VAT UPDATE
JANUARY 2019

Covering material from October – December 2018

Notes prepared by Mike Thexton MA FCA CTA

VAT Update January 2019

Contents

1. INTRODUCTION

These notes contain a brief summary of some of the main VAT developments in the last three months – Tribunal and Court decisions, changes in legislation, Customs announcements. They are divided as follows:

- outputs generally;
- land and property;
- international matters;
- inputs generally;
- administration.

The same main headings will be used each quarter. If nothing has happened under a particular heading in a particular quarter, that heading will be omitted – but all headings will still carry the same number. That is why some headings are included with "nothing to report".

1.1 Appeals pending

It is not possible to compile a comprehensive list of cases under appeal, and some of those which are thought to be still "live" may be dropped without a hearing. The following is compiled from several sources, and is just an approximate guide to some of the arguments that do not appear yet to have been finally settled:

The HMRC website section which reports the progress of appeals originally said that it would be updated monthly, but it appears to be less frequent or regular than that. The list says "last updated 11 October 2018" after the previous update in July.

Several of the "appeal will be dropped" items are still on the website list, but where they have already been reported in the update they are not reproduced below.

http://www.hmrc.gov.uk/vat/vat-appeal-update.pdf

- *Done Brothers (Cash Betting) Ltd and others*: HMRC seeking leave to appeal against the FTT decision that the company was entitled to exemption of its gaming supplies on fiscal neutrality grounds.
- *Fortyseven Park Street Ltd*: HMRC have been granted leave to appeal to the CA against the UT decision that the company's supplies were exempt licences to occupy land not excluded as "similar to hotel accommodation".
- *Frank A Smart & Son Ltd v HMRC*: HMRC have been granted leave by the Supreme Court to appeal the CS decision in the taxpayer's favour on the deductibility of input tax on the cost of single farm payment entitlements. HMRC will seek a reference to the CJEU.
- *Gala 1 Ltd v HMRC*: Court of Appeal due to hear taxpayer's appeal against refusal of claims for repayment of output tax on bingo – FTT/UT both ruled that only the representative member of the group could make the repayment claim (not on the HMRC list).

- *Hastings Insurance Services Ltd*: HMRC have applied for leave to appeal the FTT decision on place of establishment (and have hurried through counteracting legislation, covered in the current update).
- *Hotels4U.com Ltd*: HMRC's list states "no appeal lodged" – FTT decision mainly in favour of the taxpayer. A hearing was listed for November 2018 to decide whether to refer questions to the CJEU.
- *KE Entertainments Ltd*: HMRC have appealed to Court of Session against UT decision that change of calculation of bingo takings constituted an "adjustment of consideration" within reg.38, rather than leading to a time-capped repayment claim under s.80 (hearing 25/26 September 2018, decision awaited).
- *LIFE Services Ltd*: partial win for HMRC in the Upper Tribunal; one point to be jointly decided in the Upper Tribunal with *The Learning Centre (Romford) Ltd* (hearing scheduled for December 2018, decision awaited).
- *Lowcostholidays and Lowcostbeds*: being heard with *Hotels4U.com Ltd* (CJEU reference to be considered in November 2018).
- *Metropolitan International Schools Ltd*: taxpayer is appealing to CA against UT decision that its supplies were compound supplies of taxable education rather than zero-rated printed matter (hearing scheduled for January 2019).
- *MG Rover Group Ltd*: taxpayer is appealing to CA against UT's ruling that its *Fleming* claim could not succeed as it should have been made by the representative member of the group (hearing listed for January 2019).
- *Newey (t/a Ocean Finance)*: HMRC describes the CA decision as a "partial win for HMRC". The case has been remitted to the FTT for further consideration in the light of the CJEU judgment.
- *Pacific Computers Ltd*: MTIC case remitted by the UT to differently constituted FTT for rehearing (not on HMRC's list).
- *Pertemps Ltd*: HMRC are seeking leave to appeal against the FTT decision that the company's "mobile advantage plan" for employee travelling expenses did not involve making taxable supplies.
- *Praesto Consulting Ltd*: the UT overturned the FTT's decision in the taxpayer's favour about the deductibility of input tax on legal costs incurred in defending the shareholder/director from litigation. The company is appealing to the CA (hearing scheduled for February 2019).
- *Privin Corporation Ltd*: the FTT found in favour of a MTIC appellant. HMRC were granted leave to appeal to the UT, but it was agreed that the case would be remitted to a differently constituted FTT for rehearing (not on HMRC's list).
- *Rank Group plc*: HMRC are seeking leave to appeal against the FTT decision that certain supplies qualified for exemption on fiscal neutrality grounds.
- *SAE Education Ltd*: company has been granted leave to appeal against CA's ruling that it did not qualify for exemption as a "college of a

university" (Supreme Court hearing listed 30 October 2018, decision awaited).

- *Tesco Freetime Ltd and Tesco plc*: HMRC are appealing to the UT against FTT finding in favour of taxpayer in relation to tax treatment of loyalty points scheme (hearing November 2018, decision awaited).
- *The Chancellor, Masters and Scholars of the University of Cambridge v HMRC*: CA has referred questions to CJEU (Case C-216/18) on deductibility of investment management costs where an endowment fund supports the whole of the university's activities.
- *Wetheralds Construction Ltd*: the company is seeking leave to appeal to the CA against the UT's decision that its supplies did not qualify for the lower rate as "installation of energy-saving materials".

1.2 Other points on appeals

The HMRC list also confirms that some recently reported appeals are final:

- *Character World Ltd*: TC06619 held that sleeved blankets were children's clothing, appeal allowed.
- *DPAS Ltd*: HMRC's list notes that the CJEU "found in favour of the UK" and does not comment on how the appeal will be formally settled – it may be that the decision was sufficiently clear that there is no need for a further hearing.
- *Findmypast Ltd*: the Supreme Court has refused HMRC leave to appeal against the Court of Session's judgment in favour of the taxpayer, so the decision is final.

1.3 Decisions in this update

The following cases from HMRC's list are in the current update:

- *Stoke by Nayland Golf and Leisure Ltd*: HMRC's appeal to the UT, against the FTT's ruling that a members' club did not fall foul of anti-avoidance provisions and qualified for exemption, was unssuccessful.
- *Volkswagen Financial Services (UK) Ltd v HMRC*: Supreme Court found for taxpayer on one issue but referred the main issue to the CJEU; A-G's opinion that the UK rules were the problem has been overruled by the full court, which has effectively rejected HMRC's arguments.

2. OUTPUTS

2.1 Scope of VAT: linking supplies to consideration

2.1.1 Article

In an article in *Taxation*, Neil Warren comments on the possible pitfalls of raising management charges between associated businesses. He highlights HMRC guidance at VATSC55400 in relation to whether payments are really consideration for a genuine supply. In the case of *Stirling Investments* (TC00374) it was held that a payment was a dividend, not a management charge, when the parties realised that the company paying the "charge" was partially exempt (a favourable decision).

Taxation, 22 November 2018

2.2 Disbursements

Nothing to report.

2.3 Exemptions

2.3.1 Updated Notice

HMRC have updated their Notice *Insurance*. The update (from February 2013) only highlights a revised address for written enquiries.

Notice 701/36

2.3.2 Special investment funds

A UK VAT group included two investment fund management companies. They received services from a US affiliated company, in the form of an "investment management computer platform" that was used to manage investment funds. HMRC ruled that a reverse charge was due on the purchase of the services; the companies argued that the supply was exempt because it was involved in the management of special investment funds.

It was accepted that the US company made a single supply of the platform (called "Aladdin"), and separate supplies of some other services. There were two questions: did the SIF exemption apply at all, when the supply was from one company to another rather than to the individual small investors? And if it did apply, could the reverse charge be apportioned because Aladdin was also used for non-SIF investments? The dispute had been running since a ruling request in 2012, and the FTT hearing (TC06069) covered appeals for the periods from 1 January 2010 to 30 September 2016.

First-Tier Tribunal

The FTT examined the way in which SIFs operate, the way in which the software was used to assist in their management, and the different ways of managing investments before and after the software was introduced.

The judge went on to consider the two main relevant authorities of the CJEU on management of SIFs and outsourcing: *Abbey National plc v C&E* (Case C-169/04) and *GfBk Gesellschaft fur Borsenkommunikation mbH v Finanzamt Bayreuth* (Case C-275/11). He set out the following principles:

(1) The exemption in Article 135.1(g) PVD is defined according to the nature of the services provided and not according to the person supplying or receiving the service. (*Abbey National* [66]-[69] *GfBk* [20])

(2) The exemption was an exception to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person, and should therefore be interpreted strictly. (*Abbey National* [60])

(3) The exemption applied not only to investment management involving the selection and disposal of assets under management but also to administration and accounting services. (*Abbey National* [26], [63] and [64] and *GfBk* [27])

(4) Services falling within the exemption included those functions which related to administering the fund, such as those set out under the heading "administration", in Annex II to the UCITS Directive. Annex II was not exhaustive. (*GfBk* [25])

(5) To ensure fiscal neutrality, the transactions covered by that exemption are those which are specific to the business of undertakings for collective investment. (*Abbey National* [62]-[63])

(6) There was nothing in principle which prevented the management of special investment funds from being broken down into a number of separate services. (*Abbey National* [67] *GfBk* [28])

(7) The services supplied fall within the exemption if, viewed broadly, they form a distinct whole, and are specific to, and essential for, the management of special investment funds. (*Abbey National* [72] *GfBk* [21])

(8) Mere material or technical supplies, such as the making available of a system of information technology, are not covered by the exemption. (*Abbey National* [71])

(9) Services which were intrinsically connected to the activity characteristic of an investment management company would have the effect of performing the specific and essential functions of management of a SIF. (*GfBk* [23]) The service of giving recommendations to an investment management company to purchase and sell assets was so intrinsically connected. (*GfBk* [24])

(10) The purpose of the exemption was to facilitate investment in securities by small investors by means of collective investment by excluding the cost of VAT in order to ensure fiscal neutrality when compared with direct investment. (*Abbey National* [62] and *GfBk* [30])

(11) It followed from the principle of fiscal neutrality that investment advice services provided by a third party should not be subject to a

disadvantage when compared with funds which provided their own investment advice. Economic operators must be able to choose the form of organisation which, from the strictly commercial point of view, best suits them. (*Abbey National* [68] *GfBk* [31])

The key test, therefore, was whether the services supplied by the US affiliate to the UK companies formed a distinct whole, and were specific to, and essential for, the management of special investment funds. The judge was satisfied that they were "specific and essential": the meaning that HMRC tried to import into that expression was too restrictive. As regards "a distinct whole", the judge noted that the CJEU had not clarified the meaning of this expression, and the A-G opinions in the two cases seemed to be inconsistent. Nevertheless, he was satisfied that the services were "interrelated and had an inner coherence", which he considered to be the test. HMRC had argued that they were "a mere tool used in management of SIFs", but the judge did not agree that this was the relevant test.

Given that the services constituted a single supply, the question was then whether different parts of it could have different liabilities. The company argued that the *Talacre Beach Caravan Sales* case applied, and that apportionment would serve the purpose of the exemption. HMRC responded that the same could be said of any compound supply where part was exempt, and apportionment should only apply in exceptional and clearly defined circumstances.

The judge agreed with HMRC: there were special circumstances in both *Talacre* and *French Undertakers* that did not apply here. The normal rule was that a single supply must have a single liability. The proper functioning of the VAT system required a single liability, and that overrode the purpose of the specific exemption.

The company's appeal would have succeeded on the liability issue, but it failed on the apportionment issue.

Upper Tribunal

The company appealed to the Upper Tribunal (Mrs Justice Falk and Judge Roger Berner) on the apportionment issue. HMRC cross-appealed on the exemption issue, so the whole argument was revisited. Although it was primarily the taxpayer's appeal, the exemption issue was considered first, because the apportionment issue only arose if exemption was available in principle.

The UT considered *Sparekassernes Datacenter* (Case C-2/95) in detail before reviewing the cases on which the FTT decision was based. The principle established was that "in order to be characterised as exempt transactions within the exemptions in question, the services provided must, viewed broadly, form a distinct whole, fulfilling in effect the specific, essential functions of a service as described by the relevant provisions."

Turning to the decisions in *Abbey National* and *GfBk*, the UT carried out its own analysis of the judgments, and concluded that the requirements for exemption of management of SIFs depended on "distinctiveness" and "specificity". These tests were considered in the A-G's opinion in *GfBk*, which was expressly approved by the full court in that case. The UT rejected HMRC's arguments that there was any error of law in the FTT's

conclusions in this area. The judges did not agree with HMRC that "significant aspects of management and administration have to be outsourced and that each of those aspects needed to be sufficiently outsourced". The Aladdin Services formed a distinct whole, and the FTT's conclusion was the only one that could properly have been reached on the evidence before it. There was no basis for a reference to the CJEU, as HMRC requested.

The taxpayer's counsel based his argument on the apportionment issue partly on the CJEU judgment in *Commission v Luxembourg* (Case C-274/15). Although this concerned the cost-sharing exemption, it did contain a suggestion by the court that a single supply could be apportioned between exempt elements (the underlying cost that was used for the group member's exempt or non-taxable activities) and taxable elements (the underlying cost that was used for the group member's taxable activities). This gave the judges "pause for thought".

After some further consideration of other judgments on compound and multiple supplies, the judges concluded that they could not with certainty decide the apportionment issue. As a result, reference should be made to the CJEU, and in the meantime, the appeal would be stayed.

Upper Tribunal: *BlackRock Investment Management (UK) Ltd v HMRC*

2.3.3 Card handling

A company acted as a booking agent between holidaymakers and property owners. It set up an arrangement similar to that considered by the Court of Appeal in *Bookit* (2006), and relied on HMRC's Business Brief 18/06 for assurance that it was making exempt supplies of payment processing. That emphasised that exemption depended on the presence of four elements, in particular "transmitting the card information with the necessary security information and the card issuers' authorisation codes to the intermediary bank (known as the 'merchant acquirer') which liaises between the card issuer and the taxpayer". That approach was followed by the Court of Session in *SEC* (also 2006).

HMRC issued a decision in July 2010 that the company's supplies did not qualify for exemption, and raised assessments totalling £329,929 plus interest. As the *Bookit* and *SEC* decisions have subsequently been overturned by the CJEU, the company could not hope to win an appeal on the technical grounds that the supply was actually exempt. Instead, it applied for judicial review of HMRC's refusal to apply what it described as an unequivocal policy statement which gave it a legitimate expectation.

HMRC accepted that BB 18/06 could give rise to a legitimate expectation, but contended that, for the exemption to apply, in accordance with the terms of the four components, the agent itself had to obtain the authorisation code from the card issuer and transmit it to the merchant acquirer, together with the card details and necessary security information. According to HMRC, this envisaged the agent, not the merchant acquirer, obtaining the authorisation code from the card issuer so that the merchant acquirer did not have the authorisation code until it was transmitted to it by the agent. HMRC contended that the supplies made by the claimant did not satisfy the requirements of BB 18/06 because the claimant transmitted the card information and security information to its merchant

acquirer, and it received the authorisation code from its merchant acquirer.

HMRC therefore argued that BB 18/06 did not contain a promise that was "clear, unambiguous and devoid of relevant qualification", which was the test for legitimate expectation. The company was a "very sophisticated taxpayer with access to high quality advice" and BB 18/06 "only sought to summarise publicly available court decisions". HMRC's conduct in applying their view of the law was "not so outrageously unfair that it should not be allowed to stand".

The judicial review proceedings were commenced in 2010 but stayed behind the CJEU references in *NEC* and *Bookit*. Those decisions in 2016 confirmed that none of the four components identified in the earlier decision, taken separately or together, could be considered to be carrying out a specific, essential function of a payment or transfer transaction within the meaning of the exemption.

The questions for the Tribunal were whether the circumstances of the taxpayer fell within the terms of BB 18/06 as they would be understood by an "ordinarily sophisticated taxpayer" and if so, whether it would be unfair and an abuse of power for HMRC as a public authority to seek to resile from their guidance in this case.

The Tribunal rehearsed the way in which a credit card transaction takes place, explaining the different roles of the card issuer (e.g. a bank), the operator of the card scheme (e.g. Visa or Mastercard), the merchant acquirer (which liaises between the issuer and the operator), the retailer and the cardholder.

The judge went on to examine in detail how the original *Bookit* decision was reached: the VAT Tribunal had found against the taxpayer after two hearings, the second of which was to find additional facts. The High Court reversed the decision, and the Court of Appeal confirmed that the supplies should be regarded as exempt, relying in particular on the extra facts found at the second Tribunal hearing: that the company sent authorisation codes to its merchant acquirer, and this led to the transfer of funds and a change in the legal and financial situation. Bookit obtained the authorisation codes directly from the card issuer, and the merchant acquirer (Girobank) appears to have charged it a lower fee because it was not responsible for this aspect.

In *SEC*, the merchant acquirer obtained the codes and transmitted them to the company, which collated the information and returned it at the end of the day for settlement. The Court of Session did not consider it material that Bookit communicated directly with the card issuer.

The UT decision reproduces most of the BB and notes that it does not draw any distinction between the *Bookit* and *SEC* decisions. It contained an unequivocal instruction to exempt supplies where the four "components" of the *Bookit* arrangement were present.

The law on legitimate expectations was rehearsed from *R (GSTS Pathology LLP & others) v HMRC* (2013) and *R v IR Commissioners ex parte MFK Underwriting Agencies Ltd* (1989) as well as other cases. HMRC accepted that the BB could give rise to a legitimate expectation, but did not accept that it did so on the facts.

The judges examined the competing arguments about BB 18/06 relatively briefly. They concluded that the company was right: the guidance was clear, unambiguous and unqualified, and it drew no distinction between the *Bookit* and *SEC* cases. It therefore attached no apparent significance to the way in which the authorisation codes were obtained; what was critical was that they were transmitted to the merchant acquirer in order to effect payment, which is what the company did in this case. The decision contains a thorough dismantling of each aspect of HMRC's argument. The taxpayer had a legitimate expectation based on BB 18/06.

The judges found it "surprising" that HMRC should even argue the second issue (that it would still not be unfair or an abuse of power for HMRC to resile from the guidance). This was based on the fact that the taxpayer was "very sophisticated", and relied on precedents including a dissenting judgment and an entirely different set of circumstances (involving a course of conduct between the tax authority and the taxpayer, rather than public guidance).

The judges' view was that it is only open to HMRC to override the legitimate expectation in circumstances where there is a sufficient public interest to override it. In this case, HMRC had not even begun to discharge that heavy burden. The ability of the claimant to obtain legal advice on the guidance was irrelevant. The guidance was meant to be clear and readily understood by an ordinarily sophisticated taxpayer. Any legal advice would surely have confirmed the taxpayer's understanding and expectation.

The issues were determined in favour of the taxpayer: the decision was quashed. The taxpayer accepted that no further relief was necessary. It is not clear from what point its supplies should be treated as taxable within the law as it was subsequently held to apply, rather than exempt under the guidance.

Upper Tribunal: *R (oao Vacation Rentals (UK) Ltd) v HMRC*

2.3.4 Higher education

HMRC have updated the April 2017 version of their Notice *Education and vocational training*. References to the EU's Horizon 2020 programme have been added, and the notice now reflects replacement of the Young Persons Learning Agency (YPLA) and Skills Funding Agency (SFA) with the Education and Skills Funding Agency (ESFA). Section 7.2 has been updated to clarify the circumstances under which the examination services exemption will apply to end-point assessment required under the apprenticeship standard, where this is paid for using the apprenticeship service account.

Notice 701/30

HMRC have issued a Brief and an Information Sheet to explain the VAT effect of changes to the way in which funding will be provided for higher education. From 1 August 2019, higher education corporations or higher education institutions designated by an order in England will only be eligible for funding if they are registered in the 'Approved (fee cap)' category under the Higher Education and Research Act 2017. Such providers will only qualify as eligible bodies for the VAT education exemption if they are in this category. UK universities and their colleges

authorised by the Office for Students, by Royal Charters, or by Act of Parliament will not be affected by the changes. The Brief and the Information Sheet provide an outline of who will be affected and how; it notes that there are no transitional arrangements for bodies that may lose eligible status, which is why advance notice has been given so that providers can make the necessary arrangements to apply for the appropriate status and apply the correct VAT liability.

R&C Brief 11/2018; VAT Information Sheet 8/2018

2.3.5 Incidental to education

Loughborough Students Union claimed a repayment of output tax accounted for between 10/11 and 04/15 on sales of stationery, art materials and other items by the union's campus shops. It argued that it was entitled to exemption under art.132 PVD for supplies closely related to education. This was developed by reference to HMRC's policy of extending exemption to certain supplies by universities and students unions, and by reference to the cases of *Horizon College* and *Brockenhurst*.

HMRC responded that the claim was not sufficiently specific. There was no evidence that the supplies had been made to students, nor that the supplies were essential to education. The students union was not involved in the principal supply of education, but rather made supplies to the students and to the public. It did not have an educational aim "either as a matter of vires or as a matter of economic and operational reality". The shops also obtained additional income for the union, which breached the conditions in art.134.

First-Tier Tribunal

The FTT judge (Peter Kempster, TC05966) considered the "mechanism" of the PVD in determining exemption:

(1) First, art 132 defines supplies which member states must exempt, and if they fail to do so properly then a citizen can rely on the direct effect of art 132 (MDDP at [51]). Article 132(1)(i) is mandatory in application to "bodies governed by public law having [education] as their aim" but confers a discretion on member states to recognise "other organisations … having similar objects".

(2) Second, where (pursuant to art 132(1)(i)) a member state exercises its discretion and recognises certain non-public law bodies, then art 133 permits (but does not require) the member state to apply one or more of four stated conditions. Applying (or not applying) one or more of the art 133 conditions does not thereby bring an organisation within art 132 which would not otherwise meet the requirements of art 132. An organisation must first satisfy art 132; then if its home jurisdiction has enacted one or more of the art 133 conditions, the organisation must also satisfy those conditions.

The judge considered that Note 1(e) of Group 6 failed the criteria set out by the CJEU in *MDDP*. The provision concentrated on not-for-profit bodies, when exemption should rather depend on the body being recognised as having similar educational aims to public bodies devoted to education. The judge therefore examined the aims of the union, and concluded that it was (quite properly) devoted to supporting the interests

of its members and to creating a good social, cultural and sporting life, and providing appropriate pastoral care. Those were commendable objects, but they were not the educational aims that conferred exemption.

It was then not strictly necessary to consider whether the supplies were essential to education and closely related thereto, but the judge considered the question in order to find facts for any possible appeal. In his view, the second restriction in art.134 applied: the basic purpose of the supplies was to generate additional income in competition with commercial enterprises. For that reason, too, the appeal would have to fail, although this section was "obiter dicta".

Lastly, the judge commented on the calculation of the claim, which he thought was inconsistent in not restricting input tax to the same extent as the output tax reduction. He noted this uncertainty as something to be resolved at a later stage if the appellant was successful in an appeal about the basic principle of the exemption.

Upper Tribunal

The taxpayer appealed to the Upper Tribunal (Mrs Justice Rose). She noted that the structure of the UK legislation does not follow that of articles 132 – 134 PVD, which has "caused some confusion".

She started by analysing whether the supplies fell within the UK law. The union appealed against the decision that it was not an "eligible body". It was established that its prohibition on distributing surpluses satisfied one of the criteria of Group 6 Note 1(e), but the FTT had agreed with HMRC that it did not make supplies within Group 6, and that extra requirement had to be read into the law to make it comply with the Directive. The judge commented that the status of eligible body could not be considered in the abstract: there was no point in being an eligible body if that body did not make supplies that were within the Group, because they would not be exempt.

In this case, she was satisfied that the union could not be regarded as making any supplies that could be exempt. The only category that could possibly fit was "goods closely related", and those had to be supplied by the body making the principal supply of education. The union's counsel tried in vain to persuade her that the union made such a principal supply. There was also no evidence to support the contention that the supplies from the shop were in fact closely, or at all, related to education.

The appeal was dismissed again: even if the union was an eligible body within Note 1(e), it was not making a principal supply within Item 4, and the supplies for which exemption was sought were not closely related to any principal supply, as that term has been interpreted by the CJEU.

Upper Tribunal: *Loughborough Students Union v HMRC*

2.3.6 Not for profit body

A company limited by guarantee ("Leisure") operated a golf club as the tenant of a commercial business ("Club"). HMRC ruled that Leisure was not an eligible body for the purposes of the sporting services exemption, because it was either not a not-for-profit body or because it was subject to commercial influence. The company appealed, arguing that the decision was incorrect; it also argued that the 1999 Sports Order, which introduced

the "commercial influence" test, was ultra vires. Although the formalities of the appeals process had not been followed, it appeared that the hearing covered assessments for VAT from 1 January 2009 onwards and also a late registration penalty.

Club operated a hotel and gym on the site. HMRC enquired into the arrangements between the two companies in 2011 and concluded that this was "a longstanding tax avoidance scheme that has remained unchallenged [since 1996/97]".

First-Tier Tribunal

Judge Anne Redston (TC05726) considered the CJEU precedent on "not-for-profit bodies" in *Kennemer Golf & Country Club v Staatssecretaris van Financiën* (Case C-174/00). The key points from that decision were that it is the aims of the body that count: it is possible for a non-profit body to make a surplus, which is then used to improve the facilities; it is also possible for a non-eligible body to not make a profit.

