LONDON TRIBUNAL CENTRE **LON/99/0749**

B E T W E E N:

WEST HERTS COLLEGE

Appellant

- and -

THE COMMISSIONERS OF CUSTOMS AND EXCISE

Respondents

Tribunal: Mr Angus Nicol (Chairman)
Mrs Caroline de Albuquerque

Mr A Young of Counsel, for the Appellant

Mr H McKay of Counsel, instructed by the Solicitor for Customs and Excise, for the Respondents

Sitting in public in London on 17 January 2000

Decision: 17 July 2000

DECISION

1. The Appellant, West Herts College, is a non-profit-making body which provides a wide range of full-time and part-time education and leisure courses, at Watford Campus. The Appellant is a partly exempt business. It is appealing against a decision of the Commissioners that the issue of free College prospectuses does not constitute a supply of goods under paragraph 5(1) of Schedule 4 to the Value Added Tax Act 1994.

2. Paragraph 5 of Schedule 4 provides, so far as is relevant to this appeal, as follows:

> "(1) Subject to paragraph (2) below, where goods forming part of the assets is of a business are transferred or disposed of by or under the directions of the person carrying on the business so as no longer to form part of those assets, whether or not for a consideration, that is a supply by him of goods.
>
> (2) Sub-paragraph (1) above does not apply where the transfer or disposal is -
>
>> (a) a gift of goods made in the course or furtherance of the business (otherwise than as one forming part of a series or succession of gifts made to the same person from time to time) where the cost to the donor is not more than £15;

(b) ...

…

(5) Neither sub-paragraph (1) nor sub-paragraph (4) above shall require anything which a person carrying on a business does otherwise than for a consideration in relation to any goods to be treated as a supply except in a case where that person is entitled under sections 25 and 26 to credit for the whole or any part of the VAT on the supply, acquisition or importation of those goods or of anything comprised in them.

(6) …"

The relevant provisions ofthe BC Sixth Directive are the following:

"Article 5

Supply of goods

1. 'Supply of goods' shall mean the transfer of the right to dispose of tangible property as owner.

…

6. The application by a taxable person of goods forming part of his business assets for his private use or that of his staff, or the disposal thereof free of charge or more generally their application for purposes other than those of his business, where the value added tax on the goods in question or the component parts thereof was wholly or partly deductible, shall be treated as supplies made for consideration. However, application for the giving of samples or the making of gifts of small value for the purposes of the taxable person's business shall not be so treated."

3. In November 1998 the Appellant's Director of Finance, Mrs Rena Prindiville, wrote to the Commissioners concerning proposed changes to the Appellant's partial exemption method. These included the treatment of the College prospectuses, which are produced and printed by the Appellant and issued free to students, prospective students, and other people. Previously the tax incurred in the production of these prospectuses had been treated as a general business expense and the Appellant had recovered tax in accordance with the agreed partial exemption calculation. It was the Appellant's contention that the issue of the prospectuses should be treated as free supplies and that the deemed value of those supplies should be included in the total taxable supplies for the purposes of the partial exemption calculation, any input tax incurred in the design and production of the prospectuses being attributable to a taxable supply and therefore reclaimable in full as input tax. In December 1998 Mr Llewellyn, a senior officer at the Watford VAT Office, replied, saying that he regarded the prospectus as a means of advertising rather than a business asset and that paragraph 5(1) of Schedule 4 was not appropriate.

