



TC04130

Appeal number: TC/2013/05011

*VAT – exemption for supply of private tuition – Item 2, Group 6 of Sch 9
VATA – Principal VAT Directive, art 132(1)(j) – whether teaching of pilates
is an exempt supply – meaning of “school or university education” –
meaning of “subject ordinarily taught in school or university”*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

CHRISTINE JOY HOCKING

Appellant

- and -

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

**TRIBUNAL: JUDGE ROGER BERNER
 MR NIGEL COLLARD**

Sitting in public at 45 Bedford Square, London WC1 on 1 October 2014

**Glyn Edwards CTA, Senior VAT Consultant, CCH Fee Protection, for the
Appellant**

Philip Shepherd, HMRC Appeals and Reviews, for the Respondents

DECISION

1. Miss Hocking teaches pilates. She says that the supplies she makes in that respect should not be subject to VAT, but should be exempt, and that in consequence she should be repaid VAT that she has wrongly accounted for and should not be liable to be compulsorily registered for VAT.

2. The dispute is whether the supplies made by Miss Hocking fall within the exemption from VAT for private tuition. That exemption is provided by article 132(1)(j) of Council Directive 2006/112/EC of 28 November 2006 (“the Principal VAT Directive”), as implemented into UK law by Item 2, Group 6 of Schedule 9 to the Value Added Tax Act 1994 (“VATA”). Those provisions are as follows:

Principal VAT Directive

3. Article 132(1)(j):

“Tuition given privately by teachers and covering school or university education;”

4. The context of the exemption in paragraph (j) is that of the exemption, in Article 132(1)(i), for the provision of education by bodies governed by public law and certain other bodies:

“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;”

VATA

5. Item 2, Group 6 of Sch 9 is:

“The supply of private tuition, in a subject ordinarily taught in a school or university, by an individual teacher acting independently of an employer.”

6. Item 1 provides for an exemption for the provision, by an “eligible body” of education or vocational training. Item 3 exempts the provision of certain examination services, including those supplied by or to an eligible body.

7. Note (1) of Group 6 provides a detailed definition of “eligible body”, but there is no definition of “school or university” as such. The definition of “eligible body”, so far as it relates to schools, includes:

“(a) a school within the meaning of The Education Act 1996, the Education (Scotland) Act 1980, the Education and Libraries (Northern

Ireland) Order 1986 or the Education Reform (Northern Ireland) Order 1989, which is –

- 5 (i) provisionally or finally registered or deemed to be registered as a school within the meaning of the aforesaid legislation in a register of independent schools; or
- (ii) a school in respect of which grants are made by the Secretary of State to the proprietor or managers; or
- 10 (iii) a community, foundation or voluntary school within the meaning of the School Standards and Framework Act 1998, a special school within the meaning of section 337 of the Education Act 1996, or a maintained school within the meaning of the Education and Libraries (Northern Ireland) Order 1986; or
- 15 (iv) a public school within the meaning of section 135(1) of the Education (Scotland) Act 1980; or
- ...
- (viii) a grant-maintained integrated school within the meaning of Article 65 of the Education Reform (Northern Ireland) Order 1989;”

20 **The facts**

8. We had a witness statement from Miss Hocking, and she gave oral evidence. We also had a witness statement from Ms Stephanie Affleck, but she did not appear to give oral evidence. In the circumstances, and because he was unable to cross-examine Ms Affleck, Mr Shepherd objected to her statement being received in evidence.

25

9. We decided that we would consider the extent, if at all, we would place any weight on Ms Affleck’s statement after we had heard the other evidence and the respective submissions of the parties. In the event, no particular reliance was placed by Mr Edwards on Ms Affleck’s evidence, and having read it we consider that it adds little to the evidence of Miss Hocking herself and the documentary evidence before us. We have therefore placed no weight on the witness statement of Ms Affleck.