HMRC argued that Leisure was an integral part of Club's commercial operation, and had been set up with the intention of exploiting the VAT exemption. Its board was not independent of Club, whose finance director was in effect a "shadow director" of Leisure exerting commercial influence.

HMRC had provided draft minutes of an August 2012 meeting with the owner of Club which included the sentence "the family had received advice from Deloitte & Touche, the Club's auditors, who advised [the owner] to set up a non-profit making company". The owner had an employee also taking notes, and HMRC's draft minutes had been returned to them with this sentence deleted and replaced with "the family did not receive advice from Deloitte & Touche". There was no record of the correction being commented on by HMRC. Under cross-examination at the hearing, the owner denied having taken advice on the VAT position – she gave a number of other explanations for the way in which the golf club was structured, which mainly related to removing a time-consuming distraction from the running of her commercial enterprise. In her view, the VAT treatment followed from the non-profit constitution, rather than the other way around.

The judge considered the arguments and the evidence of the witnesses, and concluded that the taxpayer's version was more likely to be correct. It appeared that HMRC's officers had concluded in advance that this was the same as many other VAT avoidance structures they had seen, when in fact there were substantial differences.

The judge went on to examine the reasons for the appointment of Leisure's directors, the way in which the licence fee was set, an agreement in 2009 by which visitors' green fees were transferred from Club to Leisure in return for an increase in the annual licence fee, market valuations of the licence fee carried out at various times, and the basis for a number of cross-charges between Club and Leisure. She concluded that HMRC's main contentions were not correct:

- Leisure's affairs were not managed so that its financial surpluses were applied for the benefit of Club;
- it was not operated as an integral part of a single commercial enterprise.

HMRC's final argument, that Leisure could not satisfy art.133's requirement to spend any surpluses on improvement of the facilities because it did not own them, was also rejected. That is a subsidiary requirement to the main condition that the body must not systematically aim to make surpluses. That was satisfied, in line with the *Kennemer* decision.

The judge also commented briefly on two cases that had been cited, *Messenger Leisure Developments* and *Massey t/a Hilden Park*. She explained the significant differences in the underlying facts that, in her opinion, distinguished those cases (where the taxpayers lost) from the present situation.

Lastly, the judge commented on the arguments about the Sports Order. She considered that the UK's application of a "commercial influence" test based on the existence of a shadow director was justified by condition (b) of art.133 PVD, which allows the imposition of a "managed on an essentially voluntary basis by persons who have no direct or indirect influence" test. She therefore concluded that the Sports Order was not incompatible with the PVD, even though this was not a necessary part of the decision because she had already allowed the appeal on the main issue.

Upper Tribunal

HMRC did not appeal the decision that Leisure was not subject to commercial influence, but appealed against the finding that it was a non-profit-making body. HMRC made extensive criticisms of the FTT's findings of fact (running to 20 pages), which meant that the UT judges had to re-examine those findings in detail.

The UT examined the concept of "non-profit-making bodies" in detail, considering in particular a situation (as here) where it was alleged that profits were being covertly distributed to someone who was not an owner or member of the body. If it could be established that the directors of the body acted independently of that person and made decisions on payments at arm's length, that should be enough to establish that there was no distribution of profit.

The judges grouped HMRC's grounds of appeal under three headings:

(1) a large number of contentions that the FTT erred in law in making findings of fact or inferences for which there was either no evidence or which were inconsistent with the evidence, or were made on the incorrect premise that the findings were unchallenged or accepted by HMRC;

(2) a contention that the FTT failed to apply the correct legal principles as enunciated in *Kennemer*, although this ground was unhelpfully included under the general heading of the FTT having erred in making findings of fact or inferences for which there was no evidence. It is, however, clear that it is a separate ground and was argued accordingly, the basis for it being that in focusing on the arm's-length nature of the licence fee and not taking into account that it is possible to have distributions of profit even

where contracts are priced at the market rate the FTT made an error of law; and

(3) a contention that the Tribunal erred in failing to take account of other decisions of the FTT which had material similarities to the operation in this case.

As regards criticism of the findings of fact, the UT noted the principle from *Edwards v Bairstow* that an appellate court should be slow to overturn findings of fact by the FTT. HMRC's arguments were considered and rejected: the UT's only criticism of the FTT was one of form, in that it could have explicitly set out some of its conclusions where they were only implicit in the decision that was issued. The UT was satisfied that the FTT had identified the correct legal test to be applied, and had applied it correctly to the facts that it had found.

The UT dismissed an attack on the conclusion that the taxpayer had not taken VAT advice as irrelevant. HMRC had not argued that the arrangements were abusive, only that they were ineffective. The motive behind the arrangements would only be relevant if HMRC were arguing that *Halifax* applied. For completeness, the UT was also satisfied that the FTT had come to a justifiable conclusion on the question, but it would not have assisted HMRC in any case.

The UT considered that an attack on the way in which the directors of Leisure were appointed was far more relevant. However, the actual criticisms of the FTT decision did not have any substance.

The FTT's conclusions that the directors of Leisure acted independently of Club were also highly relevant. Once again, the detailed criticisms were considered and rejected. They were characterised as an impermissible attempt to second-guess the business judgement of the directors, and an impermissible attack on the weight the FTT gave to the evidence that was before it.

The conclusion of the UT was that there was no reason, let alone a compelling reason, to interfere with the FTT's findings of fact. The FTT had been careful in weighing up the evidence and deciding what weight to give to the various documents and witnesses. It had also given full reasons for its findings. The FTT correctly understood its task as to carry out a multifactorial assessment of the circumstances present in the particular case, and then apply the correct legal test to those circumstances; previous FTT decisions on which HMRC relied were not particularly relevant (e.g. *Hilden Park* and *Messenger Leisure*), because the facts were different.

HMRC's appeal was dismissed.

Upper Tribunal: *HMRC v Stoke By Nayland Golf and Leisure*

2.4 Zero-rating

2.4.1 Motorhomes

A company supplied motorhomes. It supplied a number of vehicles between 2006 and 2009 that were zero rated on the basis that they fell within Item 2A Group 12 Sch.8 VATA 1994. HMRC raised assessments for £276,238 on the basis that they did not qualify. By the time the matter reached the FTT, this had been gradually reduced to £83,263.

HMRC originally queried 45 matters. This had been reduced to 13; they related to six transactions involving 5 customers where the issue was whether the customers were usually wheelchair users. There were 7 cases (some overlapping with the first group) where the issue was whether a carrier fitted to the motorhome fell within Note 5L(b), which refers to a vehicle "that by reason of its design, or being substantially and permanently adapted, includes features whose design is such that their sole purpose is to allow a wheelchair used by a handicapped person to be carried in or on the motor vehicle."

The taxpayer gave evidence that there are no products on the market specifically designed for carrying a wheelchair on a motorhome. They are not normally fixed to the floor of the motorhome because such floors are made of wood and, in the event of a crash, the fixings might tear out. So it is normal to carry wheelchairs on bicycle racks on the outside of the vehicle. The racks are designed to carry bicycles, but in the absence of anything specific for wheelchairs, they are adapted for the purpose.

The first issue was whether the taxpayer had discharged the burden of collecting sufficient evidence that a customer "usually" used a wheelchair. The judge (Marilyn McKeever) considered the available evidence and concluded in each case that, on the balance of probabilities, each of the 5 customers would usually have used a wheelchair.

Turning to the Note 5L issue, the judge noted that HMRC accepted the attachment of the bicycle racks as "substantial and permanent adaptations". However, HMRC argued that Note 5L has a "sole purpose" test, which could not be satisfied by a bicycle rack.

The judge examined several precedents, although these concerned Note 5L(a). She concluded that the purpose of the adaptation had to be considered in its context: it was not the purpose of the particular piece of equipment (a bicycle rack) that counted, but the purpose of the adaptation (to enable a wheelchair to be carried). This was in line with the purpose of Group 12; if the adaptation had not been made, the wheelchair user would in practice not be able to use the vehicle.

The appeal was allowed and the assessment was quashed.

First-Tier Tribunal (TC06725): *Richard Baldwin Motorhomes*

2.4.2 Updated Notice

HMRC have updated their Notice *Charity funded equipment for medical and veterinary uses*. Several items have been added to the list of qualifying zero-rated goods or services in para.4.11 since the September 2003 version. Other items have been clarified.

Notice 701/6

2.5 Lower rate

Nothing to report.

2.6 Computational matters

2.6.1 Interest-free credit

The FTT has considered a calculation question in the following circumstances:

- a consumer purchases goods in a Dixons (D) store and pays a deposit to D;
- the balance of the cost of the purchase is funded by a loan, provided by a third party company, L;
- the customer gives authority to L to pay the money borrowed to D;
- where the customer loan is on favourable terms (to the consumer), the amount paid by L to D is a lower amount than that authorised by the consumer, following deduction of an amount described as a "Subsidy". The favourable terms are generally interest free arrangements, including "Buy Now, Pay Later" arrangements, whereby the customer pays no interest on the amount borrowed if the full amount of credit is repaid by the customer within the "Pay Later" offer period.

The question to be determined was whether the "Subsidy" deducted by L is to be treated as part of the consideration for the supply of goods by D for VAT purposes, in which case D would have to account for output tax on the full selling price agreed with the customer; or whether it could be deducted from D's daily gross takings under its bespoke retail scheme.

HMRC argued that this was simply a variation on the arrangement considered by the CJEU in *Primback*: the subsidy was an exempt cost for D, rather than something that reduced the consideration for the sale of the taxable supply. D put forward a number of differences between the present case and *Primback*, including the absence of written agreements in the earlier case that forced the court to infer the terms that applied to the contracts.

HMRC also argued that the commercial and economic reality of the situation was so similar to *Primback* that the outcome could not be different, regardless of differences of detail in the contracts. In their view, the "reality" was:

(1) The supply of goods by D to the customer;

(2) The supply of credit by L to that customer;

(3) A supply of "introduction and related" services by D to L;

(4) A supply of services being L to D, being the provision of credit facilities for use by customers of D.

The consideration for D's supply to the customer was the amount payable by the customer to L and paid on to D by L on the customer's behalf; the

subsidy was part of the contract between L and D, and did not affect the transaction between D and the customer.

Judge Anne Fairpo heard the case in October 2017, and commented that the decision was only released in September 2018 because of "considerable review and re-review of the contractual documentation to endeavour to determine whether there is any support for Dixons' position". It was agreed by all parties that the case should be determined on the basis of the specific provisions of these contracts and not merely on the basis of earlier case law.

In this case, the contracts available were the Retailer Contract between D and L and the credit agreement documents between L and the customer. Retail receipts were provided to illustrate the transactions between customers and D, but there was no formal written contract between D and a customer. These were therefore the contracts that the judge analysed.

In her view, the Retailer Contract related only to the provision of credit by L to D's customers. There was no suggestion that L was providing consideration for a supply of goods or services by D. That suggested that the subsidy, which was an adjustment to payments between L and D, could not affect the taxable amount for the supplies by D. She drew the same conclusion from the contract between L and the customer. The retail receipts did not provide any particular assistance one way or the other.

That was enough to determine the appeal against the taxpayer. The judge went on to consider in some detail arguments about the nature of the subsidy, which she concluded was consideration effectively paid by D to L (even though in practice it was instead deducted from payments by L to D) for a supply of services from L to D. Those services were described as the provision of "uncommercial credit facilities" which D used for promotional purposes to sell more goods. The judge did not issue a specific ruling on the liability of that supply, because it was not material to the appeal. Presumably, however, it must be exempt.

First-Tier Tribunal (TC06731): *Dixons Carphone plc*

2.7 Discounts, rebates and gifts

2.7.1 Prompt payment discounts

The rules on prompt payment discounts were abruptly changed in the 2014 Budget, with immediate effect for supplies of telecommunications services and delayed implementation for other supplies one year later. A case has now come to the FTT to indicate why HMRC sought to act. It concerns supplies made by Virgin Media Ltd (VML) between 28 August 2012 to 30 April 2014.

The company supplied 95% of its customers with telecommunications connections on a monthly payment plan (referred to as "FLR services" – Fixed Line fibre optic cable and Related telephony services). It supplied the other 5% on annual payments for a lesser sum (the "saver price"). The company argued that the saver price was effectively the monthly sum reduced by a prompt payment discount (PPD); under the rules then in force (Sch.6 para.4(1) before amendment), it was only liable to account for output tax on the lower amount. HMRC disagreed, and raised assessments for £63m of VAT and £3m of interest.

Judge Harriet Morgan considered the UK law and articles 73 and 79 PVD, as well as provisions on the timing of the charge to tax. She summarised the issues as follows:

- whether the saver price constituted a prompt payment discount;
- whether the exclusion in para.4(2) of "payment by instalments" applied;
- whether the saver price was a discount applicable to those customers who did not choose that option.

HMRC argued that the different groups of customers contracted for different supplies. Monthly customers were entitled to one month's service for a fixed sum; saver customers were entitled to 12 months' service for a sum that was less than 12 times the monthly sum. It was not refundable if the services were not required during that time. Because the contracts were different, it was not appropriate to regard the saver price as comparable to the monthly price but reduced by a PPD. HMRC considered that the 2014 amendment was made to remove an ambiguity in the law as previously written; however, the *Marleasing* principle required the UK law to be interpreted in accordance with the EU law, where it was ambiguous, and this required the whole consideration actually received to be brought into account.

The judge examined the contractual arrangements in detail, including the way in which a customer chose one option or the other, and the way in which that choice could be changed. She also considered the principles of construing contracts for VAT, as set out in particular in *SecretHotels2* and *Newey*. She summarised her conclusions as follows:

(1) It is necessary to assess (a) the contractual effect of the arrangements between VML and its customers in relation to the provision of the FLR services in the relevant period, (b) in the light of the contractual nature of the arrangements, what was supplied to whom for what consideration and on what terms and (c) in the light of that analysis, whether the FLR

services "are supplied for a consideration in money and on terms allowing a discount for prompt payment" within the meaning of para.4(1).

(2) In assessing the nature of the contract between VML and its customers, as set out in Secret Hotels2 , the tribunal must consider the words used, the provisions of the agreement as whole, the surrounding circumstances in so far as they were known to both parties, and commercial common sense.

(3) In analysing the effect of the arrangements for VAT purposes it must be borne in mind that consideration of economic and commercial realities is a fundamental criterion for the application of VAT. Whilst the contractual position normally reflects that reality, the contractual position may be vitiated on the relevant facts if, for example, the contractual terms constitute a wholly artificial arrangement. This is also reflected in the principle that there is a supply for consideration only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance. It follows that a supply of services is objective in nature and applies without regard to the purpose or results of the transactions concerned.

Applying these principles, the judge concluded that HMRC were right: different contractual options were offered, and those who chose the monthly option were not paying a higher price that could be reduced by a PPD. They were receiving a different package of services and paying the full price for what they had chosen.

That was enough to dispose of the appeal, but the judge also considered the other arguments. In HMRC's view, a PPD could only apply if a supply was made before payment was due. In the present case, the tax point for the continuous supplies was always triggered by the receipt of payment. It was therefore not possible for there ever to be a price that could be reduced by being received earlier. The judge examined this argument in detail and concluded that HMRC were wrong. This interpretation created more difficulties and appeared to be out of kilter with the plain meaning of para.4(1). If she was wrong about the basic application of the PPD rule, this second line of attack would not assist HMRC.

She came to the same conclusion on HMRC's arguments about the "instalments exclusion" in para.4(2). The monthly payments were not instalments of a larger total debt. She also rejected HMRC's contention that para.4(1) should be interpreted in line with the *Marleasing* approach as only allowing the PPD to be taken into account for VAT where the discount was actually allowed to reduce the consideration. That was contrary to the plain intention of the provision, which was a "blunt instrument" (and contrary to EU law) that was, until 2014, intended to alleviate the practical difficulties faced by businesses in determining the VAT charge where there is doubt at the time of invoicing about how much will be received.

On the basic application of para.4(1), therefore, the appeal was dismissed. The other matters will become relevant if the company successfully appeals against that part of the decision.

First-Tier Tribunal (TC06730): *Virgin Media Ltd*

2.8 Compound and multiple

2.8.1 Opticians

In October 2017, the FTT heard an appeal (TC06192) by DCM (Optical Holdings). It concerned a dispute with HMRC about the calculation of output tax on the sale of spectacles and dispensing services. HMRC's approach was set out in Information Sheet 08/99, which consolidated guidance on the apportionment of charges for supplies of spectacles and dispensing. The Information Sheet sets out the two methods of apportionment open to opticians, namely Full Cost Apportionment ("FCA") and Separately Disclosed Charges ("SDC"). If the requirements for SDC are not met then FCA is the only other alternative.

Judge Anne Scott considered the history of the dispute and the way in which it had been conducted, and concluded by striking out all six appeals brought by the company. The appeals have now moved on to the Upper Tribunal.

The Upper Tribunal noted that DCM had been in dispute with HMRC over a number of issues over many years. Various input tax disputes have now been resolved, and were therefore not directly relevant to the current proceedings; however, they were noted as one of the reasons it had taken so long for the present dispute to reach the Tribunal.

DCM had conceded one of the disputed output tax issues before the hearing. The issues that remained were:

- the information that had to be disclosed by DCM to customers in order to qualify for a "separately disclosed charges" method under IS 08/99;
- the allocation of customer discounts between exempt and taxable output supplies.

The appeals related to assessments for underpaid output tax in periods 10/02, 01/03, 04/03 and 07/03, and decisions taken in 2013 amending repayment claims for periods between 07/05 and 12/08.

The grounds of appeal were:

1. HMRC had no power to "amend" a repayment return – they could only raise an assessment, which they had not done within any applicable time limit.
2. Contrary to HMRC's assertion, the company had operated a SDC method that complied with IS 08/99 up to February 2004.
3. It was appropriate to allocate discounts against taxable supplies of goods, and HMRC were wrong to apportion the discounts to taxable and exempt supplies.
4. The assessments for periods from 10/02 to 07/03 were made out of time.

In respect of issue 1, HMRC argued that the time limits in s.73 only applied where an error in a return produced an amount due from the taxpayer. In relation to a repayment return, the FTT had accepted that HMRC could effectively refuse to repay at the conclusion of an investigation without having a particular time limit to satisfy; the FTT was

also satisfied that the officers concerned had carried out their investigation in a proportionate way against the background of a lack of cooperation by the taxpayer.

The UT considered the arguments and agreed with HMRC and the FTT. The right to refuse a repayment claim was implicit in HMRC's care and management powers; there was a right of appeal against a decision to refuse or reduce a claim, and a right to apply for judicial review where a decision was unreasonably delayed, but s.73 had no application.

On the SDC issue, the UT noted that documents purporting to be examples of the company's receipts issued to customers before 2004 were only provided to HMRC on the Friday before the FTT hearing was to start on Monday 26 September 2016. There was argument about whether they should be admitted, but in the end they were considered by the judge. The FTT concluded that they did not comply with the IS because they only referred to "services", not to "dispensing". Accordingly, the FTT held that the company did not have a compliant SDC method until it changed its documentation in February 2004.

The UT disagreed with the FTT. There was no possible candidate for "services" other than "dispensing"; in conjunction with notices displayed prominently in the company's shops, it was clear what the documents meant. The changes in February 2004 did not add anything of substance. The UT was satisfied that the FTTs' conclusion, even though it appeared to be one of fact, was so unsupported by the evidence that the FTT had found that it amounted to an error of law. The UT therefore held that the information provided to customers before February 2004 did comply with the IS, and expressed regret "at the least" that appropriate evidence of this was not provided to HMRC until just before the hearing.

Turning to the discounts issue, the FTT decision did not gather all the findings in one place. The UT noted a number of different findings that related to the discounts, and concluded that the FTT had applied the right test: it had agreed with HMRC's representative that the company was entitled to allocate the discount entirely to the goods, but that there was insufficient evidence that this had been done. In particular, the company appeared to offer "free eye tests", but then allocated no discount to the exempt charge for the eye test on its documentation. The earliest documentation did not allocate the discount between taxable and exempt supplies at all. Accordingly, the UT decided that there was no reason to interfere with the FTT's conclusion in this area.

The time bar issue related to assessments raised on 20 October 2005 more than two years after the end of the relevant periods. The company argued that HMRC had had sufficient information on which to base these assessments for more than 12 months by that date, and were therefore out of time. The FTT had expressed itself "wholly unable to see any material fact which was known to HMRC prior to 31 August 2005 which would have justified making the assessment earlier", and had therefore rejected this ground of appeal.

HMRC argued that the company was wrong to assume that the time bar only operated on the specific information relevant to the output tax assessment. In their view, a piece of information relating to an input tax overclaim could open up an unconnected output tax under-declaration in the same period, even if the latter would, on its own, have been time-

barred. However, in this case the FTT had been correct to find that the "last piece of the puzzle" was not provided to HMRC until a meeting on 31 August 2005, so even on its own, HMRC argued that the output tax assessment was in time.

The UT agreed with HMRC's view that an assessment is a "unitary demand for tax", so information about an input tax issue could keep open a period for assessing output tax. However, it was necessary to consider the assessment that was actually raised, and the information used to raise it. The information provided at the meeting in August 2005 was not the basis for the assessment, which was rather the difference between the officer's best judgement calculations of output tax and the figures on the company's VAT returns. The way in which those VAT returns had been calculated was not relevant to the assessment. The UT was satisfied that HMRC had had all the relevant information for more than a year before October 2005, and the assessment was out of time in relation to the periods in issue.

The appeal was therefore allowed in respect of issues 2 and 4, and refused in respect of issues 1 and 3.

Upper Tribunal: *DCM (Optical Holdings) Ltd v HMRC*

2.8.2 Article

In an article in *Taxation*, Mike Thexton examines the history of the *BPP* case, and considers the lessons to be learned by HMRC and by taxpayers in the conduct of disputes.

Taxation, 4 October 2018

2.9 Agency

2.9.1 Net or gross?

A company ran a website offering services to students, including writing essays and coursework for them. The identity of the client and the identity of the person writing the work were not known to each other. The judge noted that the terms and conditions that clients were required to agree to were obviously drafted with the intention that the website would be regarded as acting as an agent arranging a transaction between the other parties; the question was whether that reflected the economic reality.

The judge considered that the terms and conditions contained a number of "glaring examples of artificiality and disingenuousness". The website purported to offer educational services, prohibiting the submission of the work as if it was the client's; it was obvious, and acknowledged at the hearing by the appellant's witness, that the clients were obtaining essays to hand in and pass off as their own. The contracts between the appellant and the clients, and the appellant and the writers, purported to impose a liability of £5,000 from the writer to the client if the client (or, presumably, his/her tutors) detected plagiarism in what was supposed to be "original work".

The judge (Geraint Jones) described the business model in very robust terms: "it assists those who have little or no academic ability and/or are lazy, to cheat. It is beyond doubt that the appellant's business thrives upon providing essays, dissertations and coursework to cheats." Against that background, the judge was satisfied that the contractual documents, which were designed to prevent the client and the writer ever having contact with one another or even knowing each other's identity, were designed to disguise the nature of the business and, in turn, deflect attention from it being unethical. However, the judge did not suggest that it was illegal, and the judge acknowledged that HMRC were not arguing that any part of the contractual documents was a sham.

HMRC argued that the economic reality was that the appellant provided the service and used the writers as subcontractors. The appellant argued that the Tribunal should look no further than the contracts, which on their face provided that it was an agent arranging a contract between the principals.

The judge considered the evidence of how the business was run and the contracts, and concluded that, when the matter was considered in the round, there was in reality a supply from the appellants to the clients. This decision was based on the following factors:

- the impression that a person visiting the website would obtain;
- the efforts made to make sure that the two "principals" did not know the identity of the other;
- the lack of any contract between the two principals, and the lack of any reference in the company's contracts to the extent of its authority as agent;
- the fact that the contract was stated to be "binding on the client" once a suitable expert had been found, and no refund would be issued;
- the fact that the writers were paid by the appellant in its own name and from its own bank account, on invoices raised to the appellant by the writers and without mentioning any relationship of agency.

The economic reality was that the appellant was acting as a principal, and it was therefore liable for VAT on the full value received for its supplies, rather than just the commission it retained. The assessments, covering the periods from January 2012 to September 2015, amounted to just over £900,000.

As the company lost on the "principal" issue, there would have to be a further dispute in due course on whether some of the supplies were outside the scope as received by customers belonging outside the EU. That was not argued before the Tribunal in this hearing.

First-Tier Tribunal (TC06845): *All Answers Ltd*

2.9.2 Tour operator or principal?

A company rented residences in Germany, Austria and Italy from their owners and let them, in its own name, to individual customers as holiday rentals. The service included the cleaning of the accommodation. Initially it applied the TOMS and accounted for output tax at the standard rate (19%) on its margin; it subsequently applied for a repayment, arguing

that the reduced rate (7%) applied in Germany to the renting of holiday accommodation.

The German court referred questions to the CJEU, asking whether a service that consists primarily of renting holiday accommodation, with ancillary services that are merely for the better enjoyment of that supply, should be taxed as such; and if so, whether the TOMS could also be applied, but with the margin charged at the lower rate.