4. That letter was passed to Mr Plumbley, of Deloitte & Touche, who referred to the decision in the appeal of The Post Office (1996) (Decision No.14075), and invited the Commissioners' comments. He also enclosed a schedule indicating amounts underclaimed in earlier accounting periods as a result of the treatment of the issue of the prospectuses, amounting in all to £22,864.08. There followed an exchange of correspondence, in the course

of which the Commissioners asked for and received a copy of a prospectus, and were informed that the prospectuses were not printed in the College, that the VAT incurred in the production of them related only to design services, and an analysis of production costs which showed that the cost of printing any single prospectus was less than £1. On 10 June 1999 M Llewellyn wrote to Deloitte & Touche dealing with all the information given to him. He said,

> "The college prospectuses are issued free of charge, just as the Post Office distributes the magazines free of charge to its employees. In the case of the West Herts College, however, I believe that paragraph 5(2) of Schedule 4 VATA 1994 does apply, and thereby nullifies the provisions of {paragraph 5(1)], for the following reasons:
>
> * Your analysis of brochure costs indicates that the cost to the college of producing a single copy of a prospectus is less than £15, and
>
> * I believe that potential students only require one copy of a prospectus in order to obtain the information they require as to the educational courses available at the College, and
>
> * The prospectus is given away in order to advertise and promote the activities of the College, and
>
> * The prospectus includes an enrolment form which is designed to be returned to the College and is used by the College for administration purposes.
>
> In conclusion, therefore, I consider that the issue, free of charge, of a college prospectus is not a supply of zero-rated goods and cannot be given a deemed value for inclusion in a partial exemption calculation.
>
> It follows also that the VAT incurred on design services does not relate directly to a zero-rated supply of goods; the design services are overhead costs to the College and it could be urged that they are directly related to the provision of education. I cannot, therefore, accept your voluntary disclosure for a refund of VAT totaling £22,864.08."

5. Mr Plumbley replied, on 16 August 1999, saying that the Appellant did not accept that paragraph 5(2) applied, since, as in the case of the Post Office, the College transfers its right of disposal of the prospectuses; gift treatment was, therefore, not appropriate. He continued,

> "Even if it was accepted that gift treatment is appropriate, the prospectuses are, as a matter of course, distributed to the same local households on a regular basis. Thus satisfying the `series of gifts to the same person' exclusion within paragraph 5(2)."

6. Mrs Prindiville gave evidence at the hearing. She told us that there is an external consultant who designs the prospectuses, and also works in the College. The prospectuses are printed externally. They are distributed to households, offices, libraries, schools, career centres, and community centres. A mailing list was maintained by the College. Households were selected in specific areas and the distribution was by a door-to-door drop, for which the College employed a company. Some distributions were done by sending the prospectuses to a distribution centre for insertion in newspapers. Between 50,000 and 60,000 were distributed at a time. The recipients of the prospectuses were free to do what they liked with them. Distribution took place in September, just before the annual enrolment, and again in January.

Some of the schools and career centres also received two distributions a year. The prospectuses gave information to the potential student and helped him to make the right choice. The distribution of prospectuses was of benefit to the College; if there were no distribution the College would not close, but its recruitment would probably be affected. This evidence was unchallenged, and we accepted it.

7. There was produced to us a copy of the prospectus for part-time courses for the year 2000. The introduction offers courses for many purposes, including literacy and numeracy, learning English as a second language, degree courses, courses for other types of qualification including professional qualifications apprenticeship courses, business courses. The subjects, of which there are more than fifty, include art and calligraphy, accountancy and book-keeping, catering, dancing, hairdressing, to information technology, languages, navigation, and many others. The prospectus is in colour and runs to forty pages. It includes information as to timing of courses, course fees and concessions, and two enrolment forms. On the back there is a sketch map showing where the College is. According to the schedule of production costs, this part-time course prospectus cost £40,099 and 180,000 were produced: a cost of 22p each.

8. Mr Young, who appeared for the Appellant, conceded that there was no entitlement to input tax where the prospectuses were distributed to prospective students, who received them as gifts made in the course or furtherance of the business. The other category of person to whom they were distributed were those who received them each year, and those were to households and offices, distribution with free advertising papers, libraries, and careers services. The same people received these every year, and this amounted to a series or succession of gifts to which the exception in paragraph 5(2) applies, and the Appellant is therefore entitled to deduct input tax. The prospectuses are tangible property, and when it issues them the Appellant transfers the right to dispose of them, and the supply therefore fails within Article 5.1 of the Sixth Directive. They also fall within Group 3 of Schedule 8 as brochures, and should properly be zero-rated.