30

10. From the evidence before us, we make the following findings of fact.

11. After obtaining a degree in sociology, Miss Hocking began her working life as a dancer with the Royal Opera House, Sadler’s Wells and Kent Opera, amongst others. It was after retiring from dancing in 1987 that Miss Hocking launched her business, Pilates Body Awareness. At that time it was the first school teaching matwork pilates.

35

12. Miss Hocking had been introduced to pilates in 1979 by the UK pioneer, Alan Herdman, who had studied the technique in America and who had opened the first UK studio at the London School of Contemporary Dance in 1971. The technique had been developed by a German national, the eponymous Joseph Pilates, during his

40

internment in England during the First World War. Following emigration to the US, he had set up his first physical fitness studio in New York.

13. Miss Hocking has described pilates in her published pocket book “Pilates Based Body Awareness: Preparing for Class and the Warm-up” in the following terms:

5 “It is an exercise system or more accurately a movement system. Its
 objective is to build a lean, lithe and optimally functional body. The
 characteristics of the technique, laid down decades ago and still taught
 today, are quality, economy and fluidity of movement, harmony of
 breath, energy and movement, and the integration of mind and body.
10 The aim is to put people in touch with their whole integrated being and
 to bring mind and body together into a single dynamic and well-
 functioning entity. More simply, the aim is fitness and health.”

14. Miss Hocking’s evidence was that, unlike traditional sports, such as tennis,
15 which develop concentration and physical skills such as hand-eye coordination and
 agility, pilates is more demanding in that it demands an intellectual understanding of
 the living, moving body. In terms of physical conditioning, pilates is a corrective
 exercise, differentiating it from dance, yoga and other forms of “keep fit”. Applying
 pilates requires a comprehensive understanding of the mechanics of the body. This
 understanding means that pilates offers greater educational value than traditional
20 sports; it helps people to avoid musculoskeletal diseases and injuries and has a
 positive influence on other systems of the body, namely the endocrine, circulatory,
 digestive, reproductive, lymphatic and respiratory systems.

15. As well as the physical training, Miss Hocking said that the teaching of pilates
25 would include teaching of the human skeleton, bones and joints, and the muscles,
 their classification and origin. There would be discussion of skeletal variation and the
 strengths and weaknesses of different types of physique, and insights into the history,
 background, geographic and cultural context of the Pilates’ method.

16. Miss Hocking has established her own syllabus, which incorporates five levels
30 of study, set by her and not by any independent body. Level 1 is for beginners with
 no previous knowledge of pilates. Level 2 is described as elementary, level 3 as
 intermediate and level 4 as advanced. At those levels students develop their
 techniques until they are able to reach level 5 – super advanced – which incorporates
 the original 34 matwork exercises from the classical sequence developed and
 choreographed by Joseph Pilates in New York in around 1950.

35 17. We were shown a copy of the syllabus, dating from May 2006, and prepared by
 one Carolyn Skan in association with Miss Hocking. The syllabus contains exercises
 grouped by reference to particular areas or muscle groups, and graduated according to
 each level. The syllabus describes the exercises by name or description, with more
 detailed cross references and notes, again in relation to the physical techniques. Some
40 exercises are also cross-referenced to teacher’s notes: these notes include both
 instructions for particular exercises and, although to a lesser extent, historical and
 anatomical explanations.

18. Miss Hocking's students range from their mid-20s to their mid-60s. She has also taught at two universities and at the Southbank American International School. For six years between 1988 and 1994, Miss Hocking taught pilates as a module of the BA Dance degree at the University of Surrey. This had involved 2 hours of classwork per week for one term a year. Briefly, she taught pilates for the BA Dance degree at Roehampton University in the late 1980s. At the Southbank American International School Miss Hocking taught 14 to 16 year-olds for 3 hours a week for two terms; this was principally to drama students preparing for an annual theatre festival run by the International Schools Theatre Association.

19. Miss Hocking confirmed that in these ventures she had employed tailored versions of her syllabus and structure. Thus, in relation to the drama group, exercise had been selected from a menu with a view to the drama objectives of the participants and their particular well-being. The aim had been to create a group functioning at its best, not emotional or tense, irritable, stiff or tired, and without any block to their creativity.