The court noted that a number of precedents show that the supply by a travel agent of accommodation on its own can fall within TOMS. It was therefore not relevant to consider whether other services were ancillary, when a single supply could be within the scheme. It was necessary for the supplies to be bought in from taxable persons, which it was for the referring court to determine.

The service of a travel agent was a single supply that was different from the individual underlying elements comprised within it. It was therefore not possible to characterise this taxpayer's supplies as "holiday accommodation". Travel agents' supplies were not listed in Annex III, and were therefore not capable of being subject to the reduced rate in art.98 PVD.

CJEU (Case C-552/17): *Alpenchalets Resorts GmbH v Finanzamt München Abteilung Körperschaften*

2.9.3 Holiday deposits

A Polish travel agent formed the view that it was not clear from the national legislation when VAT on payments on account was due. It requested a tax ruling. This stated that VAT is chargeable at the time when payments on account are received. In order to determine the travel agent's margin, which amounts to the taxable amount for purposes of VAT, the agent could deduct from its gross receipts the estimated costs that it would have to incur, relating to the supply in question, and make, later, as appropriate, the necessary adjustments, once it was in a position to determine the final amount of the costs actually incurred.

The agent appealed, arguing that it should only have to account for output tax when it was in a position to determine the finally taxable amount (i.e. after all the costs had been settled). The local court agreed that the Polish law had that effect, and held that the use of estimates and subsequent adjustments to tax returns should only be an exceptional procedure. The tax authority appealed and questions were referred to the CJEU.

The referring court suggested that there was a gap in the PVD in that art.65 and art.308 did not appear to deal with this particular problem; the solution (to use estimates of costs to calculate a margin and adjust later) was not set out in the Directive and could only be inferred from its general framework; but to require output tax on the full amount of receipts, because costs had not yet been paid, would impose a heavy burden and appeared to go against the purpose of the margin scheme.

The court noted that the margin scheme is an exception to the normal rules of VAT that is included in the PVD to deal with specific difficulties (deduction of input tax on costs incurred in different countries). It is not a self-contained and independent scheme of VAT. Art.65 therefore applies to receipts by travel agents, who must account for output tax on receipt of

payments on account, provided that the services to be rendered are "precisely designated" (i.e. the receipt is linked to a specific supply).

The court's answer on the calculation of an estimated margin is unusually long and detailed. Although the procedure is not prescribed by art.308, the court considered that a travel agent "of average diligence" should prepare a "rather detailed estimate" of the total cost of an individual trip, and calculate the VAT on payments on account based on an estimate of the margin. The agent should then correct the calculation to the actual costs incurred as soon as they are known. That correction should lead to an amendment of the output tax in the original return.

It is perhaps surprising that it has taken so long for this question to be asked.

CJEU (Case C-422/17): *Szef Krajowej Administracji Skarbowej v Skarpa Travel sp. z o.o.*

2.9.4 Updated Notice

HMRC have updated their Notice *Tour operators margin scheme* from the February 2016 version, but there is no "What's changed" section to highlight the nature of the amendments.

Notice 709/5

2.10 Second hand goods

2.10.1 Works of art

A German art dealer purchased a number of works of art as acquisitions from artists residing elsewhere in the EU and paid German acquisition tax on the purchases. He asked his local tax authority to apply the margin scheme to his sales, but this was refused. He declined to deduct input tax on the purchases, although it was noted that he could still do so, if his request for the margin scheme calculation of output tax failed.

Questions were referred to the CJEU on the application of articles 314 and 316 PVD. Article 314 makes the margin scheme mandatory where a taxable dealer supplies something that has been supplied to him within the EU by a non-taxable person; or by a taxable person where the supply was exempt within art.136 (input tax blocked on purchase); or by a taxable person covered by the exemption for small enterprises; or on a supply also within the margin scheme. Article 316 allows taxable dealers to opt for the margin scheme in relation to works of art that the dealer has personally imported, or acquired from the creator, or acquired in circumstances where the reduced rate in art.103 applies. In each of these cases, application of the margin scheme is likely to be preferable to deduction of input tax and accounting for output tax on the full selling price.

The problem was that the transactions appeared to fall within art.316, in that the supplies were purchased from the artists or their successors in title, but not within art.314, because the acquisition was effectively a taxable transaction. The question for the CJEU was whether the German

law, which ruled out the margin scheme in these circumstances, was incompatible with the PVD.

The CJEU ruled that the right to opt for the margin scheme in art.316 could not be made subject to art.314. It was clear and mandatory, and the German law did not comply.

There was a second question about the right to deduct input tax, which the German law allowed. The CJEU confirmed that the trader could not have it both ways: if he opted for the margin scheme, he could not also deduct the input tax that had been paid on the acquisitions.

CJEU (Case C-264/17): *Harry Mensing v Finanzamt Hamm*

2.10.2 Sale of repossessed vehicles

A hire purchase company claimed repayment of £24m of output tax accounted for on sales of vehicles that had either been repossessed or voluntarily surrendered at the end of finance agreements. The claims related to the period from 1 July 2010 to 30 June 2014, and the FTT was asked to give a ruling in principle, with the amount to be settled separately if the ruling favoured the taxpayer.

The company had accounted for output tax on the full amount of the sales. It now contended that it should have been liable to a lower amount on one of two bases:

- either the margin scheme ought to apply to the sales; or
- if not, art.4(1)(a) of the Cars Order should take the supplies outside the scope of VAT as the sale of a repossessed item.

The second proposal was based on a contention that the 2006 restriction on this rule, brought in to prevent the double relief that was enjoyed in the *General Motors Acceptance Corporation* case, did not apply. That restriction was supposed to impose output tax on the full amount of any resale where the finance company was able to adjust the output tax on the first sale of the car as a result of the repossession (which this taxpayer did). The company argued that the restriction was only compatible with EU law if the margin scheme applied to the sale; if it did not, then it should be unenforceable.

The basis of the company's overall position that it must succeed on one or other argument to avoid double taxation. As the customers of its HP sales would not be able to recover VAT on the first sale to them, charging VAT again on the full proceeds of a second sale would result in a double charge. This would be contrary to art.1 PVD. It was common ground that all of the customers, for both the first and second sales of the vehicles involved in the appeal, would not be able to recover input tax on their purchases.

The company contended that the margin scheme should apply because the customers "supplied" the car back to them at the end of the finance agreement. This was described as a "novel proposition" by the judge (Harriet Morgan). The consideration given by the company for this "supply" was the release from the obligation to pay the remaining amounts due under the original agreement, which were then used to reduce the consideration on that first supply under reg.38. The company also argued that this was logically consistent with art.14, which regarded

the HP purchaser as having bought the car at delivery; if the end of the agreement did not involve a supply back to the company, it could not validly make a further supply to anyone else.

The company argued that its "margin" on the second sale was the difference between the amount that the customer had paid under the finance agreement (as adjusted) and the amount received on the second sale at auction. This was normally negative, so no output tax would be due. The application of the margin scheme would therefore normally achieve the same result as the non-supply relief.

The judge set out an analysis of the way traditional HP and "PCP" sales work. PCP agreements involved lower monthly instalments and a large "balloon payment" at the end before the purchase of the car. Where a customer chose not to pay the "balloon payment", the contract provided for the company to sell the car as the customer's agent. Cars sold in this way were not included in the claim. Where a customer had paid at least half the total amount due under the agreement, it was possible to terminate voluntarily without incurring a cost (subject to any excess mileage and damage charges); where a customer defaulted on the payments, the company would repossess the car (a "forced termination").

The judge also included a numerical example of how the VAT accounting works:

- suppose the company pays £120 for a vehicle acquired from a dealer – that includes £20 of VAT;
- the company charges £120 of capital to the customer, receivable in 10 instalments, each including £2 of VAT;
- this involves a cash flow cost, in that the £20 of output tax is due to HMRC immediately on the sale, even though it will be collected from the customer later;
- if the customer terminates voluntarily halfway through the agreement, he has paid £50 of net capital plus £10 of VAT, so the company adjusts the output tax on the sale from £20 to £10.

Unfortunately, the judge's numerical example is not clear in relation to a forced termination – she says that "if the termination occurs on the customer's default and VWFS sells the vehicle for £30, VWFS makes a VAT adjustment under regulation 38 reflecting an amount equal to the sales proceeds of £30 as a reduction in the consideration for the HP supply. VWFS may be able to claim bad debt relief in respect of the remaining amount owed of £20". If the customer had paid half of the amount due, the £30 and the £20 here appear to be net amounts rather than gross, and the judge does not spell out the effect on the output tax.

As a preamble to considering the merits of the company's argument, the judge set out the history of the "desupply provision". She noted that it was introduced before the adjustment mechanism in reg.38: at that time, it was needed because otherwise the HP company would clearly have suffered double taxation. If it made the first sale for £120 (gross), received £60 before repossessing the car, and then made a second sale for £60, it would be liable for the full £20 on the first sale and £10 on the second. The *GMAC* case resulted from the introduction of the reg.38 mechanism without any restriction on the desupply rule: the courts held

that the clear words of the law gave that company both reliefs at once – it was entitled to reduce the VAT on the first sale to £10, and to account for no VAT on the second. The purpose of the amendment in 2006 was to allow one relief or the other, which should produce a fair result.

HMRC argued that there was no question of double taxation in the circumstances put forward by the company. The company's position would result in it enjoying full relief for the VAT on the original cost of the car, but it would not charge output tax on the full amount received for the sale(s). The margin scheme should only apply if there was a supply for consideration by the customer to the HP company, which (according to HMRC) was not the case.

The CJEU had considered a similar situation in the later *GMAC* case (Case C-589/12) in which HMRC sought to deny a historic repayment on the basis that the operation of both reliefs together would provide a "windfall". The court refused to help the UK government: the reg.38 adjustment was based on a directly effective EU right, and the desupply rule was a provision of national law that the taxpayer was entitled to rely on. The fact that the national law gave an extra relief could not be a reason to deny a directly effective right. The judge interpreted this decision as confirming that the CJEU considered that the operation of both reliefs together would result in under-taxation.

The judge went on to examine CJEU decisions on the margin scheme, including *Commission v Ireland* (Case C-17/84) and *Jyske Finans v Skatteministeriet* (Case C-280/04). These decisions confirmed that the scheme was intended to prevent double taxation where a dealer acquired goods for sale from someone who could not themselves recover VAT on an earlier purchase; but also confirmed that the scheme was an exception to the normal rules of VAT, and therefore had to be applied only to the strict circumstances prescribed by the Directive.

The judge sought to illustrate her view that the company would not suffer double taxation was set out in the following continuation of her numerical example:

The VAT effects if the scheme applies to a resale and if it does not apply are best illustrated by an example as follows:

(1) A financier purchases a car from a car dealer for £100 plus VAT of £20.

(2) The financier agrees to provide the car to the customer under a HP transaction under which the customer is to pay a capital amount for the car of a total of £120 due in 10 equal instalments of £12 (plus interest costs and related fees). This represents the capital amount of £100 and VAT of £20 to be collected by the financier at £2 per instalment.

(3) At the outset the financier accounts for the VAT of £20 charged on its purchase of the car as input tax and for output tax of £20 in respect of the HP supply on the full amount of capital instalments due of £100.

(4) The financier has borrowed £120 to fund the total amount it pays for the vehicle of £120 (including VAT of £20). As noted, it recovers the output tax of £20 from the customer only over time when the capital instalments are paid.

(5) The customer terminates the HP transaction voluntarily at a point when it has paid £60 of the instalments due, comprising £50 representing the capital amounts and £10 representing output tax for which the financier has accounted on the HP supply.

(6) The financier's VAT account is adjusted under regulation 38 by treating the unpaid capital amount of £50 as a reduction in the consideration for the HP supply. On that basis it is liable to account for output tax of £10 only in respect of the HP supply on the reduced sum of £50. The financier, therefore, receives a refund of £10 of VAT overcharged on the HP supply. At that point the customer's irrecoverable VAT cost is fixed at £10.

(7) The financier takes back possession of the car and sells it at auction to a third party purchaser for a VAT inclusive price of £60 which includes VAT of £10. As established in the cases, this is a separate supply of goods for VAT purposes. Assuming the margin scheme does not apply, the financier accounts for output tax on the supply of £10, which it has to pay to HMRC. The purchaser at auction correspondingly has an irrecoverable VAT cost of £10.

(8) Overall, the financier incurs recoverable input tax of £20 (on its purchase of the vehicle) and accounts for output tax of £20 (£10 on the HP supply and £10 on the sale at auction). Correspondingly this gives rise to irrecoverable VAT costs of £20 in the hands of the consumers (£10 for the customer and £10 for the purchaser at auction).

(9) In cash terms the financier has received £120 in respect of the transactions undertaken which equals its original cash outlay of £120 (disregarding subsequent finance charges). It receives (a) £60 from the customer in respect of the HP supply (being the amount paid up to the date of termination), (b) £10 in respect of overpaid VAT (as a result of the VAT adjustment on termination to reflect that £50 (and the related VAT) is no longer due) and (c) £50 on the sale at auction (£60 of the net sales proceeds received less £10 of output tax which the company has to account for to HMRC).

If VWFS' approach is instead applied, under the margin scheme the finance company would not be liable to account for VAT on the auction sale at all or for a minimal amount of VAT only.

(1) The financier again sells the vehicle at auction for £60 (that being the auction price regardless of any VAT charge).

(2) The profit margin under the scheme is the difference between (a) the purchase price, being the amount the financier paid for the vehicle and (b) the selling price, being the amount it receives on the sale at auction. The selling price is, therefore, £60.

(3) On VWFS' analysis the customer supplies the vehicle to the financier in return for consideration equal to the instalments which are no longer due from the customer. I take that to be the purchase price. (I note that VWFS argues that the value of that consideration should be taken to be equal to the actual sums paid by the customer to the date of termination. I have addressed that argument below.) It is not clear to me whether, on VWFS' argument, that amount is to include the VAT element of the instalments or not. I have set out the position in each case.

(a) If the purchase price is £60 (including the VAT element of the instalments), the profit margin is zero so that no VAT charge is due on the sale.

(b) If the purchase price for the purposes of the scheme is £50 (leaving the VAT element of the unpaid instalments out of account), the profit margin is £10 (£60 received at the auction sale less £50). The resulting VAT is £1.67.

(4) The overall result in the scenario in (3)(a), therefore, is that the financier incurs recoverable input tax of £20 only and accounts for output tax of £10 only on the HP supply and no VAT on the repossession sale. In cash terms the finance company would receive £130 in respect of the transaction undertaken which exceeds its original cash outlay of £120 (disregarding finance charges). As before it receives £60 from the customer in respect of the HP supply and £10 in respect of overpaid VAT. However on the auction sale it receives an increased amount of £60 as it does not have to account for VAT out of the sales proceeds.

(5) In the scenario in (3)(b), the result is the same except that the financier is liable to account for a total of £11.67 of output tax and in cash terms realises £1.67 less overall.

The fallacy in the company's argument is identified as the proposition that there is unrelieved VAT that needs to be taken into account on its second sale. Although the consumer has suffered irrecoverable VAT, it is effectively reduced by the reg.38 adjustment; and the original cost of the car is effectively a cost component of both of the company's sales, relief for which would be double counted on the company's approach.

The judge then considered in detail whether the margin scheme could apply to the repossession and resale of cars. This depended on the repossession constituted a "supply" by the customer surrendering the car. The judge examined art.14 PVD in detail and also cases including *Mercedes-Benz* (Case C-164/16). In her view, there was no separate transaction on repossession: it was simply an exercise of rights arising out of the original contract. The commercial and economic reality of the situation was that there was no supply by the customer. The company's arguments that it provided consideration to the customer for the return of the vehicle were likewise unconvincing. That meant that the terms of the PVD did not bring the resale within the margin scheme.

At the conclusion of 246 paragraphs, the judge held that the company could not enjoy the desupply rule if it had made adjustments under reg.38, and could not use the margin scheme. It had correctly accounted for output tax on the full amount of resales, and its appeal was dismissed.

First-Tier Tribunal (TC06811): *Volkswagen Financial Services (UK) Ltd*

2.10.3 Updated Notice

HMRC have updated their Notice *The margin and global accounting schemes* from the April 2017 version, but there is no "What's changed" section to highlight the nature of the amendments.

Notice 718

2.11 Charities and clubs

Nothing to report.

2.12 Other supply problems

2.12.1 Face-value vouchers

HMRC have published an Information Sheet 9/2018 to explain the new rules for face-value vouchers issued on or after 1 January 2019. These changes were covered in the last update. There are a number of useful examples of different scenarios at the end of the Information Sheet, and two other points to note:

- the Information Sheet does not highlight the fact that the old rules (VATA 1994 Sch.10A) continue to apply to vouchers issued on or before 31 December 2018 (e.g. anything given for Christmas) – in practice, retailers may decide to apply the new rules to them for simplicity, possibly accounting for a little more output tax;
- the Information Sheet confirms HMRC's view that intermediaries who merely purchase and re-sell multi-purpose vouchers may not be entitled to deduct input tax, or indeed to register for VAT, because they do not have to charge VAT on these vouchers. Although they are still considered to be making supplies of the underlying goods or services, the legislation will make it clear that these will not be recognised for the purposes of input tax deduction. There are, however, situations where although an intermediary does indeed purchase and re-sell vouchers, this is a part of a much wider package of services supplied to the customer to whom the multi-purpose voucher is transferred.

VAT Information Sheet 9/2018

2.12.2 Retained payments and deposits

HMRC have issued a Brief to give more details on the change to VAT treatment of retained payments and deposits that was announced in the Budget. HMRC state that their current policy lets businesses treat many payments for services and part payments for goods, as outside the scope of VAT where the customer does not use the service or collect the goods. The reason for the change is attributed to the CJEU decisions in *Air France* (Case C-250/14) and *Firin OOD* (Case C-107/13). The new policy, which will apply from 1 March 2019, is stated as follows:

When a full or part payment is made on account for a taxable supply, a chargeable event occurs and VAT becomes due on the amount paid.

If the supply does not take place, the VAT must not be reduced, unless the payment is refunded. This is because when a customer makes or commits to make a payment, it is for a supply. It cannot be reclassified as a payment to compensate the supplier for a loss once it is known the customer will not use the goods or services.

Only one example is given: it involves a hotel room that is paid for in full on 4 January 2019, with no right to a refund if the booking is cancelled. HMRC say that if the customer cancels the booking before 1 March 2019, the hotel may make an adjustment to output tax; if the customer cancels on or after 1 March, the hotel cannot adjust the output tax.

That raises at least two issues:

- it is surprising that HMRC would allow an adjustment in this circumstance, where the room has been paid for in full;
- if the payment is contractually a security deposit, rather than the full consideration for the supply, would the CJEU judgment in *Eugenie-les-Bains* still apply?

R&C Brief 13/2018

2.12.3 Scale charges

The EU has approved the extension of the UK's VAT road fuel scale charges until December 2020. The system is operated under a derogation which was due to expire on 31 December 2018.

Council implementing decision (EU) 2018/1918

2.12.4 Updated Notice

HMRC have issued an updated version of their *Notice Transfer a business as a going concern*. The main changes are new paragraph 2.2.6 for purchasers not established in the UK and updated paragraph 4.3 to reflect new rules on transfers into a VAT group.

Notice 700/9

3. LAND AND PROPERTY

3.1 Exemption

3.1.1 Sale of land

A company claimed input tax in relation to a building development. HMRC restricted the claim in relation to some land that was not eligible for zero-rating, and repaid the balance of £3,320. They subsequently assessed the company to claw back £3,049 of this on the grounds that invoices were made out to the individual owners and directors, and there were non-business purchases included in the claim. The company appealed.

The first question before the Tribunal was whether the sale of the land had qualified for zero-rating. This would require a dwelling to be in the course of construction. The appellant's director explained that the site had been prepared and foundations had been poured; a site hut had been erected and bricks had been arranged on site to allow the local authority to approve the colour and other specifications. This had taken place over two years while funding was sought for the development, in order that potential funders could view the site and understand the proposed construction. The director argued that "substantial work" had been carried out to the site, and HMRC's view that walls had to be under construction was incorrect.

The director acknowledged that the invoices were in many cases made out to him and his wife, and they owned the land personally. The project had started before the company was incorporated, and some suppliers knew him personally and raised invoices in the wrong name.

He claimed that the land had been sold to the company immediately before onward sale to a developer who would carry on the project, but the documentation relating to this transaction was unclear. The Land Registry recorded the sale as being made by the individuals to the developer, and had no record of the company ever having an interest in the land.

The judge (Anne Fairpo) examined the evidence and agreed with HMRC that the company had not discharged the burden of proof required to show that it had made a supply of the land. It was not entitled to any input tax credit in relation to costs associated with that supply.

This meant that the question of zero-rating was not strictly relevant – the persons selling the land (the directors) were not registered for VAT. However, the judge commented that she agreed with HMRC's view: laying foundations is preparatory to construction, and does not mean that a building is in course of construction. It was therefore not possible in any case for the company to claim any input tax.

The invoices were for legal and estate agency services in relation to the land, and for some personal items and unidentified costs. The major items were all made out to the directors personally, and there was no evidence that they were incurred as agents for the company. They were not proper to the claimant.

The appeal was dismissed in full.

First-Tier Tribunal (TC06741): *Honeygarth Ltd*

3.2 Option to tax

3.2.1 Updated Notice

HMRC have updated their Notice *Opting to tax land and buildings*, replacing the November 2017 version. The main change is a new section 7.6 on authorised signatories for the purposes of notifying an option to tax. The new section sets out the minimum information that must be contained in a letter authorising another person to sign an option to tax on the opter's behalf. The section also provides a suggested form of words for an authorisation letter and a list of authorised persons for various legal entities.

Notice 742A

3.3 Developers and builders

3.3.1 Reverse charge for construction services

HMRC have issued a guidance note on the domestic reverse charge that will be introduced from 1 October 2019. The following extracts are significant, although anyone affected should read the whole document, including the explanatory flowcharts which are not reproduced here.

Supplies that will be affected

The domestic reverse charge will only affect supplies at the standard or reduced rates where payments are required to be reported through the Construction Industry Scheme (CIS).

Therefore supplies between sub-contractors and contractors, as defined by CIS, will be subject to the reverse charge unless they are supplied to a contractor who is an end user.

End users will usually be recipients who use the building or construction services for themselves, rather than sell the services on as part of their business of providing building or construction services.

The legislation also allows for those connected to end users, including landlords or tenants, to also be treated as end users. Therefore intra-group and leasing re-charges of building and construction services connected to the end user are also excluded from the reverse charge.

Implementation of the reverse charge

HMRC understands the difficulties businesses may have in implementing the domestic reverse charge and will apply a light touch in dealing with related errors that occur in the first 6 months after introduction, where businesses are trying to comply with the new legislation.

However, businesses that knowingly claim end user status when the domestic reverse charge should have applied will still be liable for the output tax that should have been paid and may be liable for penalties.

Timing and scope

The domestic reverse charge will take effect from 1 October 2019. Because it only applies to supplies where payments are reported through CIS the supplies affected are closely aligned to those defined as construction operations under CIS.

It applies to the following building and construction services at either standard or reduced rate VAT:

- *construction, alteration, repair, extension, demolition or dismantling of buildings or structures (whether permanent or not), including offshore installations*
- *construction, alteration, repair, extension or demolition of any works forming, or to form, part of the land, including (in particular) walls, roadworks, power-lines, electronic communications apparatus, aircraft runways, docks and harbours, railways, inland waterways, pipe-lines, reservoirs, water-mains, wells, sewers, industrial plant and installations for purposes of land drainage, coast protection or defence*
- *installation in any building or structure of systems of heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection*
- *internal cleaning of buildings and structures, so far as carried out in the course of their construction, alteration, repair, extension or restoration*
- *painting or decorating the internal or external surfaces of any building or structure*

It also applies to services which form an integral part of, or are preparatory to, or are for rendering complete, the services described in the bullet points above including site clearance, earth-moving excavation, tunnelling and boring, laying of foundations, erection of scaffolding, site restoration, landscaping and the provision of roadways and other access works.

Exclusions

Supplies of the following supplies are not covered by the domestic reverse charge if supplied on their own:

- *drilling for, or extraction of, oil or natural gas*
- *extraction (whether by underground or surface working) of minerals and tunnelling or boring, or construction of underground works, for this purpose*
- *manufacture of building or engineering components or equipment, materials, plant or machinery, or delivery of any of these things to site*
- *manufacture of components for systems of heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection, or delivery of any of these things to site*

- *the professional work of architects or surveyors, or of consultants in building, engineering, interior or exterior decoration or in the laying-out of landscape*
- *the making, installation and repair of artistic works, being sculptures, murals and other works which are wholly artistic in nature*
- *sign writing and erecting, installing and repairing signboards and advertisements*
- *the installation of seating, blinds and shutters*
- *the installation of security systems, including burglar alarms, closed circuit television and public address systems*

This list is not exhaustive and if these or any other non-reverse charge supplies are supplied with supplies subject to the domestic reverse charge please refer to the mixed supplies section below.

Mixed supplies

The legislation is designed so that if there is a reverse charge element in a supply then the whole supply will be subject to the domestic reverse charge. This is to make it simpler for both supplier and customer and to avoid the need to apportion or split out the supply.

