VAT on; VAT off: Martial Arts and the Education Exemption

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The *Premier Family Martial Arts* decision

1. In the 1984 film Karate Kid, Mr Miyagi admonished Daniel: "I say; you do. No questions". However, with VAT, there are always questions.

2. In the case of *Premier Family Martial Arts LLP ("PFMA") v HMRC* [2020] UKFTT 1 (TC), the First Tier Tribunal was tasked with assessing kickboxing classes and the education exemption for private tuition.

3PB's Analysis

3. **Background**: The Taxpayer, PFMA, is a partnership established by Mr Foran and his wife. It provided kickboxing classes for people of all ages over three locations with some 1600 students. Mr Foran also ran a limited company that taught other martial arts, treated as standard-rated.

4. HMRC issued a decision concluding that the supplies of kickboxing classes were standard-rated rather than exempt and, therefore, PFMA was liable to be registered for VAT.

5. **Legal Framework**: Article 132(1)(j) of Directive 2006/112/EC provides for VAT exemption of "tuition given privately by teachers and covering school or university education" so that no VAT is charged or reclaimed in relation to those services.

6. HMRC accepted that the kickboxing classes involved "tuition given privately" but not that it was "covering school… education".

7. There was some disagreement as to whether the domestic, transposed provision was congruent with the Directive or more restrictive. Schedule 9, Group 6, Item 2 of the VAT Act 1994 exempts: "The supply of private tuition, in a subject ordinarily taught in a school or university, by an individual teacher acting independently of an employer".

8. **Findings**: The FTT set out a detailed set of findings in relation to the status of kickboxing and the workings of PFMA. In summary:

   a. Kickboxing does not have a governing body and is not recognised as a sport by Sport England;
   b. There is no formal qualification or accreditation required to become a kickboxing teacher or for progressing as a student;
   c. PFMA classes are voluntarily attended outside of school hours;
   d. There were weekly lesson plans and homework for children;
   e. Kickboxing was not on the UK national curriculum;
   f. A 2019 Department of Education report noted that kickboxing had been proposed but rejected from inclusion on the list of recognised sports, and that martial arts had too many variations which made it difficult for teachers in schools to teach and assess reliably.

9. **Decision**: The FTT posed four questions. Question 1 was whether they should consider kickboxing specifically or martial arts as a whole. The FTT reviewed the non-binding FTT case law on belly dancing which was found not to be a sub-set of dancing (as taught in schools) and a case on motocross biking which was distinguished from cycling in schools. The FTT noted that kickboxing is not recognised by Sports England as a sport unlike other martial arts and concluded that there were common skills but significant differences between the two would make it inappropriate to conflate them [at 63].

10. Question 2 was whether it is necessary for kickboxing only to be taught in a single

school or to be "commonly taught". This issue was hard fought by PFMA who submitted that there is no "quantitative hurdle" (i.e. minimum number of schools) in the legislation and any such hurdle would confine the exemption to established activities and impose an unreasonable data burden in taxpayers when assessing their VAT liability. However, the Tribunal found that although the "commonly taught" wording was imprecise, it was not unclear and was a task for national courts to determine [at 97].

11. The FTT concluded that there was nothing in the case law that suggested teaching at one school would suffice to justify the exemption. The use of the plural (schools and universities) in the CJEU case law supported that conclusion [at 101].

12. Question 3 was whether PFMA had met the burden of proving kickboxing was commonly taught at schools in the EU. The FTT explained that the interpretation of "school or university education" referred to the education system common to Member States and therefore the national curriculum was not determinative. However, the fact that kickboxing did not form part of the national curriculum gave rise to a rebuttable presumption that it was not commonly taught (in that country) [at 122]. There was insufficient evidence of kickboxing being taught as part of the school curriculum in the UK or the EU. The appeal therefore failed.

13. Question 4 was now inapplicable but asked whether kickboxing was "purely recreational". The Opinion of AG Sharpston in *Haderer* referred to "purely recreational activities of no educational value", however, this additional wording was not included in the CJEU decision. Therefore, it is legally possible for the activity to have educational value and involve "a transfer of knowledge and skills" yet fall outside the exemption as purely recreational. The FTT complained about the lack of clarity in the case law on this matter. Ultimately, it was found to be a multi-factorial test and a matter of overall impression.

14. The FTT found that the teaching of kickboxing was not "purely recreational". Although the lack of formal grading or syllabus would indicate a recreational character, students cannot simply drop in for a class, and one works towards promotion and progression (personally and physically).

Impact of the Decision

15. In this case, the Tribunal interpreted Art.132(1)(j) as referring to an activity which is taught commonly (or ordinarily) at schools or universities in the EU [95]. There is no reference in the Directive or in CJEU decisions to "commonly taught". The VAT Act 1994 uses the words "ordinarily taught" which was correctly construed as taught "widely" in schools rather than addressing the frequency at which it may be taught at one school [109]. However, for a neutral tax, it would be a remarkable burden on the taxpayer to know the prevalence of a particular activity in schools across the EU before self-assessing their tax liability. This legal certainty argument has proven unsuccessful twice in the FTT on the belief that for most cases, the answer will be obvious. Advisors will find this of little comfort when facing obstinate HMRC rulings, keeping in mind the dicta on so-called "open and shut" cases of Megarry LJ in *John v Rees* [1970] 1 Ch 345.

16. Advisors should note the rebuttable presumption in relation to the national curriculum. However, there still remains some uncertainty as to whether a particular activity qualifies as a sub-set of another on-syllabus activity. In the recent case of *Cook* [2019] UKFTT 321, Ceroc dancing was found to be a methodology of teaching dance, incorporating different dance genres such that the exemption applied. In *PFMA*, kickboxing was described as incorporating elements of boxing, karate and taekwondo but was found to be distinct from martial arts [43]. Advisors should assess whether the potential sub-activity is a stand-alone discipline and how substantial the differences are with the syllabus activity.

17. As a broader evidential point, litigators will have noticed the ambiguous position in relation to quasi-expert evidence in a number of VAT cases where statistics and surveys are proffered, such as the surveys sent out to martial arts academies in this case [at 114]. Although flexibility and admissibility have traditionally been favoured procedurally, advisors should be aware that informal quasi-expert evidence with untested methodologies or which lacks statistical expertise can be a hindrance rather than a help to the taxpayer when subject to scrutiny.

18. This case noted the continued difficulties with the "purely recreational" test which has caused problems in other FTT cases. Whenever a lawyer sees the courts afforded a discretion through a "multi-factorial assessment", they should raise an eyebrow of inquisition. In *Tranter* [2014] UKFTT 959, the Tribunal explained that to avoid being "purely recreational", the "transfer of knowledge and skills" must transferring more knowledge than simply how to do the activity in question. This certainly conforms with the teachings of Mr Miyagi who said, "lesson not just karate only. Lesson for whole life. Whole life have a balance. Everything be better."

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This article intends to state the law at the date indicated above. Although every effort is made to ensure accuracy, this article is not a substitute for legal advice.

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