20. Although Miss Hocking described having taught pilates to teenagers as part of their warm-up for school drama rehearsals, she said that she had not taught pilates to students in secondary schools. The evidence in that connection was provided in documentary form.

21. The first set of documents comprised downloads from the websites of certain schools, as follows:

Sacred Heart of Mary Girls' School

22. The curriculum for Key Stage 4 pupils is described as follows:

“At KS4 pupils have 2 hours and 40 minutes per fortnight of Physical Education. In their ‘double’ 1 hour and 50 minute lesson they participate in Games, Racquets and Aesthetic activities. They are also given the opportunity to opt for the Sports Leaders and Dance Leaders course. In their 50 minute lesson all pupils take part in a compulsory Health and Fitness course, which comprises of activities such as aerobics, circuits, resistance training and pilates etc.”

Archbishop Sancroft Church of England High School

23. The GCSE in Physical Education is described in general terms in the following way:

“The GCSE in Physical Education requires students to develop their knowledge and understanding of physical education and physical activity, in relation to balanced healthy lifestyles, including:

- how, and why, people take part in physical activity
- exercise and fitness
- personal health and wellbeing

Students will also develop their knowledge in relation to performance in physical activity.

5 In addition, the Edexcel GCSE in Physical Education requires students to develop their knowledge and understanding of how a healthy, active lifestyle contributes to the growth and development of body systems, and structures (including the cardiovascular, muscular, respiratory and skeletal systems), as well as general wellbeing.”

24. In the section, “Performance in Physical Education”, students choose four sports from at least two sections or groups. One of the groups, Group F, is aimed at exercising safely and effectively to improve health and wellbeing (for example in fitness and health activities), and includes a number of activities from which students can elect: aerobics, body pump, circuit training, continuous training, interval training, pilates, weight training and yoga.

George Heriot’s School Edinburgh

15 25. The curriculum states:

“We run a vastly extensive P.E. and Games Curriculum covering over 30 different activities. These range from Pilates, Zumba, Boxersize to the more traditional games or (sic) Rugby, Hockey and Basketball.”

Haberdasher’s Aske’s School for Girls

20 26. The description of the Physical Education department includes:

“In the Upper School girls are able to choose from a wider variety of activities which ... also includes basketball, aerobics, pilates, golf, self defence, hockey, football, fitness, tag rugby, cricket and skiing.”

Formby High School, Liverpool

25 27. In the Physical Education section, it is stated:

30 “In Years 7 – 9 students follow the National Curriculum (KS3) which includes gymnastics, dance, athletics and games including basketball, badminton, hockey, netball, football, cricket, rounders, tennis and volleyball. As students move up the school, further activities are introduced such as aerobics, table tennis, yoga and pilates.”

Winterhill School, Rotherham

28. In the description of the physical education curriculum for Years 10 and 11, the following is included:

35 “CORE PE:
Students follow a structured timetable which covers many of the practical elements from KS3. Also, included in the curriculum content are activities such as: BMX, Table Tennis, Fitness Studio, Pilates and Yoga which gives an added dynamic edge to the curriculum ...

Students have 2 hours of Physical education a week and follow the same activity for a 4 / 5 week period.”

Inspection reports

29. We were referred to two inspection reports, one dated February 2012 from Estyn, HM Inspectorate for Education and Training in Wales, and the other from Ofsted, The Office for Standards in Education, Children’s Services and Skills, published in April 2009 in relation to physical education in schools in 2005 to 2008.

30. The Estyn report contained the following, at para 82:

“Generally, at key stage 3, schools allocate a larger proportion of time to competitive activities than to other areas of activity. This is particularly true for boys. However, most schools are increasing the emphasis on creative and health, fitness and wellbeing activities as well as adventurous activities. In many schools, modifications to the curriculum have helped engage girls more successfully. This has been achieved through greater emphasis on creative aspects and health, fitness and wellbeing activities that include activities such as aerobics, pilates, and street dancing.”

