was a different sort of case in which (see *Robert Gordon*):

> "[43] …the interposition of Univation [the subsidiary company] is nominal and immaterial. RGU continued to provide the students' education irrespective of the creation of an oversight in Univation…
>
> [47] there was no material difference between the situations before and after the arrangements were entered into. The same cohorts of students received the same education and training and associated services from members and representatives of the same organisation after the arrangements. The interposition of Univation in the chain of control, even if it had involved substantial as distinct from merely nominal intervention in management, did not alter the characterisation of RGU's supplies."

55. In *Horizon*, Horizon College was an organisation defined by the Member State as having educational objects. Its principal activity was the provision of secondary and vocational education, but it also seconded teachers to other establishments to meet temporary shortages of teaching staff. Under the secondment contract, the teacher's salary was paid by Horizon College, but the teacher was assigned work by the other establishment, which also paid for liability insurance. One question the Court was asked was whether, in relation to such secondments, Horizon College was providing an exempt supply of education under Article 13A (1)(i) of the Sixth Directive. The ECJ said that there was no definition of the various forms of education in that Article and education consists of a number of elements, including organisational framework. In *Horizon*, the transfer of teachers to other establishments was not an educational activity but only facilitated the provision of education.

56. The Advocate-General said (at [49] of her opinion- the emphasis is mine):

> "When one educational establishment makes teachers available to another such establishment, where they teach the latter's students under its instructions and responsibility, the supply made by the first establishment is not of 'education' but of teaching staff. And, as the Commission pointed out at the hearing, the 'education, vocational training or retraining' which students receive in an educational establishment is not merely what is provided by teachers from their own knowledge and skills. Rather, it includes the whole framework of facilities, teaching materials, technical resources, educational policy and organisational infrastructure within the specific educational establishment in which those teachers work."

57. And the ECJ said (at [18]-[24] of the judgment- again the emphasis is mine):

> "18. Admittedly, as Horizon College essentially submits, the transfer of knowledge and skills between a teacher and students is a particularly important element of educational activity.
>
> 19. However, in view of the requirements of the case law …, the fact that such a transfer is taking place is not, by itself, sufficient for the

mere supply of a teacher to an educational establishment, for the purpose of carrying out teaching duties under the responsibility of that establishment, to be described as educational activity.

20. Indeed, as the Commission submitted, in essence, at the hearing, the educational activity referred to in art 13A(1)(i) of the Sixth Directive 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.

21. However, as stated in para 7 of this judgment, according to the terms of the placement contracts at issue in the main proceedings, it was for the host establishment to define the duties of the teacher concerned, having regard to the duration of the placement and the role assigned to that teacher at Horizon College. In addition, the host establishment was required to insure the teacher for the period of his or her placement.

22. Accordingly, the making available of a teacher to the host establishment in such circumstances cannot be regarded, of itself, as an activity capable of being covered by the term 'education', within the meaning of art 13A(1)(i) of the Sixth Directive. As the Greek and Netherlands governments and the Commission essentially contend, the contract concluded between Horizon College, the host establishment and the teacher concerned aims, at most, simply to facilitate the provision of education by the host establishment.

23. That interpretation is not affected by the circumstance -with which the third question put by the referring court is concerned- that the body which makes the teacher available is itself, in common with the host establishment, an educational establishment for the purposes of art 13A(1)(i) of the Sixth Directive. Where a particular activity is not in itself covered by the term 'education', the fact that it is provided by a body governed by public law that has an educational aim, or by another organisation defined by the member state concerned as having similar objects, cannot alter that analysis.

24. The answer to the first question, read together with the third question, must therefore be that art 13A(1)(i) of the Sixth Directive is to be interpreted as meaning that the expression 'children's or young people's education, school or university education, vocational training or retraining' does not cover the making available, for consideration, of a teacher to an educational establishment, within the meaning of that provision, in which that teacher temporarily carries out teaching duties under the responsibility of that establishment, even if the body which makes the teacher available is itself a body governed by public law that has an educational aim, or another organisation defined by the member state concerned as having similar objects."