In addition, if there has already been a domestic reverse charge supply on a construction site, if both parties agree, any subsequent supplies on that site between the same parties can be treated as domestic reverse charge supplies. This should reduce doubt and speed up the decision making process for both parties.

If still in doubt, provided the recipient is VAT registered and the payments are subject to CIS, it is recommended that the reverse should apply.

End users

End users are those who receive building and construction services but do not supply those services on along with other building and construction services. Under CIS rules, they are required to report their payments to HMRC because they are 'deemed contractors', either because they are named in the legislation or because of the amount of purchases of building and construction services they make.

Payments by deemed contractors can be excepted from reporting through CIS, in which case the domestic reverse charge will not apply and the supplier should be advised of this.

The effectiveness of the reverse charge does not depend on supplies to end users being included. However, because suppliers may be unaware they are supplying an end user, it will be up to the end user to make the supplier aware that they are an end user and that VAT should be charged in the normal way instead of being reverse charged. This should be in a written form that is clearly understood and can be retained for future reference.

If the end user does not provide its supplier with confirmation of its end user status it will still be responsible for accounting for the reverse charge.

Completion of the VAT Return

Suppliers

Suppliers of goods or services under the domestic reverse charge must not enter in box 1 of the VAT Return any output tax on sales to which the domestic reverse charge applies, but must enter the value of such sales in box 6.

Customers

Customers must enter in box 1 of the VAT Return the output tax on purchases to which the domestic reverse charge applies, but must not enter the value of such purchases in box 6. They may reclaim the input tax on their domestic reverse charge purchases in box 4 of the VAT Return and include the value of the purchases in box 7, in the normal way.

Invoicing

When making a supply to which the domestic reverse charge applies, suppliers must:

- *show all the information normally required to be shown on a VAT invoice*
- *annotate the invoice to make clear that the domestic reverse charge applies and that the customer is required to account for the VAT*

The amount of VAT due under the domestic reverse charge should be clearly stated on the invoice but should not be included in the amount shown as total VAT charged.

If you produce invoices using an IT system, and that system cannot show the amount to be accounted for, you should read Domestic reverse charge procedure (VAT Notice 735).

Under the VAT Regulations 1995 invoices for domestic reverse charge supplies, when the customer is liable for the VAT, must include the reference 'reverse charge'. The following examples fulfil the legal requirement:

- *Reverse charge: VAT Act 1994 Section 55A applies*
- *Reverse charge: S55A VATA 94 applies*
- *Reverse charge: Customer to pay the VAT to HMRC*

Tax points

The provision of building and construction services are continuous supplies of services. The tax points are therefore the issue of a VAT invoice or the receipt of payment, whichever is earlier (Regulation 90 of the VAT Regulations 1995). Additionally, in certain circumstances, where there is a delay beyond one year in issuing a VAT invoice or receiving payment, an annual tax point will apply (Regulation 94B(5) of the VAT Regulations 1995).

For supplies spanning 1 October 2019 that are liable to the domestic reverse charge, the VAT treatment will be as follows:

- *for invoices with a tax point before 1 October 2019, the normal VAT rules above will apply and you will charge VAT at the appropriate rate on your supplies*

- *for invoices with a tax point on or after 1 October 2019, the domestic reverse charge will apply.*

www.gov.uk/government/publications/vat-reverse-charge-for-building-and-construction-services-guidance-note

HMRC have also issued a draft Statutory Instrument *The Value Added Tax (Section 55A) (Specified Services and Excepted Supplies) Order 2019* and a Tax Information and Impact Note in relation to the changes.

SI/Draft; www.gov.uk/government/publications/vat-reverse-charge-for-building-and-construction-services

3.3.2 Sub-contractor

A company provided construction services to a main contractor in relation to a new place of worship for a charity. It incorrectly zero-rated the work, even though the "relevant charitable purpose" rules only allow that for the final supply between the main contractor and the charity (because the recipient of the supply has to issue a certificate). The main contractor had "issued" it with a copy of its own certificate. The company accepted that it should have checked the legal position before relying on this.

HMRC assessed for the VAT fraction of the amount received. The company could not collect this amount by issuing a supplementary invoice, because the main contractor was insolvent. It argued that if it had correctly charged VAT, the main contractor would have recovered it, so HMRC were unfairly collecting a "windfall". The amount in dispute was about £220,000.

First-Tier Tribunal (TC05874)

The judge (Barbara Mosedale) considered arguments based on fiscal neutrality and the CJEU precedent of *Reemtsma* (Case C-35/05). The company argued that this gave it the right to repayment of tax overcollected directly from HMRC, where the normal route (via the supplier) was impossible because of insolvency. The judge did not agree that the position here was analogous, because *Reemtsma* was about a claim for input tax, whereas this was an assessment to output tax.

In her view, HMRC were not "enriched" at the expense of the appellant – rather, they were enriched at the expense of the main contractor and its creditors in insolvency, because it was entitled to claim the VAT that was being assessed on the appellant. Because it had been liquidated, it would not make that claim.

The company also argued that s.73 VATA 1994 gave HMRC the discretion to assess or not, which had not been considered. The judge did not agree that the FTT has jurisdiction to consider whether HMRC were correct, in a public law sense, to raise an assessment. She disagreed "with respect" with the earlier Tribunal decisions in *Technip Coflexip Offhsore Ltd* (VTD 19,298) and *Hollinger Print Ltd* (TC03117). The judge expressed sympathy for the directors, whose company would have to pay a very considerable amount of money out of its own resources, but in her view the law was clear and gave them no remedy.

Upper Tribunal

The company appealed to the Upper Tribunal (Mr Justice Snowden and Judge Greg Sinfield), on the grounds that the FTT had erred in law:

- in finding that HMRC would not be unjustly enriched and/or there would be no breach of the principle of fiscal neutrality; and
- in concluding that it had no jurisdiction to hear the appellant's ground of appeal in respect of HMRC's discretionary decision to assess.

The judges set out an explanation of how the VAT system should have operated if the company had invoiced its supplies correctly. Although they come to the conclusion that HMRC would not have ended up with the amount of the assessment, and that the company would have been able to retain the amount that it bargained for, they do not see this as "unjust enrichment of HMRC at the expense of the company". They agree with the FTT that the enrichment is at the expense of the main contractor and its creditors.

They go on to distinguish the cases on which the company relied, *Elida Gibbs*, *Reemtsma* and *Banca Antoniana*. They characterise these as relating first to a situation in which no one has made a mistake; secondly in relation to protection of the customer where the supplier has made a mistake; and thirdly in relation to a mistake by the State, which had resulted in the bank paying tax that could not be recovered from its customers. In the present situation, there had been no overpayment of tax by anyone, and the mistake had been made by the appellant. The judges considered this to be "acte clair" and there was no need to make a reference to the CJEU.

In relation to the second issue, it would be necessary for the Tribunal to conclude that the assessment had been "wholly unreasonable". Given the conclusion on the first issue, this could not be the case. The UT therefore did not consider it in any detail.

The appeal was dismissed again.

Upper Tribunal: *J & B Hopkins Ltd v HMRC*

3.3.3 Incorrect zero-rating certificate

A rowing club issued a zero-rating certificate in relation to the construction of a building to be used by itself and other sports clubs in the local area and also to provide a gym facility for which it would offer membership to non-club members. HMRC ruled that it had done so incorrectly, and charged a penalty under s.62 VATA 1994. The club's initial appeal included the submission that the certificate had been correctly issued, but this was withdrawn after the CA decision in *Longridge on the Thames*. Instead, it argued that it had a reasonable excuse for issuing the certificate.

The club argued that it had taken considerable care in deciding to issue the certificate. It had a number of financial and tax professionals as directors and members of the committee that made all the relevant decisions; further advice was taken, including counsel's opinion; the club was aware of the *Longridge* case, which at the time was progressing

through the courts with HMRC appealing against decisions in the taxpayer's favour. The certificate was issued in November 2013.

The club treasurer set out in some detail the grounds for believing that the club had acted reasonably. It had relied on a Tribunal decision that had not been overturned; it was difficult to see what it could have done differently, because if it had not issued the certificate and the CA had found for Longridge, it would have ended up incurring a significant amount of irrecoverable VAT.

HMRC argued that it was not reasonable to issue the certificate when it was known to be contrary to HMRC's settled policy in the area. They suggested that the club should have approached HMRC, who could have taken protective action and stood the case behind *Longridge*. The club had used Longridge's own counsel, who was likely to give them the opinion they wanted. Even so, he put caveats in his opinion that the club did not follow up. The club asked its accountants for a second opinion; the accountants suggested two options, and recommended one that would have disclosed the situation to HMRC at an early stage. The club chose the other option.

Judge Anne Fairpo set out the test for a reasonable excuse from *Clean Car Company* (VTD 5695): "a reasonable excuse should be judged by the standards of reasonableness which one would expect to be exhibited by a taxpayer who had a responsible attitude to his duties as a taxpayer, but who in other respects shared such attributes of the particular appellant as the tribunal considered relevant to the situation being considered."

On this basis, she considered that the club did not have a reasonable excuse. Given the awareness that counsel's opinion depended on *Longridge* succeeding on appeal, and the uncertainty that entailed, a reasonable person would have taken one of the options that would have notified HMRC of the situation, rather than waiting to see if HMRC objected. The appeal was dismissed.

First-Tier Tribunal (TC06803): *Marlow Rowing Club*

3.4 Input tax claims on land

Nothing to report.

3.5 Other land problems

Nothing to report.

4. INTERNATIONAL SUPPLIES

4.1 E-commerce

4.1.1 Commission proposals

The Commission has set out proposals for a new Directive and Implementing Regulation to overhaul the taxation of B2C supplies of services and goods through electronic platforms. The new rules will apply from 1 January 2021, and will impose significant extra responsibilities on the platforms that facilitate such sales. The explanatory memorandum is reproduced below.

Article 14a inserted in the VAT Directive by the VAT e-commerce Directive provides that where a taxable person facilitates, through the use of an electronic interface such as a marketplace, platform or portal either distance sales of goods imported from third territories or third countries in consignments of an intrinsic value not exceeding EUR150 (Article 14a(1)) or the supply of goods within the Community by a taxable person not established there to a non-taxable person (Article 14a(2)), the taxable person who facilitates the supply shall be deemed to have received and supplied the goods himself.

This effectively splits a business to consumer supply (B2C supply) from the supplier selling goods through the use of the electronic interface to the customer into two supplies: a supply from that supplier to the electronic interface (B2B supply) and a supply from the electronic interface to the customer (B2C supply). It is therefore necessary to determine to which supply the dispatch or transport of the goods should be ascribed to properly determine their place of supply. Article 1, point(1) provides that the dispatch or transport should be ascribed to the supply from the electronic interface to the customer, as also indicated in the statement included in the Council minutes upon the adoption of the VAT e-commerce Directive.

The straightforward application of Article 14a(2) would create additional administrative burdens for the companies concerned as well as the risk of VAT revenue losses resulting from the payment of VAT by the electronic interface to the supplier selling goods through the use of the electronic interface. The following amendments proposed address these issues:

- *The B2B supply from the supplier selling goods through the use of the electronic interface to the electronic interface is exempt (Article 1, point(2)) with a right for that supplier to deduct the input VAT he paid himself in respect of the purchase or import of the goods supplied (Article 1, point(3));*
- *According to Article 369b of the VAT Directive as amended by the VAT e-commerce Directive, the One Stop Shop can only be used to declare and pay VAT on intra-Community distance sales of goods and not for a domestic supply of goods. As suppliers selling goods through the use of an electronic interface may hold a stock of goods in different Member States from which they make domestic supplies, electronic interfaces deemed to have supplied those goods themselves would be obliged to register for VAT in all these Member States to account for VAT on these domestic supplies. This would remove the*

simplification of the One Stop Shop for electronic interfaces and thus result in additional obligations for them. It is therefore proposed to allow electronic interfaces to use the One Stop Shop also for domestic supplies to customers when they are deemed to supply the goods themselves under Article 14a(2) of the VAT Directive. This requires the following changes to Chapter 6 of Title XII of the VAT Directive:

- *Amend the heading of the Chapter and of its Section 3 (Article 1, points(5) and (6));*
- *Amend the definition of the Member State of consumption (Article 1, point(7)(a));*
- *Extend the scope of the special scheme (Article 1, point(8));*
- *Amend the provision on the exclusionof a taxable person from the special scheme (Article 1, point(9));*
- *Allow the declaration of these domestic supplies in the One Stop Shop VAT return (Article 1, points(10) and (11)).*

Finally, a last amendment is proposed in the special arrangements for declaration and payment of import VAT where the One Stop Shop is not used to declare VAT on distance sales of goods imported from third territories or third countries. According to Articles 369y to 369zb as inserted in the VAT Directive by the VAT e-commerce Directive global payment of import VAT must be made to customs by the end of the month following that of importation. This payment deadline is however not aligned to the deadline laid down for global payment of the customs debt in Article 111 of the Union Custom Code, providing for deferred payment until the middle of the month following the month of importation. With this proposal, the deadline for deferred payment under these special arrangements is aligned with that provided for in the Union Customs Code 8 (Article 1, point(12)).

Article 2 provides that the measures shall apply from 1 January 2021, which is the date of application of the relevant provisions of the e-commerce Directive.

There is also considerable further detail in an Implementing Regulation (amending the existing IR 282/2011). This covers rules on supply of goods, timing of transactions, accounting, and reporting under the Union and non-Union MOSS schemes.

Note that the "mini-one stop shop" is to be rebranded as a "one stop shop", because its scope has been considerably widened.

europa.eu/rapid/press-release_IP-18-6732_en.htm;
ec.europa.eu/taxation_customs/sites/taxation/files/vat_proposal_2018_819_en.pdf;
ec.europa.eu/taxation_customs/sites/taxation/files/vat_ecommerce_proposal_2018_821_en.pdf

4.1.2 MOSS rule changes

The VAT (Place of Supply of Services) (Supplies of Electronic, Telecommunication and Broadcasting Services) Order 2018 implements the new £8,818 threshold for MOSS. Businesses whose total sales of digital services across the EU do not exceed this threshold in the current and preceding year may apply the VAT rules of their home country, rather than those of the country where their customers are located.

The Explanatory Memorandum notes that there are approximately 1,200 businesses in the UK currently registered under MOSS falling below the threshold.

SI 2018/1194

The VAT (Special Accounting Schemes) (Supplies of Electronic, Telecommunication and Broadcasting Services) Order 2018 allows VAT-registered non-EU businesses (non-established taxable persons) making supplies of digital services to customers in the EU to join the 'non-union' VAT MOSS scheme with effect from 1 January 2019. Previously they were not permitted to use MOSS if they were also required to be registered because they had, for example, a stock of goods in an EU country.

The law allows individuals who are registered under VATA 1994 Sch.1 or 1A, solely by virtue of the fact the individual makes or intends to make supplies in respect of which the special scheme applies, and intends to be registered under VATA 1994 Sch.3B or the equivalent provision in another Member State, to request that the Commissioners cancel the registration under VATA 1994, Sch.1 or 1A.

If the trader is also making supplies that are not covered by the special scheme, the Sch.1 registration obligation remains in force, and separate returns are required. It is also necessary to complete a "normal" VAT return to recover input tax, because this cannot be entered on a MOSS return.

SI 2018/1197

4.1.3 MOSS guidance

HMRC have updated their guide to the *VAT Mini one-stop-shop for digital supplies* to take account of the above rule changes from 1 January 2019.

Note one other change from 1 January 2019: "*For supplies made from 1 January 2019, if you're registered for VAT MOSS in the UK you'll need to apply UK invoicing rules to your supplies. You do not need to issue VAT invoices for supplies to consumers who are not VAT registered.*

For any supplies made before this date you should follow the invoicing rules of the EU member state in which the supply has taken place."

www.gov.uk/guidance/register-and-use-the-vat-mini-one-stop-shop

4.2 Where is a supply of services?

4.2.1 Reverse charge

The Wellcome Trust (W), a charity, made reclaims totalling £13m for periods from 03/12 to 03/17. It had paid management fees to investment managers outside the EU, and had accounted for reverse charges on them. It subsequently argued that the place of supply was not the UK, so the reverse charges (that could not be recovered as input tax) should not have applied. HMRC had assessed W for reverse charges for the period 09/10; W did not appeal, and subsequently accounted for VAT in accordance with HMRC's view. It made the first reclaims in 2016.

The judge (Phillip Gillett) cited articles 43 – 45 PVD and articles 17 – 19 of the Implementing Regulation, which deal with the status and capacity of a customer in determining the place of supply. He stated that the case turned in its entirety on the meaning of the words "acting as such" in art.44 PVD. W claimed that these words took it out of art.44 and therefore out of the requirement to account for VAT on investment management services supplied to it from outside the EU, whereas HMRC claimed that they did not.

The parties agreed that a taxable person's activities could be divided into three categories:

(1) Economic business activity,

(2) Non-economic business activity, and

(3) Private activity, which includes services supplied for use by a taxable person's staff.

In Case C-155/94, the CJEU confirmed that W's activities in relation to the flotation of Wellcome plc fell within (2). The *VNLTO* case (Case C-515/07) confirmed that (2) and (3) are not the same and have different consequences for VAT.

W's counsel argued that the words "acting as such" ought to be interpreted in the same way wherever they appear in the PVD, in particular in art.2 (taxable transactions) and art.44 (place of supply). The judge did not consider this an incontrovertible rule, and preferred to interpret the words according to their context.

Art.43 states:

For the purpose of applying the rules concerning the place of supply of services:

1. a taxable person who also carries out activities or transactions that are not considered to be taxable supplies of goods or services in accordance with Article 2(1) shall be regarded as a taxable person in respect of all services rendered to him;

2. a non-taxable legal person who is identified for VAT purposes shall be regarded as a taxable person.

HMRC argued that this was a simple deeming provision that divided all taxpayers between art.44 (taxable persons, B2B) and art.45 (non-taxable persons, B2C). W's counsel argued that the Implementing Regulation drew a clear distinction between "status" and "capacity": status was

determined by art.43, but it was still necessary to consider the capacity in which a taxable person was acting in order to allocate the supply to art.44 or art.45.

The judge noted that art.43 draws no distinction between supplies received for private purposes and supplies received for non-economic business purposes. However, IR art.19 explicitly states that a taxable person receiving supplies for private purposes (including use by staff) is to be regarded as a non-taxable person in respect of those supplies. That did not explicitly confirm that W's interpretation was correct, but it suggested that HMRC's interpretation was not correct.

The judge considered whether there could be a "gap" between articles 44 and 45 PVD. It was agreed that W did not fall within art.45, because it was a "taxable person" within art.43; the question was whether the words "acting as such" in art.44 meant that there was a separate treatment for "taxable persons not acting as such". The judge was persuaded by W's counsel that the rule in IR art.18 provided sufficient certainty: a supplier was entitled to assume that someone who provided a VAT number was a taxable person, and someone who did not was not a taxable person. As W had not provided a VAT number to investment managers belonging outside the EU, under the IR, they would be required to treat the supplies as made to a non-taxable person.

W's counsel referred to the "Travaux Preparatoires" – the reports of the working party that drew up the PVD. The words "acting as such" in art.44 were controversial, and had appeared in some drafts but not in others. He argued that the reports showed that the phrase was intentional and drew a distinction between taxable persons (within art.43) using supplies for economic ("acting as such") purposes and non-economic purposes; use for private purposes was covered by art.45, as required by IR art.19. If the words did not mean that, they did not mean anything. The judge agreed that this was the most logical interpretation of the words.

The judge rejected a further argument based on equal treatment. W's counsel suggested that HMRC would not require an individual who was registered as a sole trader to account for a reverse charge on investment activities, even though the situation would be the same. The judge did not agree: an individual's investment activities would be private and within art.45, rather than "business non-economic".

Having decided that W fell outside the reverse charge provisions on the basis of the PVD, the judge considered the UK law. VATA s.7A(4)(d) transposes the Directive with the words "received by the person otherwise than for private purposes". That did not draw the distinction that he had concluded was required by the words "acting as such". W's counsel suggested that a conforming construction could be achieved by interpolating the words "or non-economic" after "private". The judge agreed with this approach, as it "went with the grain" of the legislation and did not "create a wholly different scheme from any scheme provided by the legislation" (principles of conforming construction established by the *Test Claimants in the FII Group Litigation* and *Vodafone* cases).

The appeal was allowed.

First-Tier Tribunal (TC06761): *The Wellcome Trust Ltd*

4.2.2 Specified supplies

The *Value Added Tax (Input Tax) (Specified Supplies) (Amendment) Order* confirms the blocking of the "offshore loop" arrangement found to give rise to input tax deduction in the *Hastings Insurance* case. It comes into force on 1 March 2019, and requires that insurance intermediary services relate to an insurance contract for a person who belongs outside the UK, as well as the supply being made to a person (in the *Hastings* case, the insurer) who belongs outside the EU.

SI 2018/1328

4.2.3 Evidence to justify location

Advocate-General Sharpston has given an opinion in a dispute about the evidence required by the Romanian law for a trader to be allowed to exempt transport services connected with an export of goods. At the relevant time, the law allowed exemption only if the taxpayer was able to demonstrate that the goods transported were indeed exported by producing the following documents in support of a request for exemption:

- an invoice issued by the carrier;
- a contract of carriage drawn up with the beneficiary of the service;
- specific documents of carriage; and
- documents showing that the goods transported were exported.

The dispute in the case concerned a road transport services broker which had supplied transport services in Turkey, Georgia, Iraq and Ukraine. Although it had TIR carnets and CMR consignment notes for each of the supplies, it did not have all the documentation required by the Romanian law, so the tax authorities raised an assessment. Questions were referred to the CJEU to determine whether the evidence the company had should be sufficient, or whether the extra demands of the law were permitted.

The A-G noted that it was not clear from the order for reference whether the trader had acted as an intermediary (exempt under art.153 PVD) or provided the transport services itself (exempt under art.146(1)(e)). This was left to the referring court to determine. It did not make a significant difference because exemption would be available under art.153 where the intermediary arranged a transaction that fell within art.146(1)(e).

The A-G commented that the exemption in art.146(1)(e) was mandatory where the substantive conditions were met. The PVD did not impose any specific evidential requirements; such conditions would have to fall within the scope of the general permission in art.131 for Member States to introduce rules to prevent possible evasion, avoidance or abuse. In the A-G's opinion, the Romanian requirements imposed extra formal conditions that could not be justified under this heading. They contravened the principles of fiscal neutrality and legal certainty, and were disproportionate.

The conclusion drawn by the A-G was: "*a taxpayer ... does not have to go so far as to prove that the goods concerned were actually exported. What it needs to show is that the transport services supplied were directly connected with the export of goods. The procedure for establishing that fact is not governed by EU rules and is ultimately a matter for national*

authorities subject to the supervision of national courts. That said, whilst the TIR carnet is not necessarily conclusive proof of export, it seems to me to be a document that is indeed relevant in the context of assessing whether transport services provided are directly connected with the export of the goods carried by the road haulier concerned. In the absence of evidence suggesting that the goods covered by the TIR carnet were not in fact exported, it would seem to me to provide strong evidence in support of a claim for exemption from VAT under art.146(1)(e) PVD."

CJEU (A-G) (Case C-495/17): *Cartrans Spedition Srl v Direcţia Generală Regională a Finanţelor Publice Ploieşti - Administraţia Judeţeană a Finanţelor Publice Prahova*

4.3 International supplies of goods

4.3.1 Post clearance demand

A Slovenian trader imported bananas from a third country and entered them into a customs procedure whereby no import VAT was payable on the grounds that they were to be transported to another Member State. The tax authority discovered that some of the Romanian customers had been registered for VAT shortly before the delivery and immediately removed from the register; the CMR consignment notes presented by the trader were barely legible, and there were discrepancies in the weights and other details. On enquiry to Romania, it appeared that some of the customers were "missing traders". The tax authority concluded that the supplies could not be exempt, and assessed the Slovenian trader, who appealed. Questions were referred to the CJEU.

The Slovenian Supreme Court had noted that, under art.201 PVD, Slovenian law links the liability to pay import VAT to the provisions of the Customs Code on liability to pay import duties. In *Teleos* (Case C-409/04), the CJEU made a distinction between a taxable person's liability to pay VAT and an importer's liability to pay customs debts. The referring court therefore asked whether, in a case such as this, the importer is liable to pay VAT in the same way that he is liable for the customs debt, even if the customer was responsible for transporting the goods and the importer acted with the necessary diligence and good faith.

The CJEU noted that exemption of an import under art.143(1)(d) PVD depends on the importer making an intra-Community despatch which is exempt under art.138. The exemption therefore depends on the substantive conditions for art.138 exemption being met (*Enteco Baltic* Case C-108/17). The precedents show that a Member State can deny the benefit of exemption where a trader knew that a transaction was connected with fraud, or has failed to take all reasonable steps in his power to prevent such evasion (*Mecsek-Gabona* Case C-273/11).

The liability for import duty did not directly reflect the liability for import VAT. An importer is required to pay customs duties payable on the importation of goods in respect of which the exporter has committed a customs offence, including where the importer is acting in good faith and has played no part in that offence; that principle is not transposable to the assessment of whether the supplier, in an intra-Community transaction tainted by fraud, may be required to pay the VAT after the event (*Teleos*).