31. The report goes on, at para 87, to identify that most schools offer pupils a wide range of “extra-curricular activities”. It is in this context noted once more that certain activities, including pilates, have had a positive impact on girls’ participation levels.

32. The Ofsted report followed a three-year evaluation of physical education in 99 primary and 84 secondary schools in England. In its discussion of the curriculum in relation to secondary schools, the report included the following, at para 111:

“The vast majority of the schools visited provided a good range of enrichment opportunities, encouraging wider participation. This was enhanced further by the PESSCL strategy and the introduction of more non-traditional activities. These included sports tours, skiing, Pilates, boxer-cise, golf, sailing and horse riding. ‘Street dance’ in one school proved attractive to a group of otherwise disaffected students and resulted in better attendance. The rich variety of extra-curricular programmes enabled most students to discover something they liked and wanted to carry on with into adulthood.”

Other evidence

33. We were taken to the non-statutory guidance in relation to key stage 4 in physical education published by the Council for the Curriculum, Examinations and Assessment in Northern Ireland. In the chapter *Learning and Teaching in Physical Education*, a table sets out what are described as appropriate learning experiences, and poses a number of questions designed to test the extent to which those are being achieved. Against the requirement that learning experiences should be explicitly relevant to real-life contexts, one of the questions addresses the extent to which the physical education programme “incorporate[s] new contemporary activities (e.g. pilates, aqua-aerobics, line-dancing, kabadi) as appropriate”.

34. A freedom of information request made in July 2010 to Dundee City Council was met with a response in August of that year which included confirmation, which appears (although we regard it as unlikely to be so confined) to relate to Dundee's primary schools, that many schools had specialised programmes of dance, yoga, boxercise, Pilates, body jam, body pump and martial arts delivered by external agencies.

35. We were shown the AQA (Assessment and Qualifications Alliance) GCSE specifications for courses in physical education from June 2014. The content is expressed as having been designed to enable students to “enjoy and understand the benefits of living a healthy and active lifestyle; to provide a route to further study in Further Education awards, such as A levels and to Higher Education in PE as well as to related career opportunities.”

36. All the courses specify units comprising a written paper on knowledge and understanding for the active participant, and a controlled assessment. According to the specification, students should understand that regular physical activity that is fit for purpose, safe and enjoyable has the greatest impact on physical, mental and social well-being. This can be achieved through planning a targeted selection from a range of physical activities as part of a balanced healthy lifestyle. Students should understand the reasons for and benefits of choosing different types of activities. To develop the skill of exercising safely and effectively to improve health and well-being, the type of activity specified is fitness and health activities, amongst which is included pilates, alongside a number of other activities such as aerobics, tai chi and yoga. The controlled assessment in respect of pilates is only as a player/performer, and not (in contrast to other activities in other groups, such as games activities) as leader or coach.

37. The Department for Education paper, *Evidence on physical education and sport in schools*, published in June 2013, reported on domestic and international evidence on physical education and sport in primary and secondary schools. It includes findings from the Department of Culture, Media and Sport's *Taking Part Survey* (DCMS, 2013).

38. Although the report refers to a number of sports and related activities by name, it does not refer directly to pilates. Mr Shepherd drew our attention to a table (derived from a survey by S Quick, A Simon and A Thornton in 2010, PE and sport survey 2009/10) in which individual “sports” were listed alongside the percentage of schools offering participation. The table showed participations from 98% (football) to 2% (Kabbadi), but did not refer to pilates.

39. We do not consider that we can conclude from the DoE's paper that pilates is offered in fewer than 2% of schools. It is more likely, and we find, that activities such as pilates are grouped together under fitness (71%), which means that we are unable to make a finding as to the percentage coverage. Other tables, derived from the *Taking Part Survey*, included percentages for participation in aerobics and keep fit, which in the case of 11 to 15 year olds over a four-week period in 2011-12 was

11.8%. Again, no finding can be made from this as to the level of participation in pilates.

