VAT UPDATE
JANUARY 2014

Covering material from October – December 2013

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VAT Update January 2014

Contents

1. INTRODUCTION ... 1
   1.1 Appeals pending ... 1
2. OUTPUTS ... 4
   2.1 Scope of VAT: linking supplies to consideration ... 4
   2.2 Disbursements ... 4
   2.3 Exemptions ... 8
   2.4 Zero-rating ... 8
   2.5 Lower rate ... 17
   2.6 Computational matters ... 20
   2.7 Discounts, rebates and gifts ... 21
   2.8 Compound and multiple ... 21
   2.9 Agency ... 23
   2.10 Second hand goods ... 23
   2.11 Charities and clubs ... 23
   2.12 Other supply problems ... 23
3. LAND AND PROPERTY ... 26
   3.1 Exemption ... 28
   3.2 Option to tax ... 28
   3.3 Developers and builders ... 29
   3.4 Input tax claims on land ... 30
   3.5 Other land problems ... 31
4. INTERNATIONAL SUPPLIES ... 32
   4.1 E-commerce ... 32
   4.2 Where is a supply of services? ... 32
   4.3 International supplies of goods ... 32
   4.4 European rules ... 33
   4.5 Eighth Directive reclaims ... 36
5. INPUTS ... 43
   5.1 Economic activity ... 43
   5.2 Who receives the supply? ... 43
   5.3 Partial exemption ... 43
   5.4 Cars ... 43
   5.5 Business entertainment ... 47
   5.6 Non-business use of supplies ... 47
   5.7 Bad debt relief ... 47
   5.8 Other input tax problems ... 48
6. ADMINISTRATION AND PENALTIES ... 48
   6.1 Group registration ... 50
   6.2 Other registration rules ... 50
   6.3 Payments and returns ... 50
   6.4 Repayment claims ... 52
   6.5 Timing issues ... 56
   6.6 Records ... 60
   6.7 Assessments ... 60
   6.8 Penalties and appeals ... 60
   6.9 Other administration issues ... 62

1. INTRODUCTION

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

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

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

1.1 Appeals pending

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

The HMRC website section which reports the progress of appeals reappeared on 21 January 2011 after lying dormant for some time. It says that it will be updated monthly, but it appears to be less frequent or regular than that. The latest update appeared on 20 June 2013 after a gap since 28 February.

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

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

Awaiting the CJEU:

- *GMAC UK plc*: HMRC appealed to the Upper Tribunal after the First Tier Tribunal held that the company was entitled to go back for many years in a bad debt relief claim because the UK rules were too restrictive – in a preliminary decision, the UT decided not to refer questions to the CJEU but to proceed with a substantive hearing; one issue will now be referred to the CJEU, with questions for reference being agreed (and HMRC are considering whether to appeal further on the others, once the CJEU has given its judgment)

UK appeals awaiting hearing (or announcement of decision):

- *R v Ahmad and another*: dispute over the extent to which HMRC are entitled to confiscation of proceeds of MTIC fraud – the judge at first instance decided that the gross proceeds of the fraudulent sales could be confiscated, but the Court of Appeal ruled that only the VAT was property obtained as a result of or in connection with the commission

of the offence. Supreme Court is scheduled to start hearing HMRC's appeal on 10 February 2014.

- *HMRC v Atlantic Electronics Ltd*: the Court of Appeal has reserved judgment in a dispute about the admissibility of evidence in a MTIC fraud case
- *Birmingham Hippodrome Theatre Trust Ltd v HMRC*: the Court of Appeal will hear the company's appeal against the decisions of the FTT and Upper Tribunals that HMRC were allowed to offset overclaimed input tax from a different period against its Fleming claim for overpaid output tax (hearing scheduled for December 2013)
- *Colaingrove Ltd*: HMRC intend to appeal the decision of the First-Tier Tribunal that rental of sites for caravans included an element for domestic power that could be lower-rated (the other three appeals by the same company heard in 2013 are also listed on the website – HMRC appear to regard them all as settled).
- *David Finnamore t/a Hanbridge Storage Services*: HMRC have been granted leave to appeal to Upper Tribunal after First-Tier decided that a trader was supplying a licence to occupy land rather than storage services – hearing date set as 12 – 14 February 2014
- *DCM (Optical Holdings) Ltd*: HMRC have appealed to the Upper Tribunal after the FTT accepted that a floor-area based special method could be appropriate (Upper Tribunal hearing was previously stated as 20 – 23 September 2011, but it now says "date to be confirmed")
- *European Tour Operators Association*: Upper Tribunal has remitted case back to First-Tier Tribunal for further consideration of the facts in relation to the exemption for the association's subscriptions
- *John Wilkins Ltd and others*: Supreme Court refused HMRC permission to appeal one aspect of the case, in which the Court of Appeal decided that motor dealers were entitled in principle to claim compound interest on VAT repayments. Substantive issue stayed pending the *Littlewoods* decision in the CJEU (will presumably now be addressed by the UK courts – website says "stayed until 2013")
- *Lok'n'Store Group plc*: FTT approved a special method which gave the self-storage company 99.98% input tax recovery; HMRC have been granted leave to appeal to the Upper Tribunal (hearing listed for December 2013)
- *Longridge on the Thames*: HMRC have appealed to the UT against the FTT's ruling that a charity was not in business and could receive building services zero-rated
- *Marcus Webb Golf Professional v HMRC*: the taxpayer applied to the Court of Appeal for leave to appeal against the UT decision that he was not assisted by the concept of fiscal neutrality (hearing was scheduled to commence 3 October 2013; no judgment yet)
- *Newey (t/a Ocean Finance)*: HMRC appealed to the Upper Tribunal after the First Tier Tribunal held that a scheme was effective in reducing irrecoverable VAT on advertising costs by moving a loan broking business to the Channel Islands – CJEU judgment in this

update; Upper Tribunal to reconsider the case in the light of the judgment

- *R (on the application of Rouse) v HMRC*: HMRC appealing against Upper Tribunal's decision that they were not entitled to set off a credit against money owing from the taxpayer under s.130 FA 2008.
- *Secret Hotels2 Ltd v HMRC*: the Supreme Court has given leave for the taxpayer to appeal against the Court of Appeal's decision that it was buying and selling accommodation as a principal and therefore subject to TOMS in the UK (hearing scheduled to commence 29 January 2014)
- *Sub One Ltd (trading as Subway) v HMRC*: taxpayer has appealed to Court of Appeal against rulings by the FTT and UT that it was not entitled to zero-rate certain sandwiches; UT confirmed the FTT's decision, even though the judge ruled that the FTT had applied the wrong legal test.
- *The 'Spotting the Ball' Partnership & Others*: HMRC have appealed to the UT against the FTT's ruling that the company ran a game of chance which would be exempt from VAT (covered in this update)
- *Volkswagen Financial Services (UK) Ltd v HMRC*: CA has given taxpayer leave to appeal against the Upper Tribunal's decision in favour of HMRC, overturning the FTT's decision that the company's suggested partial exemption special method was more fair and reasonable than HMRC's

In this update from previous lists:

- *Bridport & West Dorset Golf Club Ltd*: the CJEU has effectively found in favour of the claimant golf club: sporting services supplied by a not-for-profit organisation are exempt (Case C-495/12)
- *HMRC v Rank Group plc*: the Court of Appeal, applying the judgment of the CJEU, found for HMRC that the UK's exclusion of the exemption to multi-terminal "gaming machines" was valid. The company has applied for leave to appeal to the Supreme Court.
- *Loughborough Students Union v HMRC*: the UT confirmed the FTT's decision that the taxpayer did not qualify for the "cultural services" exemption, but remitted to a differently constituted FTT the question of whether the UK has correctly implemented the exemption for fundraising by not-for-profit bodies.

HMRC have announced that they do not intend to appeal the Upper Tribunal's decision in *Arkeley Ltd (in liquidation) v HMRC*. The FTT held that three invoices issued in relation to exports qualified for zero-rating, and the UT decided that the FTT had been entitled to come to that conclusion.

The Supreme Court has refused the taxpayer leave to appeal against the Court of Appeal's judgment in *BAA Ltd v HMRC*. The decision – that the company was not entitled to recover as input tax VAT incurred on professional fees incurred in a takeover by a company which subsequently became the taxpayer's holding company and joined its VAT group – is therefore final.

2. OUTPUTS

2.1 Scope of VAT: linking supplies to consideration

2.1.1 Barter

An individual owned a company whose objects included the letting of property, tourism and hotel business. He acquired as a private individual, jointly with his wife, two apartments in apartment hotels. He entered into contracts with his company under which the company would have the use of the apartments for five years (which period could be extended) for no rent, but would at its own expense fit out and finish the apartments. At the end of the contract period, the owner would receive back the improved property.

The tax authority concluded that there had been a barter of services and raised assessments on the taxpayer for the value of the work done to the apartments. As the parties were connected, the assessment was made for the open market value of the services concerned.

Questions were referred to the CJEU on whether there was indeed a supply of services for consideration in the form of a barter exchange, and if so, how the values should be determined and what the time of supply might be.

The court examined the background to the link between supply and consideration and concluded that there was no difference between a supply for money and a supply for goods or services in exchange. It was clear that the contract in this case provided for services to be supplied in exchange for each other, and so the taxpayer was making a taxable supply to the owner.

Because of the way the questions were asked, the court did not have to give any specific answers about valuation or tax point. Presumably the referring court will be able to find the principles in other decisions of the court.

CJEU (Case C-283/12): *Serebryannay vek EOOD v Direktor na Direktsia 'Obzhalvane i upravlenie na izpalnenieto' – Varna pri Tsentralno upravlenie na Natsionalna agentsia za prihodite*

2.1.2 Payment for two things

A company (C) developed software and sold it to an investment vehicle (T). It accounted for output tax on the sum received. Questions were then raised as to whether the whole of the amount was consideration for the supply of the software, or related to something else that would not be liable to output tax.

The investment arrangement provided direct tax advantages to investors, who were supposed to be able to claim capital allowances on the amount paid for the software. T raised 25% of the investment money from individuals, and borrowed the remaining 75% from a bank. A similar scheme was held not to work for direct tax purposes in the case of *Tower MCashback*. C argued that some of the money it received from T was in fact security for the bank loan, or was used to pay off the bank loan, rather than being consideration for the supply.

HMRC argued that there had been an agreement between the parties which reduced the amount paid by T for the software, resulting in a VAT credit of £81,000; but the much greater reduction claimed (£3m) was not due. It made no difference what C did with the money, or where T had obtained the money – there was an agreement that T would pay the consideration to C, and that resulted in an output tax liability on the full amount paid.

The tax scheme did not go well. There were disputes between the investors and T, and between HMRC and T; petitions for winding up were disputed in the courts. In the end, C issued T with a credit note for £20m, which included the VAT now reclaimed from HMRC. HMRC did not accept that this was a valid credit note for VAT purposes.

The original payment of the consideration by T to C on Friday 2 April 2004 was followed on Monday 5 April 2004 by C agreeing that the money was held as a security deposit for T's loan from the bank. The issue of the credit note involved repayment of the loan out of the security deposit. The taxpayer's argument was therefore that the receipt on 2 April was not truly consideration, because it was subject to conditions; it was earmarked for another purpose, as in the case of *Glawe Spiel*.

The decision is long and complicated, examining facts from 2004 to 2008 which might be distorted by the parties' original wishes to present a particular view for direct tax reasons. Precedent cases on VAT are combined with case law on contract, capital allowances and the application of EU law. In summary, the Tribunal concluded that:

- the original supply should have been charged to VAT on the reduced amount contended for by the taxpayer: the setting aside of money received to act as security for the customer's bank loan meant that it was not "consideration" for the seller at that time;
- if the Tribunal was wrong in this conclusion, the subsequent credit note should be taken as an agreement to reduce the consideration, so the VAT would then be repayable;
- if it was not a valid credit note, the appellant nevertheless had a right to bad debt relief.

The appeal therefore succeeded.

First-Tier Tribunal (TC03101): *Cabvision Ltd*

2.1.3 Supply and consideration

A professional gambler owned a company which was registered for VAT, its trade being described as 'racing tipster'. The company deregistered with effect from 31 March 2007; it was then registered with effect from the following day as being in partnership with another company; this partnership deregistered with effect from 31 December 2009, and the company then registered with effect from 1 December 2008, again describing its business as that of a 'racing tipster'.

The business had operated in different ways over the years. In the 1990s, the company had operated a premium rate telephone number and derived its income from BT; in the early 2000s, it operated a subscription service to individual customers, and derived its income only from then. By 2004, the owner decided that his income from giving tips was falling, but his

tips were becoming more successful, so he decided to bet his own money. He was so successful that bookmakers successively refused to deal with him. As a result, he could no longer place bets personally.

He therefore contacted a number of 'punters' (as the Tribunal decided to call them) and entered into an arrangement whereby he would direct them to make bets on his behalf. He provided the stake money; they accounted to him for all winnings, and deducted all losses. They received nothing other than the information – which horses the tipster was backing with his own money.

The company continued to account for VAT on its receipts, but then made a claim for repayment of £85,000 on the grounds that it was not making supplies for consideration. HMRC refused the claim, and also refused to deregister the company.

HMRC's counsel tried to find a link between the provision of the tip to the 'punter' and the amount of winnings paid over by the punter to the company. The Tribunal could not agree that this was realistic. The punters were instead providing a service to the company: there was no dispute that the owner was not able to place his own bets, so he engaged other people to do so for him. They might obtain information by so doing, and that information might be advantageous to them, but they were not paying for it in the form of money. The appeal was allowed.

HMRC and the Tribunal did not explore the possibility that there was a barter of services. It would be hard to value – precedent cases suggest that the consideration received by the taxable person (the company) should be valued at the amount that the taxable person is prepared to expend to obtain that consideration (comparing the cost of the 'rewards' in the *Empire Stores* case). That would be much less than the amounts of money changing hands in the form of stakes and winnings. If the Tribunal considered it at all, it may have decided that it was insignificant.

First-Tier Tribunal (TC02994): *Victorangle Ltd*

2.1.4 Fraudulent use of cards

A group of companies claimed a VAT repayment of nearly £2m in respect of transactions where customers had fraudulently used debit or credit cards to obtain goods. The company argued that the obtaining of goods by deception in this way did not constitute a 'supply'.

Where a card is used fraudulently, this normally comes to light when the true cardholder disputes the entry on their statement. In certain defined circumstances, the issuing bank is entitled to charge back the loss to the retailer. The VAT claim in this case related to sales where no chargeback was made – the retailers kept the proceeds, including the amount which had been treated as VAT. However, they argued that there had been no valid supply, so they should be entitled to treat those payments as outside the scope.

The FTT judge set out the main contentions by each party, but concluded that "*This case involves difficult issues of principle on which the Tribunal considers that a decision by the Court is necessary to enable the Tribunal to give judgment.*" The FTT decided to refer the following questions to the CJEU for clarification of the meaning of 'supply of goods':

1. Is Article 14.1 to be interpreted as applying when the physical transfer of goods is obtained by fraud in that the payment provided by the transferee is by means of a card which the transferee knows he has no authority to use?

2. When the physical transfer of goods is obtained by fraudulent use of a card, is there a "transfer of the right to dispose of tangible property as owner" within Article 14.1?

3. Is Article 73 to be interpreted as applying when payment is obtained by the transferor of goods under an agreement with a third party to make such payment in respect of card transactions notwithstanding that the transferee of the goods knows that he has no authority to use the card?

4. When payment is made by a third party pursuant to an agreement between the transferor of the goods and the third party as a consequence of the presentation to the transferor of a card which the transferee of the goods has no authority to use is the payment obtained from the third party "in return for the supply" within Article 73?

The court considered the precedents on the meaning of "supply", and distinguished the present case from earlier decisions about theft of goods. The retailer had the power to transfer ownership, and had intentionally transferred the goods to the person who fraudulently used the card; there was no indication of VAT fraud that might invalidate the transaction for VAT purposes. It was therefore a "supply of goods".

There were two transactions in the normal use of a credit card – the sale of the goods by the retailer to the customer, and the provision of services by the bank to the retailer. It was settled case law that the taxable amount for the supply of the goods was the full retail price, not reduced by any commission paid by the retailer to the bank for its supply of services.

There was no requirement that consideration had to come from the recipient of the supply. In the absence of fraud, consideration would pass from the purchaser to the retailer through the bank; in the case of fraud, the purchaser would pay nothing to the bank, but the retailer still received consideration for the supply. The fact that there was a problem with the legality of the customer's use of the credit card could not change the VAT analysis.

The court's answer to the questions set (combined together) was:

[The VAT Directive provisions] must be interpreted as meaning that, in circumstances such as those at issue in the main proceedings, the physical transfer of goods to a purchaser who fraudulently uses a bank card as a means of payment constitutes a 'supply of goods' ... and that, in the context of such a transfer, the payment made by a third party, under an agreement concluded between it and the supplier of those goods by which the third party has undertaken to pay the supplier for the goods sold by the latter to purchasers using such a card as a means of payment, constitutes 'consideration' ...

CJEU (Case C-494/12): *Dixons Retail plc v HMRC*

2.1.5 Vouchers

A Granton card is a transferable card which is used for the payment or part-payment for goods or services – in effect, a gift token, although the normal way in which it is used is to receive 'two services for the price of one' (rather than something only for presentation of the card). The Netherlands court referred questions to the CJEU to determine whether such cards could be treated as exempt financial instruments (as 'other securities' or 'other negotiable instruments') when issued and sold.

Advocate-General Kokott has given an opinion that the issue and sale of such cards does not qualify for exemption. As with at least one other recent opinion, this is available in 20 different European languages, but not in English (even though, as in that other case, the UK made representations to the court). The French version appears to indicate that the A-G does not consider that these cards are sufficiently similar to those documents that clearly are exempted, and are more similar to those that are excluded from exemption.

CJEU (A-G) (Case C-461/12): *Granton Advertising BV v Inspecteur van de Belastingdienst Haaglanden/kantoor Den Haag*

2.2 Disbursements

Nothing to report

2.3 Exemptions

2.3.1 Gaming machines

The *Rank* case has taken another twist: HMRC have won the argument about gaming machines in the Court of Appeal. The particular point at issue was whether particular machines fell within the statutory definition of a taxable gaming machine, which required that the 'element of chance' was provided 'by means of the machine' (s.23 VATA 1994, before amendments made with effect from 5 December 2005). The VAT Tribunal decided in 2008 that 'the machine' for this purpose could not apply to a random number generator that was located somewhere else – so terminals attached to a central RNG would not be taxable gaming machines. Other claims were made by traders who opened the back of their machines and physically removed the RNG; still more by traders who argued that their machines provided a gaming experience that was identical to those machines, and they should therefore enjoy the exemption on the basis of fiscal neutrality.

In 2009 the High Court upheld the VAT Tribunal's decision, and questions on the application of the principle of fiscal neutrality were answered by the CJEU in late 2011 (Case C-259/10). Following that decision, HMRC conceded that Rank had won in relation to its bingo claims and one ground of their appeal on slot machines. The Upper Tribunal remitted another ground of appeal on slots to the FTT for

reconsideration (stayed pending the current appeal to the Court of Appeal). What remained was the issue of whether terminals with a remote RNG were properly regarded as exempt under the VAT law at the time; in fact, HMRC had so regarded them at the time, but had changed their view (as they were entitled to do).

The Court of Appeal decided unanimously that the only sensible way of interpreting the 1968 Gaming Act provisions was to regard the terminal and ancillary and connected equipment such as the RNG as 'a machine'. The RNG was essential for the game to be played. Even though the Gaming Act provisions were regulations the breach of which could constitute a criminal offence, it was not necessary to read them in a literal way; to do so would effectively make compliance (and VAT) voluntary. Anyone who sought to gain exemption from VAT by physically reconfiguring the machine did so 'with his eyes wide open' and, if he did not obtain clearance from HMRC, ran the risk that they would disagree – and win the argument in court.

Court of Appeal: *HMRC v Rank Group plc*

The company has applied for leave to appeal to the Supreme Court.

2.3.2 More gaming machines

The CJEU has considered a dispute referred by the German courts concerning the taxation of gaming machines after the changes that were made to German law following the *Linneweber* decision. A taxpayer disputed the treatment of certain slot machines, which were subject to both VAT and a special unharmonised tax. The court ruled that the national tax was not a 'turnover tax' and could therefore be levied in addition to VAT. It also confirmed that it was permissible to use the net cash receipts of machines as the basis for assessment for VAT, where the national law set a minimum win percentage – in effect, the statute provided the separation of 'turnover' and 'prize fund' that was physically achieved in the *Glawe Spiel* case.

CJEU (Case C-440/12): *Metropol Spielstatten Unternehmergesellschaft (haftungsbeschrankt) v Finanzamt Hamburg-Bergedorf*

2.3.3 Payment services

A company operated a service whereby dental patients could spread the cost of dental treatment by making regular payments throughout the year. It collected money from patients and paid it over to the dentists, after deducting its own charges. HMRC regarded these as wholly taxable, relating either to "administration" or to "debt collection", in line with the *AXA (UK) plc* case. The company argued that it made separate supplies to the dentists (which would have to be taxable) and to the patients. The supply to the patients was exempt under the heading "payment services". HMRC further argued that, if the contracts were effective in creating a separate exempt supply to the patient, they constituted an abuse of rights.

The company had been registered for VAT from the commencement of its business in 1996. The proprietor realised in 2003 that its services were similar to those of *Sparekassernes Datacenter*, and he successfully applied to HMRC for deregistration at that time. Following the *AXA* judgment, HMRC ruled that the company should again be registered;

however, as this was effectively a change of an agreed position, they would not pursue output tax arising before 1 January 2012 (a concession which was extended generally to businesses affected by *AXA*).

The company decided, following *AXA*, that it would change its contractual arrangements so that it made supplies to patients as well as supplies to dentists. It did so because it was clear that its own supplies, as reflected in its contracts at that time, would be covered by the *AXA* judgment. The new arrangements were put into effect from 1 January 2012.

The documentation sent to dentists about the new arrangements explained that they arose from the consequences of the *AXA* judgment, and that they would make "no practical difference". It is therefore not surprising that HMRC argued that they constituted an abuse of rights. However, the covering letter also claimed that the changes "reflect the nature of the reality of our services" – that, in fact, the company had always made payment service supplies to the patients, but these had not previously been recognised in the contracts.

The dentists were invited to ask their existing patients to agree to the new arrangements, and some 30% did so. The company claimed that continuing to pay the direct debits, after being notified of the change, was acceptance of the contractual variation by conduct. After considering Chitty, the authority on contract law, the Tribunal agreed with this proposition. The new contractual arrangements therefore applied to all existing customers as well as all customers signing agreements for the first time from 1 January 2012.

The Tribunal then had to consider whether, as a matter of economic and commercial reality, the contracts reflected supplies made by the company to the patients, and if so, whether that supply was exempt. The judge concluded that the patient was indeed paying for something more than dental services, and that "something extra" was provided to the patient by the company. That "something extra" included elements of administration, but the judge was satisfied that the predominant supply was related to processing payments. It was therefore a compound exempt supply. It would not be excluded as "debt collection" because that would have to be a supply made to the creditor, not to the customer.

