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# Case alert

## Wakefield College v HMRC

May 2018

### Summary

Wakefield College is a Further Education Corporation which provides education to students. It constructed a new building and, as it has charitable status, the College sought to obtain VAT zero-rating for the construction on the basis that the building was intended for use for a relevant charitable purpose. The College considered that, as more than 95% of the students either received free education (because they were under the age of 19 (18 in Scotland) or only paid a small contribution to the normal fees, the supply of education should be regarded for VAT purposes as a non-business activity.

It is a condition of obtaining zero-rating for the construction of a relevant charitable building that the building is intended for use for a relevant charitable purpose (ie use by a charity otherwise than in the course or furtherance of a business). The College relied on the Court of Justice judgment in a similar case (EC Commission v Finland) where the court found that the provision of legal services under the Finnish legal aid scheme was not to be regarded as a business activity because the contributions made by 'customers' were either free or heavily discounted to take account of their particular social and economic means.

The Court of Appeal has dismissed the College's appeal.

### Court of Appeal judgment 1 May 2018

In a unanimous judgment (3-0), the Court of Appeal has dismissed the College's appeal from a decision of the Upper Tribunal. The College, an entity with charitable status, is a Further Education corporation. It provides education to students who, in the majority of cases either pay no fees due to their age or pay heavily subsidised fees due to their social / economic circumstances.

The College sought to have the construction of a new college building zero-rated for VAT purposes on the basis that it would be used for non-business purposes. The College argued that even though some students contributed to fees, its supply of education ought to be regarded as a non-business or non-economic activity. HMRC's view was that the payment of fees (albeit substantially discounted) constituted consideration for the supply of education which precluded the College from treating its activities as non-business.

For its part, the College relied on an earlier judgment of the Court of Justice in the case of EC Commission v Finland. That case determined that the supply of legal services by lawyers in Finland, which were paid for under the terms of the Finnish legal aid scheme, should be regarded as non-economic activities. The Court of Justice came to that determination on the grounds that, even though customers contributed something towards the legal fees, the amount contributed was determined by reference to their social and economic means. By analogy, Wakefield College considered that they were on all fours with the Finland case.

The Court of Appeal disagreed. It made a distinction between the term 'consideration' and the term 'remuneration' in the relevant provisions of the VAT Directive. Article 2 of the Directive confirms that, unless there is a relief available, VAT is due where there is a supply for consideration. On the other hand, when determining whether or not a person is engaged in an economic activity under Article 9 of the Directive, one looks to whether or not the supplies are being made for remuneration. In other words whether or not there is a supply for consideration within Article 2 and whether that supply constitutes 'economic activity' under Article 9 are separate questions and satisfaction of the test for whether there is a supply for consideration does not give rise to a presumption or general rule that the supply constitutes an economic activity.

On the facts and evidence of the Wakefield College case, the Court came to the view that the supply of courses to students paying subsidised fees was for remuneration and is, as such, an economic activity carried on by the College. As a result, the new building would not be used otherwise than in the course or furtherance of a business and could not be zero-rated.

**Comment – this case began its journey to the Court of Appeal back in 2009 with a hearing at the First-tier Tax Tribunal. That Tribunal allowed the College's appeal but this was overturned by the Upper Tribunal. The issue of whether an entity undertakes an economic activity is central to the operation of the VAT system. Although the outcome is one of defeat for the College (and those Colleges stood behind it), the decision provides some much needed clarity on the point and provides a detailed analysis of the current state of the law.**

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