40. In correspondence between Miss Hocking’s advisers and HMRC, reference was made to pilates as a necessary element in BA Dance courses conducted at conservatoires, such as the Laban Centre, the London Contemporary Dance School and the Rambert School of Contemporary Dance. It was also said that the National Ballet School and the English National Ballet offer pilates as part of their training. However, we were provided with no detail of the activities involved.

Discussion

41. As the UK legislation is intended to implement the Principal VAT Directive (and its predecessor, the Sixth VAT Directive), we consider first the European jurisprudence.

42. In *Haderer v Finanzamp Wilmersdorf* (Case C-445/05) [2008] STC 2171, a reference was made to the ECJ to determine whether, in order for the exemption to apply, the tuition services were required to be provided directly to the students as recipients of the services, or whether it was sufficient for the services to be carried out in a school or university.

43. That question is not in issue in this case. It is clear, and accepted, that Miss Hocking satisfies the requirement, in Art 123(1)(j), imposed by the term “given privately by teachers”, and the corresponding requirement, in the VATA, of being “an individual teacher acting independently of an employer”, that the supplies must be made in an independent capacity. Nonetheless, *Haderer* is instructive for the guidance it affords on the Community concept of “school or university education”.

44. In its judgment, the ECJ referred, at [18], to the well-known principles of construction of exemptions from VAT. The terms used to specify those exemptions are to be interpreted strictly, because they constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person. Nevertheless, the interpretation of those terms must be consistent with the objectives pursued by those exemptions and comply with the requirements of the principle of fiscal neutrality inherent in the common system of VAT. Thus, the requirement of strict interpretation does not mean that the terms used to specify the exemptions should be construed in such a way as to deprive the exemptions of their intended effect. Those principles apply equally to the specific conditions laid down for the exemptions to apply.

45. The ECJ went on, at [22], to observe that, under the Sixth Directive (and the same holds for the Principal VAT Directive) there was no definition of the term “school or university education” for the purposes of the exemption. It did so because, although the referring court had not expressed any doubt whether the ceramics and pottery courses provided by Mr Haderer fell within that expression, the German Finanzamt had submitted that those courses did not involve the same demands as

those of courses normally given in schools or universities, but were intended purely for leisure purposes.

46. The ECJ said, at [24] – [26]:

5 “24. In that regard, although the terms used to specify the exemption envisaged under art 13A(1)(j) of the Sixth Directive are, admittedly, to be interpreted strictly, a particularly narrow interpretation of 'school or university education' would risk creating divergences in the application of the VAT system from one member state to another, as the member states' respective education systems are organised according to
10 different rules. Such divergences would be incompatible with the requirements of the case law referred to in para 17 of this judgment.

15 25. Furthermore, in so far as the Finanzamt's arguments on that point are based on a particular interpretation of 'school' or 'university' in terms of the German education system, it should be noted that whether a specific transaction is subject to or exempt from VAT cannot depend on its classification in national law (see *Kingscrest Associates and Montecello* (para 25)).

20 26. While it is unnecessary to produce a precise definition in this judgment of the Community concept of 'school or university education' for the purposes of the VAT system, it is sufficient, in this case, to observe that that concept is not limited only 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
25 universities in order to develop pupils' or students' knowledge and skills, provided that those activities are not purely recreational.”

30 47. Mr Edwards placed emphasis on the way in which the ECJ had expressed its proviso, namely that to be taken outside the expression “school or university education”, subjects otherwise qualifying as being taught in schools or universities had to be *purely* recreational. He contrasted that with the teaching of pilates in schools which, on the evidence, he submitted followed structured courses and included teaching to examination standard as part of a physical education curriculum.