On abuse of rights, HMRC contended that it was clear from the correspondence that the sole reason for the company's change of arrangements was to avoid the consequences of the *AXA* decision. It was therefore intended to obtain a VAT advantage. However, the judge did not regard the contracts as in any way artificial, or contrary to the purpose of the legislation. Precedent cases showed that similar transactions could have different VAT treatments; there were numerous examples of taxpayers learning from the unfortunate experiences of others, and setting up their transactions to be treated in a more favourable way. This was a choice that the law permitted.

The appeal was allowed.

First-Tier Tribunal (TC03058): *DPAS Ltd*

2.3.4 Pensions management

Following the failure of *Wheels Common Investment Fund* to obtain exemption for services relating to a defined benefit pension scheme, questions have been referred to the CJEU concerning the application of the same rules to a defined contribution scheme.

The appellant supplies advisory services to a pension scheme which include maintenance and development of the pension fund platform, administrative and advisory services and services as to the payment into and disbursement out of the retirement schemes. The Danish authorities accepted that services relating to payments out of the scheme could be exempted under the *Sparekassernes Datacenter* principle, but refused to exempt most supplies relating to inward payments.

The Danish court referred detailed questions to the CJEU covering both significant aspects of the dispute: first, whether a defined contribution scheme could be a "special investment fund" under EU law, and second, whether the disputed services constituted "management". A third question asked for guidance on whether the services were a single supply or mixed.

The Advocate-General noted that the exemptions for financial services are subject to review by the Commission, and any changes may affect the scope of the exemption for pension funds. However, agreement on the changes has not been reached, and implementation is unlikely in the near future. Possible changes should therefore be disregarded, and only the current law should be considered in reaching a decision in this case.

Denmark, supported by the UK, argued that defined contribution schemes are different from "special investment funds", just as defined benefit schemes were held to be different in *Wheels*. However, the Advocate-General rejected these arguments. He considered that a defined contribution scheme did not have the features that ruled out final salary schemes from being in competition with or similar to UCITS. In his opinion, "*the term 'special investment funds as defined by Member States' has to include occupational pension funds where such funds pool the assets of several beneficiaries, and allow the spreading of the risk over a range of securities. This is only the case where the beneficiaries bear the risk of the investment. The fact that the contributions are made by their employers for their benefit under a collective agreement between organisations representing employees and employers and that payments out of the fund are only made upon retirement is irrelevant, as long as the beneficiary has a secure legal position with respect to her or his assets. Whether a fund fulfils these requirements is for the national courts to decide.*"

The Advocate-General was of the opinion that the existing case law of the CJEU was enough to deal with the other issues (management and compound/multiple). He therefore did not consider those questions or offer an opinion on them.

CJEU (A-G) (C-464/12): *ATP PensionService A/S v Skatteministeriet*

2.3.5 Education

A students' union claimed a refund of £455,000 for a six-year period, arguing that it should have been eligible for exemption under item 2(b) Group 13 Sch.9 as a "cultural body" managed on an essentially voluntary basis. This claim covered a variety of supplies on which VAT had been accounted for, including concerts, events and balls. The union also claimed exemption for some activities under item 1 Group 12 (fund-raising by a charity), covering the annual Freshers' and Graduation Balls.

The First Tier Tribunal (TC02017) held that the claim under Group 13 failed because the union was partly run by "sabbatical officers" who were paid a salary. Although this was not a full commercial amount for a graduate, it was nevertheless too great to be ignored according to the precedent cases. The precedent of *Bournemouth Symphony Orchestra* applied: the proportion of the union's management committee that was paid a salary was roughly equivalent to the proportion of the orchestra's board represented by the paid managing director, and he had been enough to disallow exemption.

The smaller, alternative Group 12 claim failed because the evidence did not demonstrate that the primary purpose of the balls was to raise money. That is a requirement for exemption to apply under that group. The union's appeals were dismissed.

The students' union appealed to the Upper Tribunal, arguing that there were errors of law in the way the FTT had dealt with both claims. The UT held that the FTT had been entitled to find that the salaried officers had too significant a role in decision-making for the Group 13 conditions to be satisfied; however, there was no explicit consideration of whether the conditions of Group 12 were authorised by the PVD. Sometimes, the absence of such a consideration would imply that a conclusion had been drawn, but that was not the case here. It would therefore be necessary to remit the case to a differently-constituted FTT in order to consider that issue.

The question is whether the conditions in Items 1 and 2 Group 12 go beyond the permitted scope of art.132(1)(o) PVD: "the supply of services and goods, by organisations whose activities are exempt pursuant to points (b), (g), (h), (i), (l), (m) and (n), in connection with fund-raising events organised exclusively for their own benefit, provided that exemption is not likely to cause distortion of competition". The disputed condition is that the event has to be promoted as primarily for the raising of money.

Upper Tribunal: *Loughborough Students Union v HMRC*

2.3.6 Eligible educational body?

A college claimed that it should benefit from exemption under Group 6 Sch.9 because it was a "college of a university". It would be taxable in relation to courses supplied to some other clients, but it believed that it was an eligible body where it was supplying education within the context of the university to which it was affiliated (the University of Wales). HMRC accepted that it was exempt in relation to certain grant-funded training it provided under Item 5 Group 6.

The FTT (TC02066) considered comparisons to the earlier cases of *School of Finance and Management* and *HIBT Ltd* in which commercial companies had been held to be acting as parts of universities. Although many of the factors identified in *SFM* were also present here, the Tribunal did not accept that the link between the company and the university was close enough. The company was one of 140 accredited learning centres for the university; clearly they were not all colleges of the university. The link was not enough even if it was right to consider only the courses which were run for the university; if the totality of the company's activities was considered, it was clearly not an eligible body. Its appeal was dismissed.

The company appealed to the Upper Tribunal. Its main contention was that the FTT had erred in concluding that it was not possible to be an "eligible body" in relation to only part of an entity's activities: the FTT ruled that it was "all or nothing". There was no case law on this question. If the UT agreed that this was an error of law, it would be necessary to reconsider the other conclusion of the FTT, that the relationship between the company and the university was not close enough to make it "a college" of the university.

The judge examined the precedent cases that touched on the concept of "an eligible body", and also the detailed wording and purpose of article 132 and Schedule 9 Group 6. He concluded that the ground of appeal was mistaken: it was not possible to be an eligible body in respect of some activities, and not be an eligible body in respect of others. Rather, it was possible for an eligible body to have some activities that did not qualify for exemption. As the company accepted that, taking all of its activities into account, it could not qualify as an eligible body, its appeal had to be dismissed.

Upper Tribunal: *Finance & Business Training Ltd v HMRC*

2.3.7 Commercial education

A private Polish company supplied training courses in finance, accountancy, tax and business management, and presumably had many customers who were taxable businesses. It wanted to deduct input tax on its own expenses, but the Polish authorities ruled that it was covered by the exemption, which in Poland covers all educational services, regardless of the purpose and nature of the provider.

The Polish court concluded that the company was entitled to rely on art.168 PVD to justify a deduction of input tax, but was not sure whether it was also entitled to rely on the exemption which the Polish law granted to its outputs. Questions were referred to the CJEU to confirm whether it was permissible to extend exemption to a private entity, and whether it could effectively enjoy the exemption and the benefit of deduction at the same time.

The court agreed with the company that educational services are only exempt under PVD art.132(1)(i) if one or more of the conditions of art.133 were satisfied. In particular, the supplier either had to be a public body or an entity recognised as having a similar purpose. The company contended that a company which systematically aimed to make a profit could not satisfy this condition. The court agreed that a general

exemption for all educational supplies, regardless of the nature and objects of the supplier, was not permitted.

The court confirmed that the company's claim must be consistent: if it wants to deduct input tax, then it cannot at the same time benefit from exemption. It had the right to be regarded as a taxable person.

CJEU (Case C-319/12): *Minister of Finance v MDDP Sp. z o.o., Akademia Biznesu, Sp. komandytowa*

2.3.8 Green fees

The Court of Justice has found in favour of the taxpayer in the *Bridport and West Dorset Golf Club* case.

The UK Tribunals

The UK law restricts the sporting exemption to services supplied by not-for-profit organisations to their members, if they operate a membership scheme. Accordingly, daily green fees charged by a golf club to visitors have been regarded as taxable. In 2009 a club submitted a "*Fleming* claim" for £140,000, arguing that this provision (or its interpretation by HMRC) was contrary to the exemption in art.132(1)(m) VAT Directive, and the restriction was not permitted within art.133(b) or 134(b).

There were also subsidiary issues concerning the application of the cap and compound interest, but the Tribunal agreed with the parties to leave these until the outcome of other litigation clarified the principles.

Art.132(1)(m) exempts "the supply of certain services closely linked to sport or physical education by non-profit-making organisations to persons taking part in sport or physical education".

Art.133 permits member states to restrict a number of exemptions, including this one, by setting conditions including "(c) those bodies must charge prices which are approved by the public authorities or which do not exceed such approved prices or, in respect of those services not subject to approval, prices lower than those charged for similar services by commercial enterprises subject to VAT; (d) the exemptions must not be likely to cause distortion of competition to the disadvantage of commercial enterprises subject to VAT."

Art.134(b) provides that exemption shall be lost "where the basic purpose of the supply is to obtain additional income for the body in question through transactions which are in direct competition with those of commercial enterprises subject to VAT." Art.134 is mandatory, whereas art.133 gives member states scope to choose.

The provisions are transposed in Group 10 Sch.9 VATA 1994. The relevant provision is item 3: "*The supply by an eligible body to an individual, except, where the body operates a membership scheme, an individual who is not a member, of services closely linked with and essential to sport or physical education in which the individual is taking part.*"

The chairman decided that the exemption had to be interpreted purposively, and that the restrictions on exemption were exhaustive – that is, a member state could not restrict the exemption in circumstances not envisaged by arts.133 and 134. The membership scheme restriction

should not be applied to the normal activities of the club (i.e. supplying the right to play golf) because that was not “additional income”.

Art.133(c) and (d) are not obviously transposed into the UK law. HMRC argued that the membership scheme rules are there to achieve the same objective – avoiding distortion of competition – but the chairman (Judge Bishopp) did not agree that this was an effective alternative. In doing so, he acknowledged that he was departing from his own earlier decision in *Keswick Golf Club* (VTD 15,493). He suggested that the parties should apply for the hearing to be continued (i.e. adjourned until a different day, but not treated as a separate case) to consider to the capping and interest issues.

HMRC appealed to the Upper Tribunal, where Mrs Justice Proudman considered that a reference to the CJEU was appropriate. The interpretation of the Directive was not clear, and the matter was of importance throughout the EU. The questions concerned the interpretation of both articles 133(d) and 134(b).

The club argued that the matter was “acte clair” (i.e. obvious from precedent decisions) and therefore should not be referred. The judge disagreed, considering that the interaction of the rule on distortion of competition and the interpretation of the expression “additional income” had not been considered before.

The CJEU

The CJEU has given judgment without a separate Advocate-General’s opinion, suggesting that the judges regarded the case as raising no new issues of law. As usual, the court considers several of the referred questions together. Its first conclusion is that the expression “additional income” cannot be interpreted as referring to fees paid by non-members. It was originally proposed in 1973 that the sporting exemption should include such a condition, but this was deliberately rejected; so it would be wrong to introduce such a restriction by so interpreting art.134. The provision of sporting services by a not-for-profit body should be exempt, regardless of the recipient.

The second conclusion related to the question of whether the UK was permitted to introduce such a restriction in order to prevent distortion of competition which would disadvantage commercial enterprises. The court ruled that any such restriction had to be made by reference to the substance of the transactions covered, not merely to the recipient of the supply. The restriction was therefore not within the permitted scope allowed to member states.

HMRC have not yet responded to the decision with a formal statement, but presumably they will have to pay the many claims which are on all fours with this one, and bring forward a change to the legislation.

CJEU (Case C-495/12): *HMRC v Bridport and West Dorset Golf Club Ltd*

2.3.9 Healthcare

Art.13A(1)(b) and (c) 6th Directive (now art.132(1)(b) and (c) PVD) exempt the following:

(b) *hospital and medical care and closely related activities undertaken by bodies governed by public law or, under social conditions*

comparable to those applicable to bodies governed by public law, by hospitals, centres for medical treatment or diagnosis and other duly recognised establishments of a similar nature;

(c) the provision of medical care in the exercise of the medical and paramedical professions as defined by the Member State concerned;

A company managed a hospital. It supplied drugs from its pharmacy both to its own inpatients and to outpatients who were being treated at the hospital by independent doctors. The German tax authority ruled that the second category of supplies did not qualify for exemption. Questions were referred to the CJEU.

Advocate-General Sharpston has given an opinion that the supply of goods which are closely related to hospital care can qualify for exemption under (b) above. The expression 'closely related activities' can cover supplies of goods as well as supplies of services.

Exemption can apply even if the goods and the care are supplied by different persons. However, supplies of goods which are not related to hospital care within (b), but are supplied in connection with medical care within (c), will not be covered by the exemption if their supply is 'physically and economically dissociable' from the provision of care. The A-G recognised that this might run counter to the principle of fiscal neutrality; however, that is only a principle of interpretation where the legislation is not clear. It cannot be used to read into the legislation words that are missing. The A-G also observed that there are various solutions to preserve fiscal neutrality offered by the current legislation; however, they would tend to operate by restricting the existing exemption, imposing VAT where none is currently levied.

CJEU (A-G) (Case C-366/12): *Finanzamt Dortmund-West v Klinikum Dortmund GmbH*

An 'addictions therapist' worked for a partnership (comprising the therapist and his wife, who did the administration), providing counselling to patients who were referred to him by their GPs or psychotherapists. He was not enrolled on any of the registers which are listed as defining the 'medical and paramedical profession in the UK' in Sch.9 Group 7. HMRC therefore ruled that the partnership's supplies were taxable.

The taxpayer appealed, arguing that it satisfied the condition for exemption under Note 2, which extends exemption where an unqualified person works under the direct supervision of a registered person. The therapist argued that close liaison with the referring GP, and weekly meetings with a psychotherapist to discuss patient cases (a requirement of his counsellor's licence), constituted 'working under direct supervision'.

The Tribunal could not accept this. The relationship between the therapist and the GPs was that of two professionals working together in the best interests of the client; one was not supervising the other. The man with whom the therapist attended weekly meetings was not registered either, so he could not confer exemption. The appeal was dismissed.

First-Tier Tribunal (TC02985): *M J Fenwick Consultancy*

2.3.10 Sports coaches or childcare?

A company provided qualified sports coaches to organise and run after-school 'clubs' in school premises. The activities occasionally included such things as birthday parties, but the essence of the service was sport coaching in the context of the care and protection of the pupils. The company accounted for VAT on its takings, then submitted a repayment claim for £85,000 on the basis that it qualified for exemption as providing welfare services in the capacity of a state-regulated entity.

The taxpayer argued that it was effectively regulated by OFSTED, in that it had to meet various OFSTED requirements or lose its contracts. However, there was no formal recognition or licensing of the after-school clubs by OFSTED – inspections would consider them, but only in the context of whether the school itself was meeting its obligation. The Tribunal did not consider that the concept of a state-regulated entity could be extended to cover such an organisation. Care and protection of the pupils was a condition for the way in which the company made its supplies, but it was not what the company supplied. The appeal was dismissed.

First-Tier Tribunal (TC03024): *Planet Sport (Holdings) Ltd*

2.4 Zero-rating

2.4.1 Disabled transport

A car dealer disputed a charge to output tax in relation to the sale of a Rolls Royce Phantom. It claimed that the sale should have qualified for zero-rating as a vehicle adapted for use by a wheelchair user. The VAT involved was £32,000.

There are separate provisions in Sch.8 Group 12 for zero-rating of:

- Item 2(f): The supply to a handicapped person for domestic or his personal use, or to a charity for making available to handicapped persons by sale or otherwise, for domestic or their personal use, of motor vehicles designed or substantially and permanently adapted for the carriage of a person in a wheelchair or on a stretcher;
- Item 2A: The supply of a qualifying motor vehicle to a handicapped person who usually uses a wheelchair, or who is usually carried on a stretcher, for domestic or his personal use.

A "qualifying motor vehicle" must be designed or adapted to enable the user to enter and drive or otherwise be carried in the vehicle, or to allow the wheelchair to be so carried.

The Tribunal reviewed the evidence on which the trader's claim was based. There were a number of unsatisfactory aspects, in particular the fact that the dealer had never met the recipient. Although sales through brokers might be normal for standard rated supplies of Rolls Royces, the special circumstances of zero-rated supplies meant that the trader should have asked more questions. HMRC had issued specific warnings about possible abuses of the system, and the trader had failed to act on them.

The trader argued that HMRC should seek out the broker which bought the Rolls Royce "on behalf of" the disabled person (and which therefore was in a position to benefit from possibly selling it on under a margin scheme). The Tribunal did not agree that HMRC were under any such obligation. It was for the trader claiming the benefit of zero-rating to demonstrate that it was entitled to the relief. The appeal was dismissed.

First-Tier Tribunal (TC03094): *John Martin Holdings Ltd*

2.4.2 Photo-books

A company sold "photo-books" at a range of attractions throughout the UK. These were books of pictures and information of the attraction, which were personalised for the customer by including photographs of them, usually digitally superimposed on background scenes from the location. The book also included a pocket which contained postcards featuring the customer, and a CD with generic photographs of the attraction. HMRC argued that the supplies were standard rated:

- they were photographic services rather than goods; or
- the book was incidental to the supply of photographs; or
- the book was not wholly or partly zero-rated within Sch.8 Group 3.

The Tribunal examined the facts in detail, including consideration of examples produced in relation to such locations as London Zoo and Edinburgh Castle, and the contracts between the company and the operators of the attractions. It concluded that the supply to the customer was purely one of goods: at the time the photographs were taken (typically while the customers were queuing for admission), there was no contract, and the company was acting speculatively. The photo-books would be made up and offered for sale near the exit, and the customer was free to buy or not. That was not similar to a supply of photographic services.

The Tribunal accepted evidence that suggested the book was the predominant supply, rather than the personalised photographs themselves. It was possible for customers to buy the photographs on their own, at a reduced price; very few people did so.

HMRC probably felt that their strongest argument was that the books were spiral bound. This was considered by the Tribunal in *Harrier LLC* to fail the test of what was a "book or booklet". However, this Tribunal disagreed. It noted that there were many examples – some of which were produced in evidence – of spiral bound documents that would be regarded in common parlance as a "book or booklet".

The appeal was allowed.

First-Tier Tribunal (TC03107): *Magic Memories Group (UK) Ltd*

2.4.3 Leaflets

A printing company produced a range of products, some of which were standard rated and some zero-rated. A dispute arose in 2008 following an inspection: an officer identified 100 products which he considered ought to be standard rated. After extended negotiation, only 5 remained in dispute for the Tribunal, and the only question was whether they were properly regarded as "leaflets".

The Tribunal considered that the ordinary English meaning of the word should be applied, and it meant the following:

(1) it is a single sheet, (or perhaps very few attached or folded sheets) of printed material containing words, with or without illustrations, which are designed to be read by the publisher's intended readership;

(2) its main purpose must be to impart information, advertising or propaganda to its readers;

(3) it is likely to be ephemeral – so as normally to have a limited useful life:

(4) but even if an item fulfilled the criteria above, it might fail to be a leaflet for the purposes of the zero-rating rules if it was so large that in reality it was best described as a poster and not as a leaflet, or so small that it was more likely to be described, not as a leaflet, but as a visiting or business card (which was the case with some of the items in GNP Booth), or made of stiff or laminated material (as in the MCC case) so that it was likely to have a more than limited life.

Applying these principles, the Tribunal concluded that 4 of the items were standard rated, being either too small (in one case) or too large and durable (in the other cases) to satisfy the above description. The other item was properly a leaflet.

The taxpayer also appealed on the grounds that it was "unfair" for HMRC to issue an assessment. According to the decision in *Technip Coflexip Offshore Ltd* (VTD 19298), HMRC had discretion to issue an assessment or to choose not to. In this case, many of the customers were fully taxable businesses that would have been able to recover VAT if it had been charged at the right time, but who would either not pay it now or would not be able to recover it so long after the event. Raising the assessment would therefore create a windfall for HMRC, so they ought not to penalise a small business which was already in difficulties by enforcing the law in a grey area.

The assessing officer did not believe that he had any discretion. Unless the matter was trivial, he had to raise an assessment. By contrast, the Tribunal considered that this confirmed a policy that discretion applied: trivial matters were to be ignored; this was consistent with the use of the word "may" in s.73 VATA 1994, as interpreted in a number of precedent cases on that provision and other similar assessing rules. The question was whether the discretion had been properly applied in this case.

The Tribunal decided that it did have jurisdiction the consider that question, in spite of the ruling by the UT in the *Noor* case that it could not exercise a judicial review function. This was a straightforward appeal against an assessment; if the assessment had not been reasonably raised, the appeal must succeed. However, the Tribunal was satisfied that the officer had not taken irrelevant information into account, nor ignored any relevant information, in deciding to issue the assessment. The effect on the survival of the business could not be a relevant consideration; nor was the officer required to consider whether HMRC would enjoy a "windfall". The assessment was a fair and honest attempt to calculate and collect the tax that was properly due. By contrast, in *Technip*, HMRC had not considered whether there was any discretion, and had not therefore taken

any possibly relevant factors into account in deciding to assess. Accordingly, the assessment should stand.

HMRC confirmed that they would allow claims to input tax by any customer to whom the company issued late standard rated invoices, even though the supply might have been made up to six years before, provided all the other conditions were satisfied.

The case was adjourned for the parties to agree the effect of the decision in relation to the one zero-rated item on the amounts assessed.

First-Tier Tribunal (TC03117): *Hollinger Print Ltd*

2.5 Lower rate

2.5.1 Energy saving materials

A business installed central heating systems in houses. It accounted for lower rated VAT on certain components, and an apportioned amount of labour charges, on the basis that they qualified to be treated as 'energy saving materials' under s.29A VATA 1994. The company carried out the calculation using a software program called 'the VAT optimiser'. After carrying out a VAT inspection, HMRC disputed this and raised an assessment for the difference between the lower rate and the standard rated VAT.

HMRC accepted that the components might qualify for the lower rate if installed on their own, but not if they were part of a larger installation. In their view, there would be a single supply of 'installation of a central heating system' which would not fall within the narrow definition of 'installation of energy-saving materials'.

The Tribunal had to consider whether there was a single supply or mixed supplies, and if there was a single supply, whether it could qualify for the lower rate. The chairman considered various arguments put forward on the basis of precedents, including *Card Protection Plan*, the French undertakers case and *Talacre Beach Caravan Sales*. He was satisfied that, on *CPP* principles, there was a single supply.

The taxpayer's counsel argued that the undertakers case and *Talacre* supported the idea that a single supply could be apportioned. The chairman did not agree that they were relevant: they dealt with situations in which the national law provided for a lower rate to be applied, and the dispute was about whether it was possible to apply mixed rates to a single supply. In the present case, he was satisfied that the national law did not provide for the lower rate: the single supply was not 'of a description' included in Sch.7A.