58. *Horizon* is not therefore as restrictive as Mr Pleming contends. Whether or not the supply is made directly to the students is an important factor, but not determinative, as *Robert Gordon* shows. There,

> "[33] …On any view, the supply to Univation was much more comprehensive in its scope than the supply considered in *Horizon College*. There was a combination of elements in the supply…."

59. *Horizon* sets out a number of (non-exclusive and non-exhaustive: see [32] of *Robert Gordon*) factors which should be taken into consideration in determining, as a matter of fact and degree, whether a supply of education is being made. Control of the teaching staff is another important factor so that in circumstances where control of the staff is assumed by the college it is unlikely that any supply could be of education since the supplier would not be in control of any of the other required elements.

60. The evidence on which HMRC acted was as follows. Until the letter of 26 November 2008, HMRC were told by ELS as follows:

- The business practice of ELS had remained unchanged since 1995. The first that HMRC heard, for instance, of the allegation that Clause 9 of the ELS contract ("ELS shall be bound to carry out the assignment carrying out all lecturing using approved lecturers") did not reflect the conduct of the parties was in the enclosure to that letter. That enclosure contained advice that,

  > "In brief, a College would either request a particular named lecturer, or would be given the opportunity to interview candidates with a view to choosing a lecturer, who would then come under the College's control and not the control of ELS…There was no obligation to provide a replacement if the lecturer was unavailable.
  >
  > …The commercial reality has been that…the Colleges have been provided with a supply of staff and not any other service".

  However HMRC were not told until that letter was received that ELS's contractual intentions had been superseded by conduct. On the contrary, HMRC were consistently told that ELS did control the lecturers.

- ELS was providing education, not staff: see p.2 of the letter from PwC to HM Customs & Excise dated 9 March 2008.

- ELS's business comprised the provision of educational assignments and courses to the colleges ("providing Colleges with complete courses of tuition which it will deliver to the College's students" ["it" is ambiguous here, bearing in mind the change from the plural to the singular of "College", but I think it must refer to ELS]), and

not solely the provision of lecturers: see [6] of the letter dated 8 August 1995 of Coopers and Lybrand to HM Customs & Excise.

- Although the college would send a course specification to ELS, ELS would be responsible for delivery of the course, including provision of teaching materials.

61. Moreover it was clearly the intention of ELS as well as PNL between 2006 and 2008 to persuade HMRC that PNL's business was supplying staff rather than education. Thus the correspondence in that period is directed to showing changes in the business of PNL. Until the letter of 8 April 2008 ELS's focus was on drawing the distinction between the two businesses that ELS had control of the lecturers and was acting as principal, whereas PNL did not and was acting as agent.

62. The 2005 Ruling is of the second type dealt with by Bingham LJ in *MFK* at p.1569D, namely an "approach to the Revenue…of a less formal nature". His words at 1569-1570 therefore apply,

> "First, it is necessary that the taxpayer should have put all his cards face upwards on the table. This means that he must give full details of the specific transaction on which he seeks the revenue's ruling... It means that he must indicate to the revenue the ruling sought. It is one thing to ask an official of the revenue whether he shares the taxpayer's view of a legislative provision, quite another to ask whether the revenue will forgo any claim to tax on any other basis…
>
> …But fairness is not a one-way street. It imports the notion of equitableness, of fair and open dealing, to which the authority is as much entitled as the citizen."

63. HMRC were therefore entitled to rely on the statements of ELS leading up to the 2005 Ruling (and until HMRC were told otherwise in the letters of 8 April and 26 November 2008) in making its decision. It is the facts as they were represented to HMRC that are relevant in applying the judgment in *Horizon*.

Conclusion

64. I therefore refuse permission to bring judicial review proceedings.

TRIBUNAL JUDGE: The Hon Mrs Justice Proudman DBE

RELEASE DATE: