VAT UPDATE
JULY 2024

Covering material from April – June 2024

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VAT Update July 2024

Contents

1. INTRODUCTION 1
   1.1 Appeals pending 1
   1.2 Decisions in this update 2
2. OUTPUTS 3
   2.1 Scope of VAT: linking supplies to consideration 3
   2.2 Disbursements 5
   2.3 Exemptions 5
   2.4 Zero-rating 12
   2.5 Lower rate 14
   2.6 Computational matters 15
   2.7 Discounts, rebates and gifts 15
   2.8 Compound and multiple 15
   2.9 Agency 22
   2.10 Second hand goods 24
   2.11 Charities and clubs 24
   2.12 Other supply problems 25
3. LAND AND PROPERTY 32
   3.1 Exemption 32
   3.2 Option to tax 32
   3.3 Developers and builders 32
   3.4 Input tax claims on land 32
4. INTERNATIONAL SUPPLIES 33
   4.1 E-commerce 33
   4.2 Where is a supply of services? 33
   4.3 International supplies of goods 37
   4.4 European rules 38
   4.5 Foreign refund reclaims 43
5. INPUTS 45
   5.1 Economic activity 45
   5.2 Who receives the supply? 45
   5.3 Partial exemption 45
   5.4 Cars 50
   5.5 Business entertainment 50
   5.6 Non-business use of supplies 50
   5.7 Bad debt relief 50
   5.8 Other input tax problems 50
6. ADMINISTRATION AND PENALTIES 55
   6.1 Group registration 55
   6.2 Other registration rules 58
   6.3 Payments and returns 59
   6.4 Repayment claims 59
   6.5 Timing issues 62
   6.6 Records 64
   6.7 Assessments 66
   6.8 Penalties and appeals 70
   6.9 Other administration issues 80

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:

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.

The latest update was published on the HMRC website on 16 May 2024.

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

- *Bolt Services UK Ltd*: HMRC granted leave to appeal FTT's decision that ride-hailing services were within TOMS.
- *Colchester Institute Corporation*: HMRC seeking leave to appeal against the most recent decision of the FTT that *Lennartz* assessments were invalid because the college was supplying exempt grant-funded education rather than non-business education.
- *Conservatory Roofing UK Ltd*: Upper Tribunal remitted case to FTT to consider further relevant information not taken into account when dismissing company's appeal (no longer on HMRC's list).
- *Northumbria Healthcare NHS Foundation Trust*: HMRC have applied for permission to appeal to the Supreme Court against the CA's ruling that the trust supplied parking under a special legal regime, and there was no evidence of a risk of significant distortion of competition.
- *Sintra Global Inc & Parul Malde*: HMRC have been granted leave to appeal to the Upper Tribunal against FTT's decision to allow appeals against various assessments and penalties relating to alleged inward diversion fraud (listed for hearing July 2024).

- *Sonder Europe Ltd*: HMRC have been granted leave to appeal the decision in this update at 2.9 that supplies of accommodation were covered by TOMS (hearing listed for December 2024).
- *Yorkshire Agricultural Society*: HMRC is seeing permission to appeal against the FTT's decision that the Great Yorkshire Show qualified for the charitable fundraising exemption.

1.2 Decisions in this update

- *Hotel La Tour Ltd*: HMRC have succeeded in their appeal to the Court of Appeal against the UT decision in the company's favour.
- *Innovative Bites Ltd*: HMRC's appeal to the Upper Tribunal against the FTT decision in the company's favour was unsuccessful.

2. OUTPUTS

2.1 Scope of VAT: linking supplies to consideration

2.1.1 Share subscription in kind

A Polish company (P) issued shares to two other companies in exchange for properties and cash. These transactions were set out in contracts which specified that the value of the shares issued was determined by the market values of the properties transferred, which had been assessed by a third party. P accounted for the purchase of the properties at the stated value and claimed input tax accordingly.

The tax authority decided that the VAT claim should be based on the nominal value of the shares issued rather than the market values. The difference was substantial – the nominal value was approximately €11.50 per share, whereas the value used was approximately €8,123 per share. P appealed against a ruling reducing its input tax entitlement, and the following question was referred by the Polish court to the CJEU:

Is consideration obtained or to be obtained by the supplier in return for a supply of goods, as referred to in PVD art.73, to be understood as meaning the nominal value of the shares acquired or the issue value, if the parties have stipulated that the consideration is to be the issue value of the shares?

The court started by stating that consideration includes everything that is received by a supplier in return for a supply, and that does not have to be in money. However, there must be a direct link between the goods or services traded and the value of the good or service provided in exchange must be capable of being expressed in monetary terms. Such a direct link is established if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient. This was clearly satisfied in the present case.

According to settled case law, the value of consideration received is the subjective value from the point of view of the person receiving it, rather than a value determined according to any objective criteria. This can be derived from an agreement between the parties, but if there is no such agreement, it corresponds to the amount the recipient is prepared to spend in order to obtain the consideration. The case cited by the CJEU is *Orfev Bolgaria* (Case C-549/11), but the principles were established in the 1980s in the cases of *Naturally Yours Cosmetics* and *Empire Stores*.

It followed that the value agreed between the parties should be used for VAT. The fact that this had been determined by a third party was not relevant: that did not make it "an objective criterion" and therefore contrary to the principles of the decided cases.

It was still open to the tax authority to consider whether the value agreed reflected economic and commercial reality, or was the result of an abusive practice. It would be open to the tax authority to apply a rule based on PVD art.80 to impose market value as the taxable amount where the

transaction was between connected parties. However, since that provision derogates from the rule that the taxable amount is represented by the consideration actually received for the goods or services by the taxable person, it must be interpreted strictly. Accordingly, it has been held that the conditions of application laid down in that provision are exhaustive and, consequently, national legislation cannot on the basis of that provision provide that the taxable amount is to be the open market value of the transaction in cases other than those listed in that provision.

There was nothing in the documents before the court that suggested there was an abusive practice in this case. Accordingly, the value of the property transaction should be determined for VAT by the issue price of the shares agreed between the parties.

CJEU (Case C-241/23): *P. sp. z o.o. v Dyrektor Izby Administracji Skarbowej w Warszawie, intervening party: Rzecznik Malych i Srednich Przedsiebiorcow*

Lecture 1

2.1.2 Carbon credits

HMRC has published a Brief on the VAT treatment of voluntary carbon credits. It starts with the following explanation:

A carbon credit is a tradable instrument issued by an independently verified carbon-crediting programme. It represents a reduction or removal of one metric tonne of carbon dioxide, or an equivalent amount of greenhouse gases (GHGs) from the atmosphere measured by reference to a baseline scenario. Voluntary carbon credits are any carbon credits that are not compliance market credits.

Voluntary carbon credits are currently treated as outside the scope of UK VAT. This is because when they were first introduced, HMRC's view was that they could not be incorporated into an onward supply and there was no evidence of a secondary market.

HMRC recognises that there have been significant changes in the voluntary carbon credit market, including the emergence of secondary market trading and businesses incorporating voluntary carbon credits into their onward supplies. Because of this, from 1 September 2024, the sale of these carbon credits must be treated as taxable for VAT where the place of supply is in the UK.

The following activities will remain outside the scope of VAT:

- the first issue of a voluntary carbon credit by a public authority;
- the holding of voluntary carbon credits as an investment, where there is no economic activity;
- donations made to voluntary carbon credit projects;
- sales of voluntary carbon credits from self-assessed projects with no independent or third-party verification.

In general, the supply of carbon credits will be standard rated where it is within the scope. However, from 1 September 2024, HMRC will allow

the zero-rating relief granted under the Terminal Markets Order (SI 1973/173) to apply to contracts in taxable voluntary carbon credits traded on terminal markets, within the terms of the relief.

The *Supply and Consideration* Manual has been updated to reflect these changes.

Revenue and Customs Brief 7/2024; VATSCO6582 – VATSCO6585

2.2 Disbursements

Nothing to report.

2.3 Exemptions

2.3.1 Article

In an article in *Taxation*, Roberto van Meurs and Fabian Barth discuss the Supreme Court judgment in *Target* and analyse its implications for application of the exemption for financial services. Their conclusion is:

The Supreme Court's judgment in Target *summarises in no uncertain terms the state of law regarding the payment exemption as it follows from CJEU case law, and as, for now, it applies in the UK. However, in the authors' view a better test than the present criterion of 'effecting changes in the legal and financial position' is possible and desirable. Whether the courts or parliament will be open to it in the future evolution of the law remains to be seen.*

Taxation, 18 April 2024

2.3.2 Credit card fees

In TC08554, the FTT dismissed an appeal by a company against two assessments totalling £109,305. The company appealed to the Upper Tribunal, where it came before Judge Phyllis Ramshaw and Judge Mark Baldwin. The judges started by summarising the situation as found by the FTT:

(1) SilverDoor provides services to providers of short-term rentals of hotels, serviced apartments and similar properties (referred to as "Property Partners"). SilverDoor acts as disclosed agent for the Property Partners. The accommodation is booked by persons ("Clients"), which are generally businesses seeking short-term accommodation for employees on temporary assignments.

(2) SilverDoor charges commissions to Property Partners for the provision of services. Those services are advertising the accommodation and making reservations of accommodation on behalf of the Property Partner. When a Client reserves accommodation, SilverDoor collects payment from the Client on behalf of the Property Partner. This amount

is paid by SilverDoor to the Property Partner after deduction of SilverDoor's commission.

(3) SilverDoor does not, itself, charge Clients a fee for making reservations of accommodation unless the Client chooses to pay for the reservation with a corporate credit card. In such a case, SilverDoor requires that the Client pay an additional fee ("the Fee/s"), being 2.95% of the accommodation charge.

The assessments were based on HMRC's view that the fees were consideration for a standard rated reservation service. It was common ground that the fee was consideration for a service supplied by the company to the client; the issues were how that service should be characterised, and whether it was exempt.

The company argued that the service was the provision of a facility to pay by corporate credit card, and this was distinct from the supply of accommodation that was made by the Property Partners. By the time of the Upper Tribunal hearing, it had abandoned an argument that the supply fell within "transactions concerning payments" (following the Supreme Court's decision in *Target Group Ltd*), but relied on a second line that it was acting as an intermediary between clients and merchant acquirers, and this fell within the exemption.

The FTT decided that the service provided to clients was a reservation service. The fact that the company only charged clients for this service if they used a corporate credit card, and recovered other costs of providing the service out of their revenue from the supply made to partners, did not change this. That was enough for the appeal to be dismissed: the reservation service had to be standard rated. However, the FTT also considered that the exemption would not apply, even if the supply related to the payment rather than the booking. There was no evidence that the company did anything other than issue a payment request containing a website link which took the client to the merchant acquirer's webpages in order to make the payment. There was no evidence that the company made any assessment of client requirements or negotiated any terms of any contract between the client and the merchant acquirer. It did not even obtain the client's credit card information, which was input directly by the client into the merchant acquirer's web page. There was therefore no act of intermediation that could fall within the exemption.

The grounds of appeal included the following:

- The FTT had failed to consider whether the supply of reservation services to the client was made for any consideration, and had come to an illogical conclusion as a result.
- The fact that a charge was only made where the client used a corporate credit card indicated that the payment facility was a separate supply from the reservation service.
- An intermediary service only requires that the intermediary brings together a provider of financial services and a person requiring financial services and puts them in a position to make a contract for the provision of that service. The FTT had misapplied the law in deciding that what the company did was not a "distinct act of mediation".

- These errors arose because the FTT did not properly analyse the extensive case law on the VAT treatment of card handling fees.

Counsel for the company attempted to distinguish the present situation from *Bookit* on the grounds that Bookit was not paid for marketing services by Odeon (whereas the appellant was paid by the property partners), so the only service it was providing for consideration was card handling. He argued that the appellant provided a reservation service for no consideration (so it should be disregarded for VAT), and only charged a fee to the clients where they chose to use a corporate credit card.

The UT examined the CJEU decisions in *Bookit* and *NEC* in detail. The judges noted that the CJEU had appeared to consider that the referring courts had failed to characterise the service correctly: there was an implication that the CJ regarded the card handling "service" as incidental to and ancillary to a taxable supply of making reservations, or even a taxable supply of tickets (even if that was a supply made by a different company). In spite of counsel's attempts to distinguish the cases, the judges held that the situations were very similar. There was a reservation service provided to clients, who only had to pay for it if they chose to use a corporate credit card; nevertheless, that choice was ancillary to receiving the reservation service, and was not a separate and distinct supply.

That was enough to settle the appeal, but the UT went on to consider the exemption issue. The judges did not agree that there was any act of intermediation, nor that the use of a credit card involved an "advance of credit". The decision includes a detailed examination of how credit card transactions are effected, which may be useful for anyone seeking to understand the process.

The clients had pre-existing credit card arrangements which the appellant had not arranged. All the appellant did was provide a link so that the clients could use their credit cards to pay for the reservation service. That was not an act of intermediation, and the appeal failed on that ground as well.

Upper Tribunal: *SilverDoor Ltd v HMRC*

Lecture 2

2.3.3 Cosmetic medicine again

A sole trader appealed against a compulsory registration decision and an assessment issued on 18 March 2021 for the period from 1 November 2007 to 28 February 2018 amounting to £212,897. She claimed that her supplies were exempt, but also that the assessment was out of time or otherwise procedurally invalid.

The case started with an enquiry letter in April 2017 in which HMRC noted that the trader's income tax returns showed that she had been trading above the VAT registration threshold. Correspondence followed, leading to the registration decision in January 2018 setting an EDR of 1 May 2007. This was upheld on review and the trader made an in-time appeal to the Tribunal in May 2018.

Because the trader had not submitted any VAT returns, HMRC issued an assessment on 7 September 2018 amounting to £270,649. The parties

attempted to settle the dispute through ADR, but without success. In January 2019 HMRC e-mailed a request for information about sales in 2007, after realising that the supplies only became taxable from 1 May 2007 and therefore the registration threshold had to be taken into account. The figures were not supplied, so an assessment was notified in March 2019 based on estimated figures and a revised EDR of 1 November 2007. This was appealed on the basis that the trader did not agree that she should be registered at all. She accepted that if her supplies were standard rated, the EDR and the amount of the assessment would be correct.

Covid and procedural arguments delayed the appeal further; the trader sought to amend the grounds of appeal to cover an objection to the long accounting period, and then submitted a nil return on 27 October 2020. HMRC then cancelled the original assessment and raised a new one on 18 March 2021. The trader appealed against this on 24 March 2021.

The judge (Vimal Tilakapala) described the trader's medical practice, which was based in Harley Street, London. She was a "nurse prescriber" who specialised in various skin conditions; she had no psychological or psychiatric qualifications, but was confident as to her ability to diagnose and treat conditions including low self-esteem, social isolation, poor body image and anxiety. Patients generally attend the appellant's clinic by choice and are not referred to the appellant by a doctor (whether specialist or general practitioner), or psychologist. The decision discusses the procedure for diagnosing and treating patients and the treatments offered.

The judge dealt first with the liability issue. He summarised a number of principles arising from case law, including the appellant's burden to justify exemption, the need for strict interpretation of exemptions, and the definition of "medical care". Following detailed discussion, the judge concluded that the appellant had not proven her case that diagnosing and treating conditions which are psychological is within the scope of her profession as a Registered General Nurse.

The purpose of the treatments was evaluated using patient reviews, the advertising material and the appellant's own view. The appellant's case was that all her treatments had a primary therapeutic purpose; there was not the evidence to support this as a universal conclusion, which meant that her appeal had to fail. The appeal against liability was dismissed.

The Tribunal noted an argument raised by the appellant based on fiscal neutrality – the claim that her competitors were all treating their supplies as exempt, and the potential reputational damage if she had to charge VAT with the implication that her supplies were not "proper medical care". However, this would require evidence to support the contention of similarity to the competitors' supplies, which had not been provided; a general allegation of unfairness could not be considered by the Tribunal.

The judge made the following comment:

Our determination should not be seen as a criticism of the Appellant's professionalism or dedication to her patients which was very apparent to us from the evidence. We are also not disputing the fact that the Appellant's treatments have a positive effect on her clients. Our decision relates to the specific requirements of the VAT exemption for medical care.

The judge then turned to the time limit issue, where the burden shifted to HMRC to show that the assessment had been issued in time. As the assessment was for a period from 1 November 2007 to 28 February 2018, the relevant time limit was the "one year from evidence of facts" rule in s.73(6) VATA 1994. The appellant claimed that HMRC had all the evidence used for the assessment before 18 March 2020; in particular, the submission of the nil return was not evidence used for the assessment.

The officer who issued the assessment gave evidence and was found to be credible and consistent. He needed to issue a new assessment because the submission of a nil return resulted in the original assessment being automatically superseded. He had taken over the file in January 2021, and was unable to give the reasons for the choice of a single long prescribed accounting period for the assessment. However, he was clear that the only reason for the issue of a new assessment was the submission of the nil return.

According to the 1984 High Court decision in *Parekh*, nil returns were not automatically "evidence of facts". They could be, but only if they communicated new information that the Commissioners had not previously been aware of. He also commented in that case that "The commissioners were not obliged to withdraw the previous assessments which were made prior to the making of the returns and they should have continued to rely on them."

HMRC argued that *Parekh* pre-dated the electronic filing system under which existing assessments were automatically cancelled or superseded by a submitted return, and it was therefore not a proper precedent. The judge therefore had to consider whether the first assessment was indeed automatically cancelled or extinguished by the return in a manner that was beyond HMRC's control. The judge was not persuaded that was the case.

The new assessment was for a slightly different period and for a slightly different amount, but it was not based on any new information. It was certainly not based on information obtained from the nil return. For this reason the judge concluded that it was issued outside the time limits, and the appeal was allowed.

The appellant had also raised an argument based on an alleged requirement to split the long PAP into 3-month periods and to apply the time limit to each of them individually. Because it was not necessary to consider that, the judge did not do so, and expressed no view on whether it was correct.

First-Tier Tribunal (TC09152): *Gillian Graham t/a Skin Science*

Lecture 3

2.3.4 Article

In an article in *Taxation*, Kevin Hall discusses recent calls by the Society of Radiographers for VAT to be removed from bras on health grounds. He considers a number of arguments, including the possibility that VAT reliefs are not reflected in the prices charged to consumers, and the difficulty of choosing particular products that deserve relief. His conclusion is:

It is interesting to consider that clothing is as much a social necessity as housing, education and health, so perhaps basic clothing should be zero rated for all, with all non-basic continuing to be standard rated. That might be difficult to define in law and overall, UK tax revenues will have to be balanced, but if the economists consider that VAT reductions would only be passed on to consumers with large-scale changes, perhaps it is the right thing to do.

Taxation, 23 May 2024

2.3.5 Online gambling

Advocate-General Kokott has given an opinion in a case on gambling. She starts by noting that the VAT exemption for gambling appears to encourage a potentially harmful activity; however, the exemption only applies "subject to the conditions and limitations laid down by each Member State". Belgium had chosen to remove the exemption from online gambling (except online lotteries) with effect from 1 July 2016. Some Belgian providers of online gambling claimed that this was a breach of the principle of fiscal neutrality, and the exemption applied to other forms of gambling constituted an unlawful State aid to their competitors. Although there was precedent case law on different types of gambling, the A-G considered that this was an opportunity for the court to clarify whether and to what extent the principle of neutrality precluded a selective exemption of individual types of gambling.

The exception from exemption introduced in Belgium with effect from 1 July 2016 was annulled with effect from 22 May 2018 by the Belgian constitutional court on the grounds that it infringed the rules on the division of powers between the Federal State and its regions. Nevertheless, the taxes collected in the meantime would not be refunded because of the budgetary and administrative difficulties that would arise from their reimbursement. The appellant in the present case applied for reimbursement in spite of that ruling. In due course, a set of six complex questions were referred to the CJEU.

A-G Kokott summarised the questions as follows:

- Whether the exemption for gambling in PVD art.135(1)(i) has direct effect;
- Whether the constitutional court had the power to maintain the tax charge without a reference to the CJEU to ascertain whether it breached EU law;
- Whether the different treatment of online lotteries (exempt) and online gaming (taxable) constituted an unlawful State aid.

The A-G considered the second of these issues inadmissible, because it was not sufficiently separate from the first. She therefore considered only the other two issues. She also noted that precedent case law determined that a taxpayer could not succeed with an argument that reliefs for other taxpayers constituted unlawful State aid in order to avoid paying its own tax.

In discussing the first issue, the A-G set out the principles of direct effect: the provisions of the Directive must be unconditional and sufficiently precise for a taxpayer to rely on them in the national courts in an action

against the State. A provision of EU law is unconditional where it sets forth an obligation which is not qualified by any condition, or subject, in its implementation or effects, to the taking of any measure either by the institutions of the European Union or by the Member States. On the other hand, a provision is conditional if it involves the application of national provisions determining the actual scope of the conditions under which EU law is applicable. It is sufficiently precise where it sets out an obligation in unequivocal terms. On this basis, the A-G concluded that the exemption for gambling did not have direct effect, because it was subject to conditions that the Member States could choose to implement. It would be for the Commission to bring infringement proceedings if it believed that the law was not in compliance with the Directive, but the Commission had not indicated that it saw any problems with it.

Turning to fiscal neutrality, the A-G discussed the differences between lotteries and other forms of gambling, which had historically been recognised by many Member States. There were real differences between the types of activity that meant they were not directly in competition and the principle was not engaged; this applied equally to the distinction between online and not online, and the distinction between online gaming and online lotteries.

The A-G's conclusions are therefore supportive of the stance taken by the Belgian constitutional court.

CJEU (A-G) (Case C-741/22): *Casino de Spa SA and Others v Etat belge (SPF Finances), Interested parties: Etat belge (SPF Justice), La Chambre des Representants*

Lecture 4

The same issues arose in a different case brought by a different taxpayer, not consolidated by the CJEU into a single case. The A-G gave a similar opinion in relation to slightly different questions.

CJEU (Case C-73/23): *ChaudfontaineLoisirs SA v Etat belge, represented by the Ministre des Finances, Interested party: Etat belge, represented by the Ministre de la Justice*

2.3.6 Gold

A company appealed against a penalty of nearly £15m assessed under VATA 1994 s.69A in respect of alleged failures in keeping records required by SI 1995/2518 reg.31A in relation to supplies of investment gold. The detailed requirements are in sections of Notice 701/21 *Gold Imports and Exports*, which have the force of law. The company appealed to the FTT, arguing that the record-keeping requirements of the Notice did not apply to its transactions. The FTT considered this as a preliminary matter.