The appeal was dismissed.

First-Tier Tribunal (TC02895): *AN Checker Heating & Service Engineers*

2.6 Computational matters

Nothing to report

2.7 Discounts, rebates and gifts

2.7.1 Barter or discount?

A company supplied 'smart whiteboards' mainly to schools. Its normal way of arranging sales was ostensibly by part-exchange: the school would 'trade in' its near-obsolete projectors and other audio-visual equipment, and the company would supply its products. The question before the Tribunal was whether:

- the transaction was purely for cash, and the allowance for the 'trade-in' was in effect a discount that should not be subject to output tax; or
- the transaction was, as recorded, a part-exchange, in which the barter consideration had to be valued and subjected to output tax.

The Tribunal found it difficult to deal with these issues in the absence of anyone from the company attending the hearing; it was necessary to apply some complex principles of VAT law, as considered by the Court of Appeal in the *Littlewoods*, *Lex Services*, *Bugeja* and *Kuwait Petroleum* cases, all reported at [2001] EWCA Civ 1542. The Tribunal noted that certain facts came to light halfway through the hearing that nobody had appreciated in advance, and on which the Tribunal had not been addressed. The only evidence of facts supplied by the appellant was found in correspondence written by an individual employee who had since left the company.

HMRC have published guidelines indicating that when concessions are given for old equipment, without regard to model or condition, the reality is that the retailer is giving a discount on selling the new product. The Tribunal had to consider whether that was the situation in the present case. HMRC's conditions for this treatment are:

- a fixed allowance is offered;
- irrespective of the nature of the item traded in;
- for any item of a particular class without regard to make, age, model or condition;
- for any item of a particular class or make irrespective of age, model or condition;
- provided that no attempt is made to value the traded-in goods and there is no reason for the goods to be accepted other than for trade promotion (which would not apply where prior arrangements have been made for the traded-in goods to be reconditioned or sold)

HMRC apparently did not agree that this was what the company did because it did not offer fixed allowances. The correspondence suggested that the company varied the allowances based on the sales value of the

new equipment, rather than the resale value of the bartered equipment; the employee suggested that a higher trade-in value would be given for a higher-value sales contract. However, the Tribunal noted that this did not appear to be borne out by the table of contracts covered by the assessment under appeal. The largest of the seven deals attracted the second-lowest discount, while the second-smallest deal attracted the largest discount.

The traded-in items were serviced and put up for sale on eBay. The employee stated that a large amount remained unsold, but there were also contradictory assertions about how much the equipment was worth and how much had been sold.

The Tribunal admitted that it was difficult to find the facts without any direct evidence, but concluded that:

- the employee's explanation – that larger discounts were given for larger sales – was not borne out by the numbers;
- that it was more likely that the allowances were given after a consideration of the specification of the items traded in, but were then 'fixed' in that the condition of those items was not considered.

The point that came to light during the hearing was that many if not all the sales were on a 'managed service lease' basis. This meant that the goods were in fact sold to BNP Paribas, who leased them to the school. The trade in was, nevertheless, paid by cheque 'upfront' to the school, rather than being reflected in a reduced rent. As a result, the full price was charged on the sale to BNP Paribas. The Tribunal concluded that this ruled out the 'discount sale' analysis, at least for sales made by this route; it might have been possible to argue that *Elida Gibbs* applied, but the company had not advanced such an argument, and none of the paperwork suggested that this was a 'cashback' incentive. It appeared to be consideration for the supply of the old equipment by the school to the company.

The Tribunal concluded that the trade-in value had been agreed between the parties, as in *Bugeja* and *Lex Services*, and it was therefore not possible for the company to use instead a subjective value for what it had received. Its case appeared to be based on the proposition that the goods were in effect worthless, although this did not appear to be the case.

The Tribunal noted that no argument had been presented about whether the schools should have accounted for output tax on the sale of the old projectors. If they should, the company's appeal would not have been necessary, as it would have been entitled to input tax deduction. The treatment of the sales on eBay was also not considered.

First-Tier Tribunal (TC03030): *AV Concepts Ltd*

2.7.2 Manufacturers' rebates

The Value Added Tax (Amendment) (No. X) Regulations 2014 have been issued in draft form. HMRC have asked for comments by 31 January 2014. The regulations insert a new reg.38ZA in SI 1995/2518 to allow for a reduction in output tax where a supplier at the head of a supply chain (e.g. a manufacturer) pays a refund to someone further down the chain than its immediate customer (e.g. a final consumer) in respect of damaged or otherwise unsatisfactory goods.

This is the implementation of the *Elida Gibbs* decision in such cases, as announced earlier in 2013. Previously HMRC had regarded such payments as compensation, outside the scope of VAT. The new law is stated as due to take effect on 1 April 2014, although it presumably could be applied for earlier than that, as it is clear that the amendment is made to correct the implementation of art.90 PVD.

SI 2014/Draft

2.8 Compound and multiple

Nothing to report

2.9 Agency

2.9.1 Triangles again

In an article in *Taxation*, Neil Warren considers the VAT problems that arise from triangular transactions involving three parties. He discusses the importance both of contractual provisions identifying principals and agents, and also the perceptions of the various parties – with whom they believe they are dealing, what they are receiving for what consideration, and to whom they might complain if they are not satisfied with the supply.

Taxation, 5 December 2013

2.10 Second hand goods

Nothing to report

2.11 Charities and clubs

2.11.1 Charitable use

The *Wakefield College* case has returned to the FTT after being remitted by the UT early in 2012.

The college appealed against HMRC's refusal to agree to the issue of a zero-rating certificate in relation to the construction costs of a new campus building. The question was whether the buildings would be used for a "relevant charitable purpose", i.e. other than for a business purpose (as it was accepted that the appellant was a charity for the purpose of this rule).

The college argued that the nature of its funding, its mode of operation and its general characteristics were such that it was not in business at all

so far as the activities intended to take place at the new campus were concerned.

The First-Tier Tribunal considered the facts of the case in detail, and then applied a number of legal principles to those facts. First, everyone agreed that the provision of grant-funded education is not a business for VAT purposes. This is backed up by the CJEU decision in *Commission v Finland* (Case C-246/08), where charging contributions for legal aid based on a means test broke the link between consideration and service and was therefore not a business activity.

However, there were a significant number of students who paid fees for their education. 11% paid up to half the cost, and 16% paid the full amount. Applying the *Lord Fisher* tests to these activities, the FTT chairman found that the college was engaged in business. HMRC were therefore correct to refuse the zero-rating certificate, and the appeal was dismissed.

The college appealed to the Upper Tribunal, arguing that the FTT had failed to appreciate that business use which was de minimis could be ignored. The FTT chairman appeared to have believed that this was only an extra-statutory concession and he could not therefore allow the appeal on that ground; however, as set out in RCB 39/09, HMRC regard the de minimis business use of buildings by a charity as a matter of interpretation of the statutory word "solely". It was therefore open to the chairman to allow the appeal if he had concluded that the business use was no more than 5% of the total. He had not drawn such a conclusion because he did not think it necessary. The Upper Tribunal remitted the case to the FTT for consideration of this point.

The college also appealed on the basis that the chairman had not reached a conclusion on a particular part of its skeleton argument. HMRC contended that the chairman had considered it and dismissed it. The Upper Tribunal judge decided that it was not entirely clear whether the chairman had reached a final conclusion – he appeared to indicate that more information was necessary. As the case was being remitted anyway, the chairman could clarify that issue at the same time.

The college had also argued before the First-Tier Tribunal that it was at the relevant time "a body governed by public law" in the sense required by art.13 VAT Directive, and it was therefore not to be regarded as a taxable person. Although this point was rejected by the High Court in the *Cambridge University* case in 2009, the Tribunal was asked to rule on the issue so that the college could argue in an appeal that the earlier case was wrongly decided. In the event, it did not appeal this point to the Upper Tribunal, as it must have decided that such an appeal would not succeed.

The FTT chairman admitted to being puzzled by the remittance of the de minimis issue. If the statutory de minimis level was 5%, it appeared clear that this was exceeded in the present case. Also, the facts predated the HMRC Brief in which the 10% de minimis concession was replaced by the 5% statutory interpretation. However, the parties appeared to have agreed that a decision on a different unresolved issue would determine the appeal: if that was in favour of the appellants, HMRC would accept that the de minimis rule was satisfied.

This point was whether income from students who paid part, rather than all, of their fees should be treated as business or non-business. The judge said that he had originally considered the matter settled – he intended that the parties should go away and agree the result based on the principles he set out in his decision. However, as it had been remitted to him for determination, he heard further evidence and reconsidered the evidence from the first hearing.

The chairman reviewed the categories of student who paid some of their fees. The college relied on the decision in *Commission v Finland* (Case C-246/08), in which legally-aided individuals had to pay some lawyers' fees. The amount they paid was linked to their ability to pay, not to the services they received, so it was not consideration for the services. Although the criteria used to determine the payment of college fees were different and not related to income levels, the chairman was satisfied that they were analogous to the *Finland* case. Accordingly, this income should be classified as non-business. Although this was a decision of principle which did not formally determine the appeal, the chairman believed that the parties would now be able to agree the outcome between them, based on the application of the de minimis principle.

First-Tier Tribunal (TC03108): *Wakefield College*

2.11.2 No business

A company registered for VAT and reclaimed input tax. HMRC disallowed the claims and ruled that it should be deregistered. It argued that it was the 'trading arm' of a registered charity, Christ Apostolic Church. The director ('outgoing', because the company was being wound up) described its business as including the reinvestment of profits in community projects, rather than by making gift aid donations to its parent charity.

The director could not produce any clear evidence of transactions undertaken by the company itself. He claimed that certain documents had been destroyed in a fire 18 months before, but the Tribunal considered that this should have given him time to obtain copies. As the onus was on the appellant to disprove HMRC's position, and there was no evidence, the appeal was dismissed.

First-Tier Tribunal (TC02996): *Wosem Communities Development Ltd*

2.12 *Other supply problems*

2.12.1 Transfer of going concern?

A company intended to enter into the electronic banking business. After encountering some difficulties with business development, its assets and undertaking were sold to part of the Virgin Money group. The business was described in the sale agreements as including:

(a) The Goodwill

(b) The Equipment

(c) The benefit of Transferring Contracts

(d) The Business Intellectual Property Rights

(e) The Information

(f) The Know-how

(g) The Records

(h) The benefit of the Claims.

The company proceeded on the basis that this was a VAT-free transfer of a going concern. However, HMRC considered that any banking processing activity of the vendor had ceased by the date of the transfer; if it had a business at all, it was IT consultancy, and that was not the same activity as that which the purchaser would carry on. It was really buying an IT platform, not a processing business.

The Tribunal decision goes through the history of a long and complex litigation in detail. It seems that the issues took some time for each side to clarify. The appellant company argued that HMRC had made various errors of fact and law, but if they were right that the UK law should be applied in this way, then it contravened various EU legal principles and the underlying purpose of the TOGC provisions as set out by the CJEU in *Zita Modes*.

The Tribunal rejected this contention. It agreed with the slightly different HMRC line, adopted by the time of the hearing, that the business carried on by the vendor was still carried on by the purchaser, but the supplies made in the course of that business were made within a VAT group registration. They were therefore "disregarded" for VAT purposes. As the business had therefore effectively ceased after the transfer, there could not be a TOGC, and output tax of £900,000 was properly due.

First-Tier Tribunal (TC03119): *Intelligent Managed Services Ltd*

2.12.2 Fuel scale rate and partial exemption

HMRC have issued a Brief to remind partially exempt businesses that the concessionary treatment of road fuel scale charges will be withdrawn from 1 January 2014. This change was the subject of consultation in 2012, and a long lead-time was allowed for traders to consider the effect and their response.

The concession allowed for possible unfairness where road fuel was used for 'residual' purposes by a partially exempt business. Rather than having to account for output tax on full scale charges while only claiming a

proportion of the input tax, the business was allowed to account for output tax on the residual proportion of the normal scale charge.

The Brief suggests the following ‘fuel sector’ special method, but allows businesses to make their own suggestions, which will be considered in line with the normal procedures for partial exemption methods. In particular, any proposed method will be subject to the requirement for a declaration that the trader considers that it will give rise to a fair and reasonable result.

The suggested formula to calculate the recoverable input tax on road fuel is as follows:

VAT on fuel scale charges + ((VAT charged on fuel purchased in the period – VAT on fuel scale charges) x PE recovery rate)

For example;

VAT on scale charge due – £300.00

VAT incurred on road fuel – £630.00

PE recovery rate 40%

Calculation =

300 + ((630 – 300) x 40%) =

300 + (330 x 40%) =

300 + (132.00) = £432.00 input tax recovery.

The effect of the suggested formula is consistent with the concession that is being withdrawn.

R&C Brief 33/2013

2.12.3 Scale rates

The *Value Added Tax (Flat-rate Valuation of Supplies of Fuel for Private Use) Order 2013* has established the procedure by which HMRC will publish annually revised tables of car fuel scale rates. This will replace the former annual revision of s.56 and s.57 VATA 1994 by statutory instrument – those provisions will be repealed by FA 2014. The updated figures will, as before, apply from the first return commencing on or after 1 May each year. The statutory instrument also confirms the formula that will be used to determine the rates.

SI 2013/2911

2.12.4 Reverse charge continues

HMRC have confirmed that the UK will continue to apply the reverse charge for mobile telephones, computer chips and emissions allowances at least until the end of 2018, following entry into force in August 2013 of the EU directive introducing the Reverse Charge Mechanism. The new directive allows member states to introduce reverse charges without a derogation, in order to combat emerging risks of fraud and evasion. The UK’s existing rules, which were introduced in 2007 for mobile phones and computer chips, and in 2009 for emissions allowances, are compliant with the new directive and do not require any amendment.

Revenue & Customs Brief 36/2013

3. LAND AND PROPERTY

3.1 Exemption

3.1.1 Retirement homes

Companies within a VAT group built and sold retirement accommodation. Purchasers paid a premium for a lease, together with a sum of £500 or £1,000 for use of "communal fittings" – furniture in common areas such as a residents' lounge. The lease also provided for the payment of rent and an annual service charge. The question before the Tribunal was whether the supply at the time of the grant of the lease was wholly zero-rated, which would entitle the company to recover input tax on the purchase of the communal fixtures. The context was a *Fleming* claim going back to 1980.

HMRC's main argument was that the supply of the use of the furniture was exempt, rather than standard rated. This was on the basis of the *Talacre Beach Caravan Sales* decision: the company's supply was an interest in land, which was essentially exempt; to the extent that it was explicitly within Sch.8, it could be zero-rated; but to the extent that it was not (i.e. was not "residential accommodation"), it would revert to being exempt. The input tax on the cost of the communal fixtures was therefore used to make an exempt supply, and it could not be recovered.

The company argued that the effect of *Talacre* was the opposite: if there was a single supply, it could be apportioned to exclude from zero-rating anything which was explicitly excluded by the domestic legislation; but if the legislation was silent, the whole supply would have a single liability.

The Tribunal examined precedents on compound and multiple supplies (including, unusually, some that predated *CPP*, because this was a *Fleming* claim and the attitude of the courts before 1996 could be relevant), and concluded that the use of the furniture was ancillary to the purchase of the lease. There was a single supply. The Tribunal also agreed with the taxpayer that the effect of *Talacre* was only to require the separation of incidental elements if that was explicitly required by the legislation.

HMRC argued that the payment of a separate amount for the use of the furniture meant that *Talacre* applied from 1989 onwards, when the zero-rating of a lease of domestic accommodation was restricted to "the amount of the premium". The Tribunal considered what was meant by the word "premium", and concluded that it was a payment for the granting of a lease, rather than the rent that would be payable throughout the existence of the lease. Even though the parties had separated out the capital contribution towards the use of the furniture and called it something different, it was nevertheless a payment for the grant of the lease, and it should be treated in the same way as the premium.

HMRC put forward an alternative argument that the payment for the use of the furniture was taxable, so that the input tax would be allowed but matched by an output tax liability. This was based on a different interpretation of the *Talacre* decision, and an assertion that the scheme of VAT required that all supplies for consideration should be taxed. The Tribunal considered this argument briefly and rejected it: *Talacre*

concerned a single supply that could be taxed at different rates, not the separation of a single supply into two different supplies. The Tribunal had decided that the present supply was a single zero-rated supply, and there was no reason to separate out the furniture element.

First-Tier Tribunal (TC03104): *McCarthy & Stone (Developments) Ltd*

3.2 Option to tax

3.2.1 Election dispute

HMRC assessed an individual to £107,000 of output tax in relation to various supplies of interests in land over which, they asserted, the individual had exercised the option to tax. HMRC had received three separate notifications of an election to waive exemption. The taxpayer claimed that the documents held by HMRC were either forgeries or documents that had been sent to HMRC without his authority, and that he had never made an election.

The taxpayer was a panel beater and car repairer who had not had to register for VAT in respect of those activities. In about 2000, he acquired some land, hoping to develop some light industrial units to rent out and provide himself with a pension. He had no experience of such an activity. VAT of £12,250 was incurred on the purchase of the land. His accountants advised him to register for VAT, but no documentation about this advice was produced to the Tribunal. He was registered from September 2002.

The Tribunal noted three factors in the history of the case: firstly, there were considerable difficulties over the development, because the Welsh Development Agency realised that his ownership of this land affected its access to the main drains for some adjacent land, and an acrimonious dispute followed over the price at which this could be allowed. The second was that the individual had set up a company, apparently to appear more ‘credible’ when hiring equipment for the development activity, but which never did more than act as his agent. HMRC had never appreciated what its role in the activity was, and all expenditure incurred by it had been claimed on the individual’s tax return. Third, HMRC had erroneously deregistered the company in 2007, and then realised that in fact it was the individual who was the registered trader; his solicitors had written at that time to confirm that he should be registered, and also confirmed the waiver of exemption over the land, which had previously been notified in 2002 and 2006.

The Tribunal also noted that the taxpayer did not appear to have received a large part of the proceeds of the grants of long leases over the industrial units that had led to the VAT assessment. Some £400,000 was missing and could not be traced.

The Tribunal noted that the mere notification of an election was not conclusive proof that an election had been made, if the taxpayer could show that the notification did not reflect an actual decision to waive exemption. However, HMRC’s arguments were very convincing:

- it did make sense in the present case for the VAT exemption to be waived;

- the appellant's accountant had advised that registration was advisable, obviously with a view to the waiver of exemption and the recovery of input VAT;
- there was no evidence of miscommunication between the appellant and those submitting the notices to HMRC about the decision to opt;
- VAT was actually returned and paid in respect of the disposal of the first unit to be leased;
- every invoice to grantees of the 999-year leases was prepared on a VAT-inclusive basis, some of them being signed by the Appellant.

The Tribunal could only conclude that the option had been exercised, and that it was the fact that he had not received half the proceeds of sale that led the taxpayer to attempt to advance an argument for which there was so little support in the evidence. The Tribunal clearly had sympathy for his difficulties, and requested that HMRC give him time to pay.

First-Tier Tribunal (TC02998): *Michael Brinkard*

3.3 Developers and builders

3.3.1 Swimming pool

An individual appealed against a decision that the builders constructing his new house had to charge standard rated VAT on the construction of a swimming pool and associated facilities. He argued that it was part of the house, and therefore qualified for zero rating.

The Tribunal examined the construction of the house, which was unusual. It was built into the side of a hill, and the outdoor swimming pool was certainly part of the overall design of the structure. However, the Tribunal did not accept that it was such an integral part of the dwelling that its construction could be regarded as "in the course of construction of a dwelling". The point at issue was not whether the materials used in the swimming pool were "building materials", but whether it was part of the dwelling in the same way that a kitchen or bedroom would be. HMRC accepted that an indoor swimming pool would be, but this was not.

The appeal was allowed only to the extent that a heat pump, which was housed in an outbuilding by the pool and which served the house, should qualify as part of the construction of the dwelling.

First-Tier Tribunal (TC03017): *Terry McCann*

3.3.2 Annexe or separate building?

The Tribunal had to consider an argument about whether a new art and design building was a mere extension, excluded from zero rating by Note 16 Group 5 Sch.8 VATA 1994, or an annexe that was capable of functioning independently of any other building. As it was agreed to have been constructed for a relevant charitable purpose, it would then qualify for zero rating.

HMRC pointed to a number of factors which suggested a close connection with the main building. These included the fact that it replaced a previous teaching block which occupied the same footprint, and that it was used for

the same overall purpose as the other buildings – education. The Tribunal was most convinced, however, by the fact that the heating system was connected to boilers in the main block – a building of this type could not function at all without heating, so it could not be said to function independently. The appeal was therefore dismissed.

First-Tier Tribunal (TC02796): *Chelmsford College*

The same point of law was discussed in another case and the same conclusion followed. A new building was constructed with a physical connection to an old building, which was refurbished as part of the same project. The Tribunal examined the facts and concluded that the new structure was either an extension of the refurbished building; if that primary conclusion was wrong, it was an annexe which was not capable of independent operation. In either case, the appeal failed.

The Tribunal examined the design and operation of the buildings in detail, including making a site visit. The new structure was larger than the existing building, which meant that it was not an "enlargement" of it; but its functioning was integrated with the existing building, making it an "extension", and the sharing of services such as hot and cold water, IT and security, meant that the two parts could not function independently.

First-Tier Tribunal (TC03042): *Leyton Sixth Form College*

3.4 Input tax claims on land

3.4.1 DIY

An individual claimed repayment of VAT on four invoices issued by a plumbing firm. HMRC refused the claim on the basis that the invoices should have been zero-rated, and the overcharging of VAT was something that had to be resolved between the customer and the supplier. The individual appealed to the Tribunal, arguing that the invoices were in respect of supply of goods, and they were therefore properly VATable and subject to the DIY scheme.

The Tribunal reviewed the four invoices, as well as a fifth which had not been specifically referred to in HMRC's decision. Each of the four carried a clear description of what it was for, and there was no convincing evidence to displace it; the Tribunal concluded that two of them were for 'supply and fit' and should have been zero-rated, while the other two were for 'supply only'. The appeal was allowed to that extent.

The fifth invoice was in respect of a deposit towards the 'estimated cost of works'. Although this description was not clear, it was more apt to represent services with incidental goods than it was to represent goods alone. This too should have been zero-rated.

First-Tier Tribunal (TC02952): *Stephen Singh Dhillo*

3.5 Other land problems

Nothing to report

4. INTERNATIONAL SUPPLIES

4.1 E-commerce

HMRC have reminded traders registered under the special scheme for non-EU businesses that Italy raised its standard VAT rate from 21% to 22% from 1 October 2013.

VAT Information Sheets 12/2013, 14/2013

HMRC have also published the usual table of exchange rates for special scheme traders for the period ending September 2013.

VAT Information Sheet 13/2013

4.2 Where is a supply of services?

4.2.1 Rule changes

In preparation for the changes to the place of supply rules for broadcasting and related services that will take effect on 1 January 2015, a new implementing regulation has been introduced to apply from that date (with some specific points only applying two years later). The regulation makes some changes to the existing 2011 implementing regulation (282/2011), setting out the details of how the new place of supply rules will operate.