35 48. In drawing the distinction in the way that it did, the ECJ was intending the exception to the rule that subjects taught in schools or universities should be within the concept of “school or university” education to be a narrow one. The concept itself is construed broadly. In doing so, however, the ECJ did not draw the line quite as sharply as the Advocate-General (Sharpston) had done in her opinion (delivered jointly in *Haderer and Stichting Regionaal Opleidingen Centrum Noord-Kennerland/West Friesland (Horizon College) v Staatssecretaris van Financiën* (Case
40 C-434/05) [2008] STC 2145). There the Advocate-General, having, at [88], described instruction in making ceramic and pottery articles as “not perhaps the most strictly academic activity”, nonetheless expressed the view that such training provides development in manual and artistic skills of a kind which is commonly pursued in school education. At [89], the Advocate-General expressed her view of the dividing
45 line in the following terms:

5 “There must of course be a defining line between exempt tuition and purely recreational activities of no educational value, but any subject or activity in which instruction is commonly given in schools or universities must in my view fall within the scope of the exemption, regardless of whether it follows a strictly defined programme or curriculum.”

10 49. The ECJ made clear that the concept of school or university education was not limited to courses leading to examinations. Furthermore, it did not limit the exemption to defined programmes. We do not therefore accept Mr Shepherd’s submission that to be educational the activities must be undertaken within a structured course.

15 50. On the other hand, the ECJ did not adopt the same distinction between the presence and absence of instruction as had the Advocate General. The ECJ acknowledged that an activity which was taught could nonetheless be taken outside the concept of “school or university education” if it was purely recreational.

20 51. An activity taking place at a school or university in respect of which there is no element of teaching cannot fall within the concept. On the other hand, the mere presence of an element of teaching, however minimal, cannot shift an activity, which is otherwise purely recreational, from one side of the line to the other. It is a question of degree. Within schools (but perhaps not universities) any activity, even one that has no educational content or value as such, will commonly be accompanied by some element of instruction. The nature of such instruction is a relevant factor, but the mere fact of it cannot be decisive. The question is whether, having regard to the nature of the instruction, and the educational content or value of the activities, those activities as performed in the school or university are purely recreational, so as to fall outside the concept of school or university education.

30 52. The Court’s construction of that concept in *Haderer* was followed by the ECJ in *Ingenieurbüro Eulitz GbR Thomas und Marion Eulitz v Finanzamt Dresden I* (Case C-473/08) [2010] All ER (D) 79 (Feb). For present purposes, *Eulitz* is relevant in its determination, at [38], that activities other than teaching in the strict sense can constitute tuition with what is now Article 132(1)(j) provided those activities are carried out, essentially, in the context of the transfer of knowledge and skills between a teacher and pupils or students and cover school or university education.

35 53. It is not necessary that the tuition should mirror the way in which the subject or activity is taught in schools or university, or for it to be analogous to what is there taught. Mr Shepherd accepted that the two need not be identical. But he argued that the purpose of the exemption was to provide a level playing field between education provided at schools and universities and that provided privately by mirroring mainstream education, and that consequently the tuition had to be of a comparable standard, or of a similar nature and level. We do not agree. To impose such a test would, in our view, be to place a gloss on the legal test which is unwarranted. It would introduce a restrictive interpretation. The requirement is, first, that the subject or activity should be one that is commonly taught in schools or universities, and not one that is purely recreational; it must be part of school or university education.

Secondly, the supply must be one of tuition in that subject or activity, in the sense of a transfer of knowledge or skills. The tuition must be educational in character but, beyond that, there is no test of comparability.

54. As is commonly the case, the UK's domestic provisions are not expressed in identical terms to those of the Directive. The rule of interpretation of domestic legislation in this context is that the court or tribunal ought, so far as possible, to interpret it in a manner that is consistent with the Directive. That is the principle, known as the *Marleasing* principle, derived from *Marleasing SA v La Comercial Internacional de Alimentacion SA* (Case C-106/89) [1990] ECR I-4135. There has hitherto been little debate on whether Item 2, Group 6 of Sch 9 VATA requires interpretation according to this principle, it having been accepted in previous cases that the UK legislation is "congruent with the European legislation" (see, for example, *Cheruvier t/a Fleur Estelle Belly Dance School v Revenue and Customs Commissioners* [2014] UKFTT 7 (TC), at [15]). Mr Edwards, however, argued that, to the extent a narrow interpretation was sought to be put on the phrase, in Item 2, Group 6 of Sch 9, "ordinarily taught", this should be construed in accordance with the guidance in *Haderer*.