9. Mr Young, contended that The Post Office decision gave an indication of the proper approach. In that case, the appellant had made voluntary disclosures relating to the advertising and production costs of three magazines which it published and distributed free to its employees and pensioners. One of these was the Royal Mail *Leisure* magazine, distributed periodically to present and some former employees. It contained a variety of articles on subjects normally considered to be related to leisure, such as holidays, fashion, do-it-yourself, and numerous advertisements. Another, entitled *Enterprise*, was subtitled “The business magazine For Royal Mail employees”. That is distributed periodically to managers of the Post Office. It contains articles devoted to the Post Office and its business. The third, *New Frontier*, is distributed only to employees of the RoMEC division of the Post Office, and contains articles related to the installation, maintenance, and development of information technology systems. The Commissioners accepted that the distribution of *Leisure* was a supply which fell within paragraph 5(1), because the magazines were for the personal use of the recipient and were no longer part of the business assets once given away. The other two were news magazines informing employees of developments and current thinking within the business of the Post Office. The Commissioners gave their view that these magazines remained assets of the business of the Post Office after distribution, “in the same sense as any other consumable overhead of the business such as stationery or pens”. They contended that these assets were consumed in the course of business, and that the input on production costs was residual input tax. There was, they contended, no entitlement to full deduction of input tax. The Commissioners contended at the hearing that in order to determine whether title to such magazine had been transferred to its recipient it was first necessary to decide whether the contents of the magazine were designed solely to further the interests of the business; if they were it could be inferred that title did not pass to the employee, and no supply had been made.

The Post Office contended that when an employee received his copy of a magazine it was on the basis that the Post Office was saying to him, “It is yours”. The chairman said that paragraph 5(1) must be read in conjunction with paragraph 1(1) of Schedule 4, which provides,

> “Any transfer of the whole property in goods is a supply of goods”.

That gave effect to Article 5(1) of the Sixth Directive (see paragraph 2 above). The chairman then referred to the decision of the European Court of Justice in Staatssecretaris van Financiën v. Shipping and Forwarding Enterprise Safe BV [1991] STC 627. The court, at page 638, construed Article 5(1) in the following terms:

> “7. It is clear from the wording of this provision that ‘supply of goods’ does not refer to the transfer of ownership in accordance with the procedures prescribed by the applicable national law but covers any transfer of tangible property by one party which empowers the other party actually to dispose of it as if he or she were the owner.”

At page 639, the court also held,

> “It is for the national court to determine in each individual case, on the basis of the facts of the case, whether there is a transfer of the right to dispose of the property as owner within the meaning of Article 5(1) of the Sixth Directive.”

The Tribunal found on the facts that the Post Office intended to transfer the property in each of the three magazines to the employees to whom they were distributed, and there had, therefore, been a supply of each magazine on its distribution.

10. My Young invited us to follow the decision in The Post Office, and find that there had been a transfer or disposal of business assets in the sense in which this was held in that case.

11. Mr McKay contended that the prospectuses were not transferred or disposed of in the sense required by paragraph 5(1) of Schedule 4. The prospectuses are, he submitted, consumed by the Appellant. It is crucial, he said, for the College to use the prospectuses to inform those people who might seek education exactly what it is that the College provides; it is a form of advertising; it is an integral part of providing the education to inform those who want it of its availability and scope. In that sense, the College is consuming the prospectuses; the College requires the prospectuses otherwise the student intake would be much smaller, and uses them. The case of The Post Office was different. In that case one of the magazines was issued for the purpose of entertainment, the other two in order to inform.