The details of the new regulation will be covered in the update nearer the time that they enter into force. The areas of 282/2011 affected are:

- new article 6a defining ‘telecommunications services’ for the purposes of art.24(2) PVD;
- new article 6b defining ‘broadcasting services’;
- amendments to article 7;
- new article 9a to assist in determining the capacity (agent or principal) of a person supplying electronically supplied services through a telecommunications network;
- new articles 13a on place of establishment and 13b on ‘immovable property’;
- amendment to article 18;
- replacement of article 24 on determining where a customer belongs;
- new articles 24a, 24b and 24c setting out presumptions for determining where the customer belongs, and 24d, 24e and 24f on the rebuttal of those presumptions;
- new articles 31a, 31b and 31c on services connected to immovable property;
- new article 33a on intermediaries issuing tickets for events;
- addition of new points (f) to (i) in Annex I;

- a new article dealing specifically with transitional rules for supply of telecommunications services across the EU boundary on either side of the change of rules on 1 January 2015.

The provisions that only apply from January 2017 are 13b, 31a and 31b.

Council Implementing Regulation 1042/2013

HMRC have also published reminders to traders about the changes (covering also the 'mini-one-stop-shop' – see further section 4.4.1 below).

www.hmrc.gov.uk/posmoss/index.htm

4.3 International supplies of goods

4.3.1 Alleged release to the home market

HMRC assessed a warehouse-keeper to excise duty and VAT on the basis that duty-suspended whisky and vodka had been 'slaughtered' – that is, released to the home market – rather than being despatched to a customer in Spain as the documents showed. Suspicions were initially aroused by the records showing that the same lorry had collected goods twice for delivery to Spain within too short a period. A further investigation revealed that the Spanish warehouse to which they were supposed to have been delivered had never received them, and the supposed customer for which they were to be held in Spain did not exist.

The Tribunal considered that the crucial question for the appellant was to show that the goods had left the UK – if they had reached Calais, the assessments would not be valid, even if they did not arrive in Cadiz, because the diversion would not have taken place in the UK.

There were a number of problems in HMRC's handling of the case – they had initially failed to identify the correct basis of assessment, and then raised an assessment of which no copy could be traced – but the Tribunal decided that these were not fatal to the assessment. On the main factual issue, the Tribunal concluded that the appellant had not demonstrated that, on the balance of probabilities, the goods had left the UK; and a number of legal arguments put forward by the appellant were rejected. The assessments were confirmed.

First-Tier Tribunal (TC02945): *TDG (UK) Ltd*

4.3.2 Excise suspension

A similar dispute arose in relation to alcohol duties on three consignments which were supposed to have been despatched to Calais but which never arrived. As in the above case, the appellant argued that inconsistencies in the Accompanying Administrative Documents (AADs) arose because trailers might be exchanged from one tractor to another for a variety of reasons. The Tribunal accepted that this was so, but it remained for the appellant to provide sufficient evidence to show that, on a balance of probabilities, the goods had left the UK. They had failed to do this.

First-Tier Tribunal (TC02990): *A & R Haulage Ltd*

4.3.3 Excise assessment

The Upper Tribunal has dismissed a warehousekeeper's appeal against the FTT's confirmation of an assessment for excise duty on spirits which went missing from a suspension regime. The goods had been released by the warehouse for despatch to other warehouses in Spain and Estonia; the documentation appeared to be in order, but it was discovered later that the goods had never arrived. The FTT concluded that the warehousekeeper had acted properly, carefully, reasonably and in good faith throughout; the appeal was based on the argument that it was unfair to impose liability on someone who was blameless, in respect of a fraud that took place after the goods had left their control.

The Upper Tribunal notes that "*That finding* [that the warehousekeeper was blameless] *was challenged by HMRC, though refreshingly without any marked enthusiasm, on the ground that it represented a view of the facts that could not reasonably be entertained.*" HMRC's main argument was that the law imposed strict liability on the warehousekeeper in such circumstances.

The Tribunal considered a number of precedent cases, and also the relevance of the EU legal principles of proportionality and legal certainty. The judge followed judgments of the House of Lords in *Greenalls Management Ltd* [2005]: a warehousekeeper operated in a business that was known to be at risk of fraud, and had the means to protect itself from those risks – expert advice, insurance, secured guarantees or other arrangements. The role of a customs warehouskeeper "carries heavy responsibilities and, no doubt, commensurate financial advantages."

The judge was satisfied that the UK's regulations, and the action taken by HMRC in this case, were wholly justified under the EU Directives on the matter. They did not contravene EU legal principles, and there was no need for a reference to the CJEU.

Upper Tribunal: *Butlers Ship Stores Ltd v HMRC*

4.3.4 Importer's debt for VAT

A company arranged the international transportation of construction and agricultural machinery. It was involved in 17 transactions on which it claimed onward supply relief, on the grounds that the goods were imported from the USA but despatched on to the Republic of Ireland; HMRC issued post-clearance demands for £707,718 and £31,095, together with a non-compliance penalty of £250.

The problem was that an agent could not claim OSR – it is a relief for principals. The penalty was for entering the wrong code on the import declarations. The appeal was based on the argument that the UK has not correctly implemented the PVD: either art.143 and art.138, taken together, should exempt these transactions for an importing agent by direct effect; or, if the UK had some discretion in the implementation, its OSR regime was not proportionate, created a fiscal distortion and contravened the principle of effectiveness.

HMRC relied on four previous decisions of the FTT: in *Radford Racing Limited*, *Big Misters Shipping Co*, *Brooklands International Freight Services Ltd* and *Finger Foods Ltd*, four differently constituted Tribunals had all concluded that the UK law should operate in the same way. This

Tribunal agreed: the UK law used the same conditions for the exemption as the Directive – the company had not "supplied" the goods, so it did not qualify for relief.

First-Tier Tribunal (TC03032): *Franck and Tobiesen (UK) Ltd*

4.3.5 Removal from VIES

A customer was removed from the VIES system, suggesting that it had become a 'missing trader'. However, the removal was only registered after the goods in a disputed transaction had been despatched. If the supplier had checked VIES at the right time, it appears that the transaction would have appeared valid. The supplier did not check VIES, and therefore arguably failed to carry out the appropriate due diligence – but, according to its defence, it would have been given assurance to carry out the transaction if it had asked the question anyway.

The Bulgarian court has referred the following questions to the CJEU:

Is the requirement giving entitlement to tax exemption under art.138(1) PVD fulfilled and is there no exception under the second paragraph of art.139(1) in circumstances such as those in the main proceedings in which it was established that the absence of the characteristic of a 'person registered under the ZDDS' in respect of the acquirer of the goods was indicated in the Union database after the actual supply, but the applicant claims that it acted with due diligence by obtaining information in this system which is not documented? The late recording of the characteristic of a 'person registered under the ZDDS' emerges from hard copies/information of the tax authorities.

Are the principles of fiscal neutrality, proportionality and protection of legitimate expectations violated by administrative practice and case-law according to which it is for the vendor – the consignor under the transport contract – to determine the authenticity of the acquirer's signature and to establish whether it comes from a person representing the company (the acquirer), one of its employees in a corresponding position or an authorised person?

In a case such as the present does art.138(1) PVD have direct effect, and can the national court directly apply the provision?

CJEU (Reference) (Case C-492/13): *Traum' EOOD v Direktor na Direktsia 'Obzhalvane i danachno osiguritelna praktika' – grad Varna pri Tsentralno Upravlenie na Natsionalnata Agentsia za Prihodite*

4.3.6 Export time limit

Hungarian law provided that zero-rating (exemption) of export sales was lost, without the possibility of remediation, if the goods did not leave the EU within 90 days of the time of supply. A company appealed against a ruling under this law, arguing that it was entitled to exemption on the facts of its case: it had fulfilled the requirements of the Directive.

The CJEU ruled that it was reasonable in principle for a member state to impose a time limit for fulfilling the conditions for exemption. However, it was not proportional to the objectives of preventing fraud and evasion to deny exemption merely on the basis of failing to meet that time limit; if a taxpayer could demonstrate after the deadline that the conditions had

been fulfilled in the end, the proportionate measure would be to require payment of the tax, but then to refund it.

CJEU (C-563/12): *BDV Hungary Trading Kft. (in voluntary liquidation) v Nemzeti Adó- és Vámhivatal Közép-magyarországi Regionális Adó Főigazgatósága*

It is possible that UK law and practice may need to be reviewed following this decision, as Notice 703 para.3.5 appears to impose a very similar requirement to the Hungarian law that was the subject of this case. However, para.11.3 appears to allow later correction if evidence of export is obtained; it is not absolutely clear that this overrides the 3 month time limit, but it is implied by the context. The only condition is that the goods must not have been used in the EU between the supply and the movement.

4.3.7 Intrastats

The threshold at or below which a registered business in the UK is exempt from providing Intrastat arrivals information increased with effect from 1 January 2014, from £600,000 to £1.2m. The threshold above which an additional piece of information known as 'delivery terms' must be provided in the supplementary declaration has also increased from £16m to £24m.

The threshold for despatch Intrastats remains the same at £250,000.

SI 2013/3034; Revenue & Customs Brief 38/2013

4.3.8 Notice update

HMRC have published a revised version of their Notice *Export of goods from the United Kingdom*. The main technical changes are to revise the definition of 'overseas person' and incorporate the new rules on indirect exports. Other changes update the guidance on the appeals process, the make-up of the EU, and the standard VAT rate (the previous version was dated August 2006).

Notice 703

4.4 European rules

4.4.1 Mini-one stop shop

HMRC have issued a release reminding businesses about the changes to the place of supply rules for broadcasting and telecommunications services from 1 January 2015, and pointing out that there will be a new option to make a single online return covering such supplies made to any EU member state. Registration for that service will open in October 2014.

The procedure will be similar to the existing special scheme for e-traders, in that a single return will be made to the authorities in the state of registration (and main establishment), and the authorities will pass the appropriate sections and related payments to the authorities in the other member states.

http://www.hmrc.gov.uk/budget2013/vat-place-supply-rules.pdf

The Commission has also published guidelines on how the new rules will work. It explains the background to the new system as follows:

The mini One Stop Shop comes into force on 1 January 2015 and will allow taxable persons supplying telecommunication services, television and radio broadcasting services and electronically supplied services to non-taxable persons in Member States in which they do not have an establishment to account for the VAT due on those supplies via a web-portal in the Member State in which they are identified. This scheme is optional, and is a simplification measure following the change to the VAT place of supply rules, in that the supply takes place in the Member State of the customer, and not the Member State of the supplier. This scheme allows these taxable persons to avoid registering in each Member State of consumption. The mini One Stop Shop mirrors the scheme in place until 2015 for supplies of electronically supplied services to non-taxable persons by suppliers not established in the European Union.

In practice, under the scheme, a taxable person which is registered for the mini One Stop Shop in a Member State (the Member State of Identification) electronically submits quarterly mini One Stop Shop VAT returns detailing supplies of telecommunications, broadcasting and electronically supplied services to non-taxable persons in other Member States (the Member State(s) of consumption), along with the VAT due. These returns, along with the VAT paid, are then transmitted by the Member State of Identification to the corresponding Member States of consumption via a secure communications network.

The mini One Stop Shop VAT returns are additional to the VAT returns a taxable person renders to its Member State under its domestic VAT obligations.

The mini One Stop Shop is available to taxable persons which are established in the EU (the Union scheme), as well as taxable persons which are not established within the EU (the non-Union scheme). Without the mini One Stop Shop, the supplier would be required to register in each Member State in which he supplies services to his customers. The mini One Stop Shop scheme is optional for taxable persons.

However, in choosing to use the mini One Stop Shop the taxable person must apply the scheme in all relevant Member States. It is not an optional scheme on an individual Member State basis.

ec.europa.eu/taxation_customs/resources/documents/taxation/vat/how_vat_works/telecom/one-stop-shop-guidelines_en.pdf

4.4.2 Review of exemptions

The European Commission is conducting a review of the VAT legislation on public bodies and tax exemptions in the public interest. A technical consultation paper is open for comment until 14 February 2014. The introduction explains the issues as follows:

The VAT treatment of public bodies and the exemptions in the public interest has raised a number of concerns and criticisms over the years.

Whilst, in general, nearly all types of economic activity fall within the scope of VAT and are generally taxed, certain supplies provided by public bodies are considered as non-taxable for VAT purposes even if they

qualify as an economic activity according to general VAT principles. Some other activities carried out in the public interest are exempted from VAT. These rules date from the 1970s when many of these services were only provided by public bodies. It is questionable whether these rules are still appropriate. Increasing privatisation and the opening up (or deregulation) of activities which were traditionally the exclusive reserve of the public sector have led to distortions of competition between public and private operators engaged in similar activities. Moreover, public-private partnerships which are increasingly used for a range of activities (e. g. infrastructure projects) were not envisaged when the legislation was drawn up.

The introduction notes that there are three possible treatments for the activities of public sector bodies (taxed, exempt, outside the scope), and also that in some Member States such bodies are compensated in whole or in part for the VAT they incur on their expenditure in relation to non-taxed activities (e.g. by means of s.33 VATA 1994 in the UK). The document identifies the main problems with the present situation as:

- fiscal distortion where the same activities are carried on by public and private bodies;
- complexity and lack of harmonisation.

Some possible solutions are outlined and specific questions put forward for comment.

ec.europa.eu/taxation_customs/common/consultations/tax/2013_vat_public_bodies_en.htm

4.4.3 Taxing the Digital Economy

The European Commission has adopted a Decision to create a High Level Expert Group on Taxation of the Digital Economy. The task of this group will be to examine the best ways of taxing the digital economy in the EU, weighing up both the benefits and risks of various approaches. Its focus will be on identifying the key problems with digital taxation from an EU perspective, and presenting a range of possible solutions. The Commission will then develop any necessary EU initiatives to improve the tax framework for the digital sector in Europe.

http://europa.eu/rapid/press-release_IP-13-983_en.htm?locale=en

The Organisation for Economic Cooperation and Development is also seeking comments on the same subject. The OECD hopes to issue a discussion draft in March 2014 based on analysis of responses. The issues to be examined include, but are not limited to, the ability of a company to have a significant digital presence in the economy of another country without being liable to taxation due to the lack of nexus under current international rules, the attribution of value created from the generation of marketable location-relevant data through the use of digital products and services, the characterisation of income derived from new business models, the application of related source rules, and how to ensure the effective collection of VAT/GST with respect to the cross-border supply of digital goods and services.

http://europa.eu/rapid/press-release_IP-13-983_en.htm?locale=en

4.4.4 Interest on late repayments

The CJEU has considered the case of a Romanian company which was denied a repayment of VAT claimed by local administrative measures which were declared unlawful (offsetting the amounts reclaimed against disputed assessments which were later cancelled). The company claimed default interest in relation to the late repayment, but Romanian law did not allow for this.

The court ruled that this too was not in accordance with EU law. The basis of its decision is that traders are to be wholly relieved of the burden of VAT on their expenditure: this implies that the VAT must be repaid to them within a reasonable period, and if it is not, they must be compensated for the delay by the payment of interest.

The tax authority argued that the law only provided for interest when there is a delay in processing and approving claims. This claim had been dealt with in good time, but the actual repayment had been delayed because of the offset against other liabilities. The CJEU ruled that the reason for the delay made no difference to the taxpayer or to the result: compensation was due.

CJEU (Case C-431/12): *Agentia Nationala de Administrare Fisacala v SC Rafinaria Steaua Romana SA*

4.4.5 Disbursement?

In Portugal, television advertising is subject to a 'screening tax' which is charged to advertisers but paid to the state by television producers. The question is then whether it is included in the taxable amount for the services that the producers provide to the advertisers, or is a disbursement 'paid in the name and on behalf of' the purchaser, and excluded under art.78 PVD.

Advocate-General Cruz Villalon gave an opinion that the question depends on whether the taxpayer is the advertiser or the producer. This is expressed as depending on whether the fiscal relationship of a public law character is between the fiscal substitute (the producer) and the state, or whether it is between the advertiser and the state. This might depend, for example, on whether the state can claim the tax directly from the advertiser in certain circumstances.

It was not possible to determine categorically what the correct relationship was on the basis of the information provided. However, it appeared more likely that the producer was liable for the tax. It was charged on the dissemination of the advertisement, which was something the producer did for consideration paid by the advertiser. The A-G recommended that the court should give general guidance on the interpretation of the expression 'in the name and on behalf of' in the Directive.

The full court looked at the problem differently. Under art.78 PVD, the taxable amount includes 'taxes, duties, levies and charges, excluding the VAT itself'; however, art.79 excludes 'amounts received by a taxable person from the customer, as repayment of expenditure incurred in the name and on behalf of the customer, and entered in his books in a suspense account'. The question of whether the screening tax fell within the first or the second depended on whether it has a direct link with the VATable supply. It did so, because the chargeable event for both taxes

was the same: the screening of the advertisement, which triggered the screening tax and constituted the supply for VAT.

The fact that the producer, rather than the advertiser, paid the tax over to the authorities did not make it a disbursement. Even though it did not represent any value added by the producer, it was within art.78.

CJEU (C-618/11, C-637/11 and C-659/11): *TVI Televisão Independente SA v Fazenda Pública*

4.4.6 Consideration VAT-inclusive

Two individuals sold several plots of land without accounting for VAT, because they believed that they were acting as non-taxable persons. The tax authority ruled that output tax was due, and assessed them for the standard rate on the amounts received, plus default interest. They appealed, arguing that the VAT should be calculated by treating the amounts received as VAT-inclusive, because the purchasers could not recover VAT and the sellers could not legally force them to pay VAT in addition to the price already agreed by contract.

It would be for the national court to determine whether it was indeed impossible for the sellers to recover the VAT from the purchasers; but, in principle, the CJEU agreed with the appellants. Articles 73 and 78 PVD must be interpreted as meaning that, when the price of a good has been established by the parties without any reference to VAT and the supplier of that good is the taxable person for the VAT owing on the taxed transaction, in a case where the supplier is not able to recover from the purchaser the VAT claimed by the tax authorities, the price agreed must be regarded as already including the VAT.

CJEU (Case C-249/12): *Corina-Hrisi Tulica v Agentia Nationala de Administrare Fiscala - Directia Generala de Solutionare a Contestatiilor and Calin Ion Plavosin v Directia Generala a Finantelor Publice Timis - Serviciul Solutionare Contestatii, Activitatea de Inspectie Fiscala – Serviciul de Inspectie Fiscala Timis*

4.4.7 Legality of tax

Advocate-General Wahl has given an opinion that a Spanish hydrocarbon levy is contrary to EU law, because it contravenes the conditions of the Excise Duty Directive for such ‘non-harmonised taxes’. Although the case does not directly concern VAT, it is interesting for a consideration of the relationship between EU-wide duties and local taxes, and the way in which EU law may restrict a Member State’s ability to raise its own levies.

CJEU (A-G) (Case C-82/12): *Transportes Jordi Besora, S.L. v Tribunal Económico Administrativo Regional de Cataluña (TEARC) and Generalitat de Catalunya*

4.4.8 E-books

The Commission has applied to the CJEU for a declaration that by applying a VAT rate of 3% (Luxembourg) and 7% then 5.5% (France) to digital or electronic books, those countries failed to fulfil their obligations under arts.96 – 99, 110 and 114 PVD, read in conjunction with Annexes II and III and the implementing regulation.

CJEU (Application) (Case C-479/13): *European Commission v French Republic*; (Case C-502/13): *European Commission v Grand-Duchy of Luxembourg*

4.4.9 Non-payment questions

The Hungarian court has referred questions about the extent to which Member States must implement art.90 PVD on non-payment of consideration:

Is [the Hungarian law] consistent with art.90(1) PVD; does the national VAT law cover all the cases of possible reduction of the taxable amount provided for in the VAT Directive?

If the answer to the first question is no, is the taxable person entitled, in the absence of national legislation, to reduce the taxable amount, on the basis of the principles of tax neutrality and proportionality, and in the light of art.90(1) PVD, where it receives no consideration on completion of a transaction?

If art.90(1) has direct effect, under what circumstances can [the taxable person] reduce the taxable amount? Is it sufficient to issue an amending invoice and send it to the purchaser or is it necessary, in addition, to demonstrate that, in fact, property in or possession of the goods has been recovered?

If the answer to the third question is no, is it obligatory under Community law to compensate the taxable person for the damage arising from the fact that the Member State did not fulfil its obligations as to harmonisation and, as a result, it was not possible for the taxable person to reduce its taxable amount?

May art.90(2) be interpreted as meaning that, in the case of total or partial non-payment, the Member States have the possibility of not applying a reduction in the taxable amount? If so, is an express prohibition in the Member State's legislation necessary or does the absence of any rule have the same legal effect?

CJEU (Reference) (Case C-337/13): *Almos Agrárkülkereskedelmi Kft. v Nemzeti Adó- és Vámhivatal Észak-alföldi Regionális Adó Főigazgatósága*

4.4.10 Paying agent

Polish law provides that in certain circumstances a 'paying agent' is liable for payment of VAT on behalf of someone else. The context of a case referred to the CJEU is a court officer appointed to make a compulsory sale of immovable property on behalf of a taxable debtor: the enforcement officer is liable to collect and pay over VAT on the sale. The Polish court has referred questions about the legality of the Polish rules in this area, having regard in particular to the legal and civil sanctions that may be

imposed on the court officer for failures, and the fact that the officer cannot practically deduct input tax that may be related to the output tax.

CJEU (Reference) (Case C-499/13): *Marian Macikowski – acting as court enforcement officer for Section I at the Sąd Rejonowy w Chojnicach v Dyrektor Izby Skarbowej w Gdańsku*

4.4.11 Capital goods scheme rules

The Polish court has referred questions to the CJEU about the detailed operation of the capital goods scheme. Where a capital item was purchased for exempt use, and is later used for purposes which confer a right of deduction, the Polish law (and UK law) requires the benefit of the input tax deduction to be spread over the remainder of the adjustment period. The appellant in the case wants to have the whole benefit of the deduction at the time of the change of use.

CJEU (Reference) (Case C-500/13): *Gmina Międzyzdroje v Minister Finansów*

4.5 Eighth Directive reclaims

Nothing to report

5. INPUTS

5.1 Economic activity

Nothing to report

5.2 Who receives the supply?

5.2.1 Sole trader and company

A chartered surveyor operated as a sole trader, registered for VAT, and also owned a company which provided related services. A dispute arose over the sole trade's deduction of input tax on three invoices which were made out in the name of the company. The trader argued that the suppliers had made mistakes, and the supplies had been made to him in the sole trader capacity. HMRC also disputed whether there was evidence that the supplies had been paid for; as the sole trade used cash accounting, this would deny deduction; and one of the suppliers had omitted its VAT number from its invoices (which otherwise contained all the required details for a VAT invoice).

The Tribunal judge noted that HMRC's objections appeared to be based on the technicalities of the law: for example, the cash accounting regulations require "the invoice" to be receipted by the supplier, and HMRC were unwilling to accept alternative evidence included in letters from the supplier. The judge was satisfied that the underlying facts were as represented by the taxpayer, and there was ample evidence for them: the supplies were made to the sole trade, the suppliers were registered, the input tax had not been claimed by anyone else, and the supplies had been paid for. The appeal was allowed.