55. We agree with Mr Edwards. It is evident that the intended scope of the exemption does not depend on a particular activity being taught universally in schools or universities, or, contrary to Mr Shepherd's submissions for HMRC, regularly so taught. However, the mere fact that an activity might be included, exceptionally, as part of a school curriculum would not be sufficient to enable it to be regarded as part of "school or university education". We consider the most helpful test is that referred to by the Advocate General in *Haderer*, namely that the activity must be one in which "instruction is *commonly* given" (our emphasis). It is a matter of judgment whether that test is satisfied in any particular case, but we find it helpful to approach the question from the opposite end, namely to ask whether the activity is only taught uncommonly.

56. As a matter of ordinary language, it is clear that "ordinarily" within Item 2 can be construed so as to mean "commonly". We consider that, to the extent that the ordinary language permits any other construction, it should be limited to the construction consistent with *Haderer*. The expression "ordinarily taught" means commonly, or not uncommonly, taught.

57. We were taken to a number of decisions of the VAT Tribunal and of this Tribunal, where consideration has been given to the question of application of the exemption in a number of cases. None of those are binding on us, and they are of limited value to the extent that they depend on their own particular facts and do not provide any insight into the relevant principles, as they have been explained by the ECJ. In particular, we do not consider any assistance can be derived from such decisions that pre-date *Haderer*. We need therefore refer to only one tribunal decision.

58. We have referred earlier to the case of *Cheruvier*. The activity at issue in that case was belly dancing. The issue was whether belly dancing was a subject ordinarily

taught in a school or university. In its discussion the tribunal referred, at [47], to what it considered was the scheme and purpose of the legislation, namely:

5 “... supplies made in the course of the provision of education by an educational institution are exempt from VAT, and, for consistency and to avoid distortion in the market, supplies by an individual giving private tuition are likewise exempt *if what is taught accords with what is taught in an educational institution.*” (Our emphasis)

10 That, with respect, does not accord with the view we have expressed as to the scope of the exemption in Item 2, Group 6. It does not, in our view, accord with the approach adopted by the ECJ in *Eulitz*; the exemption for private tuition is not specifically directed at school or university education, but at a related concept of “tuition ... covering” such education (*Eulitz*, at [32]). In the case of Mr Eulitz, the courses were of a post-graduate nature, for students continuing their professional training, so could not mirror the treatment of the subject in question (training in fire prevention) at a school or university. The ECJ held, at [35], that no distinction should be drawn between the two.

15 59. The tribunal in *Cheruvier* found, first, that Ms Cheruvier was engaged in providing recreation, rather than education. It reasoned, at [50], that most forms of dance, including belly dancing, were “inherently recreational”, that is for the enjoyment and participation of the participants (including their satisfaction through performance) rather than for their intellectual development in terms of expanding or deepening their knowledge. However, at the same time, the tribunal recognised that a form of dance might move from the recreational to the educational where it was studied in certain contexts. In the case of Ms Cheruvier, the courses were found to be practical in nature, in the sense of teaching individuals to belly dance, and not studies of belly dance in an educational sense.

20 60. We do not consider it helpful to seek to label activities as inherently recreational on the one hand or inherently educational on the other. What matters is the nature of the activity in the context of the teaching of it in schools or universities, and by way of private tuition. Not only must the private tuition be educational in character, and not purely recreational; so too must the teaching of the subject or activity within the schools or universities.