An importer who has demonstrated the necessary diligence and care cannot be made to pay the import VAT after the event. To do so would break the fundamental link between articles 143 and 138 of the PVD.

The principle of legal certainty ought to protect a trader where the customs authority has examined import documentation and approved the import for exemption. However, that does not prevent the authority from carrying out a further inspection and concluding that the trader has not acted in good faith. It would be for the referring court to determine whether, on the basis of objective evidence, the taxable person knew or should have known that the supplies subsequent to importation were involved in fraud committed by the customer, and whether he failed to take all reasonable steps in his power to avoid participation in that fraud. The objective fact that there was a fraud was not enough, on its own, to deny him exemption on the importation and on the despatch.

CJEU (Case C-528/17): *Milan Božičevič Ježovnik v Republika Slovenija*

4.3.2 Excise goods

A Czech company (A) purchased fuel originating in Austria from two Czech companies. The acquisitions took place at the end of a chain of transactions, including transport from Austria to the Czech Republic under an excise duty suspension arrangement. The final buyer in the chain transported the fuel across the border in its own vehicles, but there were paper supplies to other Czech companies as well.

The question arose as to which was an exempt intra-Community transaction. The tax authority took the view that A had made an intra-Community acquisition. It had taken possession of the goods in Austria and transported the goods across the border, in circumstances in which it had the right to dispose of the goods as owner.

The company objected that it was not possible to dispose of goods that were under a duty suspension regime. It argued that the Czech rules had not properly transposed art.138 PVD, and questions were referred to the CJEU.

The judgment involves a detailed analysis of the relationship between art.2(b)(iii) and art.3(1) PVD, with comments on the difficulty of attributing subordinate clauses with certainty. The circumstances seem to be of relatively limited application; the answers to the questions were:

1. Article 2(1)(b)(iii) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that it applies to intra-Community acquisitions of excise goods, in respect of which the excise duty is chargeable in the Member State of destination of the dispatch or transport of those goods, carried out by a taxable person whose other acquisitions are not subject to value added tax pursuant to Article 3(1) of that directive.

2. Article 2(1)(b)(iii) of Directive 2006/112 must be interpreted as meaning that, in a chain of successive transactions which gave rise only to a single intra-Community transport of excise goods under an excise duty suspension arrangement, the acquisition carried out by the trader liable for payment of the excise duty in the Member State of destination of the dispatch or transport of those goods cannot be classified as an intra-

Community acquisition subject to value added tax under that provision, where that transport cannot be ascribed to that acquisition.

3. Article 2(1)(b)(i) of Directive 2006/112 must be interpreted as meaning that, where there is a chain of successive acquisitions concerning the same excise goods and which gave rise only to a single intra-Community transport of those goods under an excise duty suspension arrangement, the fact that those goods are transported under that arrangement does not constitute a decisive factor in determining to which acquisition the transport is to be ascribed for the purposes of applying value added tax under that provision.

That appears to mean that the excise duty may be due from someone other than the person making the acquisition for VAT. It appears that the Czech authorities were correct to rule that the final buyer had made the taxable acquisition in the Czech Republic, because it took possession of the goods and transported them.

CJEU (Case C-414/17): *AREX CZ a.s. v Odvolací finanční ředitelství*

4.3.3 Fallback acquisitions

A company was an alcohol wholesaler that was approved to own excise duty suspended alcoholic goods in tax warehouses in the UK. It received goods, from its suppliers, into its accounts in a tax warehouse in a member State other than the UK. Those goods travelled across another EU border before being placed in the appellant's accounts, and those supplies were treated as exempt despatches by the suppliers using the company's UK VAT registration number. Neither the appellant nor its customers were registered for VAT in the country of destination, and no acquisition tax was accounted for.

HMRC ruled that the use of the UK VRN triggered a "fallback" acquisition tax charge in the UK, which could only be avoided if it could be shown that tax had been accounted for in the country of arrival. The company's director argued that this was a matter for the tax authorities in the other country, and it was not for HMRC to police the tax system elsewhere. His failure to produce the requested information to show what had happened to the goods was ascribed to the expense of going through all the paperwork in relation to many transactions.

The judge (Barbara Mosedale) analysed the place of acquisition rules in articles 40 and 41 PVD, and the UK's transposition of them in VATA 1994 s.13. He noted that the UK's rules on warehousing (s.18) transposed an optional provision of the PVD (articles 157 and 162). Crucially, s.18(3) states "Where this subsection applies and the material time for the acquisition or supply mentioned in subsection (2) above is while the goods in question are subject to a warehousing regime and before the duty point, that acquisition or supply shall be treated for the purposes of this Act as taking place outside the United Kingdom if the material time for any subsequent supply of those goods is also while the goods are subject to the warehousing regime and before the duty point."

The taxpayer argued that s.13 clearly states that it is subject to s.18, so s.18 should take precedence. HMRC responded that it was necessary to interpret the law so that s.18 was subject to s.13, rather than the other way around, and also that s.18 did not apply to the facts of the case.

The judge rejected HMRC's argument that s.18(3) and s.13(3) were mutually exclusive. HMRC's interpretation would deprive s.18(3) of any application, so it was rejected. However, the judge did accept HMRC's argument that s.18 should be interpreted as only applying to goods arriving in a warehouse in the UK, not anywhere in the EU. Although this is not the literal wording, reading it otherwise would create inconsistencies with the PVD, and it appeared to be the derogation that Parliament had intended to implement. That derogation had been achieved by deeming the place of supply to be outside the UK rather than providing for exemption with credit (as art.157 envisaged), but the result was the same.

The judge rejected other HMRC interpretations and constructions of the statute, but found in their favour on the simple grounds that s.18 had no relevance to a transaction that was actually outside the UK. On that basis, the "fallback" charge applied, as determined by the CJEU in the *Facet Trading* case. The trader argued that acquisition tax should then be deductible as input tax, but the judge ruled that this would only be possible if there was evidence of a link to taxable outputs. In the absence of any evidence about accounting for VAT in the other country, no recovery was available.

The director had claimed that the tax law in the other country had been complied with by self-cancelling entries in the books of the company's tax representative there. Instead of producing evidence of that, he had chosen to litigate the assessment in the UK. In dismissing the appeal, Judge Mosedale commented that it was still open to the director to produce the evidence and thereby to cancel the liability.

First-Tier Tribunal (TC06858): *Ampleaward Ltd*

4.3.4 Brexit update

Following repeated calls for the government to publish the legal advice that it has received on Brexit in full, the government published a reasoned position statement setting out the overall legal effect of the draft Withdrawal Agreement agreed in principle with the EU. Attorney General Geoffrey Cox made a statement to the House of Commons followed by questions, coming under fire for failure to publish the full legal advice in accordance with the motion passed on 13 November 2018, but declining to break convention, citing the public interest.

Two days later, after losing a further vote, the full legal advice was published.

Hansard: House of Commons, 3 December 2018

HMRC have published a new impact assessment for the movement of goods if the UK leaves the EU without a deal. HMRC note that, in such a situation, legislation will be necessary to ensure the UK's customs, VAT and excise regimes function as intended on a contingency basis. The assessment goes into some detail on the required legislation and the impact on businesses of each measure.

www.gov.uk/government/publications/hmrc-impact-assessment-for-the-movement-of-goods-if-the-uk-leaves-the-eu-without-a-deal

HMRC have updated their collection of high-level guides to help businesses involved in importing and exporting prepare for changes to customs procedures after March 2019 in the event of leaving the EU with no deal. The guide to customs, excise and VAT changes now contains new sections outlining the role of the proposed UK Trade Remedies Authority (TRA) and arrangements for the regulation of goods under the EU's 'new approach'. This guide complements the technical guides published on 23 August which were covered in the last update.

The VAT section does not appear to have changed significantly, and says:

If the UK leaves the EU on 29 March 2019 without a deal, the government's aim will be to keep VAT procedures as close as possible to what they are now. This will provide continuity and certainty for businesses.

However, there will be some specific changes to the VAT rules and procedures that apply to transactions between the UK and EU countries.

The government has taken decisions and actions where necessary in order to mitigate the impacts of these changes for businesses.

In the VAT for businesses technical note, the government has announced that in a 'no deal' scenario it will introduce postponed accounting for import VAT on goods brought into the UK.

This means that UK VAT registered businesses importing goods to the UK will be able to account for import VAT on their VAT return, rather than paying import VAT on or soon after the time that the goods arrive at the UK border. This will apply both to imports from the EU and non-EU countries.

In reaching this decision, the government has taken account of the views of businesses and sought to mitigate any adverse cash-flow impacts keeping VAT processes as close as possible to what they are now.

If the UK leaves the EU without an agreement, VAT will be payable on goods entering the UK as parcels sent by overseas businesses. The government set out in the Customs Bill White Paper (published October 2017) that Low Value Consignment Relief (LVCR) will not be extended to goods entering the UK from the EU.

This note confirms that if the UK leaves the EU without an agreement then LVCR will no longer apply to any parcels arriving in the UK, this aligns the UK with the global direction of travel on LVCR. This means that all goods entering the UK as parcels sent by overseas businesses will be liable for VAT (unless they are already relieved from VAT under domestic rules, for example zero-rated children's clothing).

For parcels valued up to and including £135, a technology-based solution will allow VAT to be collected from the overseas business selling the goods into the UK.

If the UK leaves the EU without an agreement, the UK will stop being part of EU-wide VAT IT systems such as the VAT Mini One Stop Shop. Detail for specific EU-wide VAT IT systems is set out in the VAT for business technical notice.

www.gov.uk/government/publications/partnership-pack-preparing-for-a-no-deal-eu-exit

HMRC have published an information pack specifically aimed at partnerships to help them plan for "no deal". The guidance is intended to help partnerships with their own contingency planning and in particular to help partnerships and connected parties think about how they will need to adapt their business to comply with new systems, processes and controls; assess the impact of the increased demand for customs declarations on their business; consider whether they need to recruit and train additional staff and stay up-to-date with these changes.

www.gov.uk/government/publications/partnership-pack-preparing-for-a-no-deal-eu-exit/how-to-find-what-you-need-in-this-partnership-pack

The CIOT, ICAEW and ICAS have published a factsheet summarising the *Taxation (Cross-border Trade) Act 2018,* which received Royal Assent on 13 September. Acknowledging the changing nature of Brexit legislation, the factsheet notes: 'it is entirely possible that new legislation may be introduced to amend/repeal some or all of the Act'. This is the first in what is intended to be a series of factsheets about Brexit.

www.tax.org.uk/policy-technical/technical-news/brexit-factsheet

4.3.5 Brexit legislation

A raft of statutory instruments has been issued ahead of the planned exit date on 29 March 2019. Brief summaries are given below. The bulk of the regulations will come into force on a date to be appointed by Treasury order, although a group of provisions will come into force on 2 January 2019, to allow applications for authorisation or approval to be determined in advance of the UK leaving the EU.

www.gov.uk/government/collections/customs-vat-and-excise-regulations-leaving-the-eu-with-no-deal

The Value Added Tax (Disclosure of Information Relating to VAT Registration) (EU Exit) Regulations 2018 will, from a date to be appointed, allow HMRC to disclose certain information about VAT registration numbers (VRNs). HMRC is developing a new VRN checker service to perform a similar function to the EU 'VIES' system, which will cease to be available in the UK after Brexit. The permitted information includes confirmation that the number is a VAT registration number allocated to a person in the UK's VAT register and the name and address of that person.

SI 2018/1228

The Customs (Import Duty) (EU Exit) Regulations 2018 set out the main provisions which will govern the importation of goods to the UK under a new standalone customs regime to be introduced in the event that the UK leaves the EU without a deal.

SI 2018/1248

The Customs (Special Procedures and Outward Processing) (EU Exit) Regulations 2018 set out rules for outward processing and non-transit special customs procedures, providing for import duty relief or suspension for certain goods imported to the UK, under a new standalone customs regime in the event the UK leaves the EU without a deal.

SI 2018/1249

The Customs Transit Procedures (EU Exit) Regulations 2018 set out the rules for suspension of duty in the UK on international movements of goods under the common transit convention (CTC) procedure and TIR convention, as part of a new standalone customs regime in the event the UK leaves the EU without a deal.

SI 2018/1258

The Wharves and Temporary Storage Facilities (Approval Condition and Transitional Provision) (EU Exit) Regulations 2018 will allow HMRC to require import and export locations that handle goods moving between the UK and the EU to meet certain conditions, under a new standalone customs regime to be introduced in the event that the UK leaves the EU without a deal.

SI 2018/1264

The Wharves, Examination Stations and Temporary Storage Facilities (Approval Conditions) (EU Exit) Regulations 2018 formalise the amenities and facilities that must be provided free of charge by temporary storage facilities, airport examination stations and approved wharves to enable HMRC and Border Force to carry out their duties. The regulations will come into force on the day the UK leaves the EU.

SI 2018/1265

The Value Added Tax (Postal Packets and Amendment) (EU Exit) Regulations 2018 make overseas suppliers liable for import VAT on postal packets sent to the UK containing goods with a value of £135 or less. They also set out a scheme for suppliers to register with HMRC and account for import VAT on a three-monthly return. Failure to register will incur a £1,000 penalty and there may be joint and several liability with recipients, postal operators, or online marketplaces in cases of non-compliance. The regulations also remove low-value consignment relief for commercial imports of goods valued at £15 or less.

SI 2018/1376

4.3.6 Crown dependencies

Draft statutory instruments have been issued that, when enacted, will give effect to new customs arrangements with the Isle of Man, Jersey and Guernsey which amend the 1979 Customs and Excise Agreement to establish a new 'UK/Crown Dependencies Customs Union' after the UK leaves the EU. In the event of a no deal scenario, the governments of the parties intend the arrangements to enter into force on the withdrawal date in March 2019.

www.gov.uk/government/news/uk-agrees-new-customs-arrangements-with-the-crown-dependencies

The draft statutory instruments are:

The Crown Dependencies Customs Union (Guernsey) (EU Exit) Order 2018

The Crown Dependencies Customs Union (Isle of Man) (EU Exit) Order 2018

The Crown Dependencies Customs Union (Jersey) (EU Exit) Order 2018

4.3.7 Updated Notices

HMRC have updated their Notice *The single market* to bring it into line with excise guidance. Para.15.4(d) now states that a vendor is responsible for UK Excise Duty when excise goods move between EU Member States, as well as appointing a UK representative to account for their duty.

Notice 725

HMRC have updated their Notice *Gold acquisitions, imports and investments* to show the correct way to record on invoices the amount of output tax due under the special accounting scheme for gold (section 11.6), and also with a revised address for written enquiries.

Notice 701/21

HMRC have updated their Notice *Sailing your pleasure craft to and from the UK* with a reference to the form C384 (Vessels), to be used for paying VAT on pleasure craft imported into the UK from outside the EU (section 3.4). The "what's changed" section also lists new information about temporary admissions and importing foodstuffs from outside the EU.

Notice 8

4.4 European rules

4.4.1 VAT 'quick fixes'

The Economic and Financial Affairs Council (ECOFIN) has adopted a Directive and regulations for the four 'quick fixes' they have identified as ways of improving the day-to-day functioning of the current VAT system as an interim measure pending eventual introduction of the proposed definitive EU VAT regime. The legislation comes into force on 27 December 2018 and the measures will apply from 1 January 2020.

The four measures relate to:

- call-off stock. The text provides for a simplified and uniform treatment for call-off stock arrangements, where a vendor transfers stock to a warehouse at the disposal of a known acquirer in another member state.
- the VAT identification number. To benefit from a VAT exemption for the intra-EU supply of goods, the identification number of the customer will become an additional condition.
- chain transactions. To enhance legal certainty in determining the VAT treatment of chain transactions, the texts establish uniform criteria.
- proof of intra-EU supply. A common framework is established for the documentary evidence required to claim a VAT exemption for intra-EU supplies.

At the same time, discussions are ongoing on a definitive VAT system to replace the current 'transitional' VAT arrangements, applied since 1993.

www.consilium.europa.eu/en/press/press-releases/2018/12/04/vat-council-adopts-short-term-fixes-to-current-eu-system

4.4.2 VAT rates

On 2 October 2018, the Council agreed a proposal allowing member states to apply reduced, super-reduced or zero VAT rates to electronic publications, thereby allowing alignment of VAT rules for electronic and physical publications. The amending Directive was adopted by the Council on 6 November and came into force on 4 December 2018.

Under the previous rules, electronic publications had to be taxed at the standard rate. Printed publications were (and remain) eligible for reduced rates under art.98 and Annex III PVD. The intention is that this is a temporary measure, pending introduction of the "definitive VAT system" in 2022.

www.consilium.europa.eu/en/press/press-releases/2018/10/02/electronic-publications-council-agrees-to-allow-reduced-vat-rates/

4.4.3 Anti-fraud measures

EU finance ministers have agreed the Commission's proposals for increased exchange of information and cooperation between national tax authorities and law enforcement bodies aimed at tackling large-scale EU VAT fraud. The regulations enter into force on 5 November 2018, with most of the new provisions applying from 1 January 2020.

www.consilium.europa.eu/en/press/press-releases/2018/10/02/vat-fraud-council-adopts-measures-to-boost-administrative-cooperation/

In a Press Release, the European Court of Auditors has warned that the proposed changes to the European anti-fraud office (OLAF) will not be sufficient to ensure investigations are significantly more effective. The auditors noted that although the proposal reflects the principles of cooperation between OLAF and the future European public prosecutor's office (EPPO), some issues remain which could 'hamper effective collaboration'.

The auditors suggested that OLAF's investigations should be reviewed by the Court of Justice to ensure that procedural safeguards have been adhered to, and regretted that the proposal does not address OLAF's role in investigating criminal offences affecting the EU's financial interests when these concern both Member States that participate in EPPO and those that do not.

European Court of Auditors Press Release, 22 November 2018

4.4.4 Generalised reverse charge

EU finance ministers have agreed the Commission's proposal allowing member states to apply the reverse charge mechanism to domestic supplies of goods and services above an invoice threshold of €17,500. This generalised reverse charge is intended to be a temporary anti-fraud measure pending implementation of the definitive EU VAT system in 2022.

Member states will be able to use the generalised reverse charge mechanism (GRCM), only for domestic supplies of goods and services above a threshold of €17 500 per transaction, only up until 30 June 2022, and under very strict technical conditions. In particular, in a member state that wishes to apply such a measure, 25% of the VAT gap has to be due to

carousel fraud. Among other requirements, the member state will have to establish appropriate and effective electronic reporting obligations on all taxable persons, in particular those to which the mechanism would apply. The mechanism may only be used by a member state once it meets the eligibility criteria and its request has been authorised by the Council. The application of this measure is also subject to strict EU safeguards.

www.consilium.europa.eu/en/press/press-releases/2018/10/02/vat-fraud-council-agrees-to-allow-generalised-temporary-reversal-of-liability/

4.4.5 Data-sharing by payment service providers

The European Commission has put forward legislative proposals for quarterly information-sharing obligations on payment service providers, such as credit card companies and other payment intermediaries, as part of anti-fraud measures to support the EU VAT e-commerce directive. The losses of VAT on cross-border supplies of goods in this area is estimated at €5bn a year. Analysis of the data will enable identification of both EU and non-EU online sellers when they do not comply with VAT obligations. The Commission says that more than 90% of online purchases by European customers involve a payment intermediary and data held by these companies 'can offer EU tax administrations a useful tool to control the VAT obligations on cross-border sales of goods and services'.

An amending regulation is proposed which provides for:

- creation of a new central electronic system of payment information (CESOP), which is expected to take at least three years to set up; and
- competent authorities to transmit to CESOP the information they collect from the payment service providers established in their own member state every quarter.

A proposed amending directive introduces the new record-keeping obligation for payment service providers, which would require these records:

- to identify the payment service provider, the payee and details of transactions and payments received by the payee, but not information about payers;
- to be kept only when the total number of payments received by a given payee in a calendar quarter exceeds 25; and
- to be kept for 2 years.

The 25-payment threshold is based on an average value of online shopping orders in the EU which would equate to approximately €10,000 in sales over a full year (matching the €10,000 threshold on intra-EU supplies introduced by the VAT e-commerce directive).

ec.europa.eu/taxation_customs/news/online-payment-companies-help-fight-against-tax-fraud_en

4.4.6 Infringement proceedings

The European Commission has begun infringement proceedings against the UK, sending a letter of formal notice concerning the Isle of Man's 'abusive VAT practices' with regard to supplies and leasing of aircraft for private use. The UK has two months to respond to the Commission's points.

The so-called 'Paradise Papers' revealed widespread VAT evasion in the yacht and aviation sectors, facilitated by national rules which do not comply with EU law. The Commission launched a first package of infringements against Cyprus, Malta and Greece on their reduced VAT basis for the lease of yachts and has received assurances from all these member states that the legislation would be amended. The Commission has also sent a letter of formal notice to Italy over its VAT treatment of the leasing of yachts.

europa.eu/rapid/press-release_IP-18-6265_en.htm

4.4.7 Resale rights

Under a European Directive, the creators of original works of art are entitled to a payment when their works are resold. Austria imposed VAT on such receipts, and the Commission took infringement action in an attempt to have the charge removed. In the Commission's view, the resale right did not constitute consideration for a supply made by the artist. Rather, it was granted directly by law in order to bestow on the author a share in the economic success of his work. The argument between the Commission and the State has been going on since 2014.

The Commission argued that the payment did not meet the definition of consideration because there was no legal relationship between the artist and the payer, and it did not reflect value given in return for a service provided by the author. The author could not influence or prevent the resale. It was not related to copyright.

Austria argued that there was an exchange of services in the context of a legal relationship, and the royalty had to be subject to VAT in the normal way. To do otherwise would infringe the principle of fiscal neutrality. Alternatively, the resale right could be an increase in the taxable amount received by the author for the first sale of the item.

The court agreed entirely with the Commission and rejected Austria's arguments. The author did not participate in the resale in any way, and could not be said to be providing any service in return for the royalty, whether by "tolerating the resale" or otherwise. The first sale of the artwork took place between different parties, and the royalty was not connected with it at all.

Austria was declared to be in breach of its obligations.

CJEU (Case C-51/18): *Commission v Austria*

4.4.8 Change of use and TOGC

A Romanian company, owned and managed by two individuals, claimed input tax deduction for expenditure on a restaurant and on fixed assets. It then leased the building to another company, which carried on the restaurant under the same name. It made no adjustment to its input tax,

even though the lease rental income was exempt. The tax authorities prosecuted them for tax evasion.

They argued that the letting constituted a transfer of a totality of assets within articles 19 and 29 PVD, and they were therefore entitled to the deduction and entitled not to adjust it. Questions were referred to the CJEU.

The court considered the principles of the cases *Zita Modes* (Case C-497/01) and *Schriever* (Case C-444/1). For there to be a transfer of a "totality of assets", it was essential that a bundle of property was transferred sufficient to carry on the activity. It was not necessary for all the property of the transferor to be transferred, and it was not necessary for the transferee to own the premises in which the activity was carried on, as long as (in the case of a restaurant) it had premises in which to operate.

However, in this case, there did not appear to be a "transfer" of most of the assets – they were let rather than sold. It was for the referring court to determine whether the limited assets that were transferred were sufficient to enable the transferee to continue to pursue autonomously the economic activity in question. Although the reasoning is not very clear, the court concluded that the letting of premises could not constitute a TOGC, even if the lessee pursues the activity of the lessor under the same name.

A second question asked whether the lease, which covered all the equipment as well as the premises, should be treated as a straightforward letting of immoveable property (i.e. exempt) or should be treated as a supply of complex services (i.e. not within the exemption). The main precedent for this discussion is *RR Donnelley Global Turnkey Solutions* (Case C-155/12). Although it is normally for the national courts to determine whether a supply is single/compound or mixed, the CJEU here gave a clear answer: the different elements of this transaction were not dissociable from each other, and there was therefore a single supply which was principally a letting of immoveable property.

CJEU (Case C-17/18): *Criminal proceedings against Virgil Mailat and others*

4.5 Foreign refund reclaims

4.5.1 Refunds of VAT in the UK for non-EU businesses

HMRC have issued a Brief to explain that they will reconsider rejected VAT refund claims for 2016/17 under the 13th Directive overseas refund scheme, where the claim was processed after 23 May 2018 and the reason given for rejection was an invalid certificate of status (COS). HMRC introduced new verification procedures for overseas refund scheme claims from 23 May, requiring strict compliance with the legislative requirements for a valid COS, but failed to inform businesses of the change. The Brief explains the verification changes and actions HMRC will take in respect of 2016/17 claims. For new 2017/18 claims, HMRC will extend the deadline until 31 March 2019 for submission of a valid COS.

R&C Brief 12/2018

5. INPUTS

5.1 Economic activity

5.1.1 Sale of a sub-subsidiary

The Danish tax authorities refused a company a deduction for input tax incurred on consultancy fees paid in connection with a proposed sale of a group company. The sale was not completed. The holding company supplied management and IT services to the group company.