First-Tier Tribunal (TC03074): *Michael Savva t/a Savva & Co Associates, Chartered Surveyors*

5.3 Partial exemption

5.3.1 Adjustment of VAT previously deducted

The CJEU has considered the rules for the option to tax and subsequent adjustments of input tax deduction in the Netherlands. Although the rules are not the same as those in the UK, there may be some implications for the UK's capital goods scheme.

In the Netherlands at the relevant time, there was an option to tax land and buildings, but it was dependent on the purchaser/lessee making a declaration that the building would be used for purposes that carry a right to deduct all or virtually all related input tax. If this declaration could not be made, the option was not applicable, and the transaction was therefore exempt. The blocking of input tax was therefore transferred to the supplier of the exempt building, rather than the user.

In the Netherlands, the liability for the VAT on such a transaction was transferred to the purchaser. This specific 'reverse charge mechanism' was authorised under the 6th Directive by Council Decision 88/498/EEC as an authorised derogation from the normal rules. As a result, where the option to tax is validly made:

- the supplier of the building can deduct all related input tax, but accounts for no output tax;
- the purchaser/lessee makes netting entries on the VAT return, and does not have to pay any VAT to the authorities.

The derogation was cancelled with effect from 1 January 2008.

In the case in dispute, there were two successive transactions:

- taxpayer A sold the building to taxpayer B, opting for taxation – A recovered input tax in relation to the building, and B netted off the entries on the tax return;
- some years later, in January 2000, taxpayer B sold the building to taxpayer C, the appellant in the case – C made the declaration, so B opted to tax, justifying the declaration made to taxpayer A, and taxpayer C made netting entries on the tax return;
- taxpayer C then let the building in an exempt transaction in April 2000, and sold it in another exempt transaction in July 2000.

The Netherlands authorities decided that taxpayer C's declaration had been invalid. The result of this would be to invalidate taxpayer B's declaration as well, at least in part, because taxpayer B had not made a taxable supply to C. However, it appeared that B was fully justified in making the declaration at the time it was originally made.

In accordance with the Netherlands law, the authority raised assessments on C, the person who had received the supply on which the declaration should not have been made. It appears that the effect of the assessment was to claw back some of the input tax that had originally been claimed by B in respect of its acquisition – the capital goods scheme adjustment that would have been made had B made an exempt supply after several years of taxable use.

C objected to the assessment, and the following question was referred to the CJEU:

Does the Sixth Directive allow, in the event that the VAT initially deducted in accordance with Article 20 of that directive is adjusted in such a way that the amount of the deduction must be reimbursed in full or in part, that amount to be charged to a person [i.e. C] *other than the taxable person who applied the deduction in the past* [i.e. B]*, in particular – [as under Netherlands law] – to a person to whom a property has been supplied* [i.e. C] *by that taxable person* [i.e. B]*?*

The CJEU commented that there are no express provisions in the Directive concerning the person who shall be liable to pay an adjustment of input tax deduction. However, that did not imply that Member States were free to choose which person should pay it; it was a 'substantive rule' rather than a 'detail' or 'procedure' within the rules.

The purpose of the rules on adjustment of deduction is to achieve a deduction which is fairer and more precisely related to the extent of taxable use by a person. It therefore made sense for the adjustment of the deduction to be imposed on the person who had enjoyed the initial deduction.

The fact that the Netherlands was authorised to impose the liability for output tax on an opted transaction on someone other than the supplier was not relevant. That was a specific and limited derogation which had no wider application than its explicit scope – the output tax on the supply itself.

The Netherlands authorities argued that C obtained an unjustified advantage if it could not be made liable for the adjustment. The court disagreed: the proper treatment, according to the way the Netherlands had implemented the option to tax, would have been for the purchase in January 2000 to have been exempt. If that had been known at the time, C would not have been considered to be liable for a capital goods scheme adjustment – the adjustment would have been in respect of B's purchase some years before, which was a transaction in which C had no part.

The court's answer was that only the person who originally applied a deduction can be made liable for the adjustment of that deduction.

CJEU (Case C-622/11): *Staatssecretaris van Financiën v Pactor Vastgoed BV*

5.3.2 Apportionment

A trader owned two properties which he used for retail and wholesale grocery sales. They comprised adjacent terraced houses with shops downstairs and living accommodation upstairs. In 2006 and 2007, he carried out renovation of the premises and let out some of the property for business and residential occupation. He claimed all the input tax on the repairs and improvements. This was discovered during a control visit in 2009, when HMRC raised an assessment for £6,000 in respect of input tax incurred in making exempt supplies.

The appellant's main ground of appeal appears to have been a request for discretion in view of his difficult personal circumstances – his business was small and struggling, and at the time of the renovation his wife had been seriously ill. The Tribunal observed that it did not have any such discretion; HMRC appeared to have used some discretion in his favour in dropping a misdeclaration penalty that had originally been assessed. The appeal had to be dismissed.

The decision does not record the detailed figures used in the calculation of the assessments. The figure of £6,000 is below the annual de minimis threshold for partially exempt input tax; the only figure given in the decision, apart from the assessment itself, is the rent of £1,000 received from the business tenant. If £6,000 was less than half the total input tax, it should have been recoverable – as the trade involved the sale of beer and wine, there ought to have been a reasonable amount of input tax on that. However, it may not have been enough to bring the de minimis limits into play.

First-Tier Tribunal (TC03036): *Zyna Ltd*

5.3.3 Attribution

A bingo hall made promotional gifts to customers, below the threshold at which these would be counted as a taxable output. It regarded the cost of the gifts as attributable entirely to taxable supplies (door entry fees); HMRC ruled that they were residual, with the input tax recoverable only to the extent of taxable supplies of the whole business.

The Tribunal considered that there was a clear and unequivocal link between the gifts and the door entry fees, because of the way in which the promotion worked – a card was stamped each time an entry fee was paid, and a certain number of stamps entitled the cardholder to a gift. HMRC's attempt to make something of the timing of the gift was dismissed: *Midland Bank* suggested that uncertainty about whether a particular entry fee would incur the cost of a gift might break the necessary link, but the Tribunal considered the current facts to be distinguishable. Similarly, *Kretztechnik* suggested that inputs should be attributed to the whole of the business if they were linked to a transaction that was not itself taxable (share issue or gift of goods below £50); but in that case there was no other supply to which the share issue costs were closely linked, whereas in this case the gifts were linked to the entry fees.

The Tribunal also considered whether the "commercial link" between promoting entry into the premises (taxable) and earning more fees from people playing bingo (exempt) should make the costs residual. HMRC argued that the *Dial-a-Phone* case supported this contention. The Tribunal did not agree that this was the proper test. The *BLP Group* case showed that a direct and immediate link to one part of the business could not be overruled by a general and indirect link to another part of the business. The judge quoted guidance from the *Mayflower Theatre Trust* decision:

(i) input tax is directly attributable to a given output if it has a "direct and immediate" link with that output (referred to as "the BLP" test);

(ii) that test has been formulated in different ways over the years, for example whether the input is a "cost component" of the output; or whether the input is "essential" to the particular output. Such formulations are the same in substance as the "direct and immediate link" test;

(iii) the application of the BLP test is a matter of objective analysis as to how particular inputs are used and is not dependant upon establishing what is the ultimate aim pursued by the taxable person. It requires more than mere commercial links between transactions, or a "but for" approach;

(iv) the test is not one of identifying what is the transaction with which the input has the most direct and immediate link, but whether there is a sufficient direct and immediate link with a taxable economic activity; and

(v) the test is one of mixed fact and law, and is therefore amenable to review in the higher courts, albeit the test is fact sensitive.

The Tribunal was satisfied that, applying these criteria, the cost of the gifts was wholly attributable to the taxable income of the company.

First-Tier Tribunal (TC03093): *Buckingham Bingo Ltd and related appeals*

5.3.4 HEIs

HMRC have agreed with the British Universities Finance Directors Group an updated framework for Higher Education Institutions' partial exemption special methods. It covers in particular the following problems which are important for these institutions:

- How to determine a fair 'value' for supplies of grant-supported education;
- When to add 'sectors' to a PE method; and,
- How to identify and deal with 'distorting supplies'.

Use of the framework is not mandatory, but it will enable HMRC more easily to understand and agree to any proposed PESM.

5.3.5 NHS bodies

HMRC have also issued a framework document for NHS bodies. As with the HEI framework, it is not mandatory, but is intended to ease the approval process for a VAT recovery method. The document outlines ways of producing a combined method to deal simultaneously with the business/non-business and exempt/taxable splits.

HMRC 25 November 2013

5.4 Cars

5.4.1 Derogation extended

The European Council has agreed to the UK's request for an extension of the derogation which allows the blocking of input tax on cars where they are not wholly used for business purposes. The latest extension will run until 31 December 2016; if the UK wishes it to extend beyond that (which is likely), an application is required by 1 April 2016.

http://register.consilium.europa.eu/pdf/en/13/st13/st13945.en13.pdf

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 Missing traders

A company appealed against the refusal of input tax credit amounting to £1.4m for the periods to June and July 2006. The appellant had accepted that there was a fraudulent loss of VAT and its transactions were connected with that loss, through contra-trading. It disputed whether it "knew or had the means of knowing"; a particular point of argument was whether spent convictions could or should be taken into account in forming the view that the trader was likely to be involved in dishonest transactions. The Tribunal decided to allow the evidence to be admitted – the past offender was a director of the appellant's counterparty, and the question of whether the appellant's own director knew that she had a past conviction for dishonesty was relevant in determining whether he ought to have suspected something wrong with the transactions.

In the event, there was probably sufficient other evidence for the Tribunal to reach the normal conclusion – it was satisfied, mainly on the lack of due diligence and the lack of further questions that ought to have been raised by the limited checks that were carried out, that the appellant knew that the transactions were connected with the fraud.

First-Tier Tribunal (TC03099): *3G Mobile Phones Ltd*

In TC01798, the FTT confirmed HMRC's denial of £183,000 input tax in relation to two despatches of mobile phones to Denmark in July 2006. The appellant had earlier applied for an interim release of £100,000 of the VAT at issue, which the FTT had declined to authorise. In the substantive hearing, the FTT concluded that the only reasonable explanation for the deals was that they were facilitating a fraud, and the company knew all the facts that led to that conclusion at the time it entered into the transactions. It was therefore not entitled to claim input tax.

The company appealed to the Upper Tribunal. Its representative, Michael Patchett-Joyce, tried (as he has in numerous recent appeals) to persuade the Tribunal that the FTT had misapplied EU law by reference to the CJEU decisions in *Mahageben*, *Peter David* and *Toth*. The UT dismissed this argument, holding that the Court of Appeal's decision in *Mobilx* (applied by the FTT) was entirely consistent with those decisions.

Mr Patchett-Joyce also argued that the FTT's conclusion that the company had "the means of knowing" was unreasonable based on the evidence. It was involved in the "clean chain" of a contra-trading arrangement, and did not even deal directly with the contra-trader. The UT did not accept that this ruled out the FTT's finding; it had considered all the evidence before it and concluded that there was no error of law. The various criticisms of the decision were examined in turn and dismissed, as was the appeal.

Upper Tribunal: *Fonecomp Ltd v HMRC*

Another company appealed against a refusal of input tax amounting to £1.4m in relation to April and June 2006. The company had in 2001 been involved in a criminal prosecution for conspiracy to cheat the revenue which was struck out in 2005 because HMRC had withheld vital evidence from the defendants, so there had been an abuse of process. The Tribunal concluded that, at the very least, its directors would therefore have a detailed knowledge and understanding of the risks of MTIC fraud. There

were a number of features that confirmed the usual decision, that the directors knew or ought to have known that their later transactions were connected with fraud.

First-Tier Tribunal (TC03059): *Synectiv Ltd*

Another company similarly lost an appeal in relation to £1m claimed for the period to April 2006.

First-Tier Tribunal (TC03062): *Wireless Wizards Ltd*

A sole trader also lost appeals relating to £2.1m claimed for the periods to July and October 2006 and January 2007. He did not appear at the hearing to give evidence; the Tribunal concluded from a short statement he had made in writing that he would have argued that he was an "innocent dupe" who had been tricked into assisting with the frauds of others. The Tribunal noted that he had a conviction for failing to keep proper records in 1993, and should have been well aware of the need to exercise due care in business transactions; there were numerous features of those transactions that suggested they were not commercial. The appeal was dismissed.

First-Tier Tribunal (TC03106): *Gurminder Rattan (t/a "Susvin2")*

A slightly unusual MTIC case related to the denial of input tax amounting to £440,000 in periods in 2010 and 2011. The fraud concerned soft drinks, razors and soap rather than mobile phones. The subject matter and year were different from the normal cases, but the examination of the transactions led to the same result – the appellant either knew, or should have been alerted to the very great risk, that the transactions were connected with VAT fraud. The appeal was dismissed.

First-Tier Tribunal (TC03052): *Jim Toner & Ciaran Doherty t/a The Soft Drinks Company*

5.8.2 Advisory fuel rates

The fuel-only advisory mileage rates now change quarterly, although only by very small amounts. For the month following a change (i.e. the month of December) employers may use either the old or the new rate.

The rates from 1 December 2013 (1 September 2013 in brackets) are:

Engine size	Petrol	LPG
1400cc or less	14p (15p)	9p (10p)
1401cc – 2000cc	16p (18p)	11p (11p)
Over 2000cc	24p (26p)	16p (16p)

Engine size	Diesel
1600cc or less	12p (12p)
1601cc – 2000cc	14p (15p)
Over 2000cc	17p (18p)

Although the rates change quarterly, the actual adjustments are very small.

http://www.hmrc.gov.uk/cars/fuel_company_cars.htm

6. ADMINISTRATION AND PENALTIES

6.1 Group registration

Nothing to report

6.2 Other registration rules

6.2.1 Compulsory registration

An individual provided caretaking and housekeeping services for owners of holiday cottages in Cornwall. HMRC ruled that she had exceeded the registration threshold (then £51,000) in September 1999, and should therefore have registered for VAT from 1 November 1999. She appealed, arguing that she was only supplying cleaners as an agent for the property owners, and her turnover was therefore only the commission she earned.

The Tribunal recorded the history of the dispute, which included considerable delays and difficulties experienced by HMRC in trying to obtain information from the trader. This extended to the hearing itself, which had to be adjourned at the last minute once to allow the trader to produce some important documents, and then had to be held in her absence because she said she was unable to attend because of transport difficulties.

The decision reproduces the whole of the trader's terms and conditions for dealing with property owners. These refer to the provision of a full property management service. The Tribunal noted some inconsistencies in the terms, which at times claimed that the business was only arranging the engagement of workers for the property owner, but at other points appears to reflect a principal contract to provide services; the chairman observes that '*Given these inconsistencies, it must follow that the Terms and Conditions cannot, on their own, to be determinative of the commercial and economic reality of the supply and it is therefore necessary to consider the facts as a whole*.'

These 'facts as a whole' included a list of eleven factors which all suggested that the trader was acting as a principal:

(1) The invoices submitted to the property owners by SPOT ON! do not refer to the cleaners or any "agency fee" but an hourly rate for cleaning the property payable to SPOT ON!;

(2) SPOT ON! receives payment from the property owners under its Terms and Conditions;

(3) The cleaners did not work directly for or receive payment directly from the property owners;

(4) Under the agreement between SPOT ON! and the cleaners, the cleaner would be entitled to payment from SPOT ON! on the presentation of an invoice irrespective of whether the property owner had paid SPOT ON! for the cleaning of the property notwithstanding that the document states that the payment by SPOT ON! is "on behalf of the owner of the property";

(5) The cleaners were not obliged to accept cleaning work from SPOT ON!;

(6) The cleaners were responsible for providing their own cleaning materials and equipment;

(7) In addition to SPOT ON! managed properties the cleaners were free to and did clean elsewhere;

(8) In the event of any damage caused by a cleaner the property owner would be likely to complain to and seek a remedy from SPOT ON! with whom he or she had contracted rather than the cleaner;

(9) The document describing the services provided by SPOT ON! (which is set out at paragraph 7, above) indicates that SPOT ON! provides "cleaning on changeover days" and "spring cleaning".

(10) The document headed "Full Property Management Service" (also set out at paragraph 7, above) refers to the "guaranteed availability of an experienced cleaner to clean the property on changeover day"; and also

(11) SPOT ON! states it has "Full Public Liability Insurance to cover cleaners working at a property.

The Tribunal concluded that the registration decision was well-founded. Presumably the assessment for VAT of £126,380 for the period from 1 November 1999 to 31 January 2008 is therefore also confirmed, because there was no technical appeal against that.

First-Tier Tribunal (TC02909): *Wendy Lane*

6.2.2 Business splitting

In an article in *Taxation*, Neil Warren examines some of the problems that arise from a single taxable person having more than one source of income. He considers the advantages of separating out other activities into a different taxable person, and reviews recent decisions on 'single person'.

Taxation, 10 October 2013

6.3 Payments and returns

6.3.1 Online filing requirement

A group of appellants objected to the requirements to file VAT returns online. Their reasons for objecting included:

- disability;
- old age;
- living remotely.

A fourth appellant objected both to electronic filing and electronic payment, on the grounds of concerns about online security and legal risk. This was heard as a lead case for another 100 appeals.

The Tribunal (Judge Barbara Mosedale) examined the UK VAT law, the European Convention on Human Rights, and the circumstances of the four appellants in great detail – the decision is surely a record for the FTT, running to 933 paragraphs.

The first key point was whether the Tribunal had jurisdiction to hear such an appeal: Judge Mosedale considered that it was conferred by s.83(1)(zc), which refers to '*a decision of the Commissioners about the application of regulations under section 135 of the Finance Act 2002 (mandatory electronic filing of returns) in connection with VAT (including, in particular, a decision as to whether a requirement of the regulations applies and a decision to impose a penalty)*'. All these appellants were ordered to file electronically between 1 April 2009 and 31 March 2012, when the regulations allowed traders with turnover below £100,000 to continue to file on paper. The 'tranche 1 mandation' of these traders involved a decision by HMRC that the regulations applied to them, and that was appealable.

The judge then considered the extent to which the FTT can consider matters of public law – the lawfulness of regulations, or the lawfulness and reasonableness of HMRC's actions in applying them. She examined a wide range of precedents, including the judgment of Sales J in *Oxfam* and the comments on it by the Upper Tribunal in *Noor*. She concluded that these decisions were of equal authority, and she could therefore choose between the two. She made the fine distinction between:

- the appellants' argument that HMRC had discretion to exempt them from online filing under reg.25A(10) SI 1995/2518, and had unlawfully failed to exercise that discretion (she did not consider that she had the jurisdiction to decide that);
- an alternative argument that HMRC did not have discretion to exempt elderly or disabled people from online filing, and this meant that the law was 'disproportionate' and in breach of the taxpayers' human rights (which she held that she could consider).

Reg.25A only deals with electronic returns, so the discretion to specify a different form of return in reg.25A(10) can only refer to a different form of electronic return (such as has been agreed between HMRC and certain NHS bodies). Accordingly, HMRC had no legal right to exempt any taxpayer from the requirements of the law. They could only do so by concession.

The judge went on to examine human rights law, and concluded that the requirement to file online was in breach of the Convention. It discriminated against people who were unable to use computers because of age or disability. The various solutions offered by HMRC were not satisfactory:

(a) The taxpayer could use his own computer and internet link. For taxpayers without an online computer this would involve capital expenditure on the purchase of hardware and software and income expenditure on a monthly contract for broadband or dial-up link to the internet;

(b) The taxpayer could use an online computer belonging to a friend or family member assuming that friend or family member gave permission. This would not be expected to involve expenditure on the part of the taxpayer.

(c) The taxpayer could use a public computer free of charge at a public library.

(d) The taxpayer could engage a professional agent to make the online submission on behalf of the taxpayer.

(e) At the request of the taxpayer, a friend or family member could make the online return submission on behalf of the taxpayer.

(f) The taxpayer could use HMRC's "phone filing" facility;

(g) The taxpayer could use computer at an online enquiry centre.

None of these solved the basic problem that affected the appellants, whereas permitting filing on paper, as they had done in the past, would do so easily. In particular, the "phone filing facility" was a concession that HMRC had introduced after the regulations were brought in, and which was in effect kept secret from most of the people it was supposed to benefit. The judge concluded that it did not help HMRC at all – rather, it indicated that even HMRC recognised that the law itself was discriminatory.

The judge went on to consider the effect of EU treaties and the Principal VAT Directive on the law, and concluded that the online filing requirement was also not a proportionate measure without greater flexibility to deal with people who would find it difficult to comply. It was therefore unlawful under EU law as well as human rights law. HMRC could not rely on the possibility that they might exercise an illegal concession to allow paper filing: the regulation was too inflexible.

However, there was no particular right to make payments by cheque, nor a particular provision of the PVD which specified how payments should be made. It was left to Member States to decide. The judge held that the appellant who objected to online payment had not made out a case that reg.40(2), which required it, was unlawful. The judge was not persuaded that the risks of making online payments were significant, or significantly greater than paying by cheque; and, in any case, other methods are also possible, such as paying by bank giro. The requirement to make electronic payments was held to have the legitimate aims of reducing cost and error for HMRC, and it did not go further than necessary to achieve those legitimate aims.

Judge Mosedale also commented in the middle of her decision: "*I note in passing that all the reports mentioned below refer to HMRC's 'customers'. While this is a regrettable misuse of language by HMRC as it implies people have a choice whether to interact with HMRC and that therefore the payment of taxes is voluntary, nevertheless it is clear that references to 'customers' are meant to be references to taxpayers. Needless to say the payment of taxes is not voluntary despite the misnomer and the submission of VAT returns by VAT registered entities is a legal requirement.*"

First-Tier Tribunal (TC02910): *L H Bishop Electric Company Ltd and related appeals*

By contrast, the same Tribunal decided that it did not have jurisdiction to consider an appeal against a notice of requirement to file electronically after 1 April 2012. The requirement was set out in law (amended reg.25A SI 1995/2518), and HMRC's letter was simply a notification of the legal requirement – it was not a 'decision' against which an appeal lay to the Tribunal. The appeal was struck out.

The judge noted that this was a surprising decision, given the apparent inconsistency with the position before 1 April 2012. She considered the possibility that the Convention on Human Rights would confer a right of appeal, but concluded that the ECHR decision in *Ferrazzini v Italy* [2001] STC 1314 restricted the convention right to a fair hearing in tax cases. This was unsatisfactory, because it left the trader with no means to challenge the lawfulness of the regulations, unless he broke them and HMRC issued a penalty. An appeal would then be eligible under s.83(1)(zc). The only other possibility would be to make an application for judicial review, which was clearly not within the means of a small business.

The judge commented that her ruling on 'tranche 1 mandation' continued to apply after 1 April 2012: in her judgment, the regulation was unlawful in respect of many disabled and elderly taxpayers.