12. Mr McKay said that there is a major distinction between Article 5(6) and 5(1) of the Sixth Directive. In Article 5(6) there was a prerequisite that input tax must have been recovered in whole or in part. The thrust of paragraph 5(1) of schedule 4 was to charge tax; it is an anti-avoidance provision.. The Appellant's argument, Mr McKay said, stood that provision on its head.

13. We were referred on behalf of the Commissioners to the following other cases:

> de Jong v. Staatssecretaris van Financiën (Case C-20191)
> EC Commission v French Republic (Case C-68/92) [1997] STC 684
> EC Commission v Kingdom of Spain (Case C-73/92) [1997] STC 700
> EC Commission v Grand Duchy of Luxembourg (Case C-69/92) [1997] STC 712

Kuwait Petroleum (GB) Ltd v Customs and Excise Commissioners (Case C-48/97) [1999] STC 488 ECJ

14. Mr McKay said that paragraph 5(1) of Schedule 4 gives effect to Article 5(6) of the Sixth Directive, as explained by the court in Kuwait Petroleum: to ensure equal treatment as between a taxable person who applies goods for private purposes and a consumer who purchases goods of the same type. We were referred particularly to de Jong, cited in Kuwait Petroleum, in which the court said at paragraph 15,

> "It should be noted that the purpose of Article 5(6) of the Sixth Directive is to ensure equal treatment as between a taxable person who applies goods forming part of the assets of his business for private use and an ordinary consumer who buys goods of the same type. In pursuit of that objective, that provision prevents a taxable person who has been able to deduct VAT on the purchase of goods used for his business from escaping the payment of VAT when he transfers to business use those goods from his business for purely private purposes and from thereby enjoying advantages to which he is not entitled by comparison with an ordinary consumer who buys goods and pays VAT on them."

That was a case in which the taxpayer, a building contractor, owned land in his private capacity. He constructed two houses on that land, in the course of his business, sold one and kept the other for his own private purpose. It was held that only the house, and not the land, was to be regarded for the purposes of article 5(6) as having been applied for his private use. That case is concerned with the private use of business assets, and it was held on the facts that Article 5(6) did not apply to the land, because it had never been an asset of the taxpayer's business. In the present case, the prospectuses were at all times assets of the Appellant's business, and were disposed of free of charge. Moreover, it appears that the Appellant will, or would if he were successful in this appeal, be in a position to recover input tax in respect of the design fees. The facts of de Jong are very different from those in the present appeal, so much so that, factually, there does not seem to be any real analogy between them. If the decision is intended to persuade us that because the prospectuses are distributed for the purpose of informing prospective students of what the College has to offer, and in that sense may be said to be using them for its own purposes, that depends, in turn, upon the view that we take, on the evidence, of what that purpose really is, and the nature of the issue of the prospectuses (to use a neutral term) in the light of the legislation. However, it does not appear to us that the prospectuses are used for any private purpose. Paragraph 5(1) is not a paragraph dealing with a special case: it is a paragraph of the Schedule which determines what is, or is to be treated as, a supply of goods or services (see section 5(1) of the 1994 Act). It modifies section 5(2), which provides that "supply" includes all forms of supply, but not anything done otherwise than for a consideration, by including in "supply" a transfer or disposal of goods whether or not for a consideration.

15. The cases of The Republic of France, The Kingdom of Spain and The Grand Duchy of Luxembourg are all concerned with Article 9(2)(e) of the Sixth Directive, which is concerned with the place of supply of services, and in particular the nature of "advertising services". These three infraction cases were considered together by the ECJ. Mr McKay referred us to a passage from The Republic of France at page 698, paragraphs 16 to 20, in which the court expatiated on the definition and characteristics of advertising. In paragraph 16 the court said,

> "16. The concept of advertising necessarily entails the dissemination of a message intended to inform consumers of the existence and the qualities of a product of service, with a view to increasing sales. Although that message is

> usually spread, by means of spoken or printed words and/or pictures, by the press, radio, and/or television, this can also be done by the partial or exclusive use of other means."