The referring court stated that the tax authority's practice was to disallow input tax connected with the sale of shares, even where management services were supplied, because the sale was an exempt transaction. It was possible for such input tax to be deductible only if it could be shown that the costs were part of the general costs of the holding company's economic activity, and were therefore cost components of its general transactions rather than the share sale.

The dispute arose in the context of a group that was in financial difficulties. An Icelandic financial institution had taken control of the group after non-payment of a loan; it then sought to sell off one of the group companies, but in the end abandoned the attempt because no buyer could be found. The VAT on consultancy fees incurred during the search for a buyer was deducted, and the tax authority assessed the company to claw it back.

Questions were referred to the CJEU to determine whether the input tax was deductible; whether it was relevant that the holding company had charged a fixed amount for management services including a mark-up; and how to determine whether the fees were "general costs".

The CJEU noted that there was a prior question: who was the proper recipient of the services? As the objective of the Icelandic bank was to enable it to cease to be a creditor of the group, there was a possibility that it had received some of the supplies. However, the court accepted that the group received at least some of the services, so the question referred was not merely hypothetical.

The court went on to draw the usual distinction between holding companies that are not engaged in any economic activity, because they merely hold shares and receive dividends, and those that are so engaged, because they are involved in the management of their subsidiaries and supply them with services. The *AB SKF* case (Case C-29/08) was cited as authority for the proposition that a disposal, carried out in order to enable the parent company to restructure a group of companies, could be regarded as a transaction that consisted in obtaining income on a continuing basis from activities which went beyond the compass of the simple sale of shares. In that case the Court found that that transaction had a direct link with the organisation of the activity carried out by the group and accordingly constituted the direct, permanent and necessary extension of the taxable activity of the taxable person and consequently came within the scope of VAT.

In establishing a direct and immediate link between the input and a taxable output supply, it is necessary to consider the "exclusive reason" for the transaction. If it is clear that the transaction has not been

performed for the purposes of the taxable activities of a taxable person, that transaction cannot be regarded as having a direct and immediate link with those activities within the meaning of the Court's case-law, even if that transaction would, in the light of its objective content, be subject to VAT (*Becker* Case C-104/12).

It followed that, in order for a share disposal transaction to be able to come within the scope of VAT, the direct and exclusive reason for that transaction must, in principle, be the taxable economic activity of the parent company in question, or that transaction must constitute the direct, permanent and necessary extension of that activity. That would be the case where that transaction is carried out with a view to allocating the proceeds of that sale directly to the taxable economic activity of the parent company in question or to the economic activity carried out by the group of which it is the parent company.

In the present case, the "direct and exclusive reason" for the sale was to attempt to settle the indebtedness of the company to the Icelandic bank, so there was not the necessary link. This was not affected in either direction by the fact that the provision of management services would cease if the shares were sold. It also made no difference that the sale was not completed: the decision depended on what would have been decided if the sale had been completed.

The full answer to the questions was: "Articles 2, 9 and 168 PVD must be interpreted as meaning that a share disposal transaction, envisaged but not carried out, such as that at issue in the main proceedings, for which the direct and exclusive reason does not lie in the taxable economic activity of the company concerned, or which does not constitute the direct, permanent and necessary extension of that economic activity, does not come within the scope of VAT."

CJEU (Case C-502/17): *C&D Foods Acquisition ApS v Skatteministeriet*

5.1.2 Corporate finance

In 2006 Ryanair made a bid to take over Aer Lingus. The bid failed because of competition rules, but the company had incurred costs in connection with the bid. The question of the deductibility of input tax on these costs was referred to the CJEU.

A-G's opinion

A-G Kokott noted that the fact that the transaction was aborted would not in itself be a reason to disallow the tax. Rather, the question was whether the intended acquisition was undertaken as an economic activity or as an investment activity.

The questions referred by the Irish Supreme Court asked whether there was a sufficient link between the costs and the future intention to provide management services to the target. The issue was split into two: whether the intention constituted economic activity, and whether the intention conferred a right of deduction.

The A-G noted that Ryanair is clearly an economic operator in respect of its airline business. There was also an economic objective in the acquisition, in that it wished to take control of a competitor business, increasing turnover and generating synergy and network effects. The A-G

appears to consider that a more direct route to establishing an entitlement to deduction than a consideration of the Court's case law on holding companies, where the right to deduct is dependent on an intention to levy taxable management charges. However, as the referring court had asked the question, she answered it. As the fact-finding court had confirmed this intention as a question of fact, the right to deduct was established and could not be denied just because the supplies never took place.

The Commission pointed out that the case law might encourage artificial structures to generate full deduction on takeover costs: it would be possible to levy a small taxable management charge and receive large outside-the-scope dividends. The Commission recommended some form of restriction "proportionate to the output transactions generated by management services". The A-G did not find this "convincing" – it would be too difficult to apply such a rule to a situation in which the costs would be incurred in different periods to the revenues, and impossible to apply it in the present case, where the revenues never materialised in spite of a genuine intention to generate them. The neutrality of the tax would be undermined.

The A-G then opined that the provision of services was not the only route in the case law to establish a right to deduct. There would also be economic activity if a trader intended to buy all of a competitor's physical assets. The fact that it wanted to buy its shares should not make a difference. "The strategic takeover of an undertaking by which the acquiring company pursues the aim of extending or modifying its operating business is to be regarded as such a direct, permanent and necessary extension of a taxable activity. Although such a takeover is accompanied by the acquisition of shares in the company, it constitutes a measure aimed at (extended) taxable turnover."

There was a direct and immediate link with the airline business as a whole, with the result that full deduction should be allowed.

Full court judgment

The full court judgment is much more restricted than the opinion. Ryanair is still entitled to the deduction, but this is strictly dependent on the intention to make supplies of management services to the subsidiary after acquisition and thereby to be involved in its management. There is no reference (positive or negative) to the wider possibility of deduction through an extension of the taxable trade.

The court cites numerous precedent cases to confirm the general position of "management holding companies" and those engaged in preparatory activities, in particular where those activities prove abortive. The judgment confirms that a prudent acquirer will register in its own right state a clear intention to make supplies of management services to the subsidiary if the bid is successful.

CJEU (Case C-249/17): *Ryanair Ltd v The Revenue Commissioners*

5.2 Who receives the supply?

Nothing to report.

5.3 Partial exemption

5.3.1 Hire purchase

The CJEU has now given its judgment in the *VW Financial Services* case. The dispute has been long and tortuous: the FTT (TC01401) upheld the company's appeal against a refusal by HMRC to accept its proposed partial exemption special method. In late 2012, the Upper Tribunal overturned that decision. The Court of Appeal reversed it again, restoring the FTT's decision. The Supreme Court in 2017 decided to refer questions on the main issue to the CJEU, but ruled on one question in the company's favour. Advocate-General Szpunar then gave an opinion that, in short, the UK's treatment of HP transactions was completely wrong: if they were dealt with as a single supply of taxable services, the partial exemption problem would go away. The CJEU has rejected this opinion and referred particular matters back to the referring court for determination.

Background

There has been a long-running dispute between the leasing industry and HMRC about the proper attribution of overhead input tax. In R&C Brief 31/2007, they declared a new policy to be applied from 1 April 2007 onwards: HP finance was to be treated as a wholly exempt activity, even if legally there was a taxable supply of goods, and as a result the overhead input tax incurred by an HP financier was to be regarded as wholly attributable to making exempt supplies. The logic behind this approach was explained as follows:

"*In most HP transactions, the goods are resold at cost without any margin to cover overhead costs. As there is no margin on the HP goods, the cost of the overheads will normally be built into the price of the supply of credit. In this scenario, HMRC's view is that the overheads are purely cost components of the exempt supply. Otherwise the business would continually enjoy net VAT refunds despite:*

- *making no zero-rated or reduced rate supplies; and*
- *charging a total consideration under the HP agreement that fully recovers its costs and an element of profit.*"

This Brief was later reissued as RCB 82/2009.

VW Financial Services agreed a partial exemption special method with Customs in August 2000. It was based on a 1984 agreement between the Finance Leasing Association and Customs that restricted recoverable overhead input tax in a finance business to 15%. However, the FLA withdrew from the 1984 agreement during 2000. In 2007, VWFS returned to HMRC with a suggestion for a new PESM. By this time, the new policy was in operation, and the company's proposal could not be agreed – they suggested that the overhead input tax in relation to retail business should be determined by the proportion which taxable transactions bore to total transactions. This transaction count was based on every HP agreement being two transactions (one taxable, one exempt), every leasing transaction being two transactions (both taxable) and every fixed price service and maintenance contract as one (taxable) transaction. On this

basis, 50% of the residual input tax referable to HP transactions was recoverable.

For the four periods 10/07 to 07/08, the company applied its preferred PESM and received assessments against which it appealed. After that it operated HMRC's preferred method and made voluntary disclosures to claim more input tax, and appealed against HMRC's refusal to pay these. The total amount in issue before the Tribunal was about £500,000.

First-Tier Tribunal

The FTT examined the organisation of VWFS into eight departments and the way it did business. It also went through the PESM in detail. The company's approach was to apportion overhead input tax between the number of taxable and exempt transactions (i.e. payments received, rather than contracts entered into) in each period, without regard to their value. HMRC divided the input tax between the different classes of business, but then used a value-based apportionment in which no account was taken of the initial value of the taxable car. A small amount was still recoverable under HMRC's method because there were other taxable supplies such as settlement charges and option to purchase fees.

The FTT considered a number of precedents on the basis for deducting input tax on overheads, including *BLP Group plc*, *Abbey National plc*, *Midland Bank plc*, *Kretztechnik*, *Cibo Participations* and *AB SKF*. The FTT came to the conclusion that HMRC's approach was not logical: to attribute overheads entirely to the exempt part of a mixed transaction was inherently unfair and unreasonable. It was not necessary for the input tax to be passed on to the consumer in the form of a directly identifiable element of the price charged. The input tax was incurred in relation to both taxable and exempt transactions, and VWFS's approach was a reasonable one.

Upper Tribunal

The Upper Tribunal considered that it was necessary to characterise the trader's business. If it was truly engaged in taxable vehicle sales, the FTT decision would be reasonable; if, as HMRC argued, it was purely a financial business, then the overhead costs did not have a link to the taxed transactions, and a PESM which produced such a high recovery would not be reasonable.

HMRC submitted that the company made no profit on the taxable transactions, so it had to bear all of its costs out of its exempt income. HMRC's counsel argued that this meant its overheads were only a cost component of its exempt supplies and could never be recoverable. The Tribunal rejected this conclusion, holding that it was necessary to look at the facts of each case to determine whether there was a sufficient link to taxable activities to justify some recovery.

However, the Tribunal concluded on the basis of the facts of this case that VWFS is a financial business and its input tax recovery has to be viewed in that light. It takes no part in the sale of the cars, and cannot affect the price at which they are sold; those sales are not even shown in its statutory accounts. The judge commented:

We feel that the FTT may have been misdirected by looking at the matter purely through VAT-tinted spectacles. What is required is a focus on

economic realities. It is true that VWFS's transactions will always involve a taxable transaction and an exempt transaction inextricably intertwined. But the finance transaction is, to put the matter colloquially, the 'main event' for VWFS. It is what VWFS is all about. Without it, VWFS would be a wholly unnecessary intervener.

The decision was that VWFS's PESM was not a fair and reasonable method. HMRC's assessment was based on a different PESM which excluded the value of the car itself, and as the UT has upheld the assessment, that implies approval of the imposition of that method.

Court of Appeal

The company appealed to the Court of Appeal. It argued that the UT was wrong to conclude that none of the overhead input tax of the company was incurred in making taxable supplies of motor vehicles. The CA agreed: the company was not a pure financial services business such as a bank. To make its supplies of HP finance, it had to make supplies of the cars as well. Neither part of the business could exist without the other. The FTT had therefore been entitled to conclude that the general overheads had been used to some extent in making taxable supplies.

HMRC maintained that they had put forward an alternative argument that a lesser apportionment than the PESM's 50% recovery was appropriate, if they were wrong that no recovery should be allowed. The CA did not accept that this had been part of the argument in the FTT. The challenge had been based on the view that no attribution to taxable supplies was permissible. As the FTT had rejected this point of principle, it had no alternative but to allow the company's proposed PESM instead. The CA was satisfied that the FTT's decision contained no error of law, and restored it, overturning the UT's decision.

Supreme Court

HMRC appealed to the Supreme Court, which decided to refer questions on the main issue to the CJEU. The questions were as follows:

(1) Where general overhead costs attributed to hire purchase transactions (which consist of exempt supplies of finance and taxable supplies of cars), have been incorporated only into the price of the taxable person's exempt supplies of finance, does the taxable person have a right to deduct any of the input tax on those costs?

(2) What is the proper interpretation of para.31 of the judgment of 8 June 2000, Midland Bank (Case C-93/98), and specifically the statement that overhead costs "are part of the taxable person's general costs and are, as such, components of the price of an undertaking's products"?

In particular:

(a) Should this passage be interpreted to mean that a Member State must always attribute some input tax to every supply in any special method adopted under art.173(2)(c) PVD?

(b) Is this the case even if the factual circumstances are that the overhead costs are not incorporated in the price of taxable supplies made by the undertaking?

(3) Does the fact that the overhead costs have been actually used, at least to some extent, in making taxable supplies of cars,

(a) entail that some proportion of the input tax on those costs must be deductible?

(b) Is this the case even if the factual circumstances are that overhead costs are not incorporated in the price of the taxable supplies of cars?

(4) Can it be legitimate in principle to ignore the taxable supplies of cars (or their value) for the purposes of arriving at a special method under art.173(2)(c) PVD?'

In a brief decision, the Supreme Court considered a subsidiary ground of appeal by HMRC. They argued again that the FTT should have taken a middle road between the company's unduly favourable recovery and HMRC's proposal, if it regarded HMRC's proposal as insufficiently generous. HMRC relied on the judgment of Carnwath LJ in *Pegasus Birds Ltd* (2004), in which he had suggested the Tribunal should not only be concerned with whether HMRC had exercised best judgement, but whether the right amount of tax had been assessed. The Court disagreed that this was relevant. That had not been a statement of general principle, but had been applicable to the particular facts of that case. Here, the tribunal was dealing with substantial litigants, represented by experienced counsel: it was entitled to assume that the parties would have identified with some care what they regarded as relevant issues for decision. The FTT had described the issue before it clearly as "The dispute is not on the weighting, but on whether any part of the residual input tax should be attributed at all to the taxable supply of the vehicle." There was no indication that it had misunderstood its task, nor that it had come to the wrong conclusion on that task on the basis of the evidence before it.

HMRC's appeal on this secondary ground was dismissed again.

Advocate-General's opinion

The A-G commented that there was an 'elephant in the room': the UK's classification of HP contracts, which was, in his view, incorrect. He considered the proper treatment of such transactions to be as a single supply of taxable services, which would remove any problem with partial exemption. He considered that *Part Service* (Case C-425/06) was authority for this approach, even though in that case the CJEU had held that the separation of car hire and finance was artificial and abusive, rather than the routine type of transaction that VWFS were involved in.

Full court judgment

The court starts by noting that the UK law treats a hire purchase supply as two separate supplies by the HP company: a taxable sale of the car and an exempt supply of finance. The question of whether a "bundle of elements and acts" constituted a single supply or separate supplies had to be considered in the light of the precedent case law, including *Stadion Amsterdam* (Case C-463/16). Crucially, "it is for the national court to examine the characteristic elements of the transaction concerned, taking into account the economic objective of that transaction and the interests of the recipients thereof." In this case, the referring court took the view that there were separate supplies, and "there is nothing in the order for reference or the observations submitted to the Court to show that that categorisation was not carried out in accordance with the abovementioned criteria." The UK argued that this was correct, presumably not wishing to have to completely rework the VAT treatment of the HP industry.

The court concluded that "deferred payment of the purchase price of goods, in return for payment of interest, may be regarded as a grant of credit, which constitutes an exempt transaction under that provision, provided that the payment of interest does not constitute part of the consideration obtained for the supply of goods or services, but consideration for the grant of that credit." That confirmed the old decision in *Muys' en De Winter's Bouw* (Case C-281/91).

The court went on to note that the right to deduct input tax is fundamental and may not be limited, where there is a link between the input cost and the taxed outputs of the trader. This extended to a situation in which there was a link between the costs and the economic activity as a whole, rather than to particular transactions. The overhead costs of VWFS were so linked to an activity that was partly exempt and partly taxable; "the fact that VWFS decided to include those costs not in the price of the taxable transactions, but solely in the price of the exempt transactions, can have no effect whatsoever on such a finding of fact."

The court then considered the amount that could be deducted. The basic rule in art.173 PVD was to use turnover as an "allocation key" for apportioning overhead input tax. However, art.173(2)(c) authorised Member States to allow or require a method based on "use". According to the case law, this had to "guarantee a more precise determination of the deductible proportion of the input VAT than that arising from the application of the turnover-based method."

In *Banco Mais* (Case C-183/13), the court had come to a decision that was close to what the UK authorities were arguing for: that a method that effectively ignored the taxable part of the income was justifiable. However, the court now held that this did not justify a general principle that all similar transactions in the automotive sector could be treated in the same way.

The court stated that such a method did not take account of an "actual and non-negligible allocation of a share of the general costs to transactions giving rise to a right to deduct", and therefore "cannot be regarded as objectively reflecting the actual share of the expenditure resulting from the acquisition of mixed use goods and services that may be attributed to those transactions. Consequently, such a method is not capable of ensuring a more precise apportionment than that which would arise from the application of the turnover-based allocation key."

It was for the national court to ascertain whether the method proposed in a particular case properly reflected "actual and non-negligible allocation of the general costs"; however, those general costs were a cost component of the taxable part of the transaction as well as the exempt part, and Member States could not impose a method of apportionment which does not take account of the initial value of the goods supplied.

CJEU (Case C-153/17): *HMRC v Volkswagen Financial Services (UK) Ltd*

5.4 Cars

Nothing to report.

5.5 Business entertainment

Nothing to report.

5.6 Non-business use of supplies

Nothing to report.

5.7 Bad debt relief

5.7.1 Bad debt conditions

A Portuguese company operated municipal public services in relation to waste water. It decreased its taxable amount for July 2010 in respect of eight customers who had been declared insolvent. The Portuguese authorities took the view that this was contrary to the national law, which required production of certificates proving the insolvency, and notice to be given to the debtor requiring the debtor to adjust input tax deducted. The company appealed; the national court ruled that the requirement to hold certificates of insolvency had no legal basis, but the company should have given notice to the debtors. It had done so following the tax authority's action, but the court ruled that this was subject to a limitation period of four years, which had been exceeded. Questions were referred to the CJEU about the validity of the requirement to notify and the time limit.

The court noted that art.90 allowed Member States to derogate from the provision that required adjustment of output tax in cases of total or partial non-payment – in effect, bad debt relief is not a mandatory part of the Directive, even though the proportionality of output tax to the consideration actually received by the supplier is described as a fundamental principle of the tax. Art.90 does not prescribe any conditions for such a derogation, so the Member State has some discretion in choosing measures to impose. In addition, art.273 allows Member States to introduce measures that are appropriate to prevent avoidance, evasion and abuse; the court considered that the requirement to notify the debtor fell within the permitted conditions. It was relatively easy for the supplier to give notice, so it did not impose a disproportionate condition. It was therefore not precluded by the Directive.

The question about the time limit was phrased as if it only required an answer if the court considered the notification requirement to be unlawful. As a result, the court declined to consider it. That is a pity, because it seems to be an independent issue: if the notification is a reasonable requirement, could that notification be made late? However, it appears that the taxpayer in this case will be denied its bad debt relief.

CJEU (Case C-672/17): *Tratave – Tratamento de Águas Residuais do Ave SA v Autoridade Tributária e Aduaneira*

5.7.2 Updated Notice

HMRC have updated their Notice *Relief from VAT on bad debts* from its February 2013 version. There is no "What's changed?" section, so it is hard to identify what had been amended.

Notice 700/18

5.8 Other input tax problems

5.8.1 Missing traders

A company appealed against a refusal of input tax of £758,000 for its period 07/06. There was a preliminary issue: the appellant argued that HMRC had never issued a formal assessment, and were therefore unable to collect any money. The FTT (TC04888) would have no jurisdiction to consider the matter, and should strike the case out. The judge examined a number of precedents, and was satisfied that the Tribunal did have jurisdiction over whether an assessment existed, and that HMRC's actions in this case constituted the making of one.

From that point, the appeal followed the usual course: an exhaustive examination of deals and explanations for deals, and the eventual conclusion that there was no other reasonable explanation for the transactions apart from their connection to fraud. The appeal was dismissed.

The company appealed to the Upper Tribunal. The grounds of appeal appeared to be directed at the factual findings of the FTT, so the UT began with a detailed explanation of the circumstances in which an appellate Tribunal would overturn findings of fact. It rejected the view of the company's counsel that it should remit the case to the FTT for reconsideration if it found errors within it, unless it could conclude that the decision would have inevitably been the same without the errors. The FTT decision was 100 pages long with 374 paragraphs. If everything was subjected to detailed analysis, it might be possible to discover some errors or lack of clarity; such errors would only undermine the decision if the UT was satisfied that the matter was material to the overall factual conclusion.

The judges (Mr Justice Roth and Judge Jonathan Richards) went on to consider the 36 detailed criticisms of the FTT's findings. They examined them at length, and concluded that only one of them had any substance to it. In the context of the decision as a whole, that one matter was not particularly significant. There was no reason to overturn the FTT's findings of fact.

The UT was also satisfied that the FTT had been correct to conclude that the letters sent by HMRC to the taxpayer constituted an "assessment". It appeared that the company had never paid the tax, even though there had not been a formal agreement of "hardship", but HMRC appeared willing for the Tribunals to entertain the appeal in spite of non-payment. The UT concluded that the FTT did have jurisdiction to hear the appeal, and the UT had jurisdiction as well.

The appeal was dismissed.

Upper Tribunal: *Aria Technology Ltd v HMRC*

HMRC decided to deregister a company on the basis that its registration was intended to be used for fraudulent and abusive ends, and to deny input tax credit on the purchase of scrap metal between 02/13 and 07/13 amounting to £4.9m. At the appeal hearing in 2018, the company was not represented and the sole director/shareholder did not attend, after the refusal of a (second) application to postpone. The Tribunal issued a number of directions to ensure protection of the appellant, and proceeded to hear the case.

The company had traded since 1996 in a number of different business activities. A change of name to "Energy Trading" in 2010, notified to HMRC in December 2012, prompted a visit in January 2013, followed by a number of further enquiries. These led to the deregistration decision and the assessments, together with penalties charged to both the company and the director, which were not appealed.

The main point of interest was that HMRC had interviewed the director of one of the main counterparties of the disputed transactions, who said he had been approached by the director of this appellant to set up a fraudulent trade in scrap metal acquired from Poland; as an accountant, he had set about gathering evidence of the wrongdoing to submit to HMRC. The director of the appellant had known this counterparty for some years, and claimed that the suggestion of scrap metal trade had come from him, but was not fraudulent.

The Tribunal considered the evidence available, and concluded that the "*Kittel* denial" was amply justified – the trader ought to have known that the transactions were connected with fraud. The decision to deregister was also justified on the same basis.

The appeals were dismissed.

First-Tier Tribunal (TC06784): *Millennium Energy Trading Ltd*

A second-hand car dealer in Northern Ireland was denied input tax of over £200,000 in relation to 49 purchases of cars for sale to customers in the Republic of Ireland between 06/12 and 03/13. In 46 cases, HMRC had evidence that the cars had been traded by a different dealer around the time that the appellant claimed to have traded them, in circumstances that suggested the appellant could not have been involved in transactions in these vehicles. Even if there was a supply, HMRC maintained a "*Kittel* denial", in that the trader should have known that the transactions were connected with fraud. The trader appealed, arguing that all the deals were genuine, had been carried out in good faith and were proper business transactions. If anything, it was the victim of fraud.

The Tribunal considered the evidence from documents, HMRC officers and the principal partner of the appellant partnership. The judge decided that HMRC had not discharged the burden of proof in relation to the "no supply" argument. Most of their evidence was circumstantial; there was nothing conclusive to show that the cars had been somewhere else at the time that the appellant said it was trading them. If HMRC were right, the paperwork representing the deals would have to be wholly fictitious; there were aspects of the paperwork that, while not conclusive, supported the appellant's assertion that it was genuine. For example, some of the "deal packs" included the bus ticket that was supposed to have been used by the delivery driver to return to Northern Ireland after driving the car to the

Republic. The judge did not think that someone carrying out a fraud would have gone to that much trouble.

Nevertheless, on the first 30 deals (with one supplier) the Tribunal was satisfied that the trader actually knew that they were connected with fraud; on the other 19, at the least he ought to have known. HMRC had made out their case to the required standard, and the appeals were dismissed.

First-Tier Tribunal (TC06791): *Deryck Gregory David Brady and another*

Another Northern Irish car dealer appealed against the refusal of input tax on a number of purchases, also on "*Kittel*" grounds. The judge examined the background to the business and agreed with HMRC that some of the deals, which involved newly registered traders selling him cars and purchasers turning up from the Republic looking for those cars at exactly the right time, were "too good to be true" and he ought to have formed the conclusion that they would be connected with fraud. However, there were other transactions in which he bought the vehicle, took it into stock, and later sold it to a UK customer and accounted for output tax on it. The fact that the same missing trader had sold him the vehicle would not necessarily have made the transaction appear suspicious.