First-Tier Tribunal (TC02912): *Le Bistingo Ltd*

Judge Mosedale also heard an appeal by two members of the Seventh Day Adventist Church, who believed that certain passages of the Bible required them to shun computers, the internet, television and mobile phones. Reg.25A(6) provides an exemption from online filing for a person "who the Commissioners are satisfied is a practising member of a religious society or order whose beliefs are incompatible with the use of electronic communications". However, HMRC decided that it did not apply to these taxpayers. Their church did not require them not to use computers (indeed, the church has a website), and the HMRC reviewing officer concluded that "*constructions of scripture which fall outside the tenets of a definable faith*" were not intended to fall within the potential exemption.

The judge decided that the regulation was not compatible with the Convention on Human Rights, nor was it proportional under EU VAT law. Art.9 of the Convention protected the right of thought, conscience and religion; the judge was satisfied that the appellants had a genuine personal belief that righteousness required them to shun computers, and

that had to be taken into account as well as the beliefs of the church to which they belonged. Their appeal was allowed.

First-Tier Tribunal (TC02913): *Graham Arnold Blackburn and another t/a Cornish Moorland Honey*

Robin Williamson reviews these decisions in an article in *Taxation*.

Taxation, 24 October 2013

In the Autumn Statement, it was confirmed that the Government is to consult in order to clarify the circumstances in which VAT registered businesses will be able to submit returns other than by electronic means – or, as put in the consultative document, "to clarify the assistance available to VAT registered businesses that are required to file their VAT returns online but have difficulty in doing so." Comments are invited by 14 February 2014.

https://www.gov.uk/government/consultations/assistance-with-electronic-filing-of-vat-returns

6.3.2 Annual accounting

HMRC have issued an updated version of their Notice *Annual Accounting*, replacing the June 2010 version. The only change mentioned in the summary is an update to the Subject Matter Expert Team details.

Notice 732

6.3.3 Standard EU VAT Return

The European Commission has proposed amendments to the PVD (mainly to articles 250 and following) to standardise the requirements for VAT returns across the EU. This is intended to ease burdens on businesses by making it easier for them to make declarations in one country if they already do so in another; however, presumably that only affects businesses that have to make returns in more than one country. Some Member States currently have VAT returns with 100 information boxes.

The basic requirement will only be for the information currently set out in Boxes 1 – 9 of the UK VAT return, so it might appear that the UK will not have to change anything. The proposal allows Member States to ask for further information in order to improve control, after informing the VAT Committee. So returns are unlikely to change in the UK, but may still not be absolutely standard everywhere.

A more striking proposal is to standardise the return period at one month for all businesses with annual turnover above €2m. Other return periods may be permitted by Member States, provided that no period exceeds one year.

IP/13/988; http://ec.europa.eu/taxation_customs/resources/documents/taxation/vat/key_documents/legislation_proposed/com(2013)721_en.pdf

6.3.4 Tips on filing

In an article in *Taxation*, Neil Warren suggests some practical tips for businesses that find it difficult to file their VAT returns accurately and on time. These include aligning the VAT return periods with the financial year end, and carrying out overall reconciliations to make sure the numbers make sense in comparison with the accounts.

Taxation, 19 December 2013

6.4 Repayment claims

6.4.1 *Fleming* claim

A *Fleming* claim involved the following complicated history of different companies and their relationships:

- Company Y issued shares in 1987, and did not claim the input tax on related costs because it was thought at the time that a share issue was an exempt supply.
- Y was acquired by W in 1991 and joined its VAT group in January 1992.
- Another company, C, was incorporated in 2000 and acquired W in the same year.
- Y left the VAT group in July 2005, and was put into voluntary liquidation on the same day.
- C became the representative member of the VAT group in May 2006
- Y was dissolved in November 2006, having made a distribution of all its assets to C.

In March 2009, C made a *Fleming* claim for the VAT on Y’s share issue expenses in 1987. HMRC accepted that the input tax should have been deductible, and presumably would have paid such a claim had it been possible for Y to make it in 2009; but they disputed C’s claim on the grounds that the right to the input tax was Y’s, and it had not been assigned to C. In addition, C had not produced sufficient evidence to support the claim.

The Tribunal considered a number of preliminary questions which the case raised:

(a) Had the right to recover input tax been assigned to the Taxpayer?

(b) Was Y&V a member of the Group at the time of supply?

(c) Does the Taxpayer have some sort of unjust enrichment claim which we could entertain?

The answer to (b) was clearly ‘no’. The grouping provisions did not apply retrospectively to deem it to be part of a group which it joined later. There was no evidence for (a) – the company argued that the liquidators had intended to assign ‘everything’, but there was no evidence to support that assertion.

The Tribunal accepted that (c) was a paraphrase of one of the company's arguments – it was not intended to stand on its own, but rather to support and strengthen the rest of its case. As an argument on its own, it was not something over which the Tribunal had jurisdiction – whether the unjust enrichment of HMRC was a valid reason to force the department to pay out a claim. As the Tribunal did not consider that the other arguments were valid, it did not further consider the concept of unjust enrichment.

The Tribunal also did not consider that the amount, or even the basic fact, of any overpayment had been established on the balance of probabilities. The appeal against the refusal of the claim was dismissed.

First-Tier Tribunal (TC02968): *Chubb Ltd*

6.4.2 Time limits (1)

Leeds City Council made claims for repayment of output tax accounted for between 1974 and 2009 on a range of supplies which it argued should not have been subject to VAT. Two separate claims were made, one in May 2007 and the other on 27 March 2009. HMRC met the claims insofar as they related to periods ending on or before 4 December 1996, and for periods ending within 3 years before the dates of the claims; however, they refused to repay output tax for the intervening periods, ruling that the three-year cap on repayment claims was effective to deny repayment.

The Council appealed, arguing that the time limit should not apply. Its case was based on the assertion that the UK had failed properly to implement art.4(5) 6th Directive (now art.13 PVD), which regards local authorities and other government bodies as not taxable persons in respect of most of their public sector activities.

HMRC accepted that the article had not been implemented in the UK law, and also accepted that the Council's disputed supplies should all have been regarded as outside the scope (apart from some relating to parking). It was therefore agreed that the VAT should not have been paid in the first place. HMRC's only defence to repaying it was the operation and validity of the cap.

The Council's barrister argued that the way in which the cap had been introduced offended against the principles of effectiveness, proportionality, equivalence, legal certainty and the protection of legitimate expectations; the *Fleming* transitional period which ended on 31 March 2009 did not properly address those problems in relation to the overpayments of VAT in the periods under dispute, and the cap should be set aside until the UK implemented it properly. At the very least, questions should be referred to the CJEU to determine the matter.

The Tribunal agreed with HMRC's representative that the manner of the cap's introduction was not relevant to the appeal. All the disputed claims related to periods after the cap was introduced by legislation; they did not relate to periods in which the time limit had been longer and was then arbitrarily reduced. It also made no difference that the Council was unaware that it was overpaying VAT, or that HMRC's published policy on the matter was wrong; that could be a common feature of s.80 claims in general.

The Tribunal examined the different EU principles which the cap was said to infringe, and found no significant breach of any of them. The appeal was dismissed.

Upper Tribunal: *Leeds City Council v HMRC*

6.4.3 Time limits (2)

A motor manufacturer made a *Fleming*-type claim in November 2011 for £78.68m in relation to manufacturers' rebates paid to buyers of commercial vehicles between 1 January 1978 and 31 December 1989. Following the CJEU's decision in *Grattan* (Case C-310/11), it dropped that part of its claim relating to the period up to 31 December 1977, i.e. before the implementation of the 6th Directive in the UK. This reduced the amount to £73.36m. HMRC resisted the claim on the basis of the time limits for making claims, and also on the question of whether this appellant (registered only from 31 December 1992) was entitled to make the claims, when different taxpayers had paid the VAT in the past. The Tribunal considered the time limits as a preliminary issue.

The judge agreed with the taxpayer that the right on which the taxpayer relied, to adjust the consideration under Art.11C(1) 6th Directive, had not been properly implemented in the UK before 1990. As a result, there was nothing to determine how or when any adjustment to its VAT account should be made under UK law; until it made a claim for its directly effective EU rights, there was no "accounting for VAT that was not due". That meant that the claim was not made under s.80 VATA 1994, and the time limit in s.80(4) could not apply.

In order to give effect to the claim, the judge ruled that SI 1995/2518 reg.38 should be read as if reg.38(5) did not apply. This would be a "conforming construction" that allowed the company its EU rights. As the underlying Directive did not contain a time limit, an adjustment to the VAT account should be allowed at any time, without time limit.

HMRC argued that, if the claim was not made under s.80(4), the Tribunal did not have jurisdiction to hear an appeal. The part of s.83 most obviously applicable to repayment claims is s.83(1)(t): "a claim for the crediting or repayment of an amount under section 80." The conclusion on the time limit ruled that out. However, s.83(1)(b) allowed appeals to be heard in respect of "the VAT chargeable on the supply of any goods or services." The judge concluded that this was wide enough to encompass a dispute about the direct application of a VAT Directive in determining the chargeability of a taxable person to VAT in relation to a supply that had been made.

The preliminary issues were therefore decided in favour of the taxpayer.

First-Tier Tribunal (TC03141): *Iveco Ltd*

6.4.4 Repayment supplement

A trader made claims for input tax in its returns for January and February 2006. It then decided that it had claimed too little and submitted supplementary claims by letter, amounting to nearly £1.5m. HMRC subjected these claims, together with the following VAT return for 03/2006, to extended verification, but eventually had to pay them after the Tribunal allowed the company's appeal. The repayments were made more

than 30 days after the Tribunal's decision. Repayment supplement under s.79 VATA 1994 was added to the amounts shown on the original returns, but HMRC decided that they were not obliged to add supplement to the additional amounts claimed by letter.

In the FTT, HMRC's counsel suggested that the context and wording of s.79(2) implied that it only applied to VAT shown in a return, and anomalies would arise if it was interpreted otherwise:

(2) The said conditions are-

(a) that the requisite return or claim is received by the Commissioners not later than the last day on which it is required to be furnished or made, and

(b) that a written instruction directing the making of the payment ... is not issued by the Commissioners within the relevant period, and

(c) that the amount shown on that return … as due by way of payment … does not exceed the payment … which was in fact due by more than 5 per cent of that payment … or £250, whichever is the greater.

However, the FTT agreed with the taxpayer that there was nothing in s.79 to justify HMRC's approach. The 'requisite return or claim' could apply to the supplementary letter; as HMRC accepted late input tax claims as a matter of course, the letter was not received 'late' within the meaning of s.79(2)(a); and as the claim was eventually accepted, s.79(2)(c) was satisfied. The judge ruled that s.79 '*applies to all payments of VAT credits whether they are claimed in a VAT return or otherwise after the return has been submitted.*' The appeal was allowed.

HMRC appealed to the Upper Tribunal, which reversed the decision below. The judge considered the arguments put forward by both parties, and concluded that HMRC were correct in their interpretation of s.79 as "necessarily implying" that the claim referred to had to be included in a return, rather than being made in some other form. The expression "return or claim" appeared several times in s.79, and in some of them was undoubtedly a reference to the return for the period; it would be surprising if the same expression meant something different in different parts of the same statutory provision.

The judge rejected the company's arguments that this would lead to anomalies which Parliament would have to resolve. In his view, there were more anomalies in the company's interpretation. HMRC's appeal was allowed.

It is worth noting that one of the company's arguments was that this result suggested that HMRC would have no incentive to process repayment claims promptly, if they were not made in a return. HMRC's representative in the UT pointed out that there could still be an award of interest under s.78 if a credit was delayed due to HMRC "error". A long delay could therefore produce an extra payment comparable to repayment supplement, but a delay of only a little more than 30 days would not.

Upper Tribunal: *HMRC v Our Communications Ltd*

6.5 Timing issues

6.5.1 Cash accounting

HMRC have issued an updated version of their Notice *Cash Accounting Scheme*, replacing the January 2011 version. The only change mentioned in the summary is an update to the Subject Matter Expert Team details.

Notice 731

6.6 Records

Nothing to report

6.7 Assessments

6.7.1 Preliminary issue

HMRC raised an assessment on a company for £144,142 in respect of the periods from 02/03 to 05/05. The company appealed, and the Tribunal had to consider a preliminary argument about whether the assessment had been validly raised, issued and notified.

HMRC sent a letter on 2 February 2006 stating that an assessment would shortly arrive with a detailed schedule of errors. It was agreed that this detailed schedule was never created or sent. The parties disagreed over whether the February 2006 letter enclosed a basic schedule of assessment, and whether a VAT 655 assessment form was produced, sent and received.

The company was put into liquidation in March 2007. An assessment was received by the liquidators, who appealed against it. HMRC applied to the Tribunal to have the appeal struck out as out of time, but Judge Mosedale noted at the application hearing in April 2011 that the date on this assessment (17 November 2006) did not appear to agree with the earlier correspondence. This led to the present dispute about whether the assessment had been validly made.

S.73 VATA 1994 provides that "*Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgement and notify it to him.*"

HMRC pointed out that "making an assessment" and "notifying an assessment" were separate actions in law. The Tribunal considered precedents including the UT's decision in *Queenspice Ltd v HMRC* [2011], and concluded that the effect of failing to "notify" an assessment was simply that it was unenforceable until it was notified. There was no time limit on notification – the time limit applied to making or raising it.

Some of the documents in HMRC's records did not carry dates, but the Tribunal was satisfied as a matter of fact that the original assessment had been raised on 2 February 2006.

The appellant relied on *House (trading as P&J Autos) v CCE* as authority for the proposition that the minimum requirements for a valid assessment are that it should "state the name of the taxpayer, the amount of the tax due, the reason for the assessment and the period of time to which it relates." This meant that the covering letter of 2 February 2006 could not be an assessment on its own, because it only gave a global total for a number of periods.

The Tribunal had to weigh the evidence given by the HMRC officer, who "remembered" enclosing the detailed schedule with the letter, and the appellant, who "remembered" there being no enclosure. Without casting doubt on the reliability of the officer's work in general, the Tribunal noted that it was difficult to remember anything in such detail over 7 years; on the balance of probabilities, the enclosure had been omitted.

However, this did not invalidate the assessment. It was validly made on 2 February 2006; it was either notified at that time, or notified later in March 2008 when it was undoubtedly sent to the liquidators. The preliminary issue was decided in favour of HMRC.

First-Tier Tribunal (TC02896): *Sunlander Outdoor Products Ltd*

6.8 Penalties and appeals

The exceptional number of decisions on default surcharge in this quarter is the result of a batch of appeals, mainly ‘paper-based’, being held over pending the Upper Tribunal’s decision in *Total Technology*. Following the publication of that decision, a large number of these appeals have been resolved – almost all of them in favour of HMRC (42 to 8 in 50 cases).

In an article entitled “The beatings will continue until morale improves”, Mike Thexton reviews the fairness or otherwise of the default surcharge as a means of encouraging traders to pay their VAT on time, and questions whether it ought to be replaced by a system that distinguishes more clearly between those who “won’t pay” (through carelessness or deliberate default) and those who are in genuine financial difficulty (where a financial penalty will only exacerbate the situation). Some of the cases below highlight the huge amounts of surcharge that are paid by businesses that fall into the 15% trap.

Taxation, 12 December 2013

6.8.1 Default surcharge – successful appeals

A company appealed against two successive 15% surcharges of £3,575 and £8,031 for the periods 09/11 and 12/11. The company had been in financial difficulties, and had engaged accountants to carry out a full audit of its tax position. Following this investigation, the accountants wrote to HMRC to make amendments to past returns, resulting in a substantial overpayment of VAT. The company claimed that this overpayment should have been set against the outstanding tax for 09/11, significantly reducing the amount on which the surcharge was based; in respect of 12/11, it pleaded a reasonable excuse, based on its bookkeeper leaving on only a week’s notice at the time the return was due to be filed, and confusing information received from HMRC about the accounting entries for the tax adjustments following the repayment claim.

The main technical point at issue was whether the letter from the accountants established a ‘claim’ before the due date for the 09/11 VAT liability. HMRC argued that the claim was only validly made after that due date, so the credit could not be set against the liability for that period when calculating surcharge. The accountants’ initial letter of 2 November had been subject to further enquiries, and the validity of the claim had only been established by a further letter on 23 November. The credit had instead been credited against 12/11, and had reduced the surcharge for that period.

The Tribunal accepted that it was reasonable for a claim to be subjected to verification and enquiry; however, if that showed that the claim was valid, there was no reason for it not to be given effect from the day it was made. The letter of 2 November was therefore accepted as a claim, and the surcharge for 09/11 was reduced accordingly.

The Tribunal also agreed that the HMRC accounting was confusing, and when combined with the departure of the bookkeeper, constituted a reasonable excuse. The company’s appeals were allowed, although a small amount of surcharge remained payable for 09/11.

First-Tier Tribunal (TC02984): *Dunn and Dyer (Electrical) Ltd*

A trader applied to join the annual accounting scheme in March 2011. There were problems with the issue of the first "annual" return by HMRC (in fact, for a shorter period), and as a result it was submitted late. HMRC also failed to collect direct debits on the right dates, and the trader had to make payments by other means. However, he believed by July 2012 that these problems had been resolved. He was surprised to receive a default surcharge in relation to the first problem (the return to March 2011) and then to be told that he should have submitted a return for the period to June 2012, resulting in a further surcharge.

HMRC argued that there was no reasonable excuse. The return for March 2011 had not been submitted on time; the trader's accountants had only contacted them on 3 May, after the due date for filing (as an annual return does not have a 7-day extension); and he had been notified of his removal from the annual scheme before the due filing date for the return period to 30 June 2012.

The Tribunal fully accepted the trader's version of events. The problems were at least partly of HMRC's making, and his expectation that they would be resolved and he would be restored to the annual accounting scheme was a reasonable one. That was why he had not filed a return for the June 2012 period, because he thought it would be subsumed in a longer period later. As soon as he realised that he would not be restored, he filed his return and paid the liability.

The appeal against both surcharges was allowed.

First-Tier Tribunal (TC03071): *R Hobson (t/a Windmill Dental Suite)*

A trader appealed against a surcharge of £5,600 levied at 15%. The VAT was paid in two instalments: £20,000 was 5 days late and £19,659 was 6 days late. The trader pleaded cash flow difficulties, which the Tribunal did not consider to be a reasonable excuse in the circumstances; however, he also had suffered difficult personal circumstances at the time. He had left instructions for the VAT to be paid before taking a Christmas break, which had been interrupted by his son going missing. When he returned to work on 9 January, he found that the VAT had not been paid, and took steps to make payment as soon as he could, given that his bank imposed a limit of £20,000 per day on transfers. At the time, HMRC could not receive Faster Payments – he had believed they would have received the money on the same day.

The Tribunal agreed that the personal circumstances constituted a reasonable excuse. The trader had acted reasonably in all the circumstances, and his appeal was allowed.

First-Tier Tribunal (TC03081): *CPA Bespoke Joinery Ltd*

A trader appealed against a surcharge of £1,682 calculated at 5% for the period to 12/2012. She was an Austrian national who had visited her family in Austria over Christmas; her daughter became ill, delaying her return; on her return, she had to deal with an important project supervising work on the Olympic site, where several construction jobs were about to start. If she had not focussed on them, there could have been substantial cost overruns. In the event, she was one day late filing. The Tribunal accepted that these circumstances constituted a reasonable excuse and cancelled the penalty.

The Tribunal asked the trader if she wished to offer any reasonable excuse for the preceding two defaults which had led to the imposition of a 5% surcharge. She said that she had not considered the circumstances, because no penalty had been levied. The earlier defaults were therefore left unaffected by the decision.

First-Tier Tribunal (TC03076): *Erect Architecture Ltd*

A company was issued with a surcharge for the quarter ending March 2011, for which the payment was made on 2 and 3 June 2011. The director had been distracted by the death of his father in December 2010, and had discovered that his book-keeper (subsequently replaced by a reputable firm of accountants) had not done his job properly; also, it was a difficult time for the company financially. The Tribunal commented that none of these factors could individually constitute a reasonable excuse, but decided that the combination did so. The HMRC officer at the hearing accepted that, had she known all the circumstances earlier, the surcharge should have been dropped.

First-Tier Tribunal (TC03091): *Midshires Electrical Ltd*

A company appealed against two surcharges for successive periods of £496 at 5% and £1,111 at 10%. It argued that it had suffered cash flow difficulties (rejected) and that the penalty was disproportionate (rejected), but also that the director had in each quarter attempted to discuss a payment plan with HMRC and had not been put through to someone with the authority to agree Time To Pay. His telephone records backed this up; the company had then paid the liabilities in full in instalments, suggesting to the Tribunal that it would have complied with any TTP agreement.

The Tribunal noted that agreeing TTP was something within HMRC's discretion, but that any discretion must be exercised with diligence. As the director was not given the opportunity of putting forward his proposals to someone who could agree or reject them, this had not happened. This was accepted as a reasonable excuse.

First-Tier Tribunal (TC03116): *We R Your IT Ltd*

A trader appealed against a surcharge of £495 calculated at 10%. It claimed that confusion had arisen because of their accountant had fallen seriously ill, and they had changed their method of payment from cheque to direct debit, which had led to delays because they were not familiar with how the DD should be set up.

The Tribunal noted that the company's record was good while it was still paying by cheque, and the late payments did appear to start at the same time as the accountant's illness. As illness of the person responsible for preparing the return was accepted by HMRC as a reasonable excuse, the Tribunal accepted the explanation and allowed the appeal.

First-Tier Tribunal (TC03137): *Priory Print and Stationery Ltd*

A company appealed against a surcharge of £9,500 levied at 15%. This was reduced by HMRC to £5,000 to reflect the fact that the company had paid £30,000 of its liability by the due date. The company produced evidence of correspondence with the bank suggesting that it had agreed that payments would arrive the same day provided that all the paperwork was completed by 3pm; the Tribunal accepted that it had a reasonable

belief that this had been done on this occasion, and as a result the surcharge should be cancelled.

First-Tier Tribunal (TC03139): *Area Plant and Scaffolding Ltd*

6.8.2 Default surcharge – unsuccessful appeals

A trader made a BACS transfer on the day the VAT of £35,928 should have arrived in HMRC's account (Friday 5 October 2012). The bank did not use 'faster payments', and the trader had been unable to find out why. HMRC therefore only received the money three days later (Monday 8 October), and imposed a surcharge at 15% of the outstanding amount.

The Tribunal ruled that the trader did not have a reasonable excuse, and the penalty was not disproportionate. The trader's previous experience of being in the surcharge regime, and the various warnings given by HMRC along with surcharge liability notices, should have led the director to take more care to ensure that the payment arrived in time.

First-Tier Tribunal (TC02898): *Gielly Green*

A company was a day late paying a VAT liability of £532,886 (and also submitting the return itself). A surcharge was imposed at 2%. The company's excuse was that the directors were not available to authorise the payment on the day it was due.

The Tribunal did not consider this to be a reasonable excuse, nor did it accept that the penalty was disproportionate.