Paragraph 17 explores the possibility of advertising services being carried out by an advertising agency, and the alternative that such services might be supplied by an undertaking which was not normally engaged in advertising. The judgment continues:

> "18. It is therefore sufficient that a promotional activity, such as the sale of goods at reduced prices, the handing out to consumers of goods sold to the person distributing them by an advertising agency, the supply of services at reduced prices of free of charge, or the organization of a cocktail party or banquet, involves the dissemination of a message intended to inform the public of the existence and the qualities of the product or service which is the subject matter of the activity, with a view to increasing the sales of that product or service, for the activity to be characterised as an advertising service within the meaning of Article 9(2)(e) of the Sixth Directive."

16. Mr McKay contended that the expression "advertising services" encompassed the giving away of goods free, and urged us to treat the dissemination of the prospectuses in the same way as the court treated advertising services. The question before the court in those three cases was whether the omission from the ambit of "advertising services" of certain promotional activities, such as sales by advertising businesses to customers of goods to be distributed free on publicity occasions, and the printing of promotional literature, was a breach by each of the governments concerned of its obligations under the Sixth Directive, so that the omitted activities were not is taxed, as they ought to have been in accordance with the applicable provisions, either in the supplier's country or in the country where they are physically carried out. It does not appear to us to follow that if it be the law that goods handed out free of charge, as in the case of the Appellant1s prospectus, fall within the exception in paragraph 5(2) of schedule 4 of the 1994 Act, that the United Kingdom would be in breach of her obligations under the Sixth Directive as France, Spain, and Luxembourg were all held to be. Mr McKay said that it would be odd if a European provision achieved the result for which the Appellant argues because of the United Kingdom's retention of the zero rate, that is, that no further tax is exigible but a greater sum of input tax would be recoverable. If there were no zero rate, he continued, the Appellant would be obliged to pay a positive sum of output tax, as would be the case in other Member States. But the fact is that there is a zero rate. Moreover, the zero rate is a rate of tax; it is not an exemption. Still less is there a failure to make such a supply taxable, as was held by the ECJ in the three infraction cases referred to above.

17. It does not appear to us (as, indeed, Mr Young contended) that the prospectuses are advertising material in the same way as what was contemplated in Article 9(2). No definition of advertising has been offered in this appeal, probably because everyone knows what advertising is. It seems to us that most advertising, of the kinds discussed in the three ECJ cases mentioned above, is carried out for the commercial purpose of increasing trade, by informing the public of the availability and alleged quality of the goods or services advertised. Quite a lot of such advertising has little to do with reality, and vast sums are spent upon producing something which will catch the public eye and will tempt members of the public, perhaps for reasons unconnected with the product or service, to spend money on it, which possibly the member of the public would otherwise not have spent. Much advertising is of little, if any, practical use, in that it merely extols the alleged virtues of the product advertised. The Appellant's prospectuses are and are intended to be of practical use to the recipient, because of the considerable deal of detailed, and essential, information in them. Again, advertising is often a means of implying that the goods advertised are superior to those of another producer of similar goods, unlike the present case. It seems to us that, strictly, any

dissemination of information may amount in a way to advertising, though many forms of this would not normally be called "advertising". In our view, on the evidence in this appeal, the prospectuses, though therefore strictly advertising, are not advertising for a commercial purpose, but are for the purpose of informing those who are thought to wish for such information, of the availability and scope of educational courses, provided by a non-profit-making organization which is an associate of a university.