The company argued that the gold had never been "delivered or otherwise made available to the customer" or "delivered or available to be taken away" as referred to in sections 6.1 and 7.1 of the Notice. HMRC argued that a right of possession was sufficient to engage the regulations. The FTT agreed with HMRC that the gold was available to be taken away within the meaning of the Notice, and the preliminary issue was therefore decided in HMRC's favour.

The company appealed to the Upper Tribunal, where it came before Judges Greg Sinfield and Guy Brannan. There were nine grounds of appeal, which included criticism of the Notice as being internally inconsistent, and a claim that it was practically impossible to take delivery of the gold. It claimed that investment gold was immovable, whereas physical movement is an essential feature of the VAT regulations and PVD art.346.

The UT quoted the FTT's description of how the company acquired and sold the gold, which remained in the keeping of another company throughout. The disputed transactions took place between 1 October 2015 and 31 March 2016. It appears that the transactions were part of a remuneration scheme which was separately found to be ineffective for income tax. The FTT had concluded from the custodian's terms and conditions that it was possible for the employees to whom gold was allocated to apply to the custodian to take physical delivery, and this was enough for it to have been "made available" within the terms of the regulations, even though it never happened.

The UT considered that the FTT had made an error of law in failing to appreciate the significance of a waiver signed by the director of the appellant acting as agent of the customer's designated employees. This waiver gave up the right of taking physical delivery of the gold. They did not have physical possession, nor did they have a right to physical possession. This meant that it was not necessary to express a view on whether a right to physical possession was sufficient to trigger the regulations; the company had argued that only an actual transfer of possession was within the powers allowed by reg.31A.

The judges noted that the significance of this waiver had not, apparently, been presented to the FTT with the same emphasis that it was given in the UT. It had not been included in the appellant's skeleton argument in the FTT. There was therefore no reason to criticise the FTT for its decision, but it should be set aside and remade. The appeal was allowed and the penalties were cancelled.

Upper Tribunal: *Qubic Advisory Services Ltd v HMRC*

2.4 Zero-rating

2.4.1 Large marshmallows

In TC08605, the FTT held that "Mega Marshmallows" were zero-rated as a food ingredient rather than standard rated as "confectionery". The FTT considered the marketing, the packaging, the size of the product, the positioning in supermarkets and the seasonal fluctuation in sales when reaching its findings. The appeal related to an assessment covering the period from June 2015 to June 2019 amounting to £472,928. HMRC appealed to the Upper Tribunal.

The UT began with a review of the history of the VAT treatment of food going back to the Purchase Tax Act 1963 and the derogation to continue not to tax "staple foods" when the UK joined the EEC. The excepted item

that included "confectionery" had changed several times, with the present wording introduced with effect from 1 May 1988. At the same time, Note 5 was added: "for the purposes of item 2 of the excepted items 'confectionery' includes chocolates, sweets and biscuits; drained, glacé or crystallized fruits; and any item of sweetened prepared food which is normally eaten with the fingers."

HMRC's main ground of appeal was an argument that Note 5 is a "deeming provision": if something falls within the terms of a deeming provision, no further enquiry is appropriate, and the item is deemed to be within the law regardless of any contrary indications. In HMRC's view, the marshmallows were "sweetened prepared food normally eaten with the fingers", and the FTT had been wrong to consider the various factors that led it to the conclusion that the product was not confectionery.

The taxpayer's counsel argued that all the authorities showed that a multifactorial assessment was required. The purpose of Note 5 was to enlarge the definition of confectionery, to include some things that would not otherwise be thought of as "sweets", but it was not intended to be nor worded as a deeming provision.

The UT discussed the concept and effect of deeming provisions before going on to conclude that Note 5 was not of that type. It was appropriate to go back to the Explanatory Notes which were issued with the Statutory Instrument that introduced it: its main purpose was to bring cereal bars within the definition, after a number of Tribunal disputes on the question in the 1980s. HMRC's arguments were "confusing and to some degree conflicting": they claimed that some products that have been traditionally zero-rated (e.g. cooking chocolate and tiny marshmallows) were so treated by concession rather than by the law. HMRC's reasoning was described as a Catch-22 situation or circular argument – VAT Notice 701/14 accepted that some forms of confectionery were zero-rated, but as Mega Marshmallows were confectionery they could not be zero-rated. This was not logical.

The UT concluded the review of the law by setting out its view of the correct approach:

(1) The starting point is to consider if the product falls within any of the descriptions in Note 5. This may, but need not, involve a multi-factorial assessment in relation to the descriptions, e.g., whether a product is normally eaten with the fingers.

(2) If the product falls within any of the descriptions in Note 5 then, absent any other relevant facts, the product can be classified as an Excepted item of confectionery and will be standard rated. There is no need to consider separately the term confectionery in Item 2.

(3) If the product falls within any of the descriptions in Note 5 but there are other relevant factors (e.g., it is a product used for other purposes) then a multi-factorial assessment should be undertaken to determine whether the product is confectionery (or, if HMRC is correct, if it is untaxed by concession).

(4) If the product does not fall within any of the descriptions in Note 5 then a Tribunal must determine if the product falls within Item 2 (usually requiring a multi-factorial assessment).

(5) The multi-factorial assessment in some cases may be relevant to determining the issues in (1), (3) and (4) above. It may (but need not) be artificial to apply the analysis to the descriptions in Note 5 and then subsequently to the wider meaning of confectionery in Item 2. In such cases an overall evaluation may be appropriate.

(6) In all cases a Tribunal should adopt a reasonably structured approach in drawing together its conclusions and make reference to any relevant description in Note 5 and say why the product does/does not fall within any such descriptions.

The UT went on to consider whether the FTT had erred in applying the tests to the product. Although it had erred in its approach to construing Note 5, there was no basis to interfere with its finding that the product was intended to be subjected to further cooking (roasting, to make into "s'mores" along with chocolate and biscuits) and were not therefore confectionery.

The UT also rejected a challenge on *Edwards v Bairstow* grounds that the conclusion was based on irrelevant factors such as the way in which the product was marketed. The UT considered that the FTT's conclusions were open to it on the evidence, and there is a high hurdle to overturn a fact-finding Tribunal's decision on the basis of *Edwards v Bairstow*. HMRC's claim that the product was sold in the confectionery section of some stores was not borne out by the UT's analysis of the evidence.

HMRC's appeal was dismissed.

Upper Tribunal: *Innovative Bites Ltd v HMRC*

Lecture 5

2.4.2 Updated Manual

The *VAT Energy Saving Materials and Grant Funded Heating Supplies* Manual has been significantly expanded to reflect recent changes to the rules in Northern Ireland from 1 May 2023, and the expansion of relief for energy saving materials from 1 February 2024.

The content on replacement roofs has been updated to reflect the *Greenspace (UK) Ltd* case.

VAT Energy Saving Manual

2.5 Lower rate

Nothing to report.

2.6 Computational matters

Nothing to report.

2.7 Discounts, rebates and gifts

Nothing to report.

2.8 Compound and multiple

2.8.1 NHS supplies

In TC08557, the FTT (Judge Greg Sinfield) had to consider whether a company supplied compound or multiple supplies to the NHS. NHS England (NHSE) engaged Spectrum Community Health CIC (S) to deliver primary healthcare at various prisons. S agreed to provide a range of services including nurses, GPs, pharmacies, mental and sexual health services, optometry, dentistry, and physiotherapy.

S was of the view that each of these services was a separate supply, and hence each service should be taxed in its own right. This meant that although the bulk of the services provided by S were exempt healthcare, some of the services were treated as taxable (e.g. supplies of drugs were treated as zero-rated and supplies of sexual health services were treated as reduced-rated). As a result of these taxable services, S sought to recover some input tax.

HMRC disagreed and contended that the company made a single composite supply of exempt care and medical treatment. The Tribunal agreed with HMRC, saying that the prison service was buying a complete package of medical care rather than a collection of distinct services, and there was no need to look beyond the contract between S and NHSE. Notably, the tribunal found that NHSE wanted to engage with S to deliver an integrated primary healthcare service equivalent to that provided by the NHS in the general community. This was, in the Tribunal's view, a single supply that it would be artificial to split. The FTT rejected an argument based on *Commission v UK* (Case 353/85) and *Finanzamt Dortmund-West v Klinikum Dortmund GmbH* (Case C-366/12) that the supply of drugs and contraceptives in these circumstances could never be part of a *CPP/Levob* composite supply, but had to be regarded as separate for VAT purposes.

There was then a separate discussion about whether the company was a duly recognised establishment of a similar nature to hospitals. That was important, because such an establishment would be exempt under PVD art.132(1)(b), which also covers the supply of goods closely related to healthcare. The Tribunal held that the test was whether or not the company operated from a physical building like a hospital and that was not the case here. The supplies were exempt under art.132(1)(c); nevertheless, that was still capable of covering incidental supplies that were part of the healthcare under the principles of *CPP/Levob*. The consequence was that all of the company's supplies were exempt, and no input tax recovery was possible.

The company appealed to the Upper Tribunal (Mr Justice Zacaroli and Judge Swami Raghavan). Its stated grounds were:

- ***Ground 1****: the FTT erred in deciding to resolve the issue of whether Spectrum made multiple supplies (under CPP/Levob) before reaching a decision on the contested scope of Article 132(1)(c) of the PVD.*
- ***Ground 2****: the FTT erred in finding that EC v UK and Klinikum did not decide that supplies of drugs or goods (other than minor supplies strictly necessary for and not physically and economically dissociable from medical care) could never be elements in a single supply of medical care.*
- ***Ground 3****: the FTT wrongly resolved the single/multiple supply issue by reference to the perspective of NHSE on the basis that NHSE was the contractual recipient of Spectrum's supplies. The FTT ought to have taken the patient's perspective.*
- ***Ground 4****: the FTT made an Edwards v Bairstow error of law – the only conclusion open to the FTT on the evidence was that Spectrum made multiple supplies including supply of medical care and supply of prescribed drugs and contraceptives.*

The judges noted that it was not in dispute that a *CPP* or *Levob* analysis could expand the scope of an exemption by bringing something taxable within the scope of a compound or single supply. The only support for treating the supplies as separate was *Commission v UK*, which predated both *CPP* and *Levob* by many years; in the *Klinikum* case, the A-G had considered the possibility of a compound or single supply but suggested that it was unlikely on the facts (because the drugs were being supplied by someone other than the healthcare), and the CJEU had said nothing to contradict the possibility. After some discussion, the UT agreed with HMRC that there was nothing in the precedents to suggest that it was impossible for the (taxable) drugs to be exempt if they formed part of a single complex supply. That had to be the first question, so the UT rejected both Ground 1 and Ground 2.

On ground 3, the question was whether the "point of view of the typical consumer" should be that of the contractual recipient (NHSE) or the physical recipient of the supply (the patient). The judges reviewed a number of precedent cases and rejected this argument. The relevant perspective was that of the person receiving the supply, and for VAT purposes that was NHSE: it was not correct to view the patient as the recipient and NHSE as paying third party consideration.

The appellant argued that a special approach applied in the case of the health exemption; however, in *Frenetikexito* and *Dr Beynon* the CJEU and House of Lords had applied the standard jurisprudence on compound and multiple supplies.

Ground 4 involved the appellant putting forward nine "factual indicators" that the FTT was bound to find that there were multiple supplies, which meant that its decision was unreasonable on the basis of the evidence. The UT commented that six of these fell away after it had concluded that the correct perspective was that of NHSE as recipient of the service; none

of the others, individually or together, would have compelled the FTT to conclude that there were separate supplies.

All the grounds of appeal were therefore rejected, and the decision of the FTT was upheld.

Upper Tribunal: *Spectrum Community Health CIC v HMRC*

Lecture 6

2.8.2 Dips

A KFC franchisee had, until 2019, accounted for VAT on dip pots sold with a hot takeaway as part of a standard rated composite supply. It then submitted an error correction, reclaiming VAT for the period between October 2015 and September 2018. After some debate, HMRC agreed to repay the VAT. The company then submitted a further error correction for the period from October 2018 to September 2019. This was reviewed by a different officer who refused the repayment, and issued assessments under VATA 1994 s.80(4A) to recover the earlier repayment. The company appealed against both the refusal of the second reclaim and the recovery assessment. As well as the substantive ground of appeal (that the supplies were zero-rated), the company argued that the recovery assessment should be cancelled on the principles of legitimate expectation or estoppel, because nothing had changed after HMRC had agreed to make the repayment.

The judge (Robin Vos) noted that there were 17 related cases standing behind the lead appeal, with a total of some £3 million of VAT at issue (although the lead appeal would be dealt with in principle only, without considering the quantum). The decision would also have a significant impact on future liabilities of these and similar traders.

At the outset, the Tribunal had to consider procedural matters relating to late submission of part of HMRC's case on legitimate expectations. The appellant applied to have that part of the case struck out for breach of the Tribunals rules; HMRC also applied to strike out a new ground of appeal based on estoppel. HMRC accepted that they had been very late without good reason, so it fell to the Tribunal to decide whether to admit the point under the overriding objective in Rule 2 (to deal with cases fairly and justly).

The judge noted that it is important for both parties to state fully their grounds of appeal or statement of case, so that the other side is not "ambushed" at the hearing. However, the question of the Tribunal's jurisdiction was fundamental; as HMRC's late submission was an argument that the Tribunal did not have jurisdiction to consider the question of legitimate expectations, that was something that would have to be examined in any case. That was a strong factor in favour of allowing HMRC's application.

The decision to allow the appellant's extra ground was more finely balanced, but the judge decided that there would be no significant prejudice in permitting it. Although HMRC argued that they might need to produce further evidence to counter it, the judge considered that this could be taken into account during cross-examination. He therefore allowed both applications to proceed. The issues before the Tribunal were then:

- Whether the dip pots were a separate, zero rated supply (affecting the reclaim and the recovery assessment);
- If they were not, only in relation to the recovery assessment:
  - Whether it had been validly made;
  - Whether the Tribunal had jurisdiction to consider arguments based on legitimate expectation;
  - If so, whether that prohibited HMRC from recovering the repayments;
  - If not, whether the appellant could show there was an estoppel by convention.

The judge next set out the way in which the dip pots were sold. They were larger than the sachets of sauce that were given out for free; they could be sold separately, or as part of an inclusive meal deal, or as part of a list of items from the menu that were not a “deal”. The appellant’s group, which operated about 50 KFC franchises, sold some 400,000 dip pots individually (i.e. not with anything else) between 2017 and 2023, averaging about 4 per store per day.

The 2019 decision to zero rate cold elements of a takeaway meal covered coleslaw, cookies, yoghurts and milkshakes, as well as dip pots. The first reclaim was for £86,803 (covering 12/15 to 09/18), which included £75,502 relating to dip pots included in takeaway meal deals. After some correspondence, during which HMRC did not raise the issue of separate supplies, in October 2019 the officer agreed to make the repayment, but commented that the issue might be revisited during any later “audit activity”.

A further correction notice was submitted in April 2020 for £33,867 (covering 12/18 to 09/19), including £30,936 for dip pots. A different officer dealt with this claim. In July 2020 he accepted that cookies and yoghurts could be treated as separate supplies as they could be consumed on their own, but considered that dip pots formed part of a single supply alongside the hot food that formed part of the relevant meal deal. In his view, the dips were ancillary to the supply of the hot food and were a means of better enjoying that food. They could not be consumed on their own and were therefore not an independent supply.

His decision was upheld on review in December 2020, and in March 2021 HMRC issued the recovery assessments in relation to the earlier repayments. Their first attempt included yoghurts and cookies, which were excluded from a replacement set of assessments covering dip pots only issued in May 2021. The decision to issue these assessments was upheld on review in July 2021.

The judge recited the case law principles from *CPP* and *Middle Temple*, and noted the Upper Tribunal’s decision in *Ice Rink Company* that the point of view of a consumer of the package deal should be considered, rather than people who did not buy the package – in this case, the meal deal. The taxpayer’s counsel contended that this was not the end of the enquiry: it was necessary to look at other factors, in particular the element of choice.

The judge commented that cases in which choice had been considered important (*Field Fisher Waterhouse*, *Middle Temple*, *BGZ Leasing* and *Wheels Private Hire*) all concerned situations where there was no doubt that the customer wanted the service that was eventually bought together with another supply; the only question was whether the customer had a genuine choice to buy it as part of a package, or separately from someone else. That was not the case with the dip pots.

Counsel for the appellant also argued that HMRC could not justify treating the dip pots as part of a single standard rated supply when they accepted that other cold elements of a meal deal were separate zero rated supplies (such as coleslaw and cookies). HMRC's counsel said that there was no inconsistency: the question was whether the elements were ancillary to other elements or not. The judge found no authority which assisted on this subject, so he approached it from first principles. After discussing the point, he agreed with HMRC: there was no reason in principle why a supply could not consist of some elements that were separate and had their own individual liabilities, and some that were ancillary and were therefore compounded for VAT.

The judge then considered the arguments about whether the purchase of a dip pot, as part of a meal deal, could be an "aim in itself". He concluded that this was "fanciful". The overwhelming likelihood was that the typical purchaser of a meal deal would regard the dip pot as a condiment to enjoy with that meal. The fact that customers could turn down the dip pot without a change in the price was wholly irrelevant: then there would be no supply of a dip pot so there would be nothing that could be zero rated, whether ancillary or not. The argument on liability was decided in HMRC's favour.

Turning to the arguments about the validity of the recovery assessments, the judge reviewed the law: s.80 allows a taxpayer to reclaim overpaid VAT, and s.80(4A) allows HMRC to recover such a repayment if it is subsequently realised that it was excessive or undue. The time limits for a recovery assessment are set out in s.80(4AA).

The taxpayer's counsel argued that a recovery assessment could only be made if there had been a clarification of the law or new factual evidence had come to light, which had not happened in this case. The judge rejected this argument. It appeared that the repayment had been wrongly made, and s.80(4A) gave HMRC the opportunity to recover it; the assessments had been raised within the time limits, and were in principle valid.

The judge next had to consider the taxpayer's arguments about legitimate expectation. The taxpayer claimed that the 2021 Upper Tribunal decision in *KSM Henryk Zeman* confirmed that the FTT had jurisdiction in this context; HMRC disagreed. The judge considered a number of precedents, both from VAT and direct taxes, in which the question of the use of a "public law argument" (e.g. legitimate expectations) could be considered as part of a defence against a tax assessment. "With some hesitation", the judge concluded that the FTT had jurisdiction to entertain the argument: the FTT was not exercising a general supervisory jurisdiction, but rather considering an appeal within s.83 that was based on an argument of a public law type. The judge commented that HMRC had not included a

full analysis of the statutory provisions in their submissions, and a different Tribunal might come to a different conclusion at a later date.

The principles of legitimate expectation were those set out by the High Court in *R v Inland Revenue Commissioners, ex parte MFK Underwriting Agencies Ltd* (1990). HMRC accepted that, in this case, the taxpayer had "put all its cards face up on the table". There was an argument about whether "the ruling or statement relied upon [was] clear, unambiguous and devoid of relevant qualification". The parties agreed that the Tribunal should consider objectively how the statement or ruling would be interpreted by a reasonable recipient in the context in which it was made; HMRC considered that the involvement of PwC as advisors was relevant, as they would have particular expertise in interpreting the law.

The judge rejected a submission by HMRC that the mere possibility of a recovery assessment was "a relevant qualification". The comment by the officer that "this issue may be revisited" did not refer to the question of single or multiple supplies, because that had not been raised by HMRC up to that point. The judge concluded that the acceptance of the repayment claim satisfied this condition for a legitimate expectation.

However, the final requirement is that it would not be fair to depart from the clear and unambiguous ruling. There is no requirement that the person to whom the ruling is given has relied on it to their detriment. In the context of tax, some guidance on the approach to unfairness was given by the Court of Appeal in *HMRC v Hely Hutchinson* (2017): the law imposes on HMRC a duty to collect tax and that taxpayers must expect to pay the right amount of tax. The judge commented in *MFK* that "the taxpayer's only legitimate expectation is, *prima facie*, that he will be taxed according to statute not concessions or a wrong view of the law".

In that context, it was appropriate to consider the extent of detriment that would be suffered by the company if the recovery assessment were to stand. The company's witness had described certain expansion and refurbishment projects that had been postponed or cancelled because of the assessments; the judge did not consider that the monetary amounts were sufficient to connect the two. The assessments totalled £75,000 and the plans appeared to involve expenditure of £1 million. It seemed that these plans must have been impacted by other factors as well.

The judge also commented that the company "*must bear some responsibility for HMRC's mistake… Whilst Queenscourt cannot be criticised for not doing HMRC's job for them, given the existence of HMRC guidance referring to the* Domino's *case where dips supplied with hot food were treated as part of a single standard rated supply which, given PWC's expertise, they would no doubt have been aware of, it is hard for Queenscourt to say that it is conspicuously unfair for HMRC to recognise its mistake and to apply the law correctly despite its original acceptance of the claim.*" Taking all these factors together, the judge concluded that the assessment was not so outrageously unfair that it should not be allowed to stand.

The final issue was that of "estoppel by convention", the principles of which were set out by the Supreme Court in *Tinkler v HMRC* (2021):

- There must be an expressly shared common assumption between the parties.

- The sharing of the common assumption must include words or conduct from which the necessary sharing or assent to the assumption can properly be inferred.
- The expression of the common assumption by the party alleged to be estopped (in this case HMRC) must be such that they may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that they expect the other party to rely on it.
- The person alleging the estoppel (the appellant) must in fact have relied upon the common assumption, to a sufficient extent, rather than relying upon their own independent view of the matter.
- That reliance must have occurred in connection with some subsequent mutual dealing between the parties.
- Some detriment must thereby have been suffered by the person alleging the estoppel (the appellant) or some benefit must thereby have been conferred upon the person alleged to be estopped sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position.

The problem for the company was that the detriment was not sufficiently connected to the reliance, as already discussed in relation to legitimate expectation.

The appeal was dismissed, both on the technical ground of VAT liability and on the arguments about the validity of the assessment.

First-Tier Tribunal (TC09184): *Queenscourt Ltd v HMRC*

Lecture 7

2.9 Agency

2.9.1 Wholesale TOMS supplies

HMRC have issued a Brief to announce a technical change to their policy and guidance on wholesale TOMS supplies (i.e. where a supply of relevant travel services is made to another business which will supply it on). HMRC had previously regarded wholesale TOMS supplies as outside the scope of TOMS and therefore subject to the normal rules; following the CJEU decision in *Commission v Spain*, they issued RCB 5/2014 to confirm this view, but allowed traders to apply direct effect of EU law (i.e. bring the supplies within TOMS if they wished).