First-Tier Tribunal (TC02899): *New River Retail Ltd*

A trader appealed against a surcharge of £277. The only grounds of appeal appeared to be 'insufficiency of funds'. The trader had previously entered into Time To Pay arrangements, and appeared to have asked for one in respect of the current period, but this had not been agreed by the proper means. The Tribunal held that there was no reasonable excuse, and no disproportionality.

First-Tier Tribunal (TC02946): *Craigton Coach Inn*

A trader submitted a VAT return electronically but mailed the cheque. HMRC can accept a cheque, even though payment should now always be made electronically, but they then require cleared funds to be in their account by the due date of one month after the period end, without the 7-day extension. The trader's cheque did not clear by this date.

The trader pleaded illness as a reason for the late payment; however, the VAT return had been filed electronically on a day on which an electronic payment would have been in time. The Tribunal concluded that the reason for lateness was sending a cheque, not illness. The appellant also claimed that the HMRC website did not make clear the due date for cheques; the Tribunal disagreed, holding that the website makes it very clear that payments are supposed to be electronic. The appeal was dismissed, and the surcharge of £291 confirmed.

First-Tier Tribunal (TC02923): *Marc's of Tamworth Ltd*

A surcharge of £3,225 was levied at 15% on a trader who had been late four times in five periods up to November 2011. The surcharge was for the period to May 2012. The trader appeared to have simply forgotten

that the payment was due, owing to pressure of work at a busy time of year; the appeal was based on 'government policy to help small businesses'.

The Tribunal expressed sympathy over the harshness of the penalty, noting that it would have mitigated it if that had been legally possible. However, it was not, so the appeal was dismissed.

First-Tier Tribunal (TC02917): *Robert Henry Dunckley*

A company appealed against a 2% surcharge of £611 for the period to December 2011. This arose because the company had been told by its bankers that there was a daily limit on 'faster payments' of £10,000, when the limit was in fact £30,000. Had the company paid £30,000 on the last available day, which it could have done, it would have only been surcharged on the balance of £558, and no penalty would have been collected.

HMRC had cancelled a surcharge for the immediately preceding period, accepting that there was a reasonable excuse and noting the company's previous good record. The letter confirming this was sent only two weeks before the events leading to the current surcharge. HMRC's representative argued that this should have focussed the attention of the directors on the need to make payments on time.

The Tribunal appears to have accepted this contention; it found nothing in the company's reliance on the bank's incorrect advice that could constitute a reasonable excuse.

First-Tier Tribunal (TC02916): *Mansell McTaggart Ltd*

A finance director knew he would be out of the country when the VAT payment was due, so he made arrangements for electronic transfers to be made in his absence. Unfortunately, he failed to take into account either the company's daily transfer limit of £20,000 imposed by the bank, or the Easter Bank Holidays, which resulted in late payment of some of the VAT and a surcharge of £959 at 5%. The appeal was the subject of a 'paper hearing'.

HMRC submitted that the daily banking limits and the holidays were foreseeable, and could not therefore be reasonable excuses. The Tribunal agreed, and also considered itself bound by the *Total Technology* decision to dismiss any argument based on the disproportionality of the penalty.

First-Tier Tribunal (TC02931): *Puro Ventures Ltd*

Another penalty of £1,169 was appealed mainly on the grounds of disproportionality. This could not succeed. The trader's letter of appeal referred to a difficult period of trading, but there was not enough information on which a '*Steptoe*' defence could be supported. The surcharge was confirmed.

First-Tier Tribunal (TC02938): *Honiton Carpets Ltd*

Another paper hearing considered a surcharge of £781, levied at 5% for a payment received a day late. The trader argued that he had a printed receipt from his bank showing a payment instruction being given on 7 May, the due date; he could not understand why HMRC would not accept that the payment had been made on time. Although 7 May was a Bank

Holiday, the payment was made through 'faster payments', which should not be affected by holidays or weekends.

The Tribunal pointed out that the receipt clearly showed the words 'to be paid 8 May', presumably because the instruction had been given too late in the day to be processed immediately. The trader should have been put on notice that the payment would not arrive on time, and did not have a reasonable excuse.

First-Tier Tribunal (TC02933): *Speedlink Transport Southwest Ltd*

A 10% penalty (£32,674) was imposed for late payment of tax in three instalments 4, 17 and 28 days late. This was subsequently halved to 5% after HMRC accepted that a previous period had not been in default. The company had agreed TTP in respect of an earlier period, and had met its agreement to pay by instalments. It tried to set up a similar agreement for the period in dispute, but only started the procedure after the due date, which was too late.

The company claimed that the illness of the finance director, which later led to his early retirement, was the reason for the late application for TTP. The Tribunal was not sure whether it was possible to extend the concept of 'reasonable excuse' in this way; however, in any case, it regarded this illness as something foreseeable, rather than something sudden and unavoidable. Defences based on cash flow problems and disproportionality were also rejected.

First-Tier Tribunal (TC02958): *Olive Business Solutions Ltd*

A surcharge of £1,504 was levied at 15% for late payment of part of a VAT liability. The company claimed to have suffered a major computer collapse in January; the director contacted HMRC to say that the return would be late. He was advised to pay £20,000 by the due date (which he did) and to appeal against the standard surcharge letter, setting out the circumstances.

In the event, the return was filed on time, but the balance of the VAT was not paid until 9 days after the due date. The company therefore knew (in spite of its computer difficulties) how much it should have paid on the due date, and did not have a reasonable excuse. The Tribunal noted that it did not even have an explanation as to why it had been late when the return had been on time.

First-Tier Tribunal (TC02969): *Fastaway Services UK Ltd*

A company appealed against a 5% surcharge of £690, arguing among other things that the company had been due a large repayment from an earlier quarter which was subjected to verification and was therefore delayed. HMRC responded that the repayment had actually been made before the liability for the later period was due, so it was not relevant. The Tribunal agreed, and noted that in another part of its appeal letter, the company had effectively admitted that 'sometimes things do get missed'. There was no reasonable excuse.

First-Tier Tribunal (TC02974): *Euro Rugs UK Ltd*

A trader appealed against a surcharge of £1,746. The employee who had previously prepared VAT returns had left and not replaced; it appeared

that ‘pressure of work’ was the main excuse offered, together with trading difficulties and the unfairness of the penalty.

HMRC pointed out that the company had been in default for 14 out of 19 quarters and incurred 13 surcharges, a total of £18,811. The trader should therefore have been well aware of the requirements. The employer had the ultimate responsibility for ensuring that the VAT return was submitted on time, together with the payment.

The Tribunal agreed: disproportionality could not be accepted as a defence, and the employee had left two months before the next VAT return was due. The surcharge was confirmed.

First-Tier Tribunal (TC02970): *Hi Tec Signs Ltd*

A trader claimed that payments had been made on time for two successive return periods, and did not understand why surcharge notices were issued. He had not appealed against them because he assumed that they would be cancelled when HMRC’s error was discovered. HMRC maintained that the payments had not been received until after the due dates, and charged a 2% penalty of £884 for the second late payment.

The Tribunal noted that there were inconsistencies in HMRC’s internal documentation supporting the levying of the penalty. However, the trader had produced no evidence such as bank statements or other documentation supporting the date on which payment had been made, or the method used. It was the trader’s responsibility to produce such evidence to displace the assessment. In its absence, the appeal had to be dismissed.

First-Tier Tribunal (TC02973): *Glamorgan White Lining Ltd*

An unusual argument was rejected by the Tribunal in a case about a £1,869 surcharge. The director argued that the following wording on the HMRC website was misleading: ‘*If you submit your return online you must pay electronically you get seven extra calendar days to submit your return and seven extra calendar days to pay any VAT electronically.*’ He claimed to have believed that this meant that the payment was due 14 days after the end of the month following the period, not 7 days.

The Tribunal accepted that the statement was capable of different interpretations. However, as it was ambiguous, and the trader had received surcharge liability notices, it would have been reasonable for him to have attempted to confirm what it meant. There was no evidence that he had done so, and his excuse was therefore rejected. The disproportionality defence was also ruled out.

First-Tier Tribunal (TC02999): *Webcurl Ltd*

A trader appealed against surcharges for 07/11 and 10/11. The Tribunal also considered the previous two periods as they were also material to the amount of the penalty. The company’s appeal was based solely on ‘trading difficulties’, without any specific underlying reason for the insufficiency of funds. It could not therefore qualify as a reasonable excuse. Disproportionality was also rejected.

First-Tier Tribunal (TC03001): *A F Bradshaw & Co Ltd*

A company appealed against a 15% surcharge of £10,465 for being a day late with the payment for the period to 03/12. It argued that the delay had been caused by the Bank Holiday on 7 May, and the amount was

disproportionate – 71% of the pre-tax profits for the quarter, and 16% of the profit made by the business in the previous year.

The company had made several returns late and had run up a substantial total of surcharges by 03/12 – 6 separate penalties amounting to approximately £30,000. It is interesting that the Tribunal decided to consider the criteria set out by Judge Bishopp in *Enersys Ltd*, allowing the possibility of finding that the penalty was disproportionate, and viewed in isolation, the Tribunal considered that it possibly was; however, it also noted that it was reasonable to consider the context of the surcharge in the compliance history of the company. Given that it had been in default so many times before, it was less likely that a penalty of this size was disproportionate to the default. The appeal was dismissed.

First-Tier Tribunal (TC03004): *Automa Ltd*

Another appeal against a £238 surcharge at 15% was solely based on disproportionality, and was dismissed by reference to the Upper Tribunal's decision in *Total Technology*.

First-Tier Tribunal (TC03007): *Matt Telecom Services Ltd*

The Bank Holiday on 7 May 2012 was once again a contributory factor for a £9,341 surcharge. The company had made the transfer on the previous Friday, but after the deadline for CHAPS same-day transfers. There had been a history of accounting difficulties, including staff changes and errors made by people who then left.

Once again, the Tribunal considered the possibility that the penalty could be disproportionate; however, once again, it decided that the company should have been well aware of the consequences of late payment, and also of the deadlines which applied. It did not have a reasonable excuse, and the appeal was dismissed.

First-Tier Tribunal (TC03012): *Polti (UK) Ltd*

Another 15% surcharge at £8,378 was confirmed by the Tribunal. The appellant failed to attend the hearing; as its defence appeared to depend on 'shortage of funds', it would have been essential to produce evidence of the reason for this, if the Tribunal was to accept that the *Steptoe* defence applied. The appeal was dismissed.

First-Tier Tribunal (TC03013): *Artisan Furnishings Ltd*

A 10% surcharge of £1,085 was similarly confirmed. In this case, the appellant's director did attend and gave evidence about specific financial problems with particular customers paying late. However, the Tribunal considered that a reasonable trader would then have explored other possible ways of meeting the VAT liability, including arranging an overdraft, or asking for Time To Pay. The trader had not explored these possibilities, and it therefore did not have a reasonable excuse.

First-Tier Tribunal (TC03014): *W-T Windowstore Ltd*

A company claimed that it had believed that a Time To Pay arrangement was in place for its period to 06/12. It was issued with a surcharge at 2%, amounting to £3,385. The company had used a firm of financial advisers to agree TTP for earlier periods, and believed that the agreement extended to the current period as well.

The decision does not record a detailed explanation of the misunderstanding, but the judge concluded that 'with greater diligence the management would have been aware that the VAT for the default period was not part of the TTP arrangements'. There was therefore no reasonable excuse.

First-Tier Tribunal (TC03016): *Charles Evans Group Ltd*

Another problem with maximum internet payments led to a surcharge of £3,350 levied at 15%. The company had defaulted 20 times between 2004 and the appealed period, August 2011. The company pleaded cash flow difficulties and the harshness of the penalty.

The Tribunal noted that the liability was paid only a few days late. Ironically, that seemed to count against the company: it was perhaps not in such dire straits as *Steptoe*. It did not appear to have asked for Time To Pay. In the circumstances, it could not be regarded as having a reasonable excuse.

First-Tier Tribunal (TC03034): *Ravenfield Ltd*

A surcharge of £2,443, levied at 10%, was confirmed in a case where the trader's defence was "insufficiency of funds". Again, it had failed to ask for TTP before the due date for this period. Afterwards, it had implemented more robust procedures which made sure that the problem did not recur. It should have done so earlier; it did not have a reasonable excuse.

First-Tier Tribunal (TC03033): *Estates and Law Ltd*

A surcharge of £2,090, levied at 15%, was confirmed in a case where the trader's defence was a misunderstanding over the due date for payment. The appellant claimed to have called HMRC in November 2011 to confirm the requirements, and had been given the impression that it had 21 days to make an electronic payment.

HMRC had no record of this call. The Tribunal concluded that the company should have had sufficient warning of the actual requirements by the time it was subject to 15% surcharges. An honest mistake was not a reasonable excuse. The appeal was dismissed.

First-Tier Tribunal (TC03035): *KTG Recruitment Ltd*

A trader was late 11 times over a five year period. HMRC had cancelled some surcharges where the trader had notified them before the due dates and applied for Time to Pay. However, this did not apply to the period to January 2012, and a surcharge of over £6,000 was incurred at 15%.

The trader pleaded that the way his scaffolding business was conducted involved income being taken into account for VAT and tax before he had received it. Invoices were raised at the same time for payment in two instalments; the second would only be payable some time later, when the scaffold was taken down, but the issue of the invoice triggered a tax point. The Tribunal regretted that this could not be relevant; it confirmed that the problem was an ordinary incident of the trade, rather than something unusual.

First-Tier Tribunal (TC03077): *Classic Design and Build (UK) Ltd*

A plumber made successive defaults which were not charged at 2% or 5% because the amount was below £400. He appealed against the imposition of a surcharge of £248 at 10%, arguing that he had not received the warning letters, and that he had honestly believed that the due date was 10 days after the month end, not 7 days. The Tribunal decided that he had no reasonable excuse.

First-Tier Tribunal (TC03089): *G Cardle Plumbing*

A similar case arose in relation to a 10% surcharge of £299 – the 2% and 5% penalties had not been levied. The trader pleaded difficulties arising from chronic ill health and irregular payment patterns by their major customer, Amazon – in particular, a large receipt had arrived the day after the due date for the VAT liability in question, enabling the liability to be settled by bringing the overdraft below its limit. This was pure insufficiency of funds, and could not be a reasonable excuse.

First-Tier Tribunal (TC03084): *Games Heaven*

A trader appealed against a surcharge of £1,200 levied at 15%. The trader's three excuses of "a bank holiday, staff shortages and the member of staff responsible for VAT returns being on maternity leave" could not succeed.

First-Tier Tribunal (TC03080): *Koh Samui Ltd*

Two hotels, operated by associated companies, incurred surcharges over the periods from 06/09 to 03/12 amounting in one case to £137,000 and in the other to £302,000. The reasons given were the economic downturn, the interest rate payments to which the companies were committed and the fact that the interest payments were automatically deducted from the bank accounts.

Because of the size of the amounts involved, the Tribunal examined the background in detail, but could still only conclude that there was no reasonable excuse. It was notable that the company had failed to apply for TTP before the due date at any time; it had also failed to file current returns with current payments on time, while leaving the settlement of older liabilities to be determined later – in the absence of allocation by the taxpayer, HMRC will always put receipts towards the oldest liability. The companies had therefore failed to take reasonable steps to protect themselves, and could not avoid the penalties.

First-Tier Tribunal (TC03053): *European Development Company (Westhill Hotel) Ltd*

A company appealed against a £1,300 surcharge levied at 15%. Its arguments were firstly that the payment was made on time and should have arrived on time, and secondly that the surcharge was unfair and disproportionate. The Tribunal dismissed the first, holding that the company should have known from experience that BACS payments take three days to arrive; and the second could not be upheld following *Total Technology*. The Tribunal considered the high threshold for "not merely harsh but manifestly unfair" and concluded that it could not apply here.

First-Tier Tribunal (TC03069): *Maine Engineering Ltd*

A company suffered a surcharge of £11,900 for submitting a payment four days late. Its excuse was that it had failed to appreciate the effect of the

Bank Holiday on payment times – in effect, the four calendar days related to a single working day; it also argued that the penalty was unfair and disproportionate. The Tribunal rejected both arguments.

First-Tier Tribunal (TC03070): *Storage Equipment Safety Service Ltd*

A company appealed against a surcharge of £1,400 levied at 5%. The trader claimed to have misunderstood HMRC's website as indicating that the due date for payment was an extra 7 days after the deadline for submitting an electronic return – 14 days after the month end, rather than both being required on the same day. The Tribunal did not agree: in its view, the website was quite clear in its explanation.

First-Tier Tribunal (TC03064): *Franco's Family Restaurant Ltd*

A trader appealed against a 15% surcharge of £1,362. His turnover had declined from £1m to £367,000, leading to "mild depression". He produced no evidence of anything that could constitute a reasonable excuse; the Tribunal expressed sympathy for his hardship, but could only confirm the surcharge.

First-Tier Tribunal (TC03068): *Gary Watson t/a GWA*

A company appealed against four surcharges which the finance director argued had arisen because the employee who was responsible for paying HMRC had failed in his duties. The Tribunal considered this to be "reliance on another", which could not be a reasonable excuse for maintaining inadequate accounting systems.

First-Tier Tribunal (TC03072): *Baltic Recruitment Services Ltd*

A trader appealed against successive surcharges of £123 charged at 10% for 10/2011 and £267 at 15% for 01/2012. He did not appear at the hearing, so the Tribunal proceeded on the basis of explanations given in correspondence. The trader claimed that the first return had been posted in time but must have been lost in the post; it was replaced with a copy and a new cheque shortly after HMRC informed him that it had not arrived. The correspondence did not include any evidence to support this claim, and in the absence of evidence the Tribunal could not accept the assertion.

The second return was only dated on the due date, so it was harder to argue that it had been posted in time for it to arrive and the cheque to clear. Again, there was no evidence that this had happened.

First-Tier Tribunal (TC03075): *Anthony Richard Henry Errington*

A hotel business fell into financial difficulties. It was late paying a succession of VAT liabilities, but managed to agree Time To Pay arrangements in time, resulting in the cancellation of a number of surcharges. The senior partner then fell ill, requiring the appointment of a book-keeper to work out the VAT. Unfortunately this person made significant errors in the returns for 06/2011 and 09/2011; when this was detected (by the taxpayer rather than by HMRC), an adjustment was made to the 12/2011 return which increased the liability from £50,000 to £93,000. This could not be paid, so a 15% surcharge of £13,900 was imposed.

The Tribunal noted that no evidence had been brought forward concerning the senior partner's illness, either in relation to its extent or its effect. The

business was fully aware of Time To Pay, but did not appear to have applied for a further arrangement for this quarter. Accordingly, it did not have a reasonable excuse.

First-Tier Tribunal (TC03113): *Roy Edward Myers and another*

A company appealed against a surcharge of £1,168 levied at 10%. The defences were essentially “insufficiency of funds” and “disproportionality”, and these were rejected.

Strangely, the only previous defaults in each year were in the return for the September quarter (2010, 2011 and 2012). This surcharge related to December 2012, where the return was filed on 7 February 2013, but payment was made by six instalments between 11 February and 26 February. The trader claimed to have tried to agree TTP, as in some previous quarters, but had not managed to find anyone in HMRC who could make a decision. However, the first attempt to contact HMRC was on 11 February – after the due date – which could not prevent a surcharge.

First-Tier Tribunal (TC03114): *Quarmby Garage Ltd*

A company appealed against a surcharge of £3,165 calculated at 2%. The original SLN was incurred because the trader had forgotten to instruct the bank to make a payment for an earlier quarter; the surcharge was incurred because of insufficiency of funds until Thursday 5 April, when the Easter Bank Holidays meant that the next working day was Tuesday 10 April. It might have been possible to make a CHAPS transfer on 5 April, but this had not happened; the internet transfer booked over the weekend could only take place after the due date.

The Tribunal did not consider that any of this constituted a reasonable excuse, and rejected the claim that the penalty was disproportionate for being 3 days late.

First-Tier Tribunal (TC03122): *Datasys Ltd*

A company appealed against three successive surcharges totalling £17,528. Its excuse was the withdrawal of the Bank of Ireland from the UK, which led to a reduction in its overdraft facilities; however, the Tribunal noted that it had chosen to repay other debts to associated companies rather than prioritising the payment of VAT, and the finance director admitted that “*had the appellant realised the commissioners would impose surcharges the appellant would have been able to find a way of paying the tax on time.*” The surcharges therefore arose from the company’s choices, and there was no reasonable excuse.

First-Tier Tribunal (TC03130): *Katell Ltd*

A company appealed against successive surcharges of £1,212 at 2% and £4,562 at 5%. Its excuse was that HMRC had owed VAT repayments to an associated company (with which it formed a VAT group registration 2 days after the end of the second of these surcharged periods), and the delay in making the repayment had led to an insufficiency of funds.

The Tribunal noted that the associated company’s repayment returns for the same periods were submitted too late for it to be reasonable to expect the credits to be available in time to pay the VAT. No evidence had been put forward to show the financial position of the two companies, or justify the assertion that the repayment to one was essential for payment of VAT

by the other. The defence was therefore only "insufficiency of funds", which could not succeed.

First-Tier Tribunal (TC03136): *Musion Events Ltd*

A company appealed against a surcharge of £1,966 levied at 10%. It appeared that there had been insufficient funds to meet HMRC's direct debit call, and this had not been noticed for some time because the finance director was away for a month. The Tribunal sympathised with the company, but commented that a sensible taxpayer would put arrangements in place to cover for the absence of an important employee. The failure to do so meant that there was no reasonable excuse.

First-Tier Tribunal (TC03133): *VIP Banquets Ltd*

6.8.3 Careless or deliberate, prompted or unprompted?

An elderly racehorse owner sold a racehorse for £200,000 plus VAT. Although she received the net proceeds of sale in the quarter to April 2011, she did not tell her VAT agents about it until the following quarter. When they became aware of it they realised that it was too large to correct without a voluntary disclosure, so they prepared one; however, HMRC had already become aware of the issue, because an officer was carrying out a check on the taxpayer who was claiming input tax on the same transaction.

Some of the underlying facts were hard for the Tribunal to understand, because the taxpayer herself did not attend the hearing and was therefore not able to give her side of the story. In particular, it was not clear who had prepared the invoice, and therefore why the taxpayer had not been aware of it or informed her agents about it in the proper quarter.

The investigating officer concluded that the omission amounted to 'deliberate behaviour', and proposed to charge a penalty of 70%, mitigated as follows:

The maximum reduction is 30% for "telling", 40% for "helping" and 30% for "giving" and so the maximum of 100% applied to the 35% difference between 70% and 35% would reduce the penalty to 35%... The mitigation applied by Mr Nickson in this case was 15% for telling, 30% for helping and 15% for giving and this results in a 21% reduction of the penalty to a total of 49% of the potential lost revenue.

Following a review of the decision, the penalty was further mitigated to 43.75% of the PLR. The Tribunal further describes the HMRC consideration of mitigation:

The person conducting the review, whilst accepting these difficulties, did not apply full reduction to either category because, in the case of "helping" there was a lack of co-operation in providing a full explanation of the circumstances and in the category of "giving" there was no holding letter explaining there was likely to be a delay. There was no further mitigation allowed by the reviewer in the category of "telling" from the 15% (out of a maximum of 30%) mitigation given by Mr Nickson since in the opinion of the reviewer the mitigation given by Mr Nickson was appropriate since there was no explanation of the underlying circumstances or the background to the arrangements and the third party acting on behalf of the Appellant in making the sale was not identified.