The appeal was dismissed in relation to the sales to the Republic of Ireland, but allowed in relation to the domestic sales.

First-Tier Tribunal (TC06812): *Alan McCord*

5.8.2 No knowledge of connection

A trader appealed against denial of input tax on precious metals amounting to £8.9m during the period from 2008 to 2010, and against a misdeclaration penalty of £329,000 in relation to its 02/08 period. The appeals were made in 2012 but were not heard until 13 days in June/July 2018.

The company is a wholly owned subsidiary of a global mining group with headquarters in Brazil. It operated from two refining sites in South Wales and West London. It was a long-standing and substantial business. Six employees and former employees of the company gave evidence, as well as two independent consultants with knowledge of the company and the industry.

HMRC became concerned about MTIC fraud in the precious metals industry and carried out "educational visits" to the company in 2008, explaining how missing trader fraud operates and stressing the need for due diligence.

The company disputed whether some of the transactions were directly connected to the fraudulent tax losses that HMRC had identified. The judge noted this argument, but decided not to address it directly, as it was only necessary for the company to satisfy him that it did not have the means of knowledge of any connection (if there was one). He did not accept that HMRC had discharged the burden of proof to show means of knowledge. Many of the disputed transactions had taken place before HMRC raised their concerns with the company, and they were not in areas where traders could be expected to know about MTIC fraud without the warning. At the most, the company ought to have concluded that it was

more likely than not that the transactions would be connected with fraud; the test, according to *Mobilx*, is whether the company should have concluded that there was no other reasonable explanation.

After considering the history of the enquiry, the investigation and the dispute, the judge allowed the appeal and invited the appellant to apply for costs (as the appeal had been designated "complex").

First-Tier Tribunal (TC06810): *Vale Europe Ltd*

5.8.3 Inadequate documents

HMRC raised an assessment denying input tax totalling £57,839 for periods from 09/13 to 06/15. The company appealed only against the decision on invoices relating to one supplier, totalling £16,772 from 03/14 to 06/15. The rest of the assessment was not disputed. The company also appealed against "deliberate and concealed" and "deliberate, not concealed" penalties charged for all the periods.

The disputed invoices had been rejected because they did not show the supplier's VAT number. Replacement invoices were obtained from the supplier, which also confirmed that it had accounted for output tax on the supplies, but HMRC were still not satisfied. They ruled that they had been unable to verify the transactions.

The judge (Anne Fairpo) commented that the law required a proper VAT invoice to justify input tax deduction. SI 1995/2518 allowed HMRC to direct the trader to produce alternative evidence, but the appellant had not contended that HMRC had issued such a direction. That meant that the requirement for a proper invoice was absolute. If HMRC did not accept alternative evidence, the trader would have to apply for judicial review, as the FTT did not have jurisdiction to consider the reasonableness of HMRC's decisions.

In other cases, FTT judges have often taken a different approach, and have considered whether HMRC have effectively declined to exercise their power under reg.29, and this is within the supervisory jurisdiction of the FTT. It is not clear why this particular case is different.

The trader argued that he could not be held to have deliberately submitted false information to HMRC when he effectively outsourced all the VAT return work to a firm of accountants. He said he was not a "detail man" and considered that the accountants would have a much better understanding of VAT than he had. However, the information he provided to them was inaccurate or incomplete; he admitted that he did not check it. The judge considered that this went beyond mere carelessness. Even though he did not knowingly give inaccurate information to HMRC, his actions were deliberate and they led to the submission of inaccurate information. The penalties stood, and the discounts given by HMRC were appropriate.

By contrast, HMRC had failed to explain why in respect of export transactions they regarded the failure as both deliberate and concealed. Given the seriousness of such a penalty, the judge considered there should have been a more detailed explanation to show why it was appropriate. She reduced that penalty to merely "deliberate".

First-Tier Tribunal (TC06844): *Sacutia Healthcare Ltd*

6. ADMINISTRATION AND PENALTIES

6.1 Group registration

Nothing to report.

6.2 Other registration rules

6.2.1 Registration

An individual appealed against a decision to register him with effect from 1 October 2008, together with an assessment for VAT of £45,287 and a penalty of £6,114.

There was a preliminary point about the jurisdiction of the Tribunal, as the appellant had not filed a return for the period concerned. That normally rules out an appeal; but it is possible to appeal against a decision to register, and also against an assessment raised under VATA 1994 s.77(4) (s.83(1)(r)). That provision allows HMRC 20 years to assess in relation to a failure to notify liability (among other things), and was the legal basis for HMRC's assessment in the case. The judge and HMRC's counsel were not sure about the extent of the right to challenge a s.77(4) assessment, but there was authority in *Burgess & Brimheath v HMRC* (UT 2015) to suggest that HMRC would have to show not only that it was made within the 20 year period but it was also made in accordance with the one year rule and it was made to best judgment. The judge noted that there would inevitably be a knock-on effect on the amounts of assessments if he decided that the registration decision was incorrect (as he did here).

The case arose from a 2011 complaint by BMW to council trading standards officers that the individual was selling counterfeit BMW accessories on eBay. An investigation and prosecution followed; in 2014 HMRC became aware of it, and noted that the value of the counterfeit goods sold was stated at £427,422. In 2016 they commenced an investigation into the appropriate registration date.

They considered that he started trading in January 2008 and ceased to trade in February 2012, 49 months later. They divided the estimated turnover by 49 and concluded that he would have exceeded the then registration threshold at the end of August 2008. The assessment was based on the same logic, as was the penalty, charged at 15% (later reduced by mitigation to 10%).

The judge noted that the assessment was clearly made within 20 years of the period concerned; however, if HMRC had had enough information to raise an assessment when the trading standards officers passed them the turnover information, the assessment was out of time because it was raised well over a year later. Although the eventual assessment (in January 2017) was based on figures that HMRC had had since 2014, it was clear that during 2016 they were engaged in a dialogue with the appellant to find out if he could supply alternative figures and evidence to back them up. It was only when this investigation concluded that HMRC were in a

position to issue a best judgement assessment. It was therefore raised in time.

The judge accepted in principle the appellant's assertion that some of the sales related to private assets and should be excluded. He could not prove the amounts, because his records had been confiscated and then destroyed after his prosecution. The judge directed HMRC to recalculate the registration date and the assessments on the basis that the turnover was £417,000 rather than the £427,000 figure they had used.

The appeal was allowed to that minimal extent. The reduction was too small to affect the date of registration.

First-Tier Tribunal (TC06853): *Neil Edgell*

6.3 Payments and returns

6.3.1 Capital goods for FRS

A company provided construction management services, largely through its owner and director. These were of a large scale nature, for example the management of the dismantling of a nuclear reactor, rather than domestic building projects. It had been registered for VAT in 2007 and approved to use the FRS in September of that year. In 2015, HMRC enquired into input tax deductions for various periods from 2012 to 2015. They then ruled that the items purchased – costs relating to racing cars and a trailer to transport them – were not "capital expenditure goods used in the business", and therefore did not give entitlement to deduction.

The trader appealed (after unsuccessful ADR), arguing that the cars were used as promotional tools for the business. The invoices were addressed to the director personally, but he claimed they had been paid by the company. Some of the costs related to the adaptation of a car rather than its acquisition, but he claimed this was the creation of an entirely new asset, and had been capitalised in the accounts.

The judge considered two separate issues:

(1) Were the amounts expended on the cars 'Capital Expenditure Goods'?

(2) If they are CEG, are there any other rules, within the FRS or otherwise, that would prevent such a deduction?

Some of the invoices included fuel, oil, gas cans, lubricants, coolants and transport services that were clearly consumed in using and driving the vehicle, and the appellant's representative conceded that they could not be CEG. The more difficult question was whether invoices including labour for rebuilding an engine could be treated as CEG. The judge accepted HMRC's contention that the asset was the car, not the engine, and these costs were incurred on services rather than the acquisition of goods.

That was enough to dispose of the appeal, but the judge also considered HMRC's three further arguments:

- the motor vehicle "block" applied;
- there was insufficient link to the taxable business;

- the invoices were not addressed to the taxable person.

The first argument was negated by the fact that the expenditure was not incurred on the acquisition of a car – it seems that HMRC would have to win one or other, but not both.

On the "direct link" point, the judge made an interesting finding: "*I do not agree that all the principles of input tax recovery can apply to a FRS trader. The FRS is a specific scheme for small businesses that fundamentally alters the ability of a trader to recover input tax. The rules on CEG are a specific carve out from the general prohibition under that scheme and provides for recovery of input tax on certain types of expenditure. Regulation 55E(2) states that, where the conditions for CEG input tax recovery are met 'the whole of the input tax on the goods concerned shall be regarded as used or to be used by the flat-rate trader exclusively in making taxable supplies'. I find that this deeming provision would, if the goods had been CEG, have overridden the general principles of input tax recovery.*"

The trader had not provided alternative evidence to HMRC that the company had paid the various bills and had therefore received the supplies. The judge considered that this might have been sufficient to meet the conditions of reg.29 if it had been provided; but, as she had already held that the supplies were not CEG, the validity of HMRC's decision on the recipient was not determinative of the appeal.

The appeal was dismissed.

First-Tier Tribunal (TC06740): *RPD Building Ltd*

6.3.2 Amendments to tax returns

HMRC are carrying out a "call for evidence" until 6 February 2019 on the different processes that exist across the various taxes for making amendments to tax returns, with a view to introducing a "more consistent digital experience" for taxpayers.

The document notes that process for income tax self-assessment (ITSA) is fairly prescriptive, while for corporation tax self-assessment (CTSA), HMRC has not prescribed the format and content of an amended return or provided an official form for amending returns. By contrast, the VAT return cannot be re-submitted. If a taxpayer discovers an error after filing a return, they may be able to make an amendment on their next VAT return.

HMRC aim to develop "a consistent digital approach, whilst still accommodating the digitally assisted and excluded, to make it simple for taxpayers to see their returns and make amendments where necessary".

www.gov.uk/government/consultations/amendments-to-tax-returns

6.4 Repayment claims

6.4.1 Award of interest

A company won an appeal and applied for interest under s.84(8) VATA 1994. The original appeal related to a MTIC case which was assigned to the current appellant as a shareholder and creditor in the claimant company, which went into administrative receivership. The FTT found for the company, holding that it was not satisfied that the directors knew or ought to have known that their transactions were connected with fraud; HMRC continued to withhold payment on the grounds that the substitution of the company for the original appellant was improper, even though it had been approved by the Tribunal. Only after a High Court action was commenced did HMRC pay the majority of the amount in dispute (in 2011), and after a hearing in March 2012 the payment was made in full, together with repayment supplement.

The company applied for interest under s.84(8) in July 2012. HMRC objected on the grounds that the application was "subject to an inexcusable delay". The FTT judge (TC03801 – a decision in 2014) considered the law (which changed on 1 April 2009) and a number of precedent cases, and granted the company's claim. Interest was to be payable at the Bank of England base rate plus 1.75, calculated on a simple basis for the periods from 28 April 2006 until 21 July 2011 in respect of £6,911,434 and from 28 April 2006 until 9 May 2012 in respect of £1,533,217. HMRC were to pay the company the amount so calculated less a deduction of £422,282.52 being the repayment supplement paid in July 2011.

Upper Tribunal

The company appealed to the Upper Tribunal arguing firstly that "Bank of England rate plus 2.55" was more appropriate than "plus 1.75", and secondly that the repayment supplement should not have been deducted. A third ground, that the interest should have been compounded, was dropped after the Supreme Court decision in the *Littlewoods* case.

The UT considered that s.84(8) conferred a wide discretion on the FTT, and this should only be interfered with if it could be shown that its decision was plainly wrong, or had been based on taking into account irrelevant matters or failing to take into account relevant ones. As a procedural matter, such a failure could only be criticised if the relevant matter had been put before the FTT – if it had not taken a matter into account because it had not been raised, the UT could not base a decision to overturn the FTT on it.

The judge considered the precedents on awards of interest and the reasoning given by the FTT in support of the decision to award "plus 1.75". He was satisfied that the reasoning was "unimpeachable", and the decision was well within the range of permissible decisions the FTT could make, given the discretion it had. The fact that the FTT had issued its decision after Henderson J in the High Court had awarded compound interest to *Littlewoods*, and before the Supreme Court held that this was excessive, would have been likely to lead to an award that was too high, rather than too low.

As regards the deduction of the repayment supplement from the award of interest, the relevant law is set out by the High Court in the 2007 *RSPCA* case. That suggested that the appropriate rate for an award under s.84(8) could (but did not have to) take into account the fact that repayment supplement had been paid. The UT considered that the FTT had misdirected itself and had come to an irrational decision in this regard. The award of interest was to compensate the trader for being out of the money over time; the repayment supplement was effectively a penalty levied on HMRC for delay. The FTT decision stated that it had deducted the repayment supplement from the interest merely because the interest was awarded at a rate above the conventional "Bank of England plus 1"; the result was that the amount of interest actually paid was less than the conventional award, which could not be right.

The judge therefore concluded that the appeal succeeded on the second ground, but not the first. The original award of "plus 1.75" stood, but without the deduction of the repayment supplement.

HMRC objected to a clause in the draft decision requiring them to pay the award within 14 days of the decision. The judge considered their objections and rejected them. In his view, he had the power to make such an order, and did not understand the basis of HMRC's objection that the payment "might result in a claim from someone else for further payment. There was, in short, a risk that HMRC might pay twice." That argument had never been presented to him; if such an issue arose, HMRC should present an application within 14 days of the decision explaining it.

Upper Tribunal: *Emblaze Mobility Solutions Ltd v HMRC*

6.5 Timing issues

6.5.1 Timing

A football agency received commission on placing players with German football league clubs. The commission was payable in instalments every six months for as long as the player remained contracted to the club and held a licence to play in Germany. Following a tax audit, the tax authority raised assessments for commissions due in 2015 that had not been received, and had therefore not been declared by the company. The company appealed, arguing that the commission payments were not certain and should therefore only be brought into account when they were actually received.

Questions were referred to the CJEU as to whether VAT should be due in circumstances where income is unconditionally owed, and whether a taxable person was required to "pre-finance" the VAT payment in relation to income that would not be received until over two years later. The questions also raised the possibility that deferred income could be taken into account under art.90(2) as a variation of "non-payment" and adjusted accordingly.

The court rephrased the question, which only referred to the interpretation of art.63. In the view of the court, it should consider articles 63 and 64 together, and determine whether the combination of rules precluded the

chargeable event and chargeability of a tax on the supply of agency services for professional football players by an agent, such as that at issue in the main proceedings, paid in conditional instalments over several years further to the placement, from being regarded as occurring or taking effect when the player is placed. The problem was that the service had been "supplied" when the player was placed with the club, but the remuneration was conditional on the player staying there.

The court ruled that it was for the referring court to determine whether the condition of art.64 was met – the supply "gives rise to successive statements of account or successive payments". However, it appeared to do so. In those circumstances, the PVD required the chargeable event to be deferred, and not to be considered to have arisen in full on the placement of the player.

CJEU (Case C-548/17): *Finanzamt Goslar v baumgarten sports & more GmbH*

6.6 Records

6.6.1 Making Tax Digital

As the start of MTD approaches, HMRC have stepped up their information campaign. They have been running numerous webinars to publicise the requirements, and have at last published lists of software providers working on compliant products.

www.gov.uk/government/publications/making-tax-digital-how-vat-businesses-and-other-vat-entities-can-get-ready

In October, HMRC finally opened its MTD pilot to around half a million businesses whose affairs are 'up to date and straightforward'. The pilot had been running for a group of invited businesses since April. Little information has yet been fed back from the pilot, because not many returns have been filed under it.

Trusts, charities and businesses with more complex arrangements are excluded from the pilot for the time being. The pilot is expected to open to these businesses in Spring 2019.

www.gov.uk/government/news/making-tax-digital-for-vat-pilot-open-for-business; www.gov.uk/guidance/use-software-to-submit-your-vat-returns

On 16 October, HMRC announced a delay of 6 months in the "mandation date" for a "small group of businesses with more complex requirements":

- trusts,
- 'not for profit' organisations that are not set up as a company,
- VAT divisions,
- VAT groups,
- those public sector entities required to provide additional information on their VAT return (Government departments, NHS Trusts),
- local authorities,

- public corporations,
- traders based overseas,
- those required to make payments on account, and
- annual accounting scheme users.

They also updated the "timeline" for the development of MTD:

Date	Activity
October 2018	Open to sole traders and companies (except those which are part of a VAT group or VAT Division) provided they are up to date with their VAT. Those who trade with the EU, are based overseas, submit annually, make payments on account, use the VAT Flat Rate Scheme, and those newly registered for VAT that have not previously submitted a VAT return, are unable to join at this point. Those customers with a default surcharge within the last 24 months will be able to join the pilot by the end of October 2018.
Late 2018	Private testing begins with partnerships, those customers that trade with the EU, and users of the Flat Rate Scheme.
Late 2018/early 2019	Open to other sole traders and companies who are not up to date with their VAT and businesses newly registered for VAT that have not previously submitted a VAT return.
Early 2019	Open to partnerships and those customers that trade with the EU.
Spring 2019	Pilot open for Making Tax Digital customers that have been deferred.
April 2019	Making Tax Digital mandated for all customers (except those that have been deferred).
October 2019	Making Tax Digital mandated for customers that have been deferred. The 6-month deferral applies to customers who fall into one of the following categories: trusts, 'not for profit' organisations that are not set up as a company, VAT divisions, VAT groups, those public sector entities required to provide additional information on their VAT return (Government departments, NHS Trusts), local authorities, public corporations, traders based overseas, those required to make payments on account and annual accounting scheme users. The deferral will apply to around 3.5% of mandated customers.

www.gov.uk/government/publications/making-tax-digital

HMRC have sent a letter to those businesses permitted to defer MTD to 1 October 2019, as set out in the above announcement. The letter constitutes a specific direction under reg.25A SI 1995/2518 that until October 2019 the business can continue to make VAT returns using existing methods other than 'functional compatible software', and a notification of exemption under reg.32B from the requirement to keep digital VAT records. HMRC has provided the CIOT with a sample copy of the letter.

www.tax.org.uk/policy-and-technical/making-tax-digital

The House of Lords Economic Affairs Finance Bill sub-committee has called on the government to delay the introduction of making tax digital for VAT by at least a year, to give small businesses in particular a reasonable chance to prepare. In its latest report, the committee accuses HMRC of failing adequately to support smaller businesses, or listen to their concerns. The report also recommends delaying the extension of MTD to other taxes until at least April 2022.

The committee suggests that HMRC are "alone in having confidence that all one million businesses will be ready for MTD in April 2019", and that the costs to businesses will be far more than HMRC's impact assessment. The government's claim that MTD for VAT will increase the amount of tax collected remains unconvincing. They should revisit their assumptions and publish another revised impact assessment. Neither Treasury nor HMRC are taking the risks to implementation of Making Tax Digital seriously enough.

www.parliament.uk/business/committees/committees-a-z/lords-select/economic-affairs-finance-bill-sub-committee/news-parliament-2017/making-tax-digital-report/

The CIOT and ATT have called for a full evaluation of MTD for VAT before extending mandatory digital reporting to other taxes. A press release states that software should be chosen by businesses because it delivers benefits and 'not be something they are forced to adopt'. The CIOT and ATT share many of the doubts about the potential increase in the tax take and business readiness for MTD set out in the above report from the House of Lords.

www.tax.org.uk/media-centre/press-releases/press-release-leading-tax-bodies-back-lords-call-delay-mandatory-digital

6.7 Assessments

6.7.1 More alcohol problems

A company appealed against assessments totalling more than £4.5m for periods between 12/10 and 06/13 in respect of deposits of cash of some £32.6m which the company maintained related to sales of alcoholic drinks from a bonded warehouse in France to cash and carry operators in France. HMRC maintained that there was an "inward diversion fraud" and the supplies were made in the UK; however, HMRC did not make any

allegation of fraud against the company. The company was connected with Ampleaward, the appellant in the case considered at 4.3.3 above.

The type of fraud was described as follows in *Dale Global Ltd* (2018):

In outline, alcohol diversion fraud is used to evade excise duty and VAT through abuse of the Excise Movement and Control System ("EMCS"), which permits authorised warehouse keepers to move excise goods from warehouse to warehouse within the EU on behalf of account holders, in duty suspense. Any movement requires the generation of an Administrative Reference Code ("ARC") within the EMCS, which must travel with the goods. The system has operated in electronic form since January 2011. An ARC number will typically last for a few days, and expires when the load is recorded on the system by the receiving warehouse as having been being delivered.

Inward diversion fraud, which is the type of fraud potentially relevant in this case, operates as follows. Alcohol originating in the UK is supplied under duty suspension to tax warehouses on the near continent, principally in France, the Netherlands and Belgium (what follows uses the example of France). Once in the tax warehouse they will usually change hands a number of times and will often be divided up before being reconstituted. A supply chain is set up with a purported end customer based in France. Some of the goods will be consigned back to the UK in duty suspense using an ARC number. This is the "cover load". Within the lifetime of the ARC number further consignments of goods of the same description will purportedly be released for consumption in France, attracting duty at low French rates, but will in fact be smuggled to the UK using the same ARC number. These are the "mirror" loads, and this will carry on until the ARC number expires or one of the loads is intercepted by Customs, following which a new ARC number will be generated in a similar manner.

Mirror loads are typically sold immediately following their arrival in the UK for cash. This process is known as "slaughtering". The UK customers may create false paper trails to generate the impression that the goods were supplied to them legitimately.

The judge (John Brooks) considered the burden of proof in a case where there was a dispute about the facts but no allegation of fraud. He commented that he had found the company's director an unreliable witness, because his statements were contradictory and not credible.

The company had been registered as a High Value Dealer under the Money Laundering regulations from 2004, shortly after it was formed in 2002. It received visits from HMRC in connection with compliance with the Money Laundering rules, and was noted not to be fully compliant with "know your customer" procedures and keeping of detailed records of all high value transactions. Discussion of the requirements and the company's failure to comply with them continued over a number of years.

The company made 1,311 separate deposits of cash into 42 different branches of Barclays Bank, with each deposit averaging about £22,500. The branches were all over the country; on one day, separate deposits were made in Birmingham, South Wales and Eltham, even though the director stated that only one cash courier was used for the customer who was said to have been responsible for all these sales. French customs

authorities said that there was no record of any cash being declared to them by this company.

The judge noted that there had been at least one seizure of goods apparently being returned to the UK for "slaughtering". There was insufficient evidence to link any of the deposits with any of the sales that were claimed to have taken place; there was no credible explanation to support the unlikely assertion that French customers couriered cash to banks all over the UK at their own expense.

In the absence of any evidence to displace the basic assumption of HMRC that the deposits represented UK sales, the assessments were held to be made to best judgement, and the appeal was dismissed.

First-Tier Tribunal (TC06744): *Award Drinks Ltd (in liquidation)*

For some reason, the same decision appears again with a different reference number, issued on 23 October rather than 1 October. It is not possible to detect any differences in the text.

First-Tier Tribunal (TC06783): *Award Drinks Ltd (in liquidation)*

6.8 Penalties and appeals

6.8.1 Default surcharge

A company appealed against a 10% surcharge of £17,600 for its 07/16 return period. It had entered the surcharge regime with a late payment for 07/15; the surcharge for 10/15 was less than £400, and a surcharge was paid for 04/16 after a breach of a TTP agreement. The company paid £30,000 out of £206,000 due for 07/16 on time, and then asked for TTP on 9 September, after the due date. The company's finance director said that he had rung HMRC several times during August and early September to try to agree TTP again, but had failed to get through.

The company argued that it had a reasonable excuse in that its supply chain from China had been disrupted by two factors: a serious typhoon, and the launch of the i-Phone 7, which was followed by Apple block-booking air freight capacity for two weeks.

The FTT judge considered the precedents on reasonable excuse, including the usual citation by HMRC of Lord Scott's dissenting judgment in *Steptoe* (that the circumstances had to be unforeseeable or inescapable) and the proper legal test as set out by Lord Donaldson for the majority in the same case (that the exercise of reasonable foresight and due diligence would not have avoided the insufficiency of funds). In his view, the unforeseeable and significant cash flow disruptions, arising from events outside the company's control, were sufficient to constitute a reasonable excuse. Although there was no evidence to establish for sure that the company had attempted to agree TTP, the fact that it cleared its debt very quickly suggested that it would have had every incentive to do so, because the cash flow problem was clearly only short-term.

The appeal was allowed.

First-Tier Tribunal (TC06765): *Chameleon Technology (UK) Ltd*

A company appealed against a surcharge of £9,356 for its 04/17 period. The payment was made on 7 June 2017, but as a payment on account trader, the company was not entitled to the normal 7-day extension.

HMRC objected to the appeal being brought out of time. The review decision had been issued on 25 September 2017, and invited the trader to submit further information if it wanted to. HMRC replied to this on 16 November, but the trader only received it on 13 December because it had been sent to a former address. HMRC said that the 30-day deadline for appealing ran from 25 September: "the provision of further information was offered for fairness but was clearly separate to the requirement to notify the tribunal in time." The Tribunal noted HMRC's objection but considered that the appellant had given a good explanation in the context of a non-substantial delay. There would be no significant prejudice if the application to appeal was granted, as HMRC had attended the hearing prepared to argue the case.