Following a recent Tribunal case (which is probably TC08893: *Golf Holidays Worldwide Ltd*), HMRC have decided that wholesale supplies are within TOMS as a matter of law, but they will continue to allow businesses to apply the normal rules of VAT as a concession. There is therefore no requirement to change the way a business accounts for these supplies, but Notice 709/5 has been updated to clarify the basis of the treatment.

The significance of the change is that a concession cannot be claimed retrospectively: the appellant in TC08893 wanted to take wholesale supplies out of TOMS for past periods, enabling it to claim input tax back on the costs in relation to supplies that were made to foreign businesses. The FTT supported HMRC's view that this was not possible, but HMRC had to argue that their own guidance was incorrect in law.

Revenue and Customs Brief 5/2024

Lecture 8

2.9.2 Uber and TOMS

The government has published a consultation on the potential tax impacts of the *Uber Britannia Ltd v Sefton Borough Council* High Court judgment that was handed down on 28 July 2023, and the *Uber London Ltd v Transport for London* High Court judgment that was handed down on 6 December 2021, on the private hire vehicle (PHV) sector and its passengers. The consultation invites views on potential government interventions that could help to mitigate any undue adverse effects on the PHV sector and its passengers.

The consultation notes that a significant and increasing number of PHV operators have started to account for VAT as principal since the above case decisions, and many of them are using TOMS. The government continues to maintain that TOMS does not apply to this sector and will continue to challenge those who use it. The consultation also confirms that PHV operators can continue to rely on existing guidance and use an agency model for VAT accounting until the matter is resolved.

Solutions to the problem could involve changing transport legislation (to allow PHV operators to act as agents) or VAT legislation (to allow agency treatment in spite of the legal requirement to act as principal). It is suggested that this could cost up to £750 million in VAT revenue each year.

Other possible solutions include applying the reduced rate to PHV services (at a cost of possibly £1 billion a year), and introducing a new margin scheme for the sector that would apply instead of TOMS (costing a similar amount to the above change to VAT legislation). TOMS would then be retained for those operators for whom it was originally intended.

www.gov.uk/government/consultations/consultation-on-the-vat-treatment-of-private-hire-vehicles

Lecture 8

2.9.3 Football agents

HMRC have issued new "guidelines for compliance" on football agent contracts, explaining the difficulties that can arise from "dual representation" – where an agent is acting simultaneously for the club and the player. HMRC are concerned that clubs tend to pay the fees and regard the cost as wholly incurred for the purposes of the business, enabling full tax relief to be claimed, when HMRC believe that there should be an apportionment between the club and the player. They give the following illustration of the effect of treating the supply as made to one or the other:

Agent acting for player	*Tax impact*
Agent's fee	£1 million
Amount paid to agent plus VAT	£1.2 million
Income Tax on player (£1.2 million at 45%)	£540,000
Employers Class 1A National Insurance contribution £1.2 million at 13.8%	£165,600
Club cannot reclaim VAT	£200,000
Total tax	£905,600

Agent acting for club	*Tax impact*
Agent's fee	£1 million
Amount paid to agent plus VAT	£1.2 million
Income Tax on player	£0
Employers Class 1A National Insurance contribution	£0
Club can reclaim VAT	£200,000
Total tax	£0

The document suggests that HMRC regard this as an area in which they can look for significant assessments:

In HMRC's view, the football agent, who generally has an existing relationship with the player, is working in that player's interest to place

them with (or keep them at) their preferred club, and secure the player the best employment terms. In these cases, HMRC's view is that the majority of the value of the services are being provided to the player.

A view often provided to us by agents and clubs is that by negotiating the contract between the player and club, the agent has provided a valuable service to both parties which justifies apportionment of the fee. HMRC's view is that when a representation agreement exists between the player and the football agent, the agent primarily represents the player and acts in the player's interest. The agent providing services to the player may be of value to the club, but it is not an automatic indicator of the agent providing services to the club.

We acknowledge that in addition to player services, other services may be supplied to the club by the agent. These services may take a number of forms, and clubs should keep evidence to support any amount attributed to club services. See EIM01152 — Football clubs: payments to intermediaries: retention of records and 'Documents, evidence and record keeping' for further information.

It is essential that any split in an agent fee must be based on the commercial reality of the contract negotiations. This is because the allocation of the agent fee between player and club services can have a significant impact on the liability to income tax, National Insurance contributions, and VAT liability and entitlement to reclaim VAT.

Consequently, fees for services which are wholly allocated to the club, or which are split in such a manner that the player portion is less than stated in the player-agent agreement, significantly increases the potential for an HMRC Compliance Check. EIM01151 — Football clubs: payments to intermediaries: indicators of risk provides further information.

Clearly, anyone working in the sector should read the document in full detail, and be ready for questions from HMRC.

www.gov.uk/government/publications/help-with-football-agents-fees-and-dual-representation-contracts-gfc6

Lecture 9

2.10 Second hand goods

Nothing to report.

2.11 Charities and clubs

2.11.1 Charitable donations

On "Tax Administration and Maintenance Day" (18 April 2024), the government made the following announcement:

In order to encourage charitable giving the government will consult on introducing a targeted VAT relief for low value goods which businesses donate to charities for the charities to give away free of charge to people in need. The consultation will be launched later this year.

It has been reported that the Treasury is considering other reforms to the Gift Aid rules which give income tax and corporation tax relief for charitable giving, but this appears to be a separate measure.

www.gov.uk/government/publications/summary-of-tax-administration-and-maintenance-spring-2024/tax-administration-and-maintenance-summary-spring-2024

2.11.2 Definition of a charity

HMRC have updated the VAT *Charities* Manual to clarify the definition of a charity for tax purposes, and to distinguish charities from other not-for-profit organisations.

Charities and "not for profit" organisations are not the same thing. While all charities will be non-profit making organisations, not all non-profit making organisations fall within the definition of a charity for tax purposes. For tax purposes, a charity is an organisation that is:

- *based in the UK*
- *established for charitable purposes only*
- *registered with the Charity Commission or corresponding regulator, where required*
- *run by 'fit and proper persons'*
- *recognised by HMRC*

If a charity is not currently recognised by HMRC, they can apply for recognition online.

Therefore, clubs and associations, professional and trade bodies, mutual societies (including many large insurance companies and building societies), friendly societies, motoring organisations, the Co-operative movement, trades unions, political parties and lobby groups etc are all non-profit making organisations, but they are not necessarily charities. Bodies which exist to benefit their members, as opposed to the community at large, are not usually charities. Organisations with political aims and objectives are not charities.

Charities may have a membership structure and the members may derive some benefits. But usually it is a case of the body of members coming together to support work which is of benefit to the wider community. An organisation which exists solely to benefit or further the aims of its members is not a charity.

VCHAR2200

Lecture 10

2.12 Other supply problems

2.12.1 Vouchers – single or multi-purpose?

A German company (M) marketed, via its online shop, prepaid cards or voucher codes enabling 'user accounts' to be loaded for the purchase of

digital content in a particular online shop (X). The prepaid cards or codes were referred to as ‘X cards’. X was managed by a UK company (Y).

Y was responsible for issuing X cards and marketing them in the European Union, with different ‘country’ codes, through various intermediaries. X cards with the ‘country’ code DE were intended exclusively for customers who had both their domicile or habitual residence in Germany and a German X user account. The terms and conditions required users to provide accurate information about their place of belonging (domicile or habitual residence) and only to use credits that were intended for the country corresponding to their X user account.

During 2019, M purchased X cards, issued by Y, through two suppliers (L1 and L2) that were established elsewhere in the EU (i.e. neither in the UK nor in Germany). It treated these cards as multi-purpose vouchers, on the basis that it did not know for sure the place of belonging of the end customer. A large number of customers residing outside Germany opened German X accounts to obtain some price advantages, and purchased ‘DE’ X cards from M.

The German tax authority decided that these cards were SPVs because they could only properly be used by German residents. The place of supply was therefore Germany; the possibility that customers could have circumvented the conditions of issue by providing misleading information should not change the nature of the vouchers. This led to an assessment, because the supply of SPVs is subject to VAT; the supply of MPVs is not.

The company appealed, and questions were referred to the CJEU about the interpretation of PVD articles 30a and 30b, which had only come into effect in 2019. These provided as follows:

Art.30a

For the purposes of this Directive, the following definitions shall apply:

(1) “voucher” means an instrument where there is an obligation to accept it as consideration or part consideration for a supply of goods or services and where the goods or services to be supplied or the identities of their potential suppliers are either indicated on the instrument itself or in related documentation, including the terms and conditions of use of such instrument;

(2) “single-purpose voucher” means a voucher where the place of supply of the goods or services to which the voucher relates, and the VAT due on those goods or services, are known at the time of issue of the voucher;

(3) “multi-purpose voucher” means a voucher, other than a single-purpose voucher.’

Art.30b

1. Each transfer of a single-purpose voucher made by a taxable person acting in his own name shall be regarded as a supply of the goods or services to which the voucher relates. The actual handing over of the goods or the actual provision of the services in return for a single-purpose voucher accepted as consideration or part consideration by the supplier shall not be regarded as an independent transaction.

Where a transfer of a single-purpose voucher is made by a taxable person acting in the name of another taxable person, that transfer shall be

regarded as a supply of the goods or services to which the voucher relates made by the other taxable person in whose name the taxable person is acting.

Where the supplier of goods or services is not the taxable person who, acting in his own name, issued the single-purpose voucher, that supplier shall however be deemed to have made the supply of the goods or services related to that voucher to that taxable person.

2. The actual handing over of the goods or the actual provision of the services in return for a multi-purpose voucher accepted as consideration or part consideration by the supplier shall be subject to VAT pursuant to Article 2, whereas each preceding transfer of that multi-purpose voucher shall not be subject to VAT.

Where a transfer of a multi-purpose voucher is made by a taxable person other than the taxable person carrying out the transaction subject to VAT pursuant to the first subparagraph, any supply of services that can be identified, such as distribution or promotion services, shall be subject to VAT.

The referring court was minded to conclude that the X cards were SPVs because they were intended to be country-specific. However, it considered that a different interpretation was possible, and was not sure how to reconcile either interpretation with the CJEU judgment in *Lebara* (Case C-520/10), which concerned phone cards. The questions referred were:

(1) Does a single-purpose voucher exist within the meaning of Article 30a(2) of the VAT Directive where:

– the place of supply of the services to which the voucher relates is [admittedly] known in so far as those services are intended to be supplied to [end] consumers within the territory of a Member State,

– but the fiction of the [first sentence of the] first subparagraph of Article 30b(1)… of the VAT Directive, according to which [also] the transfer of the voucher between taxable persons [is considered as] providing the service to which the voucher relates,… gives rise to a service in the territory of another Member State?

(2) If the first question is answered in the negative (and hence a multi-purpose voucher exists in the present case): Does subparagraph 1 of Article 30b(2) of the VAT Directive, according to which the actual provision of the services in return for a multi-purpose voucher accepted as consideration or part consideration by the supplier is subject to VAT pursuant to Article 2 of the VAT Directive, whereas each preceding transfer of that multi-purpose voucher is not subject to VAT, preclude a differently substantiated tax obligation (judgment of... 3 May 2012, Lebara, C-520/10)?

The court noted that the PVD did not deal with vouchers before the amendments introduced by Directive 2016/1065. All the parties to the present dispute accepted that the X cards were ‘vouchers’ within the meaning of art.30a. The court also observed that SPVs are defined in the Directive, with MPVs being a residual category of “vouchers that are not SPVs”.

The classification as a SPV depended on two cumulative conditions "existing at the time of issue of the voucher": the place of supply of the goods or services to which the voucher relates must be known, and the VAT payable on those goods or services must be known. If there is uncertainty about place or liability of the eventual supply, the instrument is not a SPV.

The referring court had been concerned that the cross-border chain of intermediaries (Y to L1/L2 to M to the consumer) might mean that the vouchers were MPVs, because the classification of them as SPVs would result in different place of supply rules applying to the intermediate transfers. The CJEU agreed with the German government and the Commission that this would be a circular argument that would result in any cross-border supply chain ruling out the existence of SPVs, and would defeat the objective of the 2016 amending Directive. The identification of the vouchers as SPV or MPV under art.30a had to be carried out first, without regard to the application of art.30b(1) to the transfers that followed their issue.

The court went on to rule that the VAT treatment of a transaction for VAT purposes cannot be determined by an "abusive practice", such as the customers providing misleading information about their place of residence. There had to be an assumption that "DE cards" would be used by people belonging in Germany, so the place of supply was known at the time of issue.

There was not enough information in the order for reference to determine whether the liability of the supply was known at the time of issue, but there was also no indication that it was not known. It would be for the referring court to determine whether the second condition for a SPV was satisfied.

It appears likely that these vouchers will be classified as SPVs. However, as it is still possible that they may be MPVs, the CJEU went on to answer the second question. Although the transfer of the MPV itself is outside the scope, any separately identifiable service (such as marketing or distribution) may be VATable. It is possible that the margin earned on buying and selling MPVs is consideration for such a service. It would be for the referring court to determine whether that applied in the present case.

This was not inconsistent with the decision in *Lebara*, which in any case pre-dated the amending Directive. It dealt with what would now be classified as SPVs.

CJEU (Case C-68/23): *M-GbR v Finanzamt O*

Lecture 11

2.12.2 Charging electric vehicles

A German company (DCS) with no fixed establishment in Sweden provided electric vehicle (EV) users in Sweden with access to a network of charging points. Via that network, users receive real-time information on prices, location and availability of charging points, in addition, to functions for locating charging points and route planning. The charging points on the network are not operated by DCS but by charge-point operators (CPOs) with which DCS has entered into contracts. DCS

provides EV users with a card and an application for authentication to enable them to charge their vehicles at the charging points. When the card or application is used, the charging session is registered with a CPO, which then invoices DCS for that session. Invoicing takes place on a monthly basis at the end of each calendar month and payment must be made within 30 days. DCS then raises invoices to the users, firstly for electricity used (variable according to amount), and secondly for access to the network and related services (a fixed charge).

In April 2021, DCS applied to the Swedish Revenue Law Commission for a ruling on the VAT treatment of the supply. Nearly a year later, the Commission made a ruling that this was a complex supply which was mainly characterised by a supply of electricity, and it was therefore taxable in Sweden. The Swedish tax authority applied to the Swedish court for confirmation that this was correct, while DCS appealed, arguing that there were two supplies which should have separate treatments – only the electricity supply should be taxable in Sweden.

A-G Capeta noted that the Law Commission was divided: the majority considered that there was a chain of supplies from the CPO to DCS to the user; the minority considered that DCS was effectively supplying a form of credit for the purchase of electricity.

The referring court put forward two questions: whether the supply of electricity at a charging point was a supply of goods, and if so, whether that was the correct treatment at each stage of the chain, when only the user had the right to decide on the quantity, time of purchase and charging location, as well as how the electricity is used. The A-G noted that the referring court appeared already to have decided that the supply was "goods", so she only considered the second question.

She stated that the fundamental criteria for the application of the VAT system is the commercial and economic reality. She therefore analysed how the transactions take place. It was established law that supplies should be treated as distinct and separate unless it was artificial to do so; the circumstances suggested that the access service (charged at a fixed rate monthly) and the electricity (charged according to quantity consumed) were different in nature. That supported the argument put forward by DCS in the referring court.

The A-G went on to examine the treatment of the supply of electricity. There were three possible treatments:

- Following *Auto Lease Holland*, the supply between DCS and the user would be a supply of credit rather than a supply of electricity – the user effectively purchased the electricity direct from the CPO.
- The supplies could be successive sales of electricity from CPO to DCS and DCS to the user.
- The supplies could be treated as a "commission model" as envisaged by PVD art.14(2)(c).

The A-G noted that the decision in *Auto Lease Holland* had been criticised by some scholarly writers, and she did not consider that it properly reflected the economic reality. It was also distinguishable because, at least at present, the way in which EVs are charged is not directly analogous to filling cars with petrol. The fact that business users

of EVs would not be able to deduct input tax on electricity under this model (because they received an exempt supply of credit) counted against it.

The second approach required a "legal fiction": DCS did not acquire the electricity "as owner", as required by art.14(1). It was possible to apply the rules in this way, but the A-G considered that it was worthwhile to explore the third option.

The A-G described the "commissionaire" model as follows:

55. The commissionaire model would describe the transaction at issue in the present case as involving an agent as an intermediary between the CPO and the card/app user.

56. There can be two types of commissionaire model: the sales commissionaire model and the purchase commissionaire model.

57. In the sales commissionaire model, the principal is the CPO, whilst the agent is the device issuer (such as DCS). In that model, the device issuer sells electricity in its own name but on behalf of the CPO to the card/app user.

58. In the purchase commissionaire model, the principal is the card/app user and the agent is DCS. In that model, the device issuer (DCS) buys electricity from the CPO in its own name but on behalf of the card/app user. That model best describes the situation in the present case, as the buying of electricity happens, as I have already stated, on the initiative of the card/app user.

The A-G went on to discuss the conditions of art.14(2)(c) – that the intermediary acted as an agent and the supplies were identical – and suggested that it was for the referring court to determine whether that was the case. Her recommended answer was:

[The PVD] must be interpreted as meaning that the recharging of an electric vehicle at a network of charging points to which a user has access by means of a subscription concluded with a company other than the charging-point operator implies that the electricity consumed is delivered from that operator to that user, and the company offering access to those charging points acts, in that supply, as a commissionaire within the meaning of Article 14(2)(c) of that directive.

Alternatively, if the two conditions of Article 14(2)(c) of Directive 2006/112 are not met, it should be considered that the supply of electricity to the user is deemed to be made by the company which provides access to a network of charging points to users within the meaning of Article 14(1) of that directive.

CJEU (A-G) (Case C-60/23): *Skatteverket v Digital Charging Solutions GmbH*

Lecture 12

2.12.3 Free of charge supplies

A German company (Y) operated a plant producing biogas from biomass. The biogas was used to produce electricity and heat. Most of the electricity was supplied to the general grid; the heat was partly used by Y in its production processes, and partly supplied "free of charge" under a

contract to two other businesses for use to dry wood and heat asparagus fields. The contracts referred to payment "determined on an individual basis according to the economic situation of the user of the heat without that payment being specified in the contracts themselves".

The tax authority raised an assessment on Y for VAT on the heat supplied to the other companies, based on the cost price of that heat. Y appealed, and in due course questions were referred to the CJEU on the application of PVD art.16. The referring court was unsure if a charge was appropriate where the recipients were economic operators, as the purpose of art.16 is to ensure that there is no untaxed final consumption; and if there was a charge, the court sought clarification on how "cost" should be calculated. There were two parts to this question: whether only costs that carried input tax should be included, and whether indirect costs should be added as well as direct costs of production.

The CJEU discussed the possibility that the taxable status of the recipient could affect the application of art.16, and rejected it. In order to prevent non-taxation, it was essential that transactions were taxed consistently. The identity of the recipient was not a relevant consideration. The scheme of art.16, including the exceptional treatment of samples as non-taxable, supported this answer.

The valuation questions concerned the application of PVD art.74. The required the value of goods supplied without charge to be the "purchase price of the goods or of similar goods or, in the absence of a purchase price, the cost price, determined at the time when the application, disposal or retention takes place". In the present case, it was not possible to find a purchase price for these or similar goods; the absence of any qualification of the phrase "the cost price" meant that all costs, whether direct or indirect and VATable or not VATable, should be included.

CJEU (Case C-207/23): *Finanzamt X v Y KG*

Lecture 13

2.12.4 VAT fuel scale charges

Updated road fuel scale rate charges have been published for use in accounting periods starting on or after 1 May 2024. This is still permitted in Northern Ireland under an EU derogation which has been extended to 31 December 2026 by Implementing Decision (EU) 2023/2907; in the rest of the UK the derogation is no longer relevant after Brexit.

www.gov.uk/guidance/vat-road-fuel-scale-charges-from-1-may-2024-to-30-april-2025

3. LAND AND PROPERTY

3.1 Exemption

3.1.1 Article

In an article in *Taxation*, Ciaran McGee discusses the Court of Appeal decision in *Northumbria NHS Foundation Trust* and its implications for other bodies in the public sector. The questions of "special legal regime" and "distortion of competition" are covered, together with the possibility of HMRC appealing to the Supreme Court.

Taxation, 25 April 2024

3.2 Option to tax

Nothing to report.

3.3 Developers and builders

Nothing to report.

3.4 Input tax claims on land

3.4.1 DIY builders

The new rules on providing evidence to substantiate DIY builders' claims will apply after Royal Assent to F(no.2)A 2024. This will give HMRC the power to request further evidence in support of a claim as 'reasonably required'.

In the meantime, HMRC have added two points to their online guidance on DIY claims:

- A link to a new "schedule of invoices template" which should be used to record details of invoices, bills, credit notes and other documents to support the amount of the claim.
- A new section on authorising agents to complete and submit claims on behalf of clients (including submitting invoices and other supporting information).

www.gov.uk/guidance/vat-refunds-for-new-builds-if-youre-a-diy-housebuilder; www.gov.uk/guidance/vat-refunds-for-conversions-if-youre-a-diy-housebuilder; www.gov.uk/guidance/vat-refunds-for-constructing-a-new-charity-building

4. INTERNATIONAL SUPPLIES

4.1 E-commerce

Nothing to report.

4.2 Where is a supply of services?

4.2.1 Fixed establishment

The Court of Justice has now ruled in the case on fixed establishments on which Advocate-General Kokott's opinion was covered in the April update.

Advocate-General

A-G Kokott noted that this was the fifth request for a ruling on the issue since 2018, and the third since the judgment in *Dong Yang Electronics* that has asked, in essence, whether a controlled company or a group company is to be regarded as a fixed establishment of the parent company or another group company. There had been, up to that point, a total of just six comparable requests for a preliminary ruling since the introduction of the Sixth Directive in 1977. The A-G found this "astonishing".

She noted that the CJEU's ruling in *DFDS* may have contributed to this; the fact that the *Dong Yang* judgment did not rule out the possibility that a subsidiary could be a FE of its holding company may have encouraged tax authorities to "search within corporate structures for fixed establishments constituted in the form of subsidiaries or even just other group companies."

She explicitly states that the Romanian tax authorities in the current case are only concerned with collecting interest and penalties: as the companies concerned can all deduct input tax, there would be no actual VAT revenue in any country.

The company in the appeal is a German group company of an automotive group. In 2016 it entered into a contract with a fellow group company in Romania to provide a comprehensive service consisting of both the manufacture and assembly of upholstery components, as well as ancillary and administrative services. The German company owned the goods that the Romanian company worked on, and was registered for VAT in Romania; nevertheless, it used its German VAT number in relation to the supplies of manufacturing and other services from the Romanian company, which treated them as outside the scope of Romanian VAT.