The taxpayer appealed to the Tribunal, arguing that the omission was ‘careless’ and the disclosure was ‘unprompted’ (which would have resulted in a possible mitigation to zero).

The Tribunal commented that the one clear fact, in the absence of any evidence from the taxpayer, was that she had received £200,000. That was such a large sum that she should at the very least have enquired as to how she ought to treat it for VAT. Failing to do that went beyond ‘a failure to take reasonable care’. It was therefore appropriate to start with the ‘deliberate behaviour’ penalty scale.

The Tribunal considered that the disclosure was, technically, ‘prompted’, because the agents had not acted as quickly as the HMRC officer when they became aware of the problem. There was no doubt that they would have dealt with the error by voluntary disclosure shortly afterwards. The Tribunal decided to give the maximum mitigation for both ‘helping’ and ‘giving’, taking into account difficulties in obtaining information from third parties; and the mitigation for ‘telling’ was increased on the basis that the error would have been corrected anyway, so that only 36.75% was chargeable. This represents a mitigation of 95% of the range between the minimum of 35% and maximum of 70%.

First-Tier Tribunal (TC02953): *Margaret Findlay*

6.8.4 Dishonesty

A trader dealt in motorcycles. He treated a number of sales as eligible for the second-hand margin scheme; HMRC disagreed, and assessed for £108,487 over a three-year period. They also alleged that he had falsified documents which purported to show that purchases from a Danish and a Dutch supplier qualified for the margin scheme, and assessed a s.60 penalty of £75,940 as well.

Goods purchased from a dealer in another country are eligible for the second-hand margin scheme on resale in the UK if they were eligible for the margin scheme in the hands of the supplier. The purchase documentation has to carry a declaration to that effect.

The enquiry was prompted by discrepancies between the EC Sales Lists of some of the trader’s suppliers and the appellant’s VAT returns. HMRC also obtained information from the French authorities in relation to supplies from a French trader: they confirmed that the supplier recorded the sales as new bikes which did not qualify for the second-hand scheme. Similar information was obtained from the Danish and Netherlands authorities. Copy invoices obtained from the foreign authorities revealed a number of discrepancies when compared to the copies provided by the UK trader.

The judge examined the underlying law and concluded that it was necessary for the UK trader to be able to show that the purchases by the Dutch and Danish traders qualified for the second hand scheme – that is, that they were purchases from non-taxable persons and therefore did not give rise to input tax deduction. This requirement was considered by the judge to be not as onerous as it appeared because use of the margin scheme was optional. As the appellant did not have enough evidence to show that the suppliers’ purchases were within the scheme, the assessment

had to stand. Declarations by the appellant's customers, that the goods were in second-hand condition when they bought them, were not relevant.

The Tribunal considered the evidence for tampering with the documents, and concluded that on the balance of probabilities they had been amended. They did not accept the appellant's statement that he had not done such a thing, and confirmed the penalty and the level of mitigation (30% for attending two meetings – nothing for "early and truthful explanations").

First-Tier Tribunal (TC03040): *Darryl Haslen t/a Racer MX*

6.8.5 Late appeal

A company appealed against a default surcharge of £5,284 imposed in respect of its return period to October 2010. This appeal was dismissed by summary judgment in July 2011. The grounds of that appeal were that the trader had not appreciated that BACS transfers would take 3 days to arrive: as he had paid "in time", he believed that he had a reasonable excuse.

The summary decision included a statement that an appeal against it had to be made within 28 days. In June 2013 (although in a letter dated 25 August 2013), the appellant wrote to the Tribunal, purporting to chase a letter which it claimed to have sent in August 2011, expressing a wish to appeal. This included a new ground of appeal, which appears to have been based on some misunderstanding of cash accounting:

"*The reason we are appealing is because we factor our invoices and the percentage held back until paid by our customers is the amount for VAT. Due to new legislation we now only pay VAT on cash received and have been on time with our VAT payments.*"

The Tribunal did not accept that the letter had been sent in August 2011 and then not followed up for nearly two years. The administration of the company appeared to have a number of shortcomings, witnessed by the different dates put on several letters that were clearly not related to when they were written. The Tribunal concluded that the first time the company had notified an intention to appeal was in June 2013. Although the Tribunal did have a general power to extend time limits, it would only do so when there was a good reason for the delay. The company had not offered any such good reasons, so the application for a statement of facts and reasons, preliminary to making an appeal, was refused.

First-Tier Tribunal (TC03028): *A & E Services (Midlands) Ltd*

A social club appealed against a decision to confirm some 23 default surcharges that had arisen over periods from March 1988 to September 2010. The appeal was submitted late, and HMRC applied for it to be struck out. The Tribunal considered that there was no good reason offered for the delay that might encourage it to allow the appeal to proceed in spite of its lateness; it also considered that there was no real prospect of success in the appeal, as the various proposed defences to the surcharges did not amount to good reasons to cancel them, even if they were all supported by evidence (mainly being "insufficiency of funds").

First-Tier Tribunal (TC03098): *Herne Bay Catholic Social Club*

6.8.6 Hardship

A company appealed against a decision by HMRC that certain supplies were standard rated rather than zero rated. It further appealed against a refusal by HMRC to accept that it would suffer hardship if it paid the resulting assessments before the hearing of an appeal. Under s.83(1)(b) VATA 1994, an appeal cannot be entertained by the Tribunal without deposit of the VAT unless hardship has been accepted either by HMRC or by the Tribunal.

The Tribunal noted that the company did not appear to have appealed against a penalty assessment that was mentioned in the correspondence, and also seemed to be unaware that the "no appeal before payment" rule did not apply to penalties.

The requirement is "all or nothing": either the full £14,415 assessed would be payable, or none of it would be. The Tribunal could not set a lesser amount.

The Tribunal commented that it did not have a great deal of evidence about the current financial position of the company. It appeared to have an overdraft facility of £50,000 and a balance, in the most recent available statement, of just over £21,000 overdrawn. The Tribunal examined some accounts for recent periods and analysed expenses and liabilities. It concluded that it did not appear that the payment of the assessment would compromise the overdraft limit.

The company also protested that HMRC were withholding £220,000 of input tax in relation to a different dispute, and it was unreasonable to demand payment of this VAT when it would not pay the other amount. The Tribunal considered the High Court precedent of *R (on the application of ToTel Ltd) v First-tier Tribunal (Tax Chamber) and another* [2011] and concluded that the provisions of s.84 do not make it impossible or excessively difficult to exercise EU law rights, and nor is the right of protection of property under article 1 of the First Protocol of the European Convention on Human Rights infringed. The company was given six weeks to deposit the VAT; if it did not do so in that time, the appeal would be dismissed.

First-Tier Tribunal (TC02961): *Fairways Lakes Ltd*

6.8.7 Sales list penalty

A company failed to submit EC Sales Lists for its periods to 03/12 and 06/12. In November 2012, HMRC charged penalties of £470 and £1,000 for late submission. One of the appellant's grounds of appeal was the argument that, had HMRC issued the first penalty more promptly, the company would have realised it was in default and would have avoided the second penalty. It accepted the first penalty but not the second.

The Tribunal noted that the company had been issued with a penalty liability notice in June 2011, and had avoided the issue of any penalties for the March 2011 quarter by submitting a Sales List by 16 July. The company should have been aware of its responsibilities, which apply whether or not HMRC issue reminders. HMRC had applied the law to the facts and their conclusion could not be faulted.

The simple oversight pleaded by the appellant could not be a reasonable excuse; nor did the Tribunal consider the penalty unduly harsh, let alone "disproportionate" in the sense required by the Upper Tribunal in *Total Technology*.

First-Tier Tribunal (TC03048): *Xtreme Graphics Ltd*

6.8.8 Costs

Judge Mosedale, who found for the appellants in the argument about online filing, awarded costs to the taxpayer in another case. The original dispute (TC02263) concerned the supply of hotel accommodation through an agency – HMRC ruled that the appellants could not recover input tax because their supplies were exempt; even though they were making supplies of hotel accommodation, HMRC ruled that this would only be taxable if the immediate recipient of the supply used it for sleeping in.

The judge had to consider whether HMRC had acted unreasonably in relation to the proceedings. Her assessment of HMRC's case is withering:

My conclusion is that, taking into account:

- *No authority even by analogy was presented to me;*
- *Unless expressly stated in the legislation, the identity of the recipient of a supply is irrelevant to the status of the supply*
- *Exceptions to exemptions are not interpreted narrowly*
- *There was nothing in the wording of either the UK legislation or EU Directive which implied that the identity of the recipient was significant;*

HMRC's case did not have a reasonable prospect of success.

She regarded taking the case, on a novel point of law with no reasonable prospect of success, was unreasonable behaviour, and awarded costs on the standard basis.

First-Tier Tribunal (TC02911): *Nathaniel David Roden and another*

A charity won an appeal which allowed it to register for VAT retrospectively and reclaim input tax following the *Gables Farm* decision that the sale of donated animals was zero rated rather than outside the scope. In the decision, the FTT commented:

"*It was quite plain from the evidence of Mrs Shackleton that she considered that she had no alternative but to reject WGAS's input tax repayment claim since the Business Brief issued by HMRC following release of the Gables Farm decision contained no reference to input tax claims such as that of WGAS, nor did the internal advice with which she was provided deal with such claims. We have no hesitation in saying that she wholly failed to consider the claim against the background of the tribunal decision in Gables Farm. Had she done so, in our judgment, she would have had no alternative but to allow the claim.*"

The charity took this as an indication that HMRC had behaved unreasonably in conducting or defending the proceedings, and applied for costs. It made its application late – the decision was released on 1 June 2012, and the application was made by the charity's accountants on 4 December. The charity explained that it had not realised immediately that

the June decision was the end of the matter: it was expecting a decision about the amount of its claim, but this was not resolved. HMRC had not agreed its calculations, and HMRC's statement of case made it clear that this was an issue between the parties, but the decision only dealt with the question of principle.

The Tribunal considered that it was normally essential for an applicant to have understood and followed the Tribunal's rules. However, it did appear that in this case there had been genuine confusion between the parties, and HMRC's own letters had not helped. The Tribunal allowed the application to proceed.

However, the Tribunal was not convinced that HMRC had acted unreasonably, in spite of the strongly-worded comments about the failure to apply the precedent. The charity's former accountants had in earlier years made representations about the sale of the dogs which contradicted the case put forward in the appeal: it was reasonable for HMRC to regard that as something that needed to be tested by the Tribunal, with the facts to be found after cross-examination of witnesses. The application for costs was refused.

First-Tier Tribunal (TC02955): *Wood Green Animal Shelters*

A company appealed in 2007 against an assessment arising from a dispute over whether some supplies had been properly zero-rated as exports. The appeal was struck out in June 2011 because the company had failed to serve a witness statement within a specified time limit. The company applied to have the appeal reinstated, but this was refused; the company applied for leave to appeal to the Upper Tribunal, but this was also refused. HMRC applied for their costs, and the company argued that it should not have to pay the costs while it was still exploring ways of reinstating the original appeal.

The judge noted that the main reason the company asked for deferral of a costs award was "hardship". This could justify deferral, but could not be a reason not to award costs where costs were due. The company had provided no evidence to support a claim that paying HMRC's costs would cause it such hardship that it could not pursue the litigation further, so the judge refused the application to delay the award of costs.

First-Tier Tribunal (TC03063): *Starmill UK Ltd*

6.8.9 Procedure

An appellant in a MTIC case applied for an order requiring HMRC to disclose certain documents relevant to its appeal. It claimed that these documents would reveal whether and how HMRC had allocated the VAT losses among the various parties to the fraudulent transactions, and whether HMRC might recover the same VAT from several sources.

The Tribunal considered a number of precedents, including the recent CJEU decision *LVK* (Case C-643/11). It concluded that the denial of input tax where a transaction was connected with fraud was a "penalty"; and that the imposition of such a penalty on someone who knew or ought to have known that his transactions were connected with fraud was compatible with the Directive. This led the Tribunal to conclude that it was not necessary for HMRC to show their allocation of the VAT loss, or to show that they could not recover the VAT from several traders. The

documents were therefore not relevant to the appeal, and the order for disclosure was refused.

UK case law brought the Tribunal to the same conclusion, although for a different reason: in *Mobilx Ltd*, the Court of Appeal held that the denial of input tax was not a penalty. It was simply the case that someone who was a participant in a fraud was not entitled to recovery. The possibility of recovery by HMRC from other taxpayers was not relevant to that question.

First-Tier Tribunal (TC02893): *Abbott International Trading Ltd and related appeal*

The FTT had to consider whether to approve an application by five appellants for a rule 18 direction that their appeals should be joined together. They all relate to the question of whether they could claim input tax in relation to supplies made to them by Royal Mail and treated as exempt, even though they contravened the conditions for exemption as found by the CJEU in the *TNT* case.

Judge Mosedale noted that a rule 18 direction goes beyond the everyday procedure of staying one appeal behind another which is on a similar subject. HMRC reported that there were another 140 cases already stayed behind the lead case of *Zipvit Ltd*. Rule 18 makes the FTT's decision in the lead case a binding precedent in the FTT for those related cases covered by the direction.

The judge reviewed the unwieldy nature of the rule 18 direction: if either party appealed the FTT decision, it would be necessary for the related appellants to apply for a direction to "unbind" them again, because the binding order was not carried forward into the Upper Tribunal. Because the total amount at stake in all the appeals is said to be £1bn, HMRC have already said that they will be obliged to ask for leave to appeal if they lose in the FTT.

Even so, the judge accepted that there were advantages for the appellants if the direction was granted. As long as one of the 6 appellants changed its grounds of appeal so that they were identical with those in the lead case (as all the other 5 were), the direction should be given. If either side chose to appeal the FTT's decision, it would be necessary to deal with the legal procedures required at that time.

First-Tier Tribunal (TC03041): *288 Group Ltd and related appeals*

6.8.10 Reinstatement

A company was denied input tax credits of £25.3m in relation to periods in 2005 and 2006. The decision was made in June 2009 and appealed the following month; the company's appeal was struck out in June 2012 after the company had failed to comply with an "unless order" to provide witness statements and exhibits. The company applied to have the appeal reinstated in July 2012.

Judge Berner reviewed the history of the litigation and concluded that the appellant's behaviour involved "brinkmanship". He had only engaged a representative when he was given a serious deadline, and failed to pursue the appeal vigorously at any stage. The reasons given for his delays were not enough to constitute a valid reason to reinstate the appeal.

First-Tier Tribunal (TC03057): *Foneshops Ltd*

6.8.11 Article

In an article in *Taxation*, Mike Thexton comments on a number of recent First-Tier Tribunal decisions that appear to contain basic errors of law:

- *Catering Solutions (North East) Ltd* (TC02832): note 13 Group 5 Sch.8 VATA 1994 considered relevant to an argument about a supply which was clearly made under item 2, not item 1 of that group;
- *Argent* (TC02680): liability (and a dishonesty penalty) for an unregistered trader calculated at 17.5% rather than 7/47 of his turnover, even though he would not be able to collect the VAT in addition to what he had already charged;
- *Mark Reid (practising as Reid & Co. Solicitors)* (TC02655): FTT judge refers to an assessment being time-barred by s.80(4) VATA 1994 – which is the time limit for repayment claims, not assessments.

The article goes on to analyse *TLLC Ltd* (TC02857), where the issues are more complex, but the writer considers that a number of CJEU precedents have been ignored by the FTT.

The conclusion is a reminder that the FTT judge does not always bring the law in his or her head: it is the work of the representatives of the appellant and HMRC to direct the judge to the law and the evidence, and if they are not properly directed, they may come to an erroneous conclusion.

Taxation, 3 October 2013

6.9 Other administration issues

6.9.1 Action against fraud and error

HMRC have announced another of their "disclosure opportunity campaigns" in which people with undeclared income or gains are invited to put their affairs in order in return for lower penalties. The "Health and Wellbeing Tax Plan" is directed at health professionals such as physiotherapist, alternative medical practitioners and other therapists. Anyone wishing to take advantage of the plan must inform HMRC of an intention to make a disclosure by 31 December 2013 and deliver the disclosure and payment by 6 April 2014. An intention to disclose can be made after 31 December but the level of penalty may be higher.

www.gov.uk/government/publications/health-and-wellbeing-tax-plan-your-guide-to-making-a-disclosure/health-and-wellbeing-tax-plan-your-guide-to-making-a-disclosure

HMRC have published their latest analysis of the "tax gap" – their estimate of the shortfall between theoretical tax receipts and actual tax receipts that arise from fraud, avoidance and error.

The 2011/12 tax gap figures continue a 'downward trend' in the percentage of theoretical tax – 7% rather than 7.1% in 2010/11 – although the value rose slightly from £34bn to £35bn. This is considered to be largely due to the increase in the standard rate of VAT.

HMRC make the following comments about their response to the tax gap:

"*While most small and medium-sized enterprises (SMEs) pay the right amount of tax, we estimate that the SME customer group is responsible for nearly half of the value of tax gap. Much of this is attributable to error or failing to take reasonable care, so we provide a wide range of tailored and targeted educational support to give customers greater certainty that they have got things right at key points in their business lifecycle. Our Campaigns target specific customer groups and provide customers an opportunity voluntarily to put their tax affairs in order. But we are also determined to crack down on evasion; tax gap analysis suggests that this is a significant risk amongst SMEs. We have invested heavily in our strategic data matching system Connect and in additional compliance staff to address this. And we deploy around 20 taskforces a year to tackle evasion in specific, high-risk regions and sectors.*"

HMRC Release 11 October 2013; www.hmrc.gov.uk/statistics/tax-gaps/mtg-2013.pdf

Six men have been charged over their alleged involvement in a £11m carbon credit fraud. Four are charged with conspiracy to cheat the public revenue, and all six are charged with money laundering offences.

www.cps.gov.uk/news/latest_news/six_charged_over_11m_carbon_credit_fraud/

HMRC report that a trader convicted of involvement in a carbon credit fraud will face a further 10 years in prison if he does not repay £3m in hidden assets within 3 months, and another £13m in VAT within 6 months.

www.gov.uk/government/news/carbon-credit-vat-fraudster-to-pay-back-13-million

HMRC have announced a new approach to Business Records Checks. The BRC programme has involved visiting small and medium sized enterprises to encourage them to improve the standard of records they keep. HMRC have discovered that many of the traders they visit have been keeping adequate records; they now intend to focus their activity to make it more cost-effective.

The new approach will be developed in the Edinburgh, Glasgow, Leeds, Bradford and Stockport areas, and suspended elsewhere. However, any BRC that has commenced will be completed. Anyone who has not yet completed a telephone questionnaire will be offered advice from a member of the Business Education and Support Team as an alternative to a visit.

www.hmrc.gov.uk/news/business-records-checks.htm

HMRC have announced new “taskforces” with particular targets.

One aims to recover £7 million by targeting fraudulent VAT repayment claims in Scotland and Northern Ireland. Although the press release states that an increase in risk has been detected in these two areas, particularly involving businesses established only to make fraudulent claims, no further details are given.

HMRC Press Release 14 October 2013

Another aims to recover £3.75 million by targeting tax evasion and use of illegal fuel in the road transport industry. Its efforts will be concentrated on individuals and businesses in South Buckinghamshire, Berkshire, Dorset, Hampshire, Isle of Wight, Kent, Surrey, Sussex and Wiltshire.

HMRC Press Release 19 November 2013

Yet another will target undeclared income of individuals and businesses in the same areas, looking for people with offshore accounts and those living lifestyles beyond their obvious means through assets from undeclared income. The target for recovery is £2.8 million.

HMRC Press Release 19 November 2013

A different taskforce will target fraudulent VAT repayment claims in the North East and Lincolnshire, with further action planned for South Wales and South West England. This is intended to save £6m.

HMRC Press Release 19 November 2013

6.9.2 Tax simplification?

The Office of Tax Simplification has published the first stage of a review of definitions in tax legislation. It suggests that a “good definition” will try to encompass these points:

1. Clarity
2. Focus on essential features
3. The use of an existing definition where possible
4. Avoid circularity
5. Avoid figurative or obscure language
6. Be affirmative rather than negative.

The only VATA reference in this first stage report is to the definition of a group in s.43; the point made is that there are numerous definitions of groups in the Taxes Acts, and the differences between them are naturally confusing. However, as different levels of connection and control have traditionally been considered necessary for different reliefs, it is hard to see how such a definition can be completely unified.

Office of Tax Simplification 3 October 2013

6.9.3 Litigation and Settlement Strategy

HMRC have published an updated commentary on the Litigation and Settlement Strategy. It is aimed at HMRC staff, but it is obviously advantageous for anyone involved in litigation with HMRC to understand their position.

The document gives the background to the LSS as encouraging HMRC staff to:

- Minimise the scope for disputes and seek non-confrontational solutions;
- Base case selection and handling on what best closes the tax gap;
- Resolve tax disputes consistently with HMRC's considered view of the law;
- Subject to that, handle and resolve disputes cost effectively – based on the wider impact or value of cases across the tax system and across HMRC's customer base;
- Ensure that the revenue flows potentially involved make any dispute worthwhile;
- (in strong cases) settle for the full amount HMRC believes the Tribunal or Courts would determine, or otherwise litigate;
- (in 'all or nothing' cases) not split the difference;
- (in weak or non-worthwhile cases) concede rather than pursue.

The LSS reflects all three of HMRC's key strategic objectives by considering:

- the overall effectiveness of disputes handling (to maximise revenue flows);
- how to reduce the scope for disputes arising and settle those that do arise as quickly and efficiently as possible (to improve customer experience); and
- the efficiency of disputes handling (to reduce costs).

http://www.hmrc.gov.uk/practitioners/lss-guidance-final.pdf

6.9.4 Finance Bill 2014

Draft legislation and Tax Information & Impact Notes for the 2014 Finance Bill were published in December following the Autumn Statement. The main VAT measures are:

- place of supply and the introduction of the Mini One-Stop Shop (see section 4.2/4.4);
- the addition of two new health service bodies to the list of those bodies entitled to recovery of VAT on expenses, once the Care Act 2014 has been passed;
- the change to the rules on refunds by manufacturers, covered in section 2.7.

www.gov.uk/government/collections/finance-bill-2014;
www.gov.uk/government/uploads/system/uploads/attachment_data/file/264647/Overview_of_legislation_in_draft.pdf

6.9.5 Money laundering registration

The Tribunal has heard an appeal by a book-keeper against a £500 penalty for failing to register with HMRC under the Money Laundering Regulations at the right time. This is a reminder that all self-employed book-keepers offering services to clients are supposed to be registered with a professional body or with HMRC. The Tribunal examined the rules and whether the penalty was appropriate, and concluded that it was.

The book-keeper had made a "prompted disclosure" – HMRC had written to remind her of her obligations after she had registered as a tax agent able to use the HMRC website for clients' self-assessment and VAT affairs.

First-Tier Tribunal (TC03096): *Christine Houghton*

6