18. Mr McKay also contended that there is a distinction between the issue of the prospectuses to a distributor, such as a newspaper, and an issue direct to the person for whom it is intended, in that the newspaper has not the right to deal with or dispose of the prospectus as owner; therefore, Mr McKay contends, the former issue, by delivery to a distribution center for inclusion with newspapers, is not within paragraph 5(1). We do not accept that such a distinction exists. The delivery to a distribution center or to a newspaper is not, in our view, a distribution by the distribution center or by the newspaper is the actual issue of the prospectus: *qui facit per alium facit per se*. In the same way, if delivery were effected by post, it would not be an issue of the prospectuses to the Post Office. The door-to-door drops were actually carried out by the employees of a company to whom this task was entrusted. Again, there is no issue of the prospectuses by handing them over to the person who actually goes from door to door: it is he or she who physically issues the prospectuses on behalf of the Appellant. In any event, paragraph 5(1) provides for the transfer or disposal of the goods "by or under the directions of the person carrying on the business", which is quite wide enough to cover the distribution by a newspaper or by another company as agent.

19. Mr McKay also contended that a delivery to the same person once a year is not frequent enough for that to come within the expression "series or succession" in paragraph 5(2). There is no indication anywhere in the Schedule, nor were we directed to any indication elsewhere, of what that expression means, or how frequently a gift must be made to fall within it. That being so, it seems to us that the proper approach is to give the words in that expression their ordinary meaning. The expression involves repetition and a degree of regularity. By itself it does not imply any particular frequency. In our judgment, repeated issues of the prospectuses to the same people once a year would be a succession, and probably a series. We bear in mind also that the unchallenged evidence was that to some recipients there was more than one issue a year. We are satisfied, therefore, that the issues of the prospectuses on each delivery formed part of a series or succession within paragraph 5(2).

20. In our view, the evidence shows clearly that the prospectuses were part of the assets of the Appellant's business. Those assets were transferred or disposed of by or under the direction of the Appellant. The question then arises, whether the prospectuses were disposed of to the recipients in such a way that the recipients were empowered to dispose of them as owner (Staatssecretaris van Financiën v. Shipping and Forwarding Enterprise Safe BV (see paragraph 9 above). In our view they were. It was not suggested in evidence that they remained the property of the Appellant at all times. No part of the prospectus was returned to the Appellant, except the enrolment form by an intending student. In our view, the enrolment form was not strictly part of the prospectus, except in so far as it was physically joined to (with the intention of being separated from) the prospectus. When a recipient of a prospectus received it, in a newspaper, from a school, in a library, or wherever, there was no indication that the prospectus was not thereafter the property of the recipient, to do with as he or she would. It would be ludicrous to suppose that if, as must have happened frequently, the dropping of the prospectus into a waste-paper basket were technically theft or the tort of conversion. We have no hesitation in concluding from the facts in this case that the prospectuses were intended by the Appellant to be transferred to the intended recipient to be put to such use as he or she might wish. As the Post Office contended, when the magazine was handed to the employee it was as if the Post Office was saying, "It is yours". So here. It is also the fact that in the letter from Deloitte & Touche dated 16 August 1999 to Mr Llewellyn,

Mr Plumbley stated, and it has not been challenged in evidence, that “as in the Post Office case, the College transfers its right of disposal to the prospectuses.” We accept that as being the case in this appeal. We therefore apply paragraph 1(1) of Schedule 4: Any transfer of the whole property in goods is a supply of goods”.

21. It follows that, in our judgment, the issue of the prospectuses falls within paragraph 5(1) of Schedule 4. In our judgment it also fails within paragraph 5(2), since, being issued free of charge it amounts to a gift, and the cost of each is considerably less than £15. However, it is saved from exclusion from paragraph 5(1) by the exception in paragraph 5(2), as being part of a series or succession of gifts made to the same person from time to time. Since it appeared from the evidence that VAT is charged in respect of the design services which go towards the production of the prospectuses, it appears to us that section 5(5) also applies in this case.

22. For the above reasons, this appeal is allowed. At the hearing the Appellant applied for costs if successful. Accordingly we direct that the Commissioners should pay the costs of the Appellant. In case any disagreement should arise as to costs, we direct that both parties shall be at liberty to apply. Any such application should be made not later than 28 days after the date of release of this decision.