Following a tax inspection, the Romanian authorities ruled that the Romanian company constituted a fixed establishment in Romania, and output tax would therefore be due on the supplies of services. In due course the following questions were referred to the CJEU:

(1) Are the provisions of PVD art.44 and of Implementing Regulation (IR) arts.10 and 11 to be interpreted as precluding the practice of a national tax authority whereby an independent resident legal person is classified as the fixed establishment (FE) of a non-resident entity solely on the basis that the two companies belong to the same group?

(2) Are the provisions of PVD art.44 and of IR arts.10 and 11 to be interpreted as precluding the practice of a national tax authority whereby it is considered, by reference only to the services supplied to a non-resident entity by a resident legal person, that a FE of a non-resident entity exists within the territory of a Member State?

(3) Are the provisions of PVD art.44 and of IR arts.10 and 11 to be interpreted as precluding tax legislation and the practice of a national tax authority whereby it is considered that a FE of a non-resident entity exists within the territory of a Member State, given that that FE supplies only goods and not services?

(4) Where a non-resident person has, within the territory of a Member State, human and technical resources within a resident legal person which are used to ensure the supply of services whereby goods are manufactured – goods which are to be supplied by the non-resident entity – are the provisions of PVD art.192a(b) and of IR art.11 and art.53(2) to be interpreted as meaning that those manufacturing services supplied by means of the technical and human resources of the non-resident legal person are: (i) services received by the non-resident legal person from the resident person by means of those human and technical resources, or, as the case may be, (ii) services provided by the non-resident legal person itself by means of those human and technical resources?

(5) Depending on the answer to Question 4, how is the place of supply of services to be determined with reference to the provisions of PVD art.44 and of IR arts.10 and 11?

(6) In the light of IR art.53(2), should activities linked to the treatment of goods, such as taking delivery, recording inventory, placing orders with suppliers, providing storage areas, managing inventory in the IT system, processing customer orders, indicating the address on transport documents and invoices, providing quality control support, and so on, be disregarded when determining the existence of a FE, given that they are ancillary administrative activities which are strictly necessary for the manufacture of the goods?

(7) In view of the principles relating to the place of taxation as the place where final consumption takes place, is it relevant for determining the place of supply of the manufacturing services that the goods resulting from those services are mostly (intended to be) sold outside Romania, while those sold in Romania are subject to VAT, and therefore the result of the services is not "consumed" in Romania or, if it is "consumed" in Romania, it is subject to VAT?

(8) Where the technical and human resources of the FE receiving the services are virtually the same as those of the provider through whom the services are actually performed, is there still a supply of services for the purposes of PVD art.2(1)(c)?

The A-G grouped the questions into:

- #8: whether the transaction could happen at all;
- #1, #2, #3 and #7: identifying FEs within a group, where the head office (place of establishment) is in another country;

- #4, #5 and #6: concerning whether the German company should be treated as resident or non-resident in Romania.

She disagreed with the Romanian government's objection that the questions were inadmissible. There was an assumption of relevance that was not overridden in any of the questions.

In answering the eighth question first, the A-G suggested that, on the Romanian government's interpretation, the supply would effectively be an internal transaction: the Romanian FE of the German company would both make and receive the supplies. No Romanian VAT would therefore be due. This circularity has been pointed out in previous cases on the same issue.

Turning to the questions about FEs and groups, she made the following points:

It is apparent from the very wording of the VAT Directive that a controlled but legally independent company cannot be regarded as being, at the same time, a fixed establishment of a different group company. Art.44 refers to "a taxable person who has established his business in one place and has a FE in another place" – but separate companies are two taxable persons, not one.

PVD art.11 allowed Member States to treat closely linked companies as a single taxable person, but that explicitly operated only within a single territory. It could not be applied where the companies were established in different countries.

None of the criteria for identifying a FE under IR art.11 related to company law connections. Rather, they are about permanence and making and receiving supplies. The A-G expanded on her opinion in Dong Yang that the *DFDS* decision was exceptional and restricted to its special circumstances: it was about the application of TOMS, and for that reason alone could not be treated as transferable to other situations.

She regretted the ambiguity in the *Dong Yang* ruling that suggested it was possible for a subsidiary to be a FE. This undermined the legal certainty required by taxpayers and tax authorities alike. The CJEU had noted in *Welmory* that treating separate companies as separately established in their own countries provided a simple, objective and practical criterion for determining the VAT treatment.

She drew a distinction between a contract for the supply of services and a contract for a supply of resources: if a company in one country (not necessarily part of the same group) agreed to provide resources to another company, it could constitute a FE. If it provided services in its own name as an independent contract partner, it is assumed to be using its own resources for its own needs.

The third question was dismissed briefly: there was no apparent reason for determining the place of supply of the Romanian company's supplies based on what the German company did.

Likewise, the seventh question introduced another irrelevant factor: the place of final consumption of the goods concerned made no difference to supplies pf services between the Romanian and German companies.

The A-G noted that the answer might be different if there was evidence of an abusive practice, but there was no such evidence. The Romanian authorities had levelled the accusation of misuse of the German VAT number, but that had been properly used as evidence of a place of establishment in Germany; the VAT number issued in Romania did not constitute, and was not proof of, a fixed establishment in that country.

The A-G summed up her conclusions in this area as follows:

An independent company cannot in principle be a fixed establishment of a different independent company at the same time. Even a complex contract for the supply of services does not mean, in and of itself, that the supplier is effecting a taxable transaction in favour of a fixed establishment of the service recipient that came into being on the basis of that contract. In that regard, the place of supply of those services depends neither on the nature of the output transactions (supply of goods or services) of the service recipient, nor on the place of 'consumption' of the individual manufacturing services.

In relation to the other questions, the A-G suggested that they concerned the situation in which there was a FE in the other country, and the issue was whether that FE was involved in the particular supply. However, that did not arise here: she returned again to the distinction between a supply of services and a supply of resources. In that case, those resources could "substitute for a head office located within the territory of another Member State".

Full court

The Romanian government objected to the questions as inadmissible on the grounds that they were based on a false premise: the government denied that the decision had been taken purely on the basis that the companies were in the same group, but rather on an assessment of all the circumstances. The court emphasised that there is a "presumption of relevance" in the questions asked by national courts, and ruled the questions admissible.

The court began by reiterating that the fixed establishment rule is a secondary point of reference where the use of the main establishment does not produce a rational result or creates a conflict with another Member State. The main establishment rule gives the benefit of objectivity and legal certainty.

It is possible that a subsidiary providing services, established in a Member State, could constitute a FE of its parent company in that MS; however, that treatment cannot be deduced merely from the fact that the parent company has a subsidiary there. Nor can this be determined merely by the provision of services between them or the existence of a contract for exclusive provision of services. Even if it only has one customer, a taxable person is presumed to use its technical and human resources for its own purposes.

It would be for the referring court to consider the arguments put forward by the Romanian government, that the Romanian company's access to the central IT systems of Adient in Germany and the tasks undertaken by Romanian staff for the holding company were so significant that they constituted "infrastructure" of the HC in Romania. The plain indication of the court was that it did not think this likely.

The court went on to emphasise the difference between the B2B and B2C rules for FEs. Even if Adient Germany had a structure in Romania which carried out supplies based on the results of Adient Romania's manufacturing processes, that would not be relevant to deciding the place of supply of those services. The question would be where Adient Germany was receiving the B2B services, not where it was making its own supplies. The Romanian authorities' attempt to rely on art.192a PVD, which refers to an establishment "intervening in a supply", was not successful.

The court went on to agree with the A-G that the same human and technical resources could not be taken into account as both making and receiving the supply. The existence of a fixed establishment of the recipient of the services therefore presupposes that it is possible to identify human and technical resources which are distinct from those used by the supplier for the fulfilment of its own supplies of services, and which are made available to the recipient of those services to ensure that they are received and used in accordance with its own needs. In the absence of such a finding, such a recipient does not have a fixed establishment in the Member State of the supplier and cannot, therefore, be regarded as established in that Member State.

The use of a subsidiary's resources for preparatory or auxiliary activities would also not be enough to constitute a FE of the holding company.

The court's answers do not go quite as far as the A-G in stating that the only circumstance in which a subsidiary can be its holding company's FE is when there is an abusive or artificial arrangement, but it is clear that it will only arise in unusual circumstances.

CJEU (Case C-533/22): *SC Adient Ltd & Co. KG v Agentia Nationala de Administrare Fiscala, Agentia Nationala de Administrare Fiscala – Directia Generala Regionala a Finantelor Publice Ploiesti – Administratia Judeteana a Finantelor Publice Arges*

Lecture 14

4.3 International supplies of goods

4.3.1 Import accounting

HMRC have launched a new service to enable traders to access documents and information about imports. The description states:

Use this service if you or your business is involved with importing goods into Great Britain (England, Scotland and Wales) and Northern Ireland.

You can:

- *view and manage your cash account (top up and withdraw funds)*
- *set up a Direct Debit for and top up a duty deferment account*
- *request older statements and certificates*
- *view and manage your general guarantee account*

- *manage the email address linked to your account*
- *access secure messages from HMRC related to your account*
- *set up, manage or view account authorities*

You can also view and download your:

- *duty deferment statements*
- *import VAT certificates (C79)*
- *postponed import VAT statements*
- *notification of adjustment statements*

www.gov.uk/guidance/manage-your-import-duties-and-vat-accounts

4.4 European rules

4.4.1 Abusive practice

Advocate-General Kokott has given an opinion on the extent to which a tax authority can rely on the principle of abuse of rights in the absence of any specific provisions in the national law. The context was the transfer of a restaurant business from one company to another when the first company had exceeded the limits to take advantage of the small enterprise exemption in Croatia. Although the owner of the former company was neither a shareholder nor managing director of the new company, he was jointly liable for its lease rentals and was the sole signatory on the company's bank account, so it was clear there was a close connection between the two. The restaurant business continued with the same employees in the same premises. In due course a question was referred to the CJEU.

The Advocate-General starts her opinion by commenting that the question is only just sufficient to be admissible. It refers to fraud rather than abusive practices, without explaining what the fraud might be, and the reference does not set out the relevant details of EU law that the CJEU should clarify. Nevertheless, the A-G considers that a useful answer should be provided, so she has recast the question and discussed the issues arising.

She describes the general principle that abusive practices are prohibited as a principle of interpretation. Preventing possible tax evasion, avoidance and abuse is an objective that is recognised and encouraged by the VAT Directive. Accordingly, the provisions of the VAT Directive must be interpreted in such manner that they cannot be relied upon by taxable persons for fraudulent or abusive ends. However, the small enterprise exemption is not detailed in the PVD: it is something that the Member States may introduce subject to their own conditions, within the overall scope of art.287 PVD. The A-G considers that it is "problematic" to introduce a principle of EU law that would interpolate an anti-abuse provision into purely domestic law, if the company satisfied the

conditions of the domestic law and there was no domestic anti-abuse provision.

On the other hand, it might be possible to analyse the factual situation in such a way that the successor company was held to be identical to the predecessor. If it only "formally" acted as a new taxable person in order to obtain the benefit of the small enterprise exemption, its tax liability could be determined on the basis that the same taxable person continued to operate. There were insufficient details in the order for reference to give an opinion on this, so it would be for the national court to determine.

In case the court decided to go further and hold that the principle of abuse of rights should apply directly to the present situation, the A-G goes on to discuss the necessary conditions for a finding of abuse in particular circumstances. There must be an objective element, in that the purpose of the relevant provision must not have been achieved. The principle can therefore only be considered in the context of the purpose of the law. In this case, it would be the purpose of the small enterprise exemption, which has been held to be intended to support the creation, activities and competitiveness of small enterprises. However, the A-G considers that to be a questionable interpretation, because of the denial of input tax and the use of an exemption rather than a tax-free threshold. It is more clearly an administrative simplification, which benefits both the trader and the Member State. As that is its main purpose, the A-G considers that invoking abuse in relation to the small enterprise exemption would be possible but exceptional.

It is also necessary for there to be a subjective element: it must be the essential aim of the transactions to obtain a tax advantage. That is a matter for the referring court to determine on the basis of the evidence.

There must also be no violation of the principles of legality of taxation, legal certainty and protection of legitimate expectations. The A-G considers that there cannot be a blanket rejection of these principles where there is an allegation of abuse of rights. She distinguishes abuse from fraud, which involves obtaining a tax advantage by means that constitute a criminal offence. Taxable persons are generally free to choose between two legal ways of arranging their affairs for the purpose of limiting their tax burdens; if there is nothing in the national law to prevent abusive practices, the taxpayer should be able to rely on the rule of law.

The opinion discusses a number of concepts that are still relevant in the UK after Brexit, but the particular scheme used by the appellant is probably countered in the UK in any case by the possibility of a business splitting direction.

CJEU (A-G) (Case C-171/23): *UP CAFFE d.o.o. v Ministarstvo financija Republike Hrvatske*

Lecture 15

4.4.2 Excise duty and VAT

A Romanian company operated a fiscal warehouse in which it stored fuel products. It sold some fuel to customers who subsequently returned the goods, apparently because of quality or suitability issues. The tax authority subsequently ruled that the company should have notified it of the reintroduction of the goods into the warehouse; the failure to notify

led to a penal rate of excise duty being charged, together with VAT on the excise duty (on the basis that VAT is charged on the value of goods including excise duty). The excise duty was charged at a higher rate applicable to road fuel, which the company claimed was not the use to which the goods had been put. The company appealed, and questions were referred to the CJEU.

The court considered that the imposition of a penal rate of excise duty was disproportionate, and the trader should be given the opportunity to demonstrate the actual use of the fuel. This was contrary to the relevant energy Directive 2003/96.

It was true that excise duty is normally included in the taxable amount for VAT. However, that depends on the event that gave rise to the VAT being linked to the event that gave rise to the charge to the duty. As the duty would only be payable if it was shown that the actual use justified the higher rate, the VAT was not due either.

CJEU (Case C-657/22): *SC Bitulpetrolium Serv SRL v Administratia Judeteana a Finantelor Publice Prahova – Directia Generala Regionala a Finantelor Publice Ploiesti*

4.4.3 Small enterprise threshold

A Bulgarian company provided consultancy services. Over a period of four days in August 2018 it issued invoices for a total value of just over €87,000, described as relating to consultancy services arising from a contract dated 30 November 2012. It applied for registration for VAT on 3 September 2018, and was registered by the authorities with effect from 19 September.

The tax authorities then decided that the issue of an invoice on 21 August had breached the threshold of €50,000, so the company should have lodged its application within 7 days, which it had failed to do. An assessment followed on the taxable supplies made from the date when the threshold had been exceeded until the date on which it was actually registered.

This appears to have been regarded as a penalty rather than simply a VAT assessment, because the company succeeded with an appeal on the grounds that it was disproportionate. The court allowed the appeal because the company had only been three days late and did not appear to have acted dishonestly. The court referred to the CJEU decision in *Salomie* (Case C-183/14) which required penalties to comply with the principle of proportionality.

The tax authority appealed, and the Bulgarian court referred questions to the CJEU, asking for clarification on whether this type of assessment should be regarded as a penalty (subject to proportionality) or simply a VAT debt. The CJEU first observed that the special scheme for exemption of small enterprises was subject to a margin of discretion on the detailed rules to be chosen by the Member States who adopted it; there was nothing in the PVD to rule out the way in which the Bulgarian rules were framed.

The CJEU went on to discuss whether the assessment was simply "the VAT that would have been due if the trader had registered on time" or was in reality a penalty. It would be for the referring court to determine this. If it was simply "the VAT", then there was nothing in the PVD to rule it out. If it was a penalty, it would be subject to the principle of proportionality, which it would be for the referring court to apply.

CJEU (Case C-122/23): *Direktor na Direktsia 'Obzhalvane i danachno-osiguritelna praktika' Sofia pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite v 'Legafact' EOOD*

4.4.4 Capital goods scheme rules

Advocate-General Collins has given an opinion on the operation of the Capital Goods Scheme in Belgium. The case appears to be of academic interest only in the UK, because it deals with a distinction that the UK law does not make – between two types of capital expenditure that have different adjustment periods. “Capital goods” and “services which have characteristics similar to those normally attributed to capital goods” are adjusted over 5 years; “immovable property acquired as capital goods” is adjusted over 15 years.

The appellant is a law firm which between 2007 and 2015 carried out extensive works to a building which was partly used for its professional business and partly used as the private residence of the proprietor. On 1 January 2014, Belgium terminated a transitional exemption of legal services, and the appellant registered for VAT from that date. It deducted input tax incurred on the works on the basis that the 15-year adjustment period applied. The tax authority disputed this, and in due course questions were referred to the CJEU.

The A-G observed that art.189 PVD gives Member States some discretion in setting the rules for adjustment of input tax on capital items. However, the concepts of “capital goods” and “immovable property”, while not defined in the PVD, should be applied uniformly throughout the EU.

The Implementing Regulation 282/2011 was amended in 2013 to include a definition of immovable property for the purpose of place of supply rules. Under that definition, ‘immovable property’ includes any building or construction fixed to or in the ground above or below sea level which cannot be easily dismantled or moved; any item that has been installed and makes up an integral part of a building or construction without which the building or construction is incomplete, such as doors, windows, roofs, staircases and lifts; and any item, equipment or machine permanently installed in a building or construction which cannot be moved without destroying or altering the building or construction. This definition was only mandatorily applicable from 1 January 2017, so it post-dated the facts of the present case. Nevertheless, the IR has been held to clarify and codify existing rules rather than changing them, so this definition could be taken into account.

The A-G concluded that “immovable property acquired as capital goods” for the purposes of art.187 had to be the goods themselves, not services which created or installed fixed assets. The appellant therefore did not fall within the provision. The A-G agreed with the submission of the Belgian state that it had acquired “services connected to immovable property”, which Belgium treats as capital goods, rather than immovable property itself.

The A-G noted that PVD art.12 and art.135(1)(j) permit the taxation of renovated or converted old buildings by treating them as a “new building before first occupation”. However, there was no link from these provisions to art.187, so they could not bring a renovated building within the concept of “immovable property acquired as capital goods”.

The A-G’s conclusions were that these services of renovation could not be treated as immovable property, which under art.187 would be eligible for an extended adjustment period of up to 20 years. On the other hand, the

first sentence of art.187, which requires the adjustment of capital goods over five years, had direct effect. That was of no assistance to the appellant, because the appellant wanted the longer period to apply.

CJEU (A-G) (Case C-243/23): *Belgische Staat/Federale Overheidsdienst Financiën v L BV*

4.4.5 Rebates required by statute

A-G Capeta has given an opinion in a case referred by Hungary about certain payments imposed by Hungarian law and calculated on the basis of subsidised medicinal products. If it was to be treated as a price reduction, it would reduce the supplier's output tax; if it was classified as a tax, it would not.

The A-G explained how the system of subsidies works in Hungary for prescribed medicines. A pharmacy receives consideration for the supply in two parts: a subsidised price paid by the patient, and a subsidy paid by the National Health Insurance Fund Management Agency, Hungary ('the NEAK').

The appellant supplied medicines in Hungary. It entered into an agreement with the NEAK under which it made payments based on the volume of sales of medicinal products subsidised by the social security system. In addition to this, government regulations required a further payment of 20% and 10% "of a part of the social security subsidy" for medicinal products benefiting from any kind of public funding sold by it through pharmacies.

Following a dispute in which the earlier case of *Boehringer Hungary* was invoked, the Hungarian Appeals Directorate accepted that the sales volume rebate was within PVD art.90 and reduced the taxable amount; however, it maintained that the regulatory rebate was a "special tax" and not a price reduction. Questions were referred to the CJEU.

The A-G discussed at length the characteristics of a price reduction and a tax, and concluded that the payment in this case met the requirements to be a price reduction and did not meet all the requirements to be treated as a tax. She therefore recommended that the CJEU finds that the circumstances are within art.90 PVD. It might, however, be open to a Member State to define such a payment as a tax, if it did so in a more explicit manner.

CJEU (A-G) (Case C-248/23): *Novo Nordisk AS v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága*

4.5 Foreign refund reclaims

4.5.1 CJEU decision

A Slovakian company (SES) carried out assembly and installation services at a power plant in Hungary during 2020, incurring VAT on various goods and services. On 18 February 2021, SES submitted an application for a cross-border refund of about €97,400 to the Hungarian tax authority in accordance with Directive 2008/9.

The Hungarian “first-tier tax authority” e-mailed a request for further information on 22 February 2021; on 6 May 2021 it issued a decision to terminate the refund procedure on the grounds that it had not received a reply. On 9 June 2021, the company appealed to the “second-tier tax authority”, submitting all the documents that had been requested in February.

The second-tier tax authority upheld the first-tier’s decision, ruling that it could not take into account the late submitted documents for an appeal where the person concerned had been aware of that evidence before the first decision was made. This was in accordance with Hungarian law on VAT appeals in general.

SES appealed, arguing that the Hungarian law was not applicable to cross-border refunds, and that the one-month period for dealing with requests for information mentioned in the Directive was not a limitation period. Questions were referred to the CJEU to determine these issues.

The CJEU ruled that the cross-border refund procedure was a fundamental entitlement of traders. According to case law on the right to deduct, as well as precedents on cross-border refunds, Member States could not rule out a refund simply because information was provided late, nor could they use the one-month period in the Directive as an absolute time limit. That infringed the principles of neutrality and effectiveness.

The decision to discontinue the refund process had to be treated as a decision to refuse the refund for insufficient information, which according to art.23 of the Refund Directive gave the trader an opportunity to appeal and to produce the missing information.

It appears that the company has met the requirements of the CJEU, and should now receive its refund.

CJEU (Case C-746/22): *Slovenske Energeticke Strojarne a.s. v Nemzeti Ado- es Vamhivatal Fellebbviteli Igazgatosaga*

5. INPUTS

5.1 Economic activity

Nothing to report.

5.2 Who receives the supply?

Nothing to report.

5.3 Partial exemption

5.3.1 Sale of shares in subsidiary

The Court of Appeal has reversed the decision of the FTT (TC08335) and Upper Tribunal in the *Hotel La Tour* case, and held that the input tax incurred in relation to the sale of shares in a subsidiary company was irrecoverable, even where the funds so generated were used for the purposes of the taxable business.