25 61. Secondly, in *Cheruvier*, the tribunal found that belly dancing was not a subject ordinarily taught in schools or universities. The evidence was that dance was taught in schools and universities, but that Ms Cheruvier did not teach that subject; nor was belly dancing a component part of any dance course taught at a school or university. Irrespective of the nature of Ms Cheruvier’s own supplies, therefore, those supplies were not within the exemption.

30 62. Turning to the facts of this case, we are satisfied that, although the practice of pilates may, depending on the circumstances, be purely recreational, the teaching of it in the schools and universities for which we have received evidence, and by Miss Hocking in her private capacity, is educational in character. In the case of certain schools, the evidence is of pilates forming part of the study, including to examination

level, of physical education. We also accept that the teaching of pilates as a module of a university degree course, would be regarded on the educational side of the line, and not purely recreational. In relation to Miss Hocking's own tuition, and the courses she offers, we take the same view. We accept that this represents more than the mere facilitation of a recreational activity, and that the transfer of knowledge and skills is of an educational nature. We do not consider that there is any principled distinction to be drawn between education in a practical discipline and education at an intellectual level. Both are equally valid elements of an education.

63. The evidence, however, of the teaching of pilates in both schools and universities is limited to a few examples only. It is not such as to persuade us that such teaching can be regarded as "commonly" or "ordinarily" carried on. Putting the test in a negative way, the evidence demonstrates that, to the extent that pilates is taught in schools or in universities, as part of a syllabus of physical education or dance, such teaching is uncommon.

64. In reaching our conclusion, we accept Mr Edwards' submission that the meaning to be attached to "school or university" in Item 2, Group 6 is not determined by reference to the definition of "eligible body" in Note (1) of Group 6. That is a definition of a specific term, and it cannot carry across to the more general description of school or university. It is made clear in *Haderer* that the exemption cannot depend on a purely domestic classification. Nonetheless, having regard to all the examples of the provision of the teaching of pilates within the various educational establishments of which we received evidence, our conclusion is that such teaching is not commonly or ordinarily provided in schools or universities.

65. Accordingly, although we find that Miss Hocking's supplies of tuition are educational in nature, they do not in our judgment at the present time cover school or university education, and so cannot fall within the exemption at Item 2, Group 6 of Sch 9 VATA.

66. We are not dissuaded from this conclusion by arguments based on the principle of legal certainty. That is, of course, a fundamental principle which requires that rules imposing charges on the taxpayer must be clear and precise so that he may know without ambiguity what are his rights and obligations and may take steps accordingly (see *Administration des Douanes v Société Anonyme Gondrand Frères and another* (Case 169/80) [1981] ECR 1931). Mr Edwards argued that this principle would be infringed if a taxpayer was unable to ascertain how many examples of the relevant activity being taught in schools would have to be produced before it was accepted that the exemption was available.

67. In our judgment there is no uncertainty or ambiguity in the rules, either under the Principal VAT Directive, or the domestic legislation. A requirement that a subject or activity must be commonly, or ordinarily, taught in schools and universities may lack the precision of a percentage threshold, but it is not unclear or imprecise so as to offend the principle of legal certainty.

68. Mr Edwards referred us to *Revenue and Customs Commissioners v IDT Card Services Ireland Limited* [2006] STC 1252. There it was held that the principle of legal certainty was not infringed by a *Marleasing* interpretation of the UK legislation in question, consistently with the objective of the Sixth Directive to avoid non-taxation. It was well-known that the provisions of VATA had to be interpreted in conformity with the Directive, and that the supplies in question constituted taxable supplies for the purposes of the Directive. *IDT Card Services* does not therefore assist Mr Edwards. The fact that Miss Hocking’s supplies are not exempt follows from the application of the Directive, as implemented in the UK by the VATA, and such an application does not involve any infringement of the principle of legal certainty.

Decision

69. For the reasons we have given, we dismiss this appeal.

Application for permission to appeal

70. 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.

**ROGER BERNER
TRIBUNAL JUDGE**

RELEASE DATE: 12 November 2014

Amended on 27 November 2014 pursuant to Rule 37 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009