The trader claimed to have researched due dates online but to have concluded that the requirement to pay on the month end only applied to annual accounting payments on account, not large trader payments on account. It had paid this particular amount late because the business had to move at short notice following an unexpected and unaffordable rent increase, and during the move administrative difficulties meant that some things were not done as quickly as normal.

HMRC responded that the company had been in the payments on account regime since the 07/16 period, when it had been sent a schedule setting out the due dates and amounts for the payments for the next year. It had fallen into the default surcharge regime with a late payment on account in 10/16, and the SLN showed the due dates. It should have been aware that the 7-day extension did not apply.

Judge Fairpo noted that the return had been filed on time, which suggested that it had been possible to carry out administration in spite of the move. Other liabilities were paid on time. It appeared that at least part of the reason for the late payment was the incorrect belief about the due date, which could not be a reasonable excuse in all the circumstances. A separate argument about proportionality of the penalty was routinely dismissed.

First-Tier Tribunal (TC06804): *Marble Commercial Contracting Ltd*

A haulage company appealed against surcharges for the periods 09/16 to 12/17 totalling £32,444. The company had suffered a severe reduction in turnover when a customer moved its manufacturing base. The bank had reduced its facilities. It had requested time to pay for 09/16, but this was refused.

The Tribunal reviewed the progress of the company's attempts to negotiate TTP, deal with its bank and with HMRC over the next year, and expressed sympathy for the fact that HMRC officers had given some confusing replies to queries. The company was commended for managing to turn the business around and settle all its tax arrears. However, the cash flow difficulties were not within the limited circumstances that could constitute a reasonable excuse, and the appeal was dismissed.

First-Tier Tribunal (TC06843): *H & R Gray Haulage Ltd*

6.8.2 Penalties

In the 2017 hearing of TC05654, a company was assessed to a "careless" penalty of £27,800 for its 09/12 period, and to "deliberate" penalties of £17,724 and £27,660 for 06/14, separately for underdeclared sales invoices and for other errors. The Tribunal reviewed the history of a company accountant who appeared to make careless errors of a substantial size over a long period, and covered them up – including concealing earlier penalty charges from the directors. Her behaviour was inexplicable, as she did not appear to benefit personally; the directors had subsequently discovered more huge errors and shortfalls that were not related to VAT.

The Tribunal considered that the decision to levy a careless penalty, and not to suspend it, for 09/12 was a reasonable one. In respect of 06/14, the Tribunal decided that the behaviour was still careless rather than deliberate; this meant that it was open to HMRC to suspend the penalty, now that the directors were aware of what had been going on and had put in place measures to prevent it happening again. The parties were encouraged to go away and agree what should happen next; failing an agreement, they could return to the Tribunal for a further hearing.

It seems that agreement could not be reached, because a further hearing took place in November 2018. It concerned the omission of three invoices from the appellant's return for the period 06/14, leading to unpaid output tax of £50,640. HMRC assessed a penalty at 35%, the minimum for "deliberate conduct, prompted disclosure". At the previous hearing, the company had advanced an argument that the invoices had never been issued to the customer and the goods had never been supplied, so there should not have been any output tax. After the hearing, agreement could not be reached on this issue, so it fell to be determined by the FTT.

HMRC had subsequently carried out further enquiries with the customer, which led them to believe that the invoices had been issued and the goods had been delivered. The debt was never paid, because the customer became insolvent. The evidence presented to the Tribunal was strongly suggestive that the goods had been delivered, because partial credit notes had been issued in relation to damaged goods – the customer appeared to have had the opportunity to examine the delivery.

The only question then was whether the "deliberate" penalty was appropriate. The company accountant had made manual amendments to the VAT account to exclude these invoices. Even allowing for the fact that she was under pressure and had health problems during the course of a difficult pregnancy, this appeared to be deliberate conduct leading to an underpayment of VAT, which she must have known was wrong. The penalty was confirmed, and the appeal dismissed.

First-Tier Tribunal (TC06787): *Promo International Ltd*

An individual was assessed in relation to underdeclared VAT, and charged penalties on the "careless" scale on £3,244 and on the "deliberate" scale on £6,866. Maximum reductions for prompted disclosure were given, so the penalties were assessed at 15% and 35%. The "careless" errors arose on a failure to appreciate that "free" supplies to an associated business should have resulted in an output tax charge based on use of business assets on which input tax had been claimed; the

"deliberate" error related to a failure to declare output tax on the value of goods on hand at deregistration, even though a visiting officer had raised the need to do so.

The trader acknowledged that she had been negligent, but pleaded that she had not deliberately understated the deregistration charge. She was Polish, and although she had good English, she had not properly understood what she had been told to do. The judge considered the arguments and concluded that "the inaccuracies were not 'deliberate' in the sense that [the trader] had acted consciously, with full intention and set purpose to under-declare the value of the deemed supply". The reasons for this, together with the law on what is "deliberate", were explored in some detail by the judge. Accordingly, the Tribunal reduced the "deliberate" penalties to the "careless" scale (35% to 15%).

There was no reason to give a special reduction to the penalties, or to attribute the errors to an agent. The judge commented that it was possible that the PLR was overstated because a van might have been depreciated for two years rather than one, but the trader had not appealed against the s.73 assessments themselves, so that could not assist her.

The appeal was allowed in part.

First-Tier Tribunal (TC06806): *Pink Eco Clean*

6.8.3 Late appeals

An individual applied for leave to appeal out of time against a personal liability notice issued by HMRC to him in respect of a penalty of £78,237 levied on a company of which he was the sole shareholder and director.

The judge noted that the UT has recently revisited the conditions for allowing an appeal to proceed out of time in the 2018 case of *William Martland*. The judge followed the three-stage process set out in that decision:

- consider the length of the delay, which was "serious and significant";
- consider the reasons for the delay, which were unclear (the appellant did not attend the hearing);
- balance all the circumstances of the case, including the prejudice to the respective parties of allowing or refusing the application.

The individual's representative argued that the prejudice would be considerable (likely bankruptcy) when the underlying case was strong. This was based on the assertion that HMRC had not provided any evidence of a fraud, let alone that the individual knew or ought to have known about it. However, the judge noted that the company had had every opportunity to appeal the disallowance of input tax on which the assessment and subsequent penalty were based; the company's failure to appeal at all, and the individual's delay of over 10 months in doing so, could not be excused. The application was refused, and the appeal struck out.

First-Tier Tribunal (TC06753): *Allen Panter*

HMRC refused a "*Bridport*" claim made by a golf club on 10 July 2009. The club claimed that it had appealed to HMRC on 17 July 2009, but HMRC said they had never received the letter. A copy was produced to

the Tribunal: the judge noted that it was in fact a request to review the decision, rather than a formal appeal. According to the legislation, where no review is carried out, the original decision is deemed to have been upheld, and the taxpayer then has a further 30 days to appeal to the Tribunal. As no appeal was made until March 2017, the delay was clearly very significant.

Judge Anne Fairpo decided that there was no good reason for such a delay, and the time limit should not be extended in this case. The appeal was struck out.

First-Tier Tribunal (TC06758): *Shirley Golf Club Ltd*

An individual who sold footwear on eBay appealed against a number of assessments for VAT, income tax and penalties totalling £235,000. The assessments were made between October 2015 and November 2016; the trader appears to have applied to HMRC to make an appeal in November 2017. They refused, and the application was lodged with the Tribunal in March 2018.

The judge noted that the appellant had not responded to the various assessments at all until June 2017, when an agent notified HMRC that he had started to act. The agent asked for a time extension, but there was no substantive response until HMRC issued a bankruptcy notice in November 2017.

Judge Barbara Mosedale considered the reason given by the trader for his lack of response: he had given HMRC an address for correspondence that was occupied by a relation, and he did not collect his mail regularly. Although she was satisfied that he did not do this with an intention of evading tax, she did not consider his conduct reasonable. She carried out the usual balancing exercise and concluded that an appeal against the "deliberate" penalties could only succeed in reducing them to the "careless" scale, which would still result in the individual being made bankrupt. Although it was regrettable that he would not be given a chance to challenge the assessments, she did not think allowing the appeal to proceed would achieve much for him.

Accordingly, the application was refused and the appeals were struck out.

First-Tier Tribunal (TC06728): *Talkmore Vela*

6.8.4 Reinstatement

A company appealed against HMRC's refusal to backdate the application of the Flat Rate Scheme. At a hearing in October 2017, the director produced a transcript of a phone call in which, he claimed, an officer of HMRC had authorised him to backdate the effect of the FRS. Judge Redston adjourned the hearing and invited HMRC to consider the effect of this phone call. They wrote to the appellant two weeks later stating that, while they did not consider a decision had been made authorising backdating, he had been given a legitimate expectation to that effect, and arrangements would be made to backdate it. Accordingly, he wrote to the Tribunal on 25 October withdrawing his appeal. In January 2018, he e-mailed the Tribunal to say that backdating had been effected, but he had not received the repayment of VAT that he expected. The e-mail was treated as a request to reinstate the appeal.

HMRC notified the Tribunal that no appeal was necessary because they were working to agree the monetary effect of the backdating; however, no agreement could be reached, so the Tribunal decided to hear the reinstatement application.

HMRC's counsel claimed that the Tribunal had no jurisdiction to determine the quantum of the repayment. The judge commented that "apparently from a lack of preparation" he did not refer to any legislative provision or authority to support his position, "a most unsatisfactory and unhelpful situation".

The taxpayer argued that the amount claimed in the original appeal was clear enough and was always in dispute. However, he had undoubtedly withdrawn his appeal, and had not applied to reinstate it within 28 days. HMRC were entitled to treat the matter as agreed within VATA 1994 s.85(4)(a); the trader would have to resile from such an agreement within 30 days, which he had also not done. According to the case of *OWD Ltd (t/a Birmingham Cash & Carry)*, the Tribunal did not have the power to extend these time limits. Accordingly, the judge had no alternative but to dismiss the application and refuse to reinstate the appeal.

First-Tier Tribunal (TC06737): *Libby's Market Place Ltd*

6.8.5 Strike-out

On 1 August 2018, Judge Richard Thomas issued a decision to strike out an appeal by a company on the basis that it had changed its grounds of appeal without applying to change them, and HMRC objected to such a late change.

First-Tier Tribunal (TC06726): *Mainpay Ltd*

The company applied for that decision to be set aside on the basis of a "procedural irregularity". The same judge heard the application and allowed it; on reviewing the chains of e-mails leading up to the hearing, he could see that the company had asked for permission to change the grounds, although that particular e-mail was not forwarded by the Tribunal to the hearing judge. He was therefore unaware of it when he made his decision to strike out.

The application was granted and the appeal would be reinstated.

First-Tier Tribunal (TC06813): *Mainpay Ltd*

An individual sought to bring an appeal against a decision that had been made in 2009 to refuse repayment of VAT to a partnership in relation to alleged cancelled supplies. The trader had failed to respond to an unless order in 2011 and the appeal was struck out.

One of the partners in the partnership sought to reinstate the appeal. However, it transpired that what he wanted to argue about was a separate decision in relation to zero-rating of despatches, also dating from many years ago. There was no power to amend the ground of appeal so fundamentally. Judge Anne Fairpo struck the appeal out as having no reasonable prospect of success.

First-Tier Tribunal (TC06820): *Ataf Iqbal Butt*

A firm of solicitors appealed against a series of default surcharges totalling £17,422 for periods from 12/14 to 12/15. The appeal was struck out in October 2016 for failure to comply with an unless order. HMRC pursued the firm for the surcharges; the firm (having changed its composition) argued that it was not liable for them, while also applying to reinstate the appeal.

The judge considered the reasons given for the failure to pursue the appeal in 2016 and the delay in applying for it to be reinstated, which was at least 12 months. An appellant seeking to reinstate has to overcome a high hurdle of reasonableness, and the judge did not consider this appellant had cleared it. In the interests of legal certainty, the application should be refused.

First-Tier Tribunal (TC06745): *Bilkus & Boyle Solicitors*

6.8.6 Costs

A sole trader appealed against an assessment following a compliance visit. The dispute concerned deductibility of expenditure on capital expenditure goods under the Flat Rate Scheme. HMRC decided not to contest the appeal the evening before the hearing was due to take place. They accepted that this was unreasonable conduct within Rule 10 of the FTT Procedure Rules 2009.

Judge Guy Brannan examined the matters on which the taxpayer complained about HMRC's conduct, and regarded most of them as part of the "rough and tumble" of litigation. However, the late withdrawal was unreasonable. The judge believed he had sufficient information in a detailed claim from the taxpayer to make a summary award of costs, rather than sending the matter away for assessment. He disallowed some of the cost of external advice, but allowed printing and stationery, and most interestingly allowed 50 hours of the appellant's own time costed at £38 per hour (£1,900). He was satisfied that this was a "cost", even for a litigant in person, under Civil Procedure Rules Part 46.5.

The total awarded was £2,126.16.

First-Tier Tribunal (TC06817): *Andrew Green*

6.8.7 Procedure

A Tribunal direction requiring disclosure of certain documents by HMRC had been issued on the judge's understanding that it had been agreed by the parties. When HMRC objected, he reconsidered the matter as an application by the taxpayer for disclosure, to which HMRC responded. The appeal related to backdated registration of an insurance broker on the basis that it was receiving reverse charge services from abroad. HMRC had raised an assessment for nearly £8m in unpaid VAT covering the period 1 January 2009 to 31 March 2015. There was an argument between the parties as to whether this was a single assessment or a series of assessments for shorter periods (clearly relevant for consideration of time limits). The judge made it clear that in referring to "the assessment" he was not prejudging the substantive issue. There was also a late notification penalty of nearly £1.2m.

The taxpayer's application was for disclosure of all documents, e-mails, notes of meetings and evidence relevant to the various HMRC decisions

and assessments. HMRC had disclosed the meeting notes, but resisted the disclosure of any other internal documentation.

The default position under Rule 27(2) of the FTT Procedure Rules 2009 is that both parties need disclose only documents on which they rely. However, Rule 27(2) recognises that the Tribunal may make directions to the contrary and it was common ground between the parties that the Tribunal therefore had the power to require HMRC to disclose documents other than those on which they rely. The question was whether the Tribunal should exercise the power in this particular case.

Judge Richards considered in detail arguments about the relevance or otherwise of the various documents requested to the arguments that were expected to be relied on by HMRC in the substantive hearing, and directed that certain categories of document should be disclosed. He excluded certain categories, and directed the parties to agree between themselves the date by which HMRC should comply and whether other case management directions were required.

First-Tier Tribunal (TC06748): *Staysure.co.uk Ltd*

A company made *Fleming* claims covering the period from 1 April 1973 to May 1999 in relation to sales of demonstrator vehicles ("*Italian Republic*") and bonuses paid to dealers ("*Elida*"). The case was stood over behind other appeals in which the legality of the three-year cap after 1996 was contested (eventually decided for HMRC). During this period the company's representatives corresponded with HMRC, arguing that the calculation of the demonstrators claim should have been higher, because HMRC had not taken periods of high inflation properly into account. On 5 September 2017 the company applied to amend its grounds of appeal in order to pursue this argument before the Tribunal. HMRC objected.

HMRC argued that the new argument was a new claim, rather than an amendment of an existing claim. It was therefore out of time to appeal, and could not be argued by amending the existing appeal. It was also ruled out because the matter had been settled by agreement when a repayment was made in 2007. The matter outstanding in the company's appeal had been determined by the decision in the lead case of *Leeds City Council*.

The taxpayer argued that it had only agreed a provisional repayment in 2007, and had not undertaken to give up its appeal. It had not considered *Leeds* to be a lead case in relation to this appeal. The amendment was merely a change in the computation of the figures that had been claimed in 2003, and was not therefore a new matter outside the scope of that claim.

The judge agreed with the taxpayer that the fundamental characteristics of the 2003 claims had not changed. The amendments were therefore capable of being within time, following *Bratt Autoparts* and other cases on that issue.

Although the initial acceptance of the provisional repayments in 2007 did not constitute full and final settlement of the appeal, further developments in that year – the House of Lords decision in *Fleming*, the accountants agreeing the amounts of the claims, and acknowledgement by HMRC that *Fleming* applied to periods up to 4 December 1996 – did. That meant that the claims for periods up to 31 December 1992 had been met in full, and could not be amended.

There was an element of the claims for the periods between 31 December 1992 and 4 December 1996 that had not been paid in full by HMRC, and therefore remained within the jurisdiction of the Tribunal. However, the amendments that the company sought to make in 2017 related exclusively to earlier periods of high inflation, and no amendments had been made for the 1990s.

Periods after 4 December 1996 were also compromised if Rule 18 of the Tribunals Rules applied, which it would if *Leeds* was a lead case and this appeal was designated as related to it. That would not be the case if an appeal was merely stayed behind another; designation of lead case and followers had to be explicit. There was no evidence that this had happened in this case; however, the decision was binding on the Tribunal, so the effect was similar. The judge considered that the appellant stood no reasonable prospect of success in pursuing the argument that the time limit was unlawful after 4 December 1996.

The taxpayer therefore won on several legal principles, but lost on the application to the facts. The grounds of appeal could not be amended.

First-Tier Tribunal (TC06766): *Ballards of Finchley plc*

A college stayed an appeal on its status as an eligible body behind *SAE Education*. When the Court of Appeal held against that appellant, this appellant dropped one of its grounds of appeal; but on hearing that *SAE* had been granted leave to appeal to the Supreme Court, it applied to have the ground reinstated, and for the hearing to be stayed until the Supreme Court had heard the case. HMRC applied for that part of the case to be struck out, and resisted the application for a stay.

Judge Kevin Poole declined to strike out the ground of appeal. That would not dispose of the matter completely in any case, so there would have to be an oral hearing; it would be more appropriate to hear the parties' arguments. HMRC argued that there was insufficient evidence to support the college's argument that it was an eligible body, but the judge considered that depended on what the correct legal test was; that would only be determined after the Supreme Court had heard *SAE*.

The judge therefore granted the application for a stay and gave directions designed to move the whole dispute as rapidly as possible to a final hearing once the judgment of the Supreme Court in *SAE* had been delivered.

First-Tier Tribunal (TC06850): *Brit College Ltd*

In a decision dated 31 July 2018, the FTT held that the appellant acted dishonestly while acting as a tax agent with a view to bringing about a loss of tax revenue in the course of assisting his client with his tax affairs. An article appeared in *Taxation* magazine on 6 November criticising the decision for procedural unfairness, because the hearing was conducted in the absence of the appellant. He had offered reasons for his inability to attend (inability to afford care for his disabled wife), but postponement was refused; he had been unaware that it would have been possible to "appear" by telephone or videolink.

The judge examined the circumstances and arguments in detail, and decided that, in order that justice should be seen to be done, the case should be reheard by a differently constituted Tribunal, at a hearing when

the appellant has a reasonable opportunity either to attend in person or by telephone or by videolink. The judge expressed the hope that the appellant, who had complained bitterly of unfair treatment by HMRC (and had made allegations of bullying and dishonesty), would avail himself of the opportunity.

First-Tier Tribunal (TC06852): *Colin Rodgers*

In TC06474, a reference was made to the CJEU in relation to the distance selling rules. The company subsequently applied to the FTT for the reference to be withdrawn and replaced by different questions. The application came back before Judge Anne Redston, who heard the original case and made the reference.

She had sent her draft questions to the parties on 27 April, requesting comments within a month. HMRC confirmed that they were content with the questions on 15 May; the company did not respond, and did not apply for an extension of time.

The company was also engaged in applying for leave to appeal other parts of the decision, where no reference was needed, to the Upper Tribunal. Judge Berner granted permission for appealing on some of the offered grounds, and made comments that the company sought to rely on to indicate that the reference should be amended.

Judge Redston considered the arguments in detail and considered them to be without merit. In particular, the company had been given plenty of opportunity to make representations about the content of the reference, and had failed to do so. A reference to the CJEU was a matter for the judge, not for the parties, and she was satisfied that the questions she had drafted were the ones she needed answered in order to make her decision.

She rejected the company's application.

First-Tier Tribunal (TC06854): *Healthspan Ltd*

6.9 Other administration issues

6.9.1 VAT Notes

In the run up to Brexit and MTD, it seems a strange time for HMRC to withdraw the traditional means of supplying news of developments to traders. The latest issue of VAT Notes was the last in the current format. In future, relevant articles will appear in the 'our announcements' section of the HMRC homepage of GOV.UK. Businesses exempt from online filing will continue to receive VAT Notes with their quarterly paper returns. Other articles in this edition concerned:

- place of supply changes for digital services supplied to private consumers from 1 January 2019;
- fulfilment house due diligence scheme reminder; and
- paying HMRC.

VAT Notes 2018 Issue 4

6.9.2 Budget 2018

In the Budget on 29 October, the Chancellor announced a number of VAT policies, including:

- the maintenance of the current VAT registration threshold until 31 March 2022;
- implementation of the EU Vouchers Directive from 1 January 2019 (see 2.12.1 above);
- the introduction of the domestic reverse charge for the construction industry (see 3.3.1 above);
- revising grouping rules to allow certain non-corporate entities to join a VAT group;
- changing the definition of groups' bought-in services to ensure that they are subject to UK VAT, and clarify HMRC's revenue protection powers and the treatment of UK fixed establishments;
- enacting the changes promised to the Specified Supplies Order to close the "loophole" held to exist by the FTT in the *Hastings Insurance* case (see 4.2.2 above);
- the change to "unfulfilled supplies" described above at 2.12.2;
- introducing stricter rules in reg.38 SI 1995/2518 from 1 September 2019 – definitions will be tightened and it will be ensured that credit notes are issued to customers through secondary legislation, to prevent businesses from benefitting from VAT that is due to the Exchequer or the consumer;
- continuity for higher education providers following the enactment of the Higher Education and Research Act (see 2.3.4 above);
- a call for evidence in relation to a possible "split payment" method of collection for online sales.

At the same time, it was announced that the consultation on the impact of VAT and air passenger duty (APD) on tourism in Northern Ireland, launched at the Spring Statement 2018, has ended and there will be no changes to the APD regime at this time. A summary of responses has been published.

The government published Finance Bill 2019 on 7 November 2018. The Bill is called Finance (No 3) Bill of the current parliamentary session. The Finance Bill Committee agreed the VAT clauses without amendment on 6 December:

- Clause 50 (VAT: duty of customers to account for tax on supplies)
- Clause 51 and Schedule 16 (VAT treatment of vouchers)
- Clause 52 and Schedule 17 (VAT groups: eligibility)

www.gov.uk/government/collections/budget-2018

6.9.3 Compliance checks

HMRC have updated their compliance check factsheet *Publishing details of deliberate defaulters* with further information on steps taxpayers can take to avoid having their details published once an investigation has begun.

CC/FS13

HMRC have also published a new compliance check factsheet *Penalties for enablers of defeated tax avoidance*. It states "You should read this factsheet if you have enabled abusive tax arrangements, or are considering enabling them in the future."

CC/FS43

6.9.4 Article

In an article in *Taxation*, Neil Warren sets out some "Christmas treats":

(1) Conditions for correcting a VAT error on a tax return;

(2) Partial exemption de minimis on input tax on rental property expenses;

(3) Business expenditure and the flat rate scheme limited cost trader category;

(4) Leaving the cash accounting scheme; and

(5) Changes to the treatment of business to customer digital sales within the EU.

Taxation, 20 December 2018

6.9.5 Scottish VAT assignment model

Under the Scotland Act 2016, the UK Government agreed to assign the first 10p of the standard rate of VAT (20%) and the first 2.5p of the reduced rate of VAT (5%) raised in Scotland to the Scottish government. The Scottish fiscal framework agreement in February 2016 set out the basis for assigning VAT to the Scottish government, leaving the full methodology to be developed in time for implementation in 2019/20. HM Treasury has now published a paper outlining the methodology for calculating Scottish VAT receipts, developed jointly with HMRC and the Scottish government. The UK and Scottish governments will seek comments on the model from key stakeholders in early 2019.

www.gov.uk/government/publications/scottish-vat-assignment-summary-of-vat-assignment-model

6.9.6 Jail terms and disqualifications

HMRC have successfully prosecuted six individuals for tax and money laundering offences. The six business owners engaged in three separate criminal schemes were sentenced to a total of 14 years and 10 months in jail. The unconnected schemes were:

- selling illegal cigarettes and alcohol;
- claiming that two Chinese restaurants were pottery businesses with turnover of £10,000 each, when they actually had a combined turnover of several million pounds a year;
- laundering money amounting to over £3.5m over eighteen months.

HMRC Press Release, 21 December 2018

The director of a road haulage company has been banned for 11 years for falsifying the firm's tax returns. He submitted false VAT claims in order to keep the company afloat while waiting for an insurance claim from an accident involving one of the company's vehicles to be settled. In a separate investigation, he was convicted of 'being knowingly concerned in fraudulent evasion of VAT', totalling £148,228 and on 15 June 2017 he was sentenced to 16 months imprisonment, suspended for 24 months.

Insolvency Service Press Release, 2 November 2018