Facts

HLT was the holding company of a subsidiary, HLTB, which operated a hotel in Birmingham. HLT was VAT registered on the basis of providing management services to the subsidiary. In mid-2015, HLT decided to construct a new hotel in Milton Keynes; after considering various possibilities, it decided that the best way to finance the development's £34.5 million cost would be to sell HLTB. This took place in July 2017. HLT claimed a deduction for input tax on various fees associated with the sale of the shares, leading to a repayment claim in respect of its 09/17 period. HMRC enquired into the return and disallowed the input tax, initially on the grounds that it was not accepted that the holding company was "in business". This was subsequently accepted, but HMRC maintained the disallowance on the basis that the costs were used in the exempt sale of the shares, rather than in the "downstream" taxable activities that would follow on from the completion of the new hotel.

FTT

The company appealed, advancing three separate arguments:

- the inputs could validly be regarded as relating to the future taxable transactions, rather than the present exempt share sale;
- because HLT and HLTB were registered as a VAT group, the share sale should be regarded as outside the scope instead of exempt;
- the sale was analogous to the sale of a business as a going concern.

In the FTT, Judge Richard Chapman considered a number of authorities on the question of "direct and immediate link" and "financing transactions". These included *VW Financial Services (UK) Ltd* (Case C-153/17); *X BV* (Case C-651/11); *Kretztechnik* (Case C-465/03); *AB SKF* (Case C-29/08); *C&D Foods Acquisition* (Case C-502/17); and *Frank A Smart & Son Ltd* (UKSC 2019). The judge noted that the parties had also referred to the older cases of *BLP Group* and *Midland Bank*, but these

were effectively covered by the analysis of the precedent case law in *Frank Smart*.

The judge's analysis concentrated first on the question of whether there could be a direct and immediate link between the costs and the downstream transactions. He accepted that, in a fundraising transaction, the question was not whether the inputs were used in the share transaction, but rather whether the funds would be used in taxable activities. As long as that was the case, the initial share transaction would not "break the chain" between the costs and the taxable use, provided that those costs were not demonstrated to be cost components of the share sale. That would be the case if the costs were added into the sale price, or were separately identified as part of the sale; however, the evidence showed that the sale was effected at the best price possible in the market, and that was not affected by the costs incurred in achieving it. This analysis, based on the judgment in *Frank Smart* (as referenced by paragraph numbers in the extract below), was summed up as follows:

(1) The purpose in fundraising was to fund its economic activity [65(iv)]. This is to be ascertained from the objective evidence [65(iv)] and [65(vii)]. As Lord Hodge notes, "The ultimate question is whether the taxable person is acting as such for the purposes of an economic activity," [65(vii)]. The circumstances to be taken into account include the nature of the asset and the period between acquisition and use for the economic activity [65(vii)].

(2) The funds are later used for taxable supplies [65(iv)]. However, the right to deduct arises immediately, potentially resulting in a time lapse between deduction and use or retention of the right to deduct even if unable to use them in certain circumstances [65(vi)] and [69].

(3) The cost of the services are cost components of downstream activities which are taxable. The right to deduct will therefore be lost if the cost of the services are incorporated into the price of the shares sold in the initial transaction that is exempt or outside the scope of VAT [47] or of downstream activities which are exempt or outside the scope of VAT [65(v)]. If the downstream activities are a combination of taxable transactions, exempt transactions and transactions outside the scope of VAT, the inputs will have to be apportioned [65(v)].

It was necessary to ascertain the purpose of the share sale on objective grounds, rather than considering the subjective intention of the taxpayer. The evidence showed that the intention was to use the funds to finance the development in Milton Keynes, and the funds were so used. The professional costs reduced the net sale proceeds, but that did not mean that they were used to obtain those proceeds in the sense of a direct and immediate link for VAT. The appeal was allowed on this basis.

Even though it was not strictly necessary, the judge went on to consider the other two grounds of appeal. The argument about the effect of group registration was raised very late (only in post-hearing submissions), and HMRC objected to its admission. After considering the case law on late changes to grounds of appeal, the judge ruled that he would not have accepted the additional ground. However, he went on to discuss it and dismiss it in any case. After considering precedents including *Thorn Materials Supply Ltd* and *Taylor Clark Leisure plc*, he concluded that it was not correct to treat the VAT group as a single entity for all purposes

(which would effectively mean that HLT's shareholding in HLTB "did not exist", and could not therefore be the subject of an exempt supply). The effect of VATA 1994 s.43 was to disregard intra-group transactions for the time being, but the companies within the group still existed and had their own economic activities. The economic activity could not be ignored, even if intra-group transactions arising from that activity were disregarded.

The going concern argument was based on the CJEU decision in *AB SKF* which raise the possibility that the sale of a subsidiary might in some cases be treated as equivalent to a TOGC. The appellant's counsel tried to distinguish the present circumstances from those in *X BV*, where the CJEU had ruled that going concern treatment did not apply. *X BV* involved the sale of a 30% holding, whereas HLTB was a wholly owned subsidiary. HMRC referred to *DTZ Zadelhoff* (Case C-259/11), which concerned the sale of a company that owned a building: the CJEU confirmed that this had to be treated as a sale of shares, not a sale of immovable property, unless the Member State had implemented an optional provision in the PVD to exclude the exemption in those circumstances.

The judge did not accept that this could be a TOGC. His reasoning was as follows: "There was no transfer of HLT's management of HLTB. On the basis of *SKF* this would not itself be fatal. However, there is nothing else that was transferred which meant that Dalata as transferee would be carrying on an independent economic activity as HLT's successor. The relevant assets were held by, and the relevant economic activity carried on by, HLTB rather than HLT prior to the transfer of the Shares and by Dalata immediately after the transfer of the Shares." This seems to require that it is part of HLT's economic activity that is transferred; consistent with his decision on grouping, the judge regards HLT's economic activity as the provision of management services, which was not transferred to the purchaser.

The appeal was allowed by the FTT on the first of the three grounds.

Upper Tribunal

HMRC appealed to the Upper Tribunal (Mr Justice Zacaroli and Judge Guy Brannan), maintaining that the FTT had ignored binding precedent from the *BLP Group* case. The company put forward the same arguments again; because the FTT had not come to a formal decision on the grouping point, there was not a formal cross-appeal, but the company put forward the same argument again.

The UT noted that the facts were not controversial, and rehearsed the same case law precedents as the FTT. HMRC said that the correct approach was to consider the link between costs and outputs in two stages:

(1) Stage 1 – the Tribunal was required to ask whether there was an output transaction or transactions (i.e. a taxable or exempt supply falling within the scope of VAT) to which the inputs were directly and immediately linked; and

(2) Stage 2 – only if there was no direct and immediate link to an output transaction in the scope of VAT was it necessary to consider whether there was a direct and immediate link to general economic activity.

HMRC argued that the FTT had erred in applying Stage 2 in spite of the existence of the share issue, which ought to block the deduction of input tax.

The UT decision was then quite brief and forceful. On the strength of the CJEU decision in *AB SKF* and the Supreme Court decision in *Frank A Smart Ltd*, the principles of linking and blocking had developed since *BLP Group*, which the judges no longer considered to be a strong precedent. The FTT had correctly identified this and applied the principles correctly. There was no error of law, and HMRC's appeal was dismissed.

Because the company's case succeeded on the basic point considered by the FTT, it was not necessary to consider the separate argument based on grouping. The UT therefore did not express any opinion on it, either to agree or disagree with the informal conclusion of the FTT judge.

Court of Appeal

HMRC appealed to the CA, where the leading judgment was given by Lady Justice Whipple over 122 paragraphs, followed by single line agreements from Lady Justice Elisabeth Laing and Lord Justice Nugee.

HMRC's main argument was that the FTT and UT had erred in holding that the law had changed since *BLP*. The judge reviewed the case law in detail, analysing in turn *BLP*, *Midland Bank*, *Abbey National*, *Kretztechnik*, *SKF*, *Sveda*, *Securenta*, *VW Financial Services* and *Frank Smart*. She summarised the issues before the court as:

i) What did the CJEU decide in SKF?

ii) To what extent has the approach in BLP been altered?

iii) Has the direct and immediate link test been varied to a test of incorporation of costs?

The discussion was relatively brief. In her view, the decision in *SKF* was not clear or helpful; she noted that it was based on a hypothetical situation (it was an appeal against a ruling) and the CJEU had commented that the file for reference was not sufficient for it to give a clear answer. In particular, the referring court had held that the inputs were attributable both to the share sale and to the general activities of the holding company, when the CJEU had held in previous cases that it could only be one or the other. The case was remitted back to the Swedish court; HMRC submitted a translation of the decision, which the appellant's counsel argued was inadmissible or irrelevant, but the judge commented on it and found it "interesting". The court noted that the costs were varied in nature, and decided that those that were clearly directly related to the sale of the shares were not deductible. Those that were more general in nature were apparently also not allowed, but for the vaguer reason that the claim had not been supported by sufficient evidence.

Concluding on *SKF*, the judge held that it had only changed the *BLP* principles marginally: the CJEU had accepted *the possibility* that the inputs might have a direct and immediate link with the taxpayer's general outputs such that they should be treated as overheads. That was to conclude that they were not *necessarily* directly attributable to the exempt share sale. It was still necessary for the fact-finding court to determine which of the two applied.

The judge did not find any inconsistency between her approach and *Frank Smart*, which was in any case not a binding precedent because it dealt with a different situation – a transaction that was definitely outside the scope rather than exempt. She stated that she did not consider the disallowance of input tax would offend fiscal neutrality, which in any case was only a principle of interpretation and could not override the words of the law. She summed up her conclusion on the first issue as follows:

Fiscal neutrality is not relevant when inputs are incurred to make an exempt supply of shares, by comparison with a situation where inputs are incurred to raise funds otherwise than by a share sale. The two situations are different, precisely because in the first there is an exempt supply of shares (with the consequences of exemption mandated by the PVD) and in the other there is no such exempt supply. That was the answer given in BLP and in my judgment, that remains good law, reflecting the fundamentals of VAT. As I have already indicated, fiscal neutrality and the comparison with other cases where there has been no exempt sale of shares only become relevant in considering whether the inputs are properly treated as overheads (ex hypothesi because they are not used in making the exempt supply of shares).

Turning to the second issue, the thing that has changed since *BLP* is the removal of the assumption that inputs incurred in the context of a share sale are necessarily directly attributable to that share sale so as to be irrecoverable. It is now accepted that those inputs *may* bear a direct and immediate link with the taxpayer's economic activity as a whole so as to be treated as overheads and recovered in proportion to taxable outputs forming part of that economic activity. She preferred to describe this as an 'either/or' test rather than a 'two-stage' test, because she did not want to imply an order of priority.

In relation to the 'incorporation of costs' she quoted the judgment of Richards LJ in the *Royal Opera House* case. He said that a cost component does not have to be reflected in the price charged for an output; it was only necessary that the input was used for the purposes of the particular output supply, as established by objective assessment of the facts and circumstances of the transactions, not by investigating the subjective intentions of the taxable person.

In conclusion, she agreed with HMRC's grounds of appeal: in her view, the Tribunals below had overstated the changes in case law since *BLP* and were distracted into an analysis of where the costs were incorporated. That was a material error of law and the appeal had to be allowed. It was not necessary to remit the case because the facts were clear and not controversial; subject to one further argument about grouping, HMRC's appeal succeeded and the input tax should be disallowed. She commented:

I accept that the consequence of allowing this appeal is that HLT has "sticking" (ie irrecoverable) input tax despite being, in the ordinary course of its hotel business, a fully taxable trader. Whether that is the right or the wrong answer as a matter of tax policy is a question for those who design the tax, not for the courts and tribunals who apply the law as it is.

It was then necessary to consider the alternative argument based on the fact that HLT and HLTB had been in a VAT group. HMRC objected that

the FTT had considered this to be introduced too late at that stage and it should not be reintroduced later, while the UT had not thought it necessary to consider it at all; the judge did not agree with these procedural objections. However, she also did not agree with the taxpayer’s argument. In her view, the effect of grouping was limited to simplification of VAT accounting, and it was still necessary to take account of the actual transactions undertaken by each company within the group. The sale of the shares was part of the economic activity of HLT because HLT charged for management services to its subsidiary; even on the taxpayer’s basis, it was still part of an economic activity because HLT would be deemed to be carrying on the business of a hotel. The one objective fact was that there was a sale of shares in the course of business, and the judge held that had to be an exempt supply rather than a non-business transaction.

HMRC’s appeal succeeded.

Court of Appeal: *HMRC v Hotel La Tour Ltd*

Lecture 16

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

Nothing to report.

5.8 Other input tax problems

5.8.1 Umbrella companies

Judge John Brooks has heard an appeal in relation to the schemes which led to the introduction of the “limited cost trader” flat rate and the effective ending of the FRS for most small businesses in 2017 – “mini-umbrella companies” (MUCs) which were set up in large numbers to supply services and create an apparent tax advantage through claiming the FRS (while supplying services to someone else who could recover the VAT so charged in full) and the Employment Allowance for National Insurance. The hearing was a lead case for many thousands of related cases, covering four named appellants. A fifth withdrew its appeal before

the hearing. The case shows that the change to the FRS did not stop this model being used: all of the facts of these cases are from 2019 or later.

The Tribunal had to consider whether HMRC had the power to deregister the appellants for VAT purposes on the grounds that they were using their registrations for fraudulent or abusive purposes; whether they were so using their registrations; whether they were entitled to use the FRS; whether they had used the wrong flat rate after registering for a misleading trade classification; and whether they were entitled to Employment Allowance.

The judge referred to bundles of nearly 7,500 pages and more than 120 detailed spreadsheets. A large number of HMRC officers gave witness evidence in person or in statements; a number of individuals gave evidence about the "model" and the appellants, including the Filipino directors of the companies. It appeared that UK individuals had been recruited through Facebook to act as the initial director of 24 companies and receive and sign some letters which were uploaded onto an app, and they then resigned in favour of foreign directors. The witnesses clearly did not know what being a director involved.

The decision goes into great detail about the way in which the companies operated. They purported to supply temporary labour to other intermediaries. Often the people who were employed had not heard of the company that claimed to employ them, which led to considerable confusion with pandemic-related furlough claims.

The exhaustive detail of the examination should be mainly of interest to anyone who has the misfortune to be involved with one of these cases. The main conclusions of the FTT were as follows:

There was sound evidence giving objective grounds for concluding that the VAT numbers of the Lead Appellants were used for fraudulent purposes and, subject to whether their directors knew or should have known that this was the case (which we consider next) we find, applying *Ablessio*, that the Lead Appellants were liable to be de-registered for VAT.

HMRC's argument that the "simple facilitation" of the alleged fraud by the directors of the Lead Appellants was not enough to meet the conditions of *Ablessio*, in the absence of any knowledge by the directors of the companies that they were facilitating or enabling the fraud of another. This conclusion might have been different if HMRC had pleaded and put to the directors in cross-examination that, having regard to all of the circumstances, particularly in the light of how they were appointed, their limited duties and responsibilities, their lack of any real decision making and their receipt of payments from a separate company rather than the companies of which they were directors, they had either known or should have known of the fraud.

HMRC's decision to terminate the lead appellants' use of the FRS could not be said to be unreasonable, and the assessments arising from that termination were upheld.

Similarly the companies did not qualify for the Employment Allowance because they were involved in "avoidance arrangements", contrary to the law on EA.

The appeal was therefore allowed in relation to the *Ablessio* issue, but failed in all the other respects.

First-Tier Tribunal (TC09126): *Elphysic Ltd and others*

Another appeal involving mini-umbrella companies (MUCs) has reached a procedural hearing. The substantive issue is the denial of some £12.8 million under *Kittel*, associated penalties under s.69C VATA 1994, and officer liability notices in respect of those penalties under s.69D.

The problem for HMRC is that the allegedly fraudulent scheme involved at least 1,520 companies. They wanted to limit the evidence in relation to the MUCs to a sample of 50 out of the known total of 1,520, with 25 selected by each side. The appellants argued that sampling might be appropriate later, to limit the evidence placed before the Tribunal, but at the disclosure stage they wanted to see everything that HMRC had.

There were three issues before the Tribunal (Judge Kevin Poole). First, he saw no reason to refuse to allow HMRC to amend their statement of case, which they had done in February 2024. Turning to the sampling issue, the judge noted that a similar question had come before Judge Dean in *Ezy Solutions Ltd* (TC09128). She had considered that denial of disclosure of all the evidence to an appellant in such a case was fundamentally unfair, and the appellant’s representatives would not be able to discharge their professional duties to their clients without seeing it all. In the context of an appeal which concerned liabilities of some £50 million, the task of examining so much evidence did not appear disproportionate. Judge Poole agreed with Judge Dean’s reasoning and her conclusion, and gave the same decision: HMRC’s request to limit the disclosure of evidence to a sample was refused.

By the hearing, HMRC had accepted that, given the allegations of dishonesty, they were required by human rights principles to disclose any information in their possession that adversely affected their own case or supported the appellant’s case. They applied for a direction that this should apply to both parties. Counsel for the appellant argued that the precedents showed that the requirement for heightened disclosure operated in one direction only: if HMRC were right, any appellant could obtain heightened disclosure simply by alleging that HMRC had been dishonest. The judge agreed, and refused HMRC’s application for heightened disclosure.

The judge issued directions for the further management of the case going forward.

First-Tier Tribunal (TC09148): *Horizon Contracts Ltd (in liquidation) and others*

5.8.2 Fraudulent supplies

A company in the building industry appealed against denial of input tax of £550,000 and penalties of £126,000 in relation to supplies claimed to have been received between 09/06 and 12/09 that HMRC considered had either not been received at all or had been substantially overstated. The supplier was a professional adviser to the company who had later been convicted of money laundering offences and sentenced to eight years in prison.

The Tribunal examined the history of the company and the allegations of fraud which involved a number of different participants. The eventual conclusion was that the assessments had been made in time, because they could not have been made before a trial bundle from the adviser's trial was received in April 2015; there was a fraudulent tax loss, and it was likely that the appellant's directors knew of this. The assessments and penalties were all upheld.

First-Tier Tribunal (TC09215): *Lancer Scott Ltd*

5.8.3 Missing traders

A company appealed against assessments totalling over £8.1m for periods from 01/2016 to 07/2017. They related to 1,081 disputed deals involving the appellant's wholesale purchase and sale of a variety of "fast-moving consumer goods" (FMCG) such as soft drinks, confectionery, batteries, and toiletries. HMRC accepted that the goods existed, but considered that the appellant knew, or should have known, that the transactions were connected with the fraudulent evasion of VAT (*Kittel*).

Judge Christopher McNall reviewed the history of the business, which was run by one man on his mobile phone out of a convenience store in Northern Ireland. It had no facilities for holding stock, but acted as a broker in FMCG, turning over millions of pounds a year. The company had been subject to monitoring and extended verification from 2013 onwards; some input tax had been initially withheld and then released in 2014 on the grounds that HMRC could not fully trace the purchases back to tax losses. The judge expressed surprise that this did not result in the director clarifying with HMRC what he needed to do to make sure that he would not suffer further disallowances. He had been warned about MTIC fraud many times over several years.

The judge considered it striking that the appellant seemed to regard "bringing the stuff into the yard" as sufficient due diligence. This is what he had said himself at the conclusion of his evidence. If the goods existed, he appeared to be indifferent about who he was buying it from, and if he was paid, indifferent about who he was selling to.

After considering the transactions with the counterparties in detail, the judge turned to the question of whether the director had actual knowledge or only "means of knowledge". He concluded that he did not actually know: that would have required "a fraudster of an especially audacious kind: it would make him a person prepared to commit fraud, over the course of many months, right under the noses of HMRC". The judge considered "him to be a clever and resourceful man, and, if he really were an actual fraudster who wished to cover his tracks, he would have done a better job."

Nevertheless, he had the means of knowledge. The facts were in front of him at all times, and he did not care to check them. The judge summed up the required test as follows: "Whilst we do not consider Mr Crothers to have been either stupid or naive, stupidity and naivety are capable of being explanations, but are not automatically exculpatory. And whilst a state of mind which is negligent is not a dishonest state of mind, it is still a culpable state of mind, for the purposes of VAT, if that negligence takes the form of failing to see that the transactions were connected with the fraudulent evasion of VAT in circumstances where the reasonable trader

(not a specialist investigator, or a lawyer, or an expert with the benefit of hindsight) would have seen that connection at the time."

The appeal was dismissed in its entirety.

First-Tier Tribunal (TC09202): *Wholesale Distribution Ltd*

5.8.4 Alternative evidence

A newly registered company claimed input tax of £1,754 on its first VAT return, with no output tax. HMRC asked for further information, which led to correspondence and a decision to deny credit. The trader asked for a review, but then declined to allow HMRC to extend the review period. HMRC replied that, because the reviewing officer had been unable to complete the review, the original decision was confirmed. The trader appealed to the Tribunal.

The trader claimed to be seeking to establish a business in the grey market for luxury goods. His representative argued that, in that context, it was difficult to obtain compliant purchase invoices for all items. HMRC's counsel responded that VAT invoices were not just "nice to have", but a fundamental requirement.

Judge Kevin Swinnerton reviewed some of the documentation provided by the appellant and agreed with HMRC that it was inadequate. The trader had had the opportunity to request proper VAT invoices but had not done so. There was no reason to regard the decision to reject alternative evidence as irrational, and the decision to refuse could not therefore be overturned.

The appeal was dismissed.

First-Tier Tribunal (TC09154): *9 Up Consultant Ltd*

5.8.5 Museums and galleries

The 2024 *VAT (Refund of Tax to Museums and Galleries) (Amendment) Order* updates the list of eligible institutions which can recover VAT under VATA 1994 s.33A attributable to the provision of free admission to the museums and galleries they operate. It comes into force on 8 July 2024, but for most of the bodies that have been added to the list, it has an element of retrospection – they can claim refunds for VAT incurred before July 2024.

The draft Order was subject to a short consultation, and the changes made as a result are summarised in the Explanatory Memorandum to the SI. HMRC have also published a policy paper.

SI/2024/720; www.gov.uk/government/publications/the-value-added-tax-refund-of-tax-to-museums-and-galleries-amendment-order-2024/vat-refund-of-tax-to-museums-and-galleries-amendment-order-2024

6. ADMINISTRATION AND PENALTIES

6.1 Group registration

6.1.1 Intra-group supplies

Advocate-General Rantos has given an opinion on a matter that has been considered by the UK courts a number of times, with inconsistent results: do supplies of goods or services effected for consideration between persons forming part of a VAT group (a VAT group's 'internal transactions') fall within the scope of value added tax (VAT) and, if so, are they subject to VAT? This is a further reference in a case that has already been the subject of one judgment (Case C-269/20) and is similar to the related case *Diakonie* (Case C-141/20).

The A-G summarised the facts as follows:

S, a German foundation governed by public law, is the controlling company of both a university medicine department and the company U-GmbH ('U-GmbH'). That foundation is liable for VAT in respect of the care services which it supplies for consideration but is not regarded as a taxable person for the teaching activities which it carries out in the exercise of its powers as a public authority. However, medical services are exempt from VAT under the Sixth Directive [which was the Directive in force at the time when the dispute arose].

For the 2005 tax year, U-GmbH provided S, inter alia, with cleaning services. Those services were supplied for all of the building complex forming the university medicine department, which includes patients' rooms, corridors, operating theatres, lecture rooms and laboratories.

The hospital area, as such, in so far as it is dedicated to patient care, falls within the sphere of the economic activities carried out by S, for which S is liable for VAT, whereas the lecture rooms, laboratories and other premises are used for the teaching of students, an activity which that foundation carries out in the exercise of its powers as a public authority and in respect of which it is not considered to be liable for that tax.

The proportion of the surface area of the building complex in question, for which cleaning services were supplied in respect of activities carried out by S as a public authority, amounted to 7.6% of the total surface area of that building complex. For those services, U-GmbH received remuneration amounting to a total of €76,085.48 from S.

Following an audit, the tax authority adjusted S's tax assessment for the tax year in question, taking the view that S's establishments formed a single undertaking for which a single VAT return had to be drawn up and, therefore, a single tax assessment had to be issued.

Moreover, according to the tax authority, the cleaning services received by S in respect of activities falling within its powers as a public authority were supplied to it by U-GmbH as part of the [VAT group registration they had formed under German law].

The tax authority considered that the cleaning services provided in respect of the activities carried out as a public authority were, therefore, non-taxable, and that they would have been carried out for purposes other than that of the business and would have given rise to a 'supply of

services free of charge, treated as a supply of services for consideration' to S.

This led to an assessment of €841 in respect of the supply of services 'free of charge', being the services supplied by U to S in respect of the part of the building that was regarded as non-taxable. The German court of first instance upheld an appeal against that assessment, which led to the first reference to the CJEU. The answer given to the questions was that the transaction between group members must not be taxed, but the referring court did not consider that was enough to enable it to determine the answer. It decided to refer the following further questions:

(1) Does the bringing together of several persons into a single taxable person, as provided for in the second subparagraph of Article 4(4) of [the Sixth Directive], have the effect of removing supplies of goods or services made for consideration between those persons from the scope of [VAT] as defined in Article 2(1) of that directive?

(2) Do supplies of goods or services made for consideration between those persons fall within the scope of [VAT] in any event in the case where the recipient of the supply of goods or services is not (or is only partly) entitled to deduct input tax, as there is otherwise a risk of tax losses?

The referring court put forward the view that the wording of art.2 6th Directive (and art.2 PVD) could be interpreting as requiring internal group transactions to be within the scope of VAT, as it made no distinction between those transactions and any other: they were supplies of goods or services effected for consideration.

The A-G observed that this only applied if the supply was made by "a taxable person". It was therefore essential to establish the scope of the concept of "taxable person". Under what is now art.9 PVD, such a person had to "independently" carry on an economic activity. Art.11 prescribed the possibility of grouping by referring to treating different persons as "a single taxable person". This meant that the members could no longer be regarded as a taxable person or persons once they were subsumed within the group. The A-G noted that this was consistent with the Guidelines resulting from the 119th meeting of the VAT Committee in November 2021, which, though not binding, nevertheless constitute an aid to the interpretation of the Directive.

The A-G went on to consider whether this literal interpretation of the provision was consistent with the context and the purpose of the law. He noted that the *Skandia* and *Danske Bank* cases supported the view that "independently carrying on an economic activity" and "consequences of being a member of a VAT group" were separate questions that were not necessarily connected: those cases dealt with head offices and branches, which would not normally be regarded as "independent", but because the branch (*Skandia*) or the head office (*Danske Bank*) belonged to a VAT group, transactions between the head office and branch were within the scope of VAT.

This distinction between the two concepts was confirmed by the CJEU judgment in *Diakonie*, in which it held that the fact that an entity is a member of a VAT group cannot be regarded as automatically meaning that that entity does not carry out economic activities 'independently' for

the purposes of the Directive. The A-G concluded from these past cases that the referring court's view (that internal group transactions were taxable) was not supported by precedent.

The A-G then considered the purpose of the provision. The referring court took the view that the purpose was administrative simplification, in which case it was not necessary to conclude that internal transactions were not taxable. The A-G suggested that the alternative was that the "simplification" might be "substantive in nature", which could lead to tax losses through not taxing transactions between group members where one of them could not recover VAT.

The A-G observed that VAT should not affect a decision to outsource an activity to a group member or to "in-source" it within the company. It should be the activity and not the legal form that defines status as a taxable person for VAT purposes. VAT grouping allows Member States to diminish the influence of VAT on the way economic operators organise themselves: grouping supports "organisational fiscal neutrality". This was not undermined by the possibility that there would be a loss of VAT where one of the companies could not fully deduct input tax; in Commission v Ireland (Case C-85/11), the CJEU had confirmed that there was no reason to prohibit non-taxable companies from joining a VAT group. The possible loss of VAT was therefore not a reason to require internal transactions to be regarded as taxable.

The overall conclusion of the opinion recommended that the various provisions of the 6th Directive (and therefore the PVD) "must be interpreted as meaning that supplies of services for consideration between persons forming part of a group formed by legally independent persons, but closely bound to one another by financial, economic and organisational links … do not fall within the scope of VAT, even where the recipient of the supply of goods or services is not (or is only partly) entitled to deduct input VAT."

CJEU (A-G) (Case C-184/23): *Finanzamt T v S*

Lecture 17

6.1.2 Delays in the process

HMRC have updated the Notice *Group and divisional registration* to amend the stated timescales in which taxpayers can expect a reply. This has been increased from the previously claimed 15 days to 40 working days.

Notice 700/2

6.1.3 Article

In an article in *Taxation*, Fabian Barth and James Hurst discuss the Court of Appeal judgment in *Prudential Assurance Co Ltd* and offer an alternative analysis to the questions raised. This considers the distinction in EU law between "chargeable event" and "the time when VAT becomes chargeable", which is established in art.62 PVD. The UK law blurs the distinction, particularly in relation to continuous supplies. The article suggests that an appeal to the Supreme Court might clarify some of the issues.

Taxation, 16 May 2024

6.2 Other registration rules

6.2.1 Updated Manual

The guidance for VAT taxable persons who do not have a UK establishment (otherwise known as non-established taxable persons or NETPs) has been substantially amended. In summary, the changes:

- provide more detail on, and define, the concept of a NETP (VATREG37150);
- set out the circumstances in which a NETP is required, or not required, to register for UK VAT (VATREG37050, VATREG37200)
- explain the circumstances in which a NETP can apply for a VAT registration exemption (VATREG37250)
- describe the application of the distance selling rules on VAT registration for a NETP (VATREG37300)
- provide guidance on the appointment of a VAT representative, based in the UK, responsible for a NETP's VAT affairs (VATREG37370, VATREG37410, VATREG37550, VATREG37600)
- set out additional HMRC powers, such as requiring security from NETPs (VATREG3715), and
- explain the effect of a NETP appointing a person to act as its VAT agent (VATREG37650).

A new section of guidance considers the circumstances in which a UK VAT registration is, or is not required, for NETPs that sell goods directly to UK customers or via online marketplaces (VATREG37210).

Another new section covers VAT registration requirements for NETPs when transferring a business as a going concern (VATREG37160).

VAT Registration Manual

A separate update covers the reallocation of a VAT registration number following a transfer of going concern: the requirements that the transferor should have no VAT debt (including penalties, or other charges), and that any centrally-raised assessment notified to transferor be paid, have been removed.

VATREG30100

6.2.2 Cancelling registration

HMRC have updated the Notice *Cancelling your VAT registration* to amend the stated timescales in which taxpayers can expect a reply. This has been increased from the previously claimed 30 days to 40 working days.

Notice 700/11

6.3 Payments and returns

6.3.1 Consultation

HMRC has launched a consultation on the proposed *Penalties for Failure to Pay Tax (Assessments) Regulations 2024* which will implement the "new" regime introduced by FA 2021 Sch.26. This is the "penalty points" system that was introduced for VAT from 1 January 2023; it will be extended to income tax from April 2026 when Making Tax Digital is applied to taxpayers generally, and will apply to anyone who volunteers for the pilot testing of MTD for income tax from April 2024.

www.gov.uk/government/consultations/draft-legislation-the-penalties-for-failure-to-pay-tax-assessments-regulations-2024

6.4 Repayment claims

6.4.1 Reclaim ruled out

In TC08478, a company had claimed input tax on fees paid to investment managers in relation to a deposit in escrow it had made to reassure the Pensions Regulator about the stability of its pension scheme. In November 2014, HMRC raised an assessment for periods 11/10 to 05/14 to disallow £1.15m of input tax so claimed. The company appealed, but withdrew the appeal in March 2016. After a change of advisers, the company submitted a claim in September 2016 for repayment of input tax of £1.3m for periods 08/12 to 08/16; this was based on the revised understanding of the relationship between a pension scheme and a business following a number of decisions that suggested management costs should be regarded as overheads of the business activity, rather than costs directly associated with a separate non-business activity.

HMRC accepted that the input tax was in principle deductible, but ruled that the periods which overlapped the assessment (08/12 to 05/14, covering £855,754) would not be repaid because the withdrawal of the appeal meant that the parties were deemed to have come to an agreement that the input tax was not deductible, and this could not be reopened. The company appealed against this decision, and HMRC applied to have the appeal struck out.

The application came before Judge Anne Redston, who considered a long list of procedural issues in detail. These included arguments for the claimant, both of which she rejected:

- That HMRC's case should be struck out because it was wrongly headed as concerning Telent Ltd, when the appeal had been taken over by the new representative member of the group, TTSL – this included consideration of the consequences of a change of representative member, which the judge did not consider undermined the validity of the appeal;
- That HMRC were themselves estopped from arguing that the overlap periods were not eligible for repayment because they had conceded that this was not the case in correspondence.

The judge's reasoning on both issues involves a long and detailed examination of precedents on legal procedure, which will be of interest to those involved in litigation. She concluded that HMRC were not estopped from raising the issue of the Tribunal's jurisdiction and therefore applying for strike-out on the grounds that the matter had been determined.

The central issue for the appeal was the interpretation of VATA 1994 s.85(4) read in connection with s.85(1). Subsection (4) states that the withdrawal of an appeal means that the preceding subsections have effect as if the decision under appeal should be upheld without variation; subsection (1) deems an agreement of an appeal without a hearing to have the same effect as if the Tribunal had determined the matter. Both are therefore deeming provisions. The judge examined the interpretation of deeming provisions and the interaction between the various rules on appeals, and preferred HMRC's view – it made more sense if an appellant was prevented from relitigating something after withdrawing an appeal on the same point. She summarised her conclusions as follows:

(1) the Assessment was issued under s 73(1) and in accordance with HMRC's best judgement, it was made on the basis that input tax on the investment management services for the periods 11/10 to 05/14 was not allowable.

(2) the Appellant appealed against the Assessment under s 83(1)(p) on the grounds that the input tax was allowable, there was no dispute about quantum;

(3) the Appellant withdrew the appeal under s 85, the purpose of which is to prevent relitigation; and

(4) the Appellant was deemed by s 85 to have come to an agreement with HMRC that input tax on the investment management services for the periods 11/10 to 05/14 was not allowable and the Tribunal was deemed to have determined that this was the case.

The decision went into further detail on the precedent case law and the difference between "cause of action estoppel", "issue estoppel" and "abuse of process", all of which resulted in findings for HMRC.

The FTT judge allowed HMRC's application to strike out the part of the appeal against the refusal of the repayment for the overlap period.

The company appealed to the Upper Tribunal, where it came before Mr Justice Michael Green and Judge Jonathan Cannan. The parties broadly relied on the same arguments that they had raised in the FTT; the grounds of appeal were:

Ground 1 – the FTT erred in law in concluding that HMRC had not acquiesced in TTSL bringing the appeal, or were not otherwise estopped from raising their procedural objections.

Ground 2 – the FTT erred in law in its determination of the meaning and effect of section 85 VATA 1994.

Ground 3 – the FTT erred in law in concluding that TTSL was subject to cause of action estoppel.

Ground 4 – the FTT erred in law in concluding that TTSL was subject to issue estoppel.

Ground 5 - the FTT erred in law in concluding that TTSL was barred by abuse of process.

The Upper Tribunal examined the various different types of estoppel in detail, and the effect of the deeming provision in s.85. It came to the same conclusions as the FTT: that HMRC were not barred by acquiescence or otherwise estopped from applying to strike out the claim appeal, and that TTSL was estopped, either by way of issue estoppel or cause of action estoppel, from bring the claim appeal. The judges said that it would be "surprising" if the result were different: even though the first appeal related to an assessment and the second to a claim, they concerned the same VAT and the same facts arising in the same periods. Once the first appeal had been withdrawn, the matter was closed.

Upper Tribunal: *Telent Technology Services Ltd v HMRC*

6.4.2 Interest claim

Colaingrove Ltd was involved in a number of disputes with HMRC over 20 years, some of which led to a successful reclaim and a repayment. The company claimed interest under VATA 1994 s.84/(8), which HMRC disputed; a highly technical appeal to the FTT (Amanda Brown KC) determined a number of issues about the relationship between s.78 interest (which HMRC accepted) and s.84(8).

The matters involved were summarised as follows:

- (1) For VAT prescribed accounting periods 03/87 to 12/11 HMRC considered that supplies of removable contents, when sold together with static caravans, should have been standard rated. The Appellant considered the supplies were zero rated. The matter was finally resolved following various stages of litigation with a partial settlement pursuant to which HMRC made a payment (as recorded in the settlement agreement) of £13.8m together with statutory interest. These sums were repaid on 15 December 2014. (Contents Dispute)
- (2) For VAT prescribed accounting periods 03/89 to 12/11 HMRC considered that verandas sold with caravans too should be standard rated whereas the Appellant considered them to be zero rated. Again, following litigation HMRC repaid to the Appellant a sum of £2.6m; the payment being made on 7 May 2015. (Verandas Dispute)
- (3) VAT was overpaid in VAT prescribed accounting periods 06/73 to 09/08 in connection with bingo participation fees. In the relevant periods HMRC considered bingo participation and session fees to be standard rated. However, following litigation conducted by others it was established that such charges were properly exempt from VAT. On 4 May 2010 HMRC repaid £3.4m in respect of VAT overpaid in the period 03/75 to 09/08. (Bingo Dispute)
- (4) VAT was also overpaid in respect of prescribed accounting periods 12/02 to 12/05 in relation to certain gaming machine income. Again, such income had been considered to be subject to VAT at the standard rate when properly it should have been exempt from VAT. That resulted in a repayment of VAT in the sum of £5.6m, such payment being made on 16 November 2020. (Gaming Dispute)

HMRC had paid £9.3m in s.78 interest; the claim was for a further £8.2m. The dispute is mainly of historical interest only, so it will not be covered in this update. The judge's conclusions were:

- *(1) The provisions of section 78 and 84(8) VATA together provide for an adequate indemnity vis à vis the payment of interest for appeals bought in connection with appealable decisions made by HMRC prior to 1 April 2009.*
- *(2) The Section 80 Objection does not preclude the payment of interest in the circumstances of this case.*
- *(3) When determining the rate and period for which interest is due, we are required to adopt the approach endorsed by the High Court in RSPCA and the UT in Emblaze.*
- *(4) In so doing we consider that for lines 1 – 17, 21 – 22, and 25 – 27(1) additional interest representing the margin between statutory interest paid and Bank of England base rate plus 1.5% as statutory interest is due.*

The effect of these decisions is not quantified, but it clearly represents a partial but significant success for the company.

First-Tier Tribunal (TC09188): *Colaingrove Ltd*

6.5 Timing issues

6.5.1 Continuous supplies

A Romanian company (C) supplied the services of administrators and liquidators to companies that were subject to insolvency proceedings. A dispute arose over the tax point for supplies that were invoiced for a period. The Romanian authorities considered that they were subject to the 'basic tax point' rules, and a tax invoice should have been issued no later than the 15th of the month following the supply; the company argued that they were 'continuous supplies of services' which could be invoiced for a period not exceeding one year.

There was a separate dispute about the deductibility of input tax on invoices issued by a law firm to C in respect of a marketing agreement. The authorities claimed that C had not demonstrated that the services provided by the law firm were used for the purposes of its taxable transactions.

Thirdly, there was a procedural dispute about the admissibility of new arguments put forward by the authorities in court proceedings, when it had not had the opportunity to respond to these arguments at an earlier stage.

The referring court asked for an "expedited procedure" on the basis that the dispute had been running since 2016. The CJEU noted that the referring court had decided to submit questions in July 2021, but had only done so in November 2022. Although there was a legitimate interest of appellants in determining their rights under EU law as quickly as possible, that was not an exceptional circumstance that justified the use of an expedited procedure. The request was refused.

The CJEU went on to criticise the questions referred. The questions about the chargeable event referred to articles 63, 64 and 66 of the PVD, but no information had been provided about how article 66 had been transposed into Romanian law. As art.66 is an optional provision, it was not possible for the court to determine whether it was relevant to the dispute; the parts of the questions that referred to art.66 were ruled inadmissible. Similarly, part of the third question on input tax deduction was inadmissible because insufficient information had been supplied.

The court explained the scope of art.64, which applies to supplies "which give rise to successive payments or successive statements of account". It applies only to the extent that the date or dates of the actual completion of services are unambiguous and potentially give rise to different interpretations, which is the case where they are, on account of their continuous or recurrent nature, supplied during one or several specific periods. Where the time at which the supply of services is completed is unambiguous, in particular, in the event of a one-time supply and of a precise point in time from which its completion can be ascertained on the basis of the contractual relationship between the parties to the transaction, art.64(1) cannot apply without disregarding the clear wording of art.63.

Art.64(2) allows Member States some leeway in whether and how they implement the rules on continuous supplies. However, if the insolvency practitioners' supplies "gave rise to successive statements of account or successive payments" (which appeared to be the case, but would be for the referring court to determine), then they fell within art.64(1) and the chargeable event would be the end of the periods to which the statements related.

The second question essentially asked whether the tax point for these supplies could be deferred in circumstances where there were insufficient funds to pay for the services. The company's contracts might provide for the creditors to authorise payment when funds were available. The CJEU noted that art.63 is binding on taxpayers, and cannot be varied by a contract between the parties. The tax point would be determined by art.63 or art.64(1) as appropriate, even if payment had not been received. The court pointed out that relief would be available under art.90 in that circumstance, but that would not prevent the tax from being due in the first place.

Turning to the input tax question, the CJEU noted that the company had put forward evidence that showed an increase in taxable turnover following the conclusion of the cooperation agreement with the law firm. The referring court asked whether this was sufficient evidence of a link between the costs and the company's taxable supplies.

The court recited the case law about the requirement for a direct and immediate link to taxed output transactions, either specifically or as part of the taxable person's general business costs. In either case, it is necessary that the cost of the input goods or services be incorporated either in the cost of particular output transactions or in the cost of goods or services supplied by the taxable person as part of his or her economic activities. It was necessary to consider the objective content of the transactions by considering all the circumstances surrounding them; the increase in turnover was not relevant, as it did not cast light on the objective purpose for which the expenditure was incurred or the objective

use to which the costs were put. It would be for the referring court to determine these matters.

On the procedural matter, the court referred to the general EU legal principle of ‘respect for the rights of the defence’. It ruled that, where the competent authority adopts a decision based on new elements of fact and of law in respect of which the person concerned has been unable to state its position, the decision adopted at the end of that procedure must be annulled if, had it not been for that irregularity, the outcome of that procedure might have been different, even though, at the request of the person concerned, enforcement of that tax assessment notice has been suspended in parallel with the legal proceedings brought against that decision.

CJEU (Case C-696/22): *C SPRL v Administrația Județeană a Finanțelor Publice (AJFP) Cluj, Direcția Generală Regională a Finanțelor Publice (DGRFP) Cluj-Napoca*

Lecture 18

6.6 Records

6.6.1 Validity of invoices

HMRC denied input tax recovery amounting to £15,218 on the grounds that the invoices did not meet the statutory requirements. They simply described the supply as “building works at the above”, referring to a box on the invoice entitled “Job address”, which showed the building site. VAT was charged at the standard rate and the document contained the relevant figures for supply, VAT and overall total as required by reg.14 SI 1995/2518.

HMRC’s decision was based on reg.14(1)(g) and (h), which require that the invoice carries “a description sufficient to identify the goods or services supplied” and “or each description, the quantity of the goods or the extent of the services, and the rate of VAT and the amount payable, excluding VAT, expressed in any currency”. HMRC’s counsel submitted that HMRC needed to be able to verify that the details on the invoices were correct, that the VAT had a business purpose and was charged at the correct rate. She suggested that the description was insufficient as it did not allow HMRC to assess the liability or determine the rate of VAT due. The company’s counsel contended that an invoice can have a simple description and “did not need a novel” in order for it to be valid.

Judge Malcolm Frost referred to *Deadoc Construction Ltd* (TC04610) in which the Tribunal had considered the same question. The passage quoted (with approval) is useful to read in full:

58. How much detail must an invoice contain for it to satisfy reg.14 (g) & (h)? Without attempting to be definitive, our view is that it depends on the matters being invoiced.

In relation to invoices for supplies of services, one example (one that was cited to us in evidence and in argument) is that of a professional firm (say, accountants) whose fee notes simply use a stock phrase such as “To professional services rendered in the period 1 March to 31 March 2015”.

That, it seems to us, must be adequate for the purposes of reg.14 (g) & (h). The services supplied can be identified (the professional services of a firm of accountants), as can their extent (those rendered in the month of March).

Turning to invoicing of supplies of goods, one would, it seems to us, normally expect to see a narrative description of the goods that the customer could check and approve for payment – that is what reg.14 (g) & (h) requires: a description to identify the goods and give the quantity of the goods. Often the goods invoice will recite the specification from the customer's purchase order (or if only part of the order is being satisfied, such part of it as relates to the particular goods being supplied).

However, we accept Mr Deane's evidence that in the line of business of construction groundworks contractors it was common practice for less information to be provided, and we look at specifics later. Of course, it may be that on receipt of an invoice the customer wishes to check or query the invoice to ascertain that it covers all and only the supplies the customer believes he is liable to pay for. Where the customer approves and pays the invoice without challenge, that is some evidence that the invoice contains a sufficient identification (reg.14 (g)) and quantification (by quantity or extent) (reg.14 (h)) of the goods or services supplied; however, we do not accept that payment of the invoice is in itself conclusive that the invoice is reg.14 compliant. Part of the purpose of reg.14 is to ensure that invoices contain sufficient information to enable an independent observer (typically HMRC) to be satisfied as to the identification and quantification of the goods and services supplied.

The judge summarised the purpose of the description in the regulation as twofold:

- *Firstly, to enable both the recipient and supplier of the supply to have a common understanding of which services the invoice relates to, so that they can complete their respective VAT returns accurately.*
- *Secondly, to provide HMRC with a means of understanding the essential nature of the supply and a means of identifying the supply in correspondence with the recipient or the supplier in order to seek more information as needed.*

It was not necessary for HMRC to be able to draw definitive views on the VAT treatment of the supply from the invoice alone. HMRC have wide-ranging powers to seek further information in relation to the supply, and to refuse recovery of input tax if such information is not supplied. The invoice is the gateway into any enquiries by HMRC, rather than a repository for the answers to any questions that might be asked.

The judge went on to give examples of descriptions that were held to comply or not comply in the *Deadoc* case. The wording “supply of labour, plant and material” without reference to a site or a contract or a period covered, or any other identifying information, was held to be insufficient. In the present case, the judge held that the invoices contained what was required by the law. The appeal was allowed.

First-Tier Tribunal (TC09144): *Fount Construction Ltd*

Lecture 19

6.6.2 Manual update

Various sections of the *VAT Assessments and Error Correction* Manual have been updated to replace references to “form VAT652” with “an error correction notification”. Presumably this is to reflect the fact that error corrections can now be made online.

VAEC7190 and other references

6.7 Assessments

6.7.1 Time limits

On 29 April 2019, HMRC assessed Nottingham Forest FC for VAT of £345,561 in respect of its 08/2015 period. The club appealed and lost before the FTT; its appeal to the Upper Tribunal solely concerned the question of whether the assessment had been raised within one year of “evidence of facts sufficient in the opinion of HMRC to justify the making of the assessment came to their knowledge”, as required by VATA 1994 s.73(6)(b). HMRC argued that the “last piece of the jigsaw” was received on 9 May 2018, whereas the club argued that HMRC had the necessary knowledge on 20 April 2018.

The grounds of appeal to the Upper Tribunal (Judge Greg Sinfield and Judge Nicholas Paines KC) were that:

(1) the FTT failed to apply the correct tests as set out in the relevant case law;

(2) the FTT erred in its treatment of the burden of proof; and

(3) the FTT's conclusion that 9 May 2018 was, on balance, the best date on which HMRC had evidence of the facts sufficient in their opinion to justify the making of the assessment was perverse because there was no evidence to support that finding.

The officer who issued the assessment did not give oral evidence to the FTT because he had retired by the time of the hearing. However, his witness statement explained that he had visited the club on 20 April 2018 to examine invoices and to download the General Ledger data, and on 9 May 2018 to collect a SAGE back up of the accounting records. The officer identified problems arising from a change of accounting systems; the club had submitted an error correction in November 2015 in respect of this, but the officer concluded that it did not correct the full liability due.

The officer suggested in his witness statement that he believed the 12 month evidence of fact rule commenced on 24 May 2018 when he submitted questions to the club based on his analysis of the data he had collected. This was not the date relied on by HMRC in either appeal; the dispute concerned whether the information collected on 20 April was enough to form the basis of the assessment, or the further information on 9 May was necessary.

The club had accepted that there had been an underdeclaration and that the amount assessed was correct. It nevertheless appealed on the basis of the time limit. The reviewing officer (who gave evidence to the Tribunal) considered that the 9 May information was potentially relevant to the assessment, although he could only speculate as he had not been the assessing officer. He agreed that the fact that the other officer sent

questions to the club on 11 May suggested a very quick turnaround, but it was not impossible that he had used the 9 May data to raise these questions.

The FTT had proceeded on the basis that the burden lay on the appellant to show that the assessment was raised outside the time limits. This was based on the decision in *Pegasus Birds*. The FTT commented that evidence had not been presented to show whether the information provided on 9 May was irrelevant to the period being assessed, as the club contended; as a result, the club had failed to discharge the burden of proof, and the assessment therefore had to stand.

The UT recited the principles set out by Dyson J in *Pegasus Birds* (and approved by the Court of Appeal in that case). These are:

1. The Commissioners' opinion referred to in s.73(6)(b) is an opinion as to whether they have evidence of facts sufficient to justify making the assessment. Evidence is the means by which the facts are proved.

2. The evidence in question must be sufficient to justify the making of the assessment in question.

3. The knowledge referred to in s.73(6)(b) is actual, and not constructive knowledge. In this context, I understand constructive knowledge to mean knowledge of evidence which the Commissioners do not in fact have, but which they could and would have if they had taken the necessary steps to acquire it.

4. The correct approach for a Tribunal to adopt is (i) to decide what were the facts which, in the opinion of the officer making the assessment on behalf of the Commissioners, justified the making of the assessment, and (ii) to determine when the last piece of evidence of these facts of sufficient weight to justify making the assessment was communicated to the Commissioners. The period of one year runs from the date in (ii).

5. An officer's decision that the evidence of which he has knowledge is insufficient to justify making an assessment, and accordingly, his failure to make an earlier assessment, can only be challenged on Wednesbury principles [i.e. that it was "unreasonable"], or principles analogous to Wednesbury.

6. The burden is on the taxpayer to show that the assessment was made outside the time limit specified in s.73(6)(b) of VATA.

The judges considered some other precedents, including the more recent Supreme Court decision in *DCM (Optical Holdings) Ltd* in which the *Pegasus Birds* principles were approved (except for point 6, which was not mentioned as the burden of proof was not an issue in that case).

The company argued that the FTT had identified the tests correctly, but had failed to apply them, as the FTT did not decide:

- what evidence was sufficient to make the assessment;
- whether the officer's opinion that the evidence did not justify making the assessment earlier was *Wednesbury* unreasonable;
- when the last piece of evidence was actually communicated to HMRC.

The UT did not agree that the FTT had applied the wrong test. It had stated that it did not have the evidence to confirm what information was used to make the assessment, because it was not clear from the retired officer's witness statement, and that meant that the appeal had to be decided on the burden of proof.

Counsel for the appellant argued that the burden should have lain with HMRC, either as a general proposition, or else following the establishment of a prima facie case by the appellant. He also argued that HMRC had not made a full and frank disclosure of all material relevant to the time limits point. In his view, the sixth proposition in *Pegasus Birds* was not a binding authority because it had been common ground in that case and therefore had not been argued; it was not part of the ratio for the decision.

The UT noted that, until this appeal, there had never been any challenge to the proposition that the taxpayer bears the burden of proof in an appeal where it is alleged that a VAT assessment was not made within the time limit in s.73(6)(b). The judges accepted that the proposition was not binding, but that did not mean that it was necessarily wrong or that they should not apply it. The Court of Appeal had accepted the proposition without comment in another case (*Lithuanian Beer*), and the judges regarded that as binding on them.

The judges also considered that the proposition was logical: in cases where the issue was the 12-month time limit, the evidence of facts which justified the making of the assessment would generally be in the hands of or known to the taxpayer and its advisers (as it was in the present case). It followed that the taxpayer would normally be able to demonstrate when it provided specific evidence to HMRC and/or why the information known to HMRC should have been sufficient in the opinion of the assessing officer to justify the making of the assessment. When the taxpayer has done so, it is then for HMRC to show why such evidence was not sufficient.

The judges agreed with a further proposition from HMRC's counsel that, even if they had the burden of proof, they would have discharged it. Even though the assessing officer's witness statement did not make it absolutely clear what evidence he considered sufficient to raise the assessment, it did appear that he did not come to that conclusion until after he had received the 9 May information. That would have shifted the burden back to the appellant to show that the information was not relevant to the assessment.

The judges decided this issue in favour of HMRC. They commented in conclusion that the FTT would not have needed to resort to deciding the appeal by reference to the burden of proof (and thus the appeal to the UT would probably not have happened) if either party had produced evidence of what was actually contained in the April and May records.

Lastly, the UT dismissed an argument based on *Edwards v Bairstow* – that the FTT had come to a conclusion that was not based on any evidence. The FTT had not given a positive conclusion that the assessment was actually based on the 9 May data; it had reached its decision based on a lack of evidence to show that there was sufficient evidence in the 20 April data. Because the FTT could not reach a conclusion that the time limit had been breached, it had to assume that it had not been breached.

The club's appeal was dismissed again.

Upper Tribunal: *Nottingham Forest v HMRC*

Lecture 19

6.7.2 Evidence of supplies

A company appealed against assessments for periods 09/17 to 03/18 totalling £78,385. The assessments had originally included earlier periods, but these were withdrawn because they were raised out of time. All the VAT assessments related to disallowance of input VAT where the invoices had apparently been paid in cash. The director of the company claimed that there had been purchases for the purposes of a taxable business (being lorry tyres, loads hauled, ground works carried out, and vehicles purchased), and HMRC did not plead that the supplies had not taken place; the company had valid VAT invoices to support its claims, but even if these were rejected, alternative evidence was available to meet any reasonable requirement under reg.29.

HMRC contended that the invoices in dispute were all identified by the appellant as having been paid in cash, but there had been no proof that this cash had ever been withdrawn from a bank or paid over, and no alternative evidence has been provided (time sheets, routes driven, driver names, contracts, bank receipts etc) that prove the underlying services have ever been provided in line with reg.29. HMRC also argued that no due diligence had been undertaken on the supplier of the majority of the invoices, and it was not credible that no business and accounting records, apart from invoices, had been produced to support cash transactions amounting to over £550,000.

The Tribunal (Judge Abigail MacGregor) set out the law at issue. She did not agree that HMRC were not pleading that the supplies had not been made: that was implicit in their enquiry correspondence from the beginning. Even where there was an invoice, it was open to HMRC to argue that the taxpayer needed further evidence to show that a supply had been made. The dispute was not about the invoices, but the prior question of whether there had been a supply.

The judge examined each of the categories of transaction, and concluded that in relation to the purchase of vehicles, the company had provided V5 documents that did displace HMRC's assessment that the supplies had not taken place. With regard to the haulage services, tyres, ground works and security services, the company did not satisfy the burden of proof, and the input tax should not be allowed.

The judge rejected an argument that HMRC's assertion implied that there must have been a fraud, and HMRC's failure to pursue a criminal prosecution undermined the validity of the assessment. The decision not to proceed with a criminal investigation did not constitute a decision by HMRC that there were no other questions to answer about supplies. The Tribunal had no evidence about the basis of the decision to drop an investigation (the director had been interviewed under caution), so no conclusions could be drawn from that fact.

Lastly, the judge rejected an argument that the assessment was based only on "suspicion" without further evidence. The use of a claimed "cash hoard" left to the director by his late father was certainly ground for

suspicion, but it was not the only ground for the assessment, and the company had failed to displace the decision with better evidence.

Apart from the input tax on the vehicles, the appeal was dismissed.

First-Tier Tribunal: (TC09143) *Block-Aid Ltd*

Lecture 19

6.7.3 Suppression of sales

Following an enquiry into the affairs of a Chinese takeaway, HMRC discovered that substantial purchases from a supplier for cash were not recorded in the books of the company, and therefore represented suppression of sales. The explanation that these were for private use of the proprietor was not accepted, as they were some 60% of the purchases.

Judge Anne Fairpo reviewed the evidence put forward by HMRC and the explanations given by the trader, and concluded that the assessments had been made to best judgement. The appeals against the assessments (to corporation tax as well as VAT), penalties and PLNs were all dismissed.

First-Tier Tribunal (TC09214): *Good Choice 2016 Ltd and another*

6.8 Penalties and appeals

6.8.1 Default surcharge

A company appealed against a default surcharge of £1,115 for its 01/2023 return period. The company had agreed Time To Pay for its 10/22 period, but had only applied for this after the due date on 14 December 2022. The liability for 01/23 was paid late on 15 March (and the return was a day late). HMRC issued a surcharge and the decision was upheld on review.

The company’s director offered a number of possible excuses, including trading problems brought on by the mini-budget in September 2022, and having applied for a second TTP arrangement. The judge reviewed the evidence and concluded that there was no reasonable excuse; a prudent trader would have heeded the surcharge liability notice and made sure that payments and returns were prioritised. According to precedent, it was not possible to succeed with an argument that the surcharge was unfair.

The appeal was dismissed.

First-Tier Tribunal (TC09142): *The Good Pack Ltd*

6.8.2 Penalty Liability Notices

An individual was the sole director and shareholder in an alcohol wholesaler which went into liquidation in November 2023. In March 2017 HMRC had denied the company a deduction of £186,000 in relation to 179 transactions which were alleged to be connected to VAT fraud; this led to an assessment for £182,000 and a “deliberate, not concealed” penalty of £83,000. The company appealed against the assessment and

the penalty, but the liquidator confirmed in January 2024 that the company would not be proceeding with the appeals.

In June 2017, HMRC issued PLNs to the director in the expectation that the company would become insolvent. He appealed and represented himself. By the time of the hearing, HMRC had accepted that 45 of the deal chains could not be traced back to a fraudulent loss, and had reduced the PLN to £74,823.

Judge John Brooks reviewed the law on denial of input tax (*Kittel*, *Mobilx* and other cases) and on penalties (FA 2007 Sch.24 and *Tooth*). The definition of a "deliberate inaccuracy" is "a statement which, when made, was deliberately inaccurate" (meaning that the person who made it knew it to be inaccurate or, possibly, that he was reckless rather than merely careless or mistaken as to its accuracy). It was for HMRC to establish, to the civil standard of proof, that the company's VAT returns were inaccurate and that such inaccuracies amounted to a false or inflated claim to repayment of tax, that such inaccuracies were deliberate but not concealed and were attributable to the appellant as the sole director of the company.

There were bundles of evidence before the judge amounting to nearly 13,000 pages, together with witness evidence presented by an officer and the appellant. The judge found the officer to be helpful and credible, but there were inconsistencies in the appellant's evidence and he was considered to be unreliable.

The judge then summarised the history of the investigation, noting that some of the company's counterparties were involved in two criminal trials in 2019. The director had obtained due diligence reports which he said he only glanced at, relying instead on his advisers to give him assurance that it was safe to continue to trade with the various suppliers. On the basis of a number of factors, which were taken together for their cumulative effect, the judge concluded that it was more likely than not that the appellant knew that he was participating in an organised fraud.

Given that the appellant was solely responsible for everything done by the company, it was inevitable that the appeal against the PLN was dismissed. HMRC had given the maximum discount for "helping" and "giving access", and had reduced the amount in relation to the deal chains where a connection to fraud could not be proven. There were no special circumstances which might justify any additional reduction.

First-Tier Tribunal (TC09175): *Anandpreet Singh Powar*

Lecture 20

TC08773 and TC08928 were both earlier rounds of an appeal that originated with the MTIC case of *CCA Distribution Ltd*, which had gone from the FTT in 2013 (TC02667) up to the Court of Appeal in 2017 and back to the FTT in 2020 (TC07708). As the company was in liquidation, HMRC issued a director's liability notice to the director of the company.

The present appeal started with a consideration of an argument about abuse of process. HMRC had not argued that the director was dishonest when seeking to disallow the input tax of the company, but they relied on his alleged dishonesty to issue a DLN. The appellant contended that it was an abuse of process to raise that argument now, when they had not

argued it before. There had been extensive arguments about the consequences of not alleging dishonesty in the company's appeal, and the judge (Richard Chapman KC) quoted at length from Judge Mosedale's discussion of the issues.

In summary, the appellant argued that it was an abuse of process for HMRC to have held back the allegation of dishonesty in the earlier case, to then deploy it in a later case in which the Tribunal cannot properly examine the underlying factual background which was determined by the earlier Tribunal. He claimed to have been prejudiced as a result of HMRC holding back a formal plea of dishonesty until this appeal. This prejudice included him being denied CPR disclosure in the *CCA* appeal, being denied the ability to cross-examine witnesses or present his own evidence as to the surrounding circumstances of the transactions in the context of a plea of dishonesty.

The judge considered these arguments in considerable detail, and concluded that he would be able to come to a conclusion on dishonesty that would be fair and principled in the present appeal. Applying a broad merits-based judgment, the failure to rely upon dishonesty at the *CCA* appeal does not cause HMRC's defence of the present appeal to be an abuse of process. Whilst dishonesty *could* have been raised in the *CCA* appeal, it could not be said that it *should* have been raised.

HMRC's counsel put forward 12 findings from the *CCA* decision that indicated the director's dishonesty. His counsel responded to each one with an explanation. The judge went through each of the grounds in detail, adopting the findings of fact from the earlier hearing, and concluded, in relation to nearly all of them, that the director's "conduct in this regard was dishonest by the objective standards of ordinary decent people." The combined weight of all the factors together was overwhelming.

The appeal was dismissed.

First-Tier Tribunal (TC09204): *Ashley Charles Trees*

Lecture 20

6.8.3 Penalties

A company appealed against inaccuracy penalties relating to input tax denied on *Kittel* grounds and output tax on sales treated as zero-rated, also disallowed because of connection with fraud, in VAT returns in 2012 to 2014. The total penalties amounted to £1,444,813. Different discounts were given for each type of penalty: on the *Kittel* penalties the rate was 52.5%, and on the zero-rating penalties it was 47.25%. In each case the starting point had been the standard 70% figure for "deliberate, not concealed" inaccuracies.

The company had appealed unsuccessfully against the underlying assessments. The FTT decision, released in November 2017, ran to 90 pages and over 300 paragraphs. The FTT also rejected most of the company's grounds of appeal against the penalty assessments, restricting the appeal to whether the quantum of the penalties should be reduced for the quality of disclosure; plus, so far as relevant to the narrower scope of the appeal as it now stood, arguments put forward in correspondence by the company's advisors seeking a reduction in respect of special

circumstances and also in relation to the proportionality of the penalties. That decision was upheld on appeal by the Upper Tribunal.

Judge Zachary Citron noted that the FTT had found that the company actually knew of the connection to fraud; that finding had not been appealed. As a result, the only possible basis for penalties had to be deliberate conduct. He rejected an argument that HMRC needed to show that the person completing the VAT return knew that it was inaccurate: the relevant knowledge is that of the corporate entity, not the individual within it responsible for completing the returns.

The present appeal therefore had to proceed on the basis that the returns contained deliberate inaccuracies. It was only necessary to consider whether the quantum should have been reduced for the quality of the company's disclosure of the inaccuracies, the principle of proportionality, or because of special circumstances.

The judge reviewed the company's arguments on each matter in detail, and rejected them all. He was satisfied that the quality of cooperation and disclosure had been adequately reflected in the discounts already given; as the decision on "special circumstances" was within HMRC's discretion, the FTT did not have jurisdiction to replace it with its own judgement; and the scheme of Sch.24 was not disproportionate.

The appeal was dismissed.

First-Tier Tribunal (TC09147): *CF Booth Ltd*

Lecture 20

An individual appealed against a PLN charging him a £107,000 penalty that had been assessed on a company of which he was sole director. It related to denial of input tax on *Kittel* grounds for periods 03/2018 to 03/2019. Although the company had not appealed against the penalty and had been dissolved, it was agreed that HMRC would have to establish that the VAT had been properly chargeable as well as showing that the penalty was attributable to the individual's dishonest behaviour.

The company had involved in scrap metal dealing for more than 10 years. HMRC had identified tax losses in some of its supply chains, and deregistered it on the grounds that the registration was being used for fraudulent purposes. The assessments and penalties followed from that.

Unusually for a missing trader case, the judge (Richard Chapman KC) examined the evidence for tax losses attributable to a list of the company's counterparties – this is usually conceded following *Fairford* directions. In each case, the judge was satisfied that, on the balance of probabilities, there was a tax loss and it arose from fraud. It followed that the company's transactions were connected to a fraudulent tax loss; the penalty had only been imposed in relation to those transactions that were so connected, which was not the whole of the disallowance.

The judge then examined the way in which the trade was carried on (or claimed to be carried on) by the appellant, and concluded that he knew that his transactions were connected with fraudulent evasion of VAT. There were numerous factors that, taken together, satisfied the judge that the transactions were contrived, and the director must have known this. If he was wrong and the director did not have actual knowledge, then for the same reasons he should have known of the connection.

The judge made the following surprising comment in summing up:

"*We have no reason to doubt that Mr Turner is a man of good character. However, that is not the test and has no bearing upon the question of attribution. Similarly, the lack of criminal investigation has no bearing upon the question of attribution either. Our findings relate to Mr Turner's knowledge or means of knowledge that Loy's transactions were connected with the fraudulent evasion of VAT. We make no findings – and do not need to make any findings – as to whether Mr Turner was acting dishonestly or as to whether he committed a criminal offence.*"

The appeal was dismissed.

First-Tier Tribunal (TC09193): *Gary Turner*

Lecture 20

Judge Jeanette Zaman heard an appeal by a Costcutter franchisee against assessments and penalties relating to periods in 2015 and 2016. After considering the evidence in detail, she concluded that the assessments had been made to best judgement and should stand; however, some of the penalties should be reduced to from "deliberate" to "careless", and one should be mitigated by a higher amount for quality of disclosure. Even though the penalties were now "careless" and therefore in principle eligible for suspension, this would not be possible because the trader's VAT registration had been suspended. As there would be no further VAT returns, there was no possibility of further inaccuracy, which meant that the penalties would have to be paid.

First-Tier Tribunal (TC09199): *Rai And Another (T/A Bursha Foods)*

6.8.4 Penalty behaviour

An individual appealed against a range of income tax assessments and a VAT belated notification penalty following an enquiry into his tax affairs from 2010 to 2016. HMRC had found certain errors in relation to consultancy income from a company in 2014/15 and had raised further assessments for other years on the basis of a "presumption of continuity". The company (*Tasca Tankers Ltd*) has been the subject of procedural hearings in the FTT and UT in relation to VAT, but that dispute does not appear to have reached a final conclusion.

By the time of the hearing, the appellant had accepted that he had been careless and was liable for extra income tax. However, he disputed the "deliberate" penalties and the ability of HMRC to go back more than 6 years.

The judge (Amanda Brown KC) took evidence from a number of witnesses, including the company's accountant and the appellant. She found them all to be credible and helpful witnesses, and made a number of findings of fact. She discussed the rules on discovery assessments in detail, and HMRC's entitlement to issue "deliberate" penalties. In spite of many of the factual findings appearing to confirm HMRC's views, nevertheless the result of the appeal was a substantial reduction in the amounts originally assessed. Some of the behaviour was held to be careless rather than deliberate, and some of the errors were held to have arisen in spite of taking reasonable care (so there would be no penalty).

As the appellant's only "excuse" for his failure to register for VAT was that he had given insufficient attention to his tax affairs, he was held liable for a 15% penalty of £21,642.

First-Tier Tribunal (TC09191): *Shaun Harte*

6.8.5 Late appeals

An individual applied to make a late appeal against PLNs totalling nearly £700,000 issued in April 2019. The company's penalties related to failures to account for corporation tax on disposals of property, deemed corporation tax on profits extracted from the company, and VAT underdeclared on parking income (£113,750 of the total). The appeal was not made until January 2023, three years and eight months years late.

Judge Nigel Popplewell set out the *Martland* criteria for considering an application to make a late appeal:

- establish the length of the delay;
- establish the reasons given for the delay;
- consider all the circumstances of the case including the merits of the reasons and the prejudice which would be caused to each party.

The company owned a pub and an associated car park. It sold the pub for £1m in March 2012 and the car park in June 2015 for £1.1m, but did not account for any corporation tax on the disposals. It had made an option to tax on both pieces of land, but accounted for no VAT on the disposals, nor on receipts for car parking which were generally paid in cash into the till of the pub. This continued after the sale of the car park.

The judge summarised the history of the enquiry into the company's affairs, which led to correspondence and assessments in 2019. There was then a gap in the contact between the officer and the appellant from June 2019 to June 2023; in the meantime, the appellant had made a closure application to the Tribunal in July 2022, requesting an order that HMRC should close their enquiry. As there was no enquiry in progress, the Tribunal struck out the application.

There were differences between the parties about the contacts that had been made over the period. The appellant claimed to have conversations that the officer did not recall, and the e-mail chains suggested that the appellant was remembering a different discussion about a creditors' voluntary arrangement. The officer pointed out that, if he had had such a conversation, he would have asked the appellant to submit evidence in writing; this was HMRC's standard practice, as oral evidence collected over the telephone is not considered sufficiently reliable.

The judge agreed with HMRC's assessment of the length of the delay: the appeal was very late. The appellant had given a number of reasons, including being hospitalised shortly after his initial discussions with the officer, and the lockdown which followed shortly after his release. He thought that HMRC and the government were not operating during this time. He had mental health issues, exacerbated by the death of his parents some 18 months before the issue of the penalty assessments. He claimed not to have understood that the company was liable to pay corporation tax on gains, nor did he accept that failing to pay output tax on sales was a

deliberate act. HMRC argued that none of these were good reasons, and the appellant's actions were demonstrably deliberate.

In carrying out the balancing exercise, the judge stated that he had to consider the conflicts in the evidence. Appropriate weight had to be given to sworn testimony: he said he did not doubt that the appellant believed what he had given as truthful evidence, but the judge still had to consider whether it was reliable. In particular, it was necessary to test the appellant's evidence against the contemporary documentary evidence to come to a conclusion. If the phone call had taken place, the judge considered that it would have been referred to in e-mails, and would have led to further correspondence from the officer. He therefore concluded that it had not taken place.

The arguments based on the appellant's mental state were undermined by the fact that he had given testimony in person in a FTT hearing in July 2019. His stated view that he believed the government had shut down during lockdown was not credible.

Taking all these factors together, the judge rejected the application to make a late appeal.

First-Tier Tribunal (TC09159): *Charles Caton*

Lecture 20

A company sought permission to appeal against an assessment for about £180,000, originally issued on 1 June 2021 and amended on 9 August 2021, another £12,700 assessment dated 30 October 2021 and a penalty assessment for £117,000 dated 24 June 2022, together with a PLN dated 24 June 2022 issued to a director. Notices of appeal had been submitted on 9 December 2022, approximately 17 months late in respect of the first assessment and about 4.5 months late in respect of the penalty assessment and PLN.

The reason given for the delay was that the taxpayer's adviser neither asked for a review nor appealed to the Tribunal. It appeared that he had pursued a complaint against the HMRC officer involved; he intended to submit a review application after the complaint, which the appellant's representative accepted was the wrong way round.

The judge (Alastair Rankin) was bound by the Upper Tribunal's decision in *Katib*: reliance on an adviser was not a sufficiently good reason to disregard the statutory time limits. HMRC had given the taxpayer several opportunities, even after the time limits had expired, to produce the evidence that it now claimed showed that it had exported goods to the Republic of Ireland; there was too much delay without good reason, and permission to appeal would be refused.

First-Tier Tribunal (TC09185): *The Tyre Company (NI) Ltd*

6.8.6 Costs

In TC08229, a company appealed on 4 October 2012 against a decision made on 1 October 2012 to deny about £460,000 of input tax in its periods 03/11 and 06/11. An earlier hearing in 2019 set out the detailed procedural history, which included an earlier dismissal of the appeal by the FTT in 2015. There were further appeals which reached the NI Court of Appeal, which decided to remit the case to a differently constituted

FTT. Judge Christopher McNall interpreted the "tenor" of the CA decision as requiring the whole appeal to be reheard. The earlier Tribunal's findings of fact were "wiped clean", but the evidence given orally and in writing for the earlier hearing still stood.

The alleged fraud related to transactions in soft drinks. In respect of one set of deals, the judge identified many suspicious elements of the transactions, but nevertheless concluded that HMRC's case did not meet the required standard of proof for a finding that the transactions were connected to a fraudulent tax loss. The judge clearly expected this decision to be appealed yet again, because he then set out a long list of matters that indicated that the trader was not acting in good faith when dealing with that counterparty.

In respect of two other sets of deals, the trader had accepted that there was a tax loss in the deal chain. The only question was therefore whether the director (Mr Donaldson) knew or ought to have known of that connection. The judge set out the following features in relation to one of the counterparties (with a similar list for the other):

Other evidence which cast doubt on Mr Magee's bona fides:

(1) He had contacted Mr Donaldson by a cold call;

(2) He had no business premises (his letterhead being a domestic address also on his driving licence), no known experience in the sector (having registered for VAT only on 1 July 2010), and no viable business assets - all of which was readily discoverable;

(3) His business paperwork (and the letter of 21 October 2010) gave an incorrect business name, road, and postcode: again, all of things which were readily discoverable and which would have put a reasonable person on the alert;

(4) His VAT certificate gave his trade as 'Retail Sale of Beverages', and not as 'Wholesale Fruit/Veg Juices and Soft Drink' (which is a different trade classification, and which was the trade classification both of Irwin and PCB);

(5) There is no credit check, nor evidence of verification of the VAT number;

(6) There could not be a check of business premises because (i) no address was given, and (ii) Mr Magee said in his letter of 21 October 2010 that he was 'sourcing other premises'; i.e., he was holding himself out as a wholesaler in October 2010, but did not state, even at that time, where his stock was kept;

(7) Mr Donaldson did not know how Mr Magee could afford to let UM have the goods before payment, nor how Mr Magee was financing his business. He should have asked, but did not. Mr Donaldson explained that his approach was that he was really just concerned with whether the goods were delivered, and that, if the VAT number was genuine, that was enough;

(8) The goods arrived on a trailer, but Mr Donaldson could not remember whose.

These features – described as a "resolute lack of curiosity" on Mr Donaldson's part – were enough to support a conclusion that the director

knew of the connection to fraud. If he did not actually know, he ought to have done.

The appeals were allowed in respect of one set of deals, and dismissed in respect of the other two.

The company then applied for an order for costs, as the appeal had been categorised as "complex", it had not opted out of the costs regime, and it claimed to have succeeded in respect of 90% of the disputed invoices. In TC08456 (April 2022), Judge Christopher McNall declined to make an order for costs. Although there were some features that suggested that the appellant "might consider itself to be vexed", the FTT had found the director's evidence to be untruthful in many respects. Although HMRC cross-applied for 10% of their costs, the judge declined to follow the "neat mathematical approach", and ruled that each party would bear its own costs.

Upper Tribunal

The company appealed against this decision on the grounds that the FTT had wrongly decided that there was "no clear winner" in the original hearing. It claimed that the FTT should have concluded the company was the "clear winner" and gone on to consider whether the criticisms it made of the company's conduct of the litigation (when weighed against the criticisms it made of HMRC's conduct) justified an exception to the general rule that the company should have its costs of the substantive appeal.

The Upper Tribunal (Mr Justice Roth and Judge Anne Redston) discussed the rules on costs orders at length. The Tribunal's jurisdiction is "at large" in deciding both whether to make an order and as to the quantum. The Tribunal should have regard to all the circumstances, including the conduct of both parties and the fact that the Appellant was the overall winner, to arrive at a fair and just outcome.

On that basis, they discounted the appellant's costs by 15% to take into account HMRC's success in relation to the deals which were found to be disallowable. They further discounted the remaining 85% to 40% to reflect the dishonest conduct of Mr Donaldson. This took into account that HMRC were required to spend time (and the related costs) which would not have been necessary had Mr Donaldson given honest, straightforward evidence, and if he had been candid in his dealings with HMRC and with the FTT.

Upper Tribunal: *Ulster Metal Refiners Ltd v HMRC*

6.8.7 Strike-out application

Judge Natsai Manyarara heard a preliminary matter in relation to an appeal against a March 2013 decision to disallow input tax of just over £500,000 in relation to purchases of mobile phones. The purchases had been made by family and friends of the director, and the invoices did not contain the company's name. HMRC applied for strike-out on the basis that the appeal had no reasonable prospect of success. The appeal had been stayed behind the Upper Tribunal decision in *Scandico Ltd* (2017), but the stay was not lifted until the Supreme Court decision in *Zipvit Ltd* (2022).

The judge first considered an argument put forward by the appellant that HMRC had "ambushed" it by changing the grounds for strike-out between the original application and the production of a skeleton argument. The judge summarised the parties' arguments, and noted that he would incorporate his decision on this issue with the main decision on the strike-out application.

In support of that application, HMRC's representative put forward a number of points, revolving around the fact that the issue was the exercise of HMRC's discretion to accept or refuse "alternative evidence" for input tax deduction within SI 1995/2518 reg.29. Given the high hurdle that an appellant had to clear to win a case on that basis, HMRC argued that the company had not produced any argument that would stand a chance of succeeding.

The taxpayer's counsel argued that HMRC had failed to engage with the alternative evidence put forward, and had based their strike-out application on a perceived incorrect form of words in the grounds of appeal that could be corrected by amendment. Strike-out would be a disproportionate result for a minor problem with the wording.

The judge considered precedents on the issue of "ambush" and also the detailed procedure for appealing, giving grounds of appeal, and HMRC's responsibility for issuing a statement of case. In his view, the taxpayer had always known the substance of HMRC's argument, so no issue of ambush arose.

Turning to the substantive argument, the judge considered that there were differences between this and previous cases involving purchases of phones through third parties. This company claimed to have a proper audit trail to trace the purchases. The judge's conclusions were:

(1) the Strike Out application does not concern a short point of law and requires determination of substantial issues and evidence. There is every risk that this could lead to a mini-trial;

(2) the initial objectionable nature of the Appellant's case could be cured by an amendment to the Grounds of Appeal but, in any event, I am satisfied that the Appellant has provided further and better particulars in its letter dated 15 August 2014;

(3) the differences between the Appellant's appeal and the appeal in Scandico are that Scandico could not show an audit trail confirming how the phones were purchased;

(4) HMRC have not established that the Appellant has no reasonable prospects of success and there is no requirement for the Appellant to show a strong case; and

(5) the Appellant's appeal invokes the supervisory jurisdiction of the FtT.

On this basis, a substantive hearing was required, and HMRC's application was refused.

First-Tier Tribunal (TC09157): *V-Com (Worldwide) Ltd*

6.8.8 Strike-out and costs

Judge Jane Bailey heard a procedural case about the proper disposal of an appeal when the underlying decisions had been withdrawn, and an

application for costs by the appellant. The underlying dispute was about two post-clearance demand notices (C18s) which had been appealed and then withdrawn because of calculation errors; there were communication delays between HMRC, the Tribunal and the appellant, resulting in the Tribunal expecting HMRC to be considering a hardship application when in fact HMRC had already withdrawn the decisions. The confusion arose because there were more C18s than those which were the subject of the appeal.

The judge recited the history of the dispute, in which the appellant maintained that the appeal should be formally allowed with costs. However, it did not explain why it considered HMRC's conduct was unreasonable.

She went on to consider the precedents on withdrawn decisions in detail, and concluded that she had to strike out the appellant's application for the appeal to be formally allowed. Once the decision had been withdrawn, the Tribunal had no jurisdiction. However, she made the following comment:

I wish to state at the outset that I agree with Judges Berner and Aleksander that, generally, proceedings would be resolved more quickly and with less dispute between the parties if (whenever possible) HMRC were to withdraw from an appeal in accordance with Tribunal Rule 17, instead of only withdrawing the underlying decision. It is not surprising that an appellant who considers they have been successful in their appeal because HMRC has withdrawn the underlying decision, should be frustrated to find the consequence of that success is that HMRC expects them either to withdraw their appeal to the Tribunal or have their appeal struck out.

It was also not possible for the Tribunal to determine an appeal if hardship had been applied for and not yet decided upon. That issue also had an impact on the Tribunal's ability to award costs; costs could be awarded even if the appeal was struck out because the underlying decisions had been withdrawn, but only if the other party had "acted unreasonably in bringing, defending or conducting the proceedings." The appellant had made no attempt to explain why it considered HMRC's conduct met this definition.

The applicant had also failed to submit a schedule of costs that were to be claimed, which is a requirement of the Tribunals Rules. The application therefore had to be refused.

First-Tier Tribunal (TC09190): *Charles Kendall Freight Ltd*

6.9 Other administration issues

6.9.1 Retained EU law

In April, HMRC published a Brief to explain the current status of EU law in the UK after Brexit and the legislation passed last year to revoke remaining EU law from 1 January 2024. Unfortunately, the Brief does not resolve many of the uncertainties in this area, which will have to wait for

clarification from legal disputes over the next few years. In an even more brief summary, it appears reasonably clear that:

- Direct effect of EU Directives can no longer be the basis of a UK legal argument, even if the facts arose before Brexit, if the UK law is inconsistent with the Directive.
- The general principles of EU law can no longer be the basis of a UK legal argument on their own.
- The principle of conforming construction remains, provided that the UK law can be interpreted in a way that is consistent with EU law.

What is less clear is the status of precedent case law, which appears to be retained by the legislation (except that CJEU precedents can be overturned by the higher UK courts). Given that many binding precedents have dealt with direct effect of EU law or application of general EU legal principles, including precedents set by UK courts (particularly when a CJEU reference has returned to the UK court that referred the question), it is not clear how these rules will apply in an area covered by a precedent case where the UK law still appears to have a gap or an inconsistency. An example covered in the April update is the *Arthur Andersen* case, where HMRC say in their internal guidance that traders can no longer rely on the decision to override the wording of VATA 1994 Sch.9 Group 2 to make their supplies taxable, if they fall within the scope of the exemption as described in the UK law.

The Brief is important and worth reproducing in full.

Purpose of this brief

This brief explains how VAT and excise legislation should be interpreted in light of:

- the Retained EU Law (Revocation and Reform) Act 2023
- the bespoke solution introduced for VAT and excise in Finance Act 2024

Both came into effect on 1 January 2024. In short, UK VAT and excise legislation means the same as it did on 31 December 2023.

Who needs to read this

All VAT registered businesses and advisers.

Background

The Retained EU Law (Revocation and Reform) Act removes the supremacy of EU law. However, to make sure there's stability, it was made clear when it was introduced, that a bespoke solution would be introduced for the VAT and excise regimes. The bespoke solution, section 28, Finance Act 2024, outlines how VAT and excise legislation should be interpreted in light of the Retained EU Law (Revocation and Reform) Act.

Both the Retained EU Law (Revocation and Reform) Act and the bespoke solution took effect on 1 January 2024.

HMRC policy for VAT and excise is unchanged. Section 28, Finance Act 2024 means that UK VAT and excise legislation will continue to be interpreted in the same way as it was before 1 January 2024. Drawing on

rights and principles that have always applied for interpreting UK law, including the principle of abuse. This means, principle of consistent interpretation (sometimes known as the 'Marleasing' principle) continues to apply in interpreting VAT and excise legislation.

However, businesses will no longer be able to rely on the 'direct effect' of EU law. It will no longer be possible for any part of UK legislation to be quashed or disapplied on the basis that it's incompatible with EU law, as UK law is now supreme. This does not lead to any changes in HMRC policy.

We've engaged with those sectors potentially affected by the removal of direct effect of EU law. We're satisfied that where businesses have before been able to rely on direct effect there are no adverse results. For example, fund management and financial intermediation, where there are generally corresponding domestic provisions that give the same treatment.

We'll update specific guidance, including the online financial services guidance, as necessary, where further clarity is needed.

The amendments to the European Union (Withdrawal) Act 2018 made by section 6 of the Retained EU Law (Revocation and Reform) Act 2023 will apply to VAT and excise legislation as they do more generally. This includes the rules that the courts must apply in interpreting legislation, including the application of case law.

Effective date

The legislation took effect from 1 January 2024.

More information

This legislation maintains the stability of the VAT and excise regimes and means that UK VAT and excise legislation continues to be interpreted in the same way now as it was on 31 December 2023. HMRC policy remains unchanged.

Revenue and Customs Brief 4/2024

6.9.2 Tertiary Legislation

HMRC have published a new manual bringing together the "tertiary legislation" which is not in (primary) Acts of Parliament or (secondary) Statutory Instruments. Most tertiary legislation is contained in Notices where certain sections "have the force of law"; the power to create such regulations is normally contained in Acts, which will use phrases such as "subject to such conditions as the Commissioners may direct in a notice published by them."

Neil Warren has written an article about tertiary legislation, with examples illustrating the range of subjects covered, in *Taxation* magazine. The manual has the following sections:

- Cash Accounting Scheme
- Flat rate schemes
- Gold imports and exports
- Land, building and construction
- Making Tax Digital for VAT

- Margin schemes
- Northern Ireland
- One Stop Shop (OSS) and Import One Stop Shop (IOSS)
- Refunds
- Registration
- Reliefs
- Retail Schemes
- Transfer as a going concern (TOGC)
- Transport
- Warehousing
- Valuation

www.gov.uk/guidance/vat-tertiary-legislation; *Taxation, 30 May 2024*

6.9.3 Liquidator's lawsuit

The liquidator of a company is in process of suing the former directors for losses incurred as a result of the company's participation in a MTIC fraud. The original fraud had taken place in 2006, when HMRC carried out extended verification of a claim to £4.5m of input tax on computer components. This was eventually denied in full in March 2010, and a s.63 penalty of £607,000 was issued to the company in January 2011. The company failed in an appeal to the FTT on the denial of input tax in 2014; the director represented the company and was cross-examined, and the FTT held that he was not an "innocent dupe" but actually knew that the transactions were connected with fraud.

A liquidator was appointed in November 2016. The liquidator commenced proceedings against the directors, who submitted a defence based on the claim that they did not know of any connection to fraud. The liquidator applied for a direction to strike out that part of the defence on the basis of issue estoppel, given that the exact point had been settled by a court already and could not be relitigated.

The interesting point of law is that the parties to the previous hearing were different (company and HMRC rather than liquidator and director) and the standard of proof was different (it was necessary for the liquidator to show dishonesty, whereas the *Kittel* denial of input tax does not require HMRC either to plead or prove dishonesty). The judge examined a range of precedents and did not find them "on all fours"; nevertheless, he considered that it would be an abuse of process to make the liquidator incur the expense of a further hearing into questions that had been examined over an 11-day Tribunal appeal which had been instigated by the appellant and determined comprehensively against him. Although it had been stated by the Court of Appeal that a finding of knowledge of fraud does not necessary equate to dishonesty (decision in *E Buyer*), the judge considered that in this case the knowledge surely "imported" dishonesty. The director was the sole authority in the company and had filed the VAT returns. The judge considered that there was no real prospect that a finding of dishonesty would not follow.

Having struck out the parts of the defence that denied knowledge of the fraud and dishonesty, the judge went on to consider the liquidator's claim more generally. As the elements that had been struck out were the only substantive defence offered, the judge gave summary judgment and awarded the liquidator the sums claimed.

High Court: *Hellard v Khan (Re Phoenix Tech Ltd)*

6.9.4 Unlawful preference

The High Court considered an application by the Insolvency Service to have a director disqualified for paying other creditors of his insolvent company in preference to paying construction industry deductions and VAT due to HMRC. The court agreed that he had acted wrongly in relation to the CIS deductions and disqualified him for four years. However, the VAT related to input tax that HMRC had disallowed; it had been deducted by the company while he was a director, but assessed by HMRC as disallowable after he had resigned. The court ruled that he could only be judged by his conduct while a director, and when he resigned he could still have believed that the input tax was deductible. The court did not take the VAT issue into account in deciding the period for which he should be disqualified. Nevertheless, the case shows the danger of paying other creditors in preference to HMRC. The account of the behaviour of the director during the period in which the company was in financial difficulties makes uncomfortable reading: it paid out £1,597,509 in respect of wages and labour costs in a period when only £2,748 was paid to HMRC. HMRC were proving for a debt of £226,002 and the Commissioners were the only creditors. It certainly appeared that the director had exercised his power to pay everyone other than HMRC.

High Court: *The Secretary of State for Business and Trade v Daniel Singh Sekhon*

6.9.5 Consultation responses

The CIOT has responded to the government consultation on *The Tax Administration Framework Review: enquiry and assessment powers, penalties, safeguards*. The response is broadly supportive of the objectives of making powers and penalties more consistent across the tax regimes, preferably with any deviations kept to a minimum and for clearly defined reasons. CIOT considers that penalties for deliberate behaviour should be more severe, but that penalties for careless behaviour could be modified by not penalising the first error instead of suspending penalties. There are further comments on the appeals process and dispute resolution, and a recommendation that a new Taxes Management Act is required to bring all the rules together and make them easier to find and follow for HMRC, taxpayers and advisers.

www.tax.org.uk/ref1295

CIOT has also responded to the consultation *Raising standards in the tax advice market – strengthening the regulatory framework and improving registration*. The CIOT is broadly supportive of approach 1 (mandatory professional body membership) as being the system which could be set up in the least amount of time and at the lowest overall cost, subject to further details as the policy develops.

Naturally this is a matter of considerable interest to CIOT and the response is a substantial document.

www.tax.org.uk/ref1308

6.9.6 Article

In an article in *Taxation*, Neil Warren puts forward the controversial view that HMRC should abolish the VAT helpline altogether, rather than trying to restrict it to five days a month (announced in March and subject to a very quick U-turn). He suggests that the quality of the advice is so poor that no one should use the service anyway; he recommends searching for information in VAT Notices and HMRC VAT Manuals.

Taxation, 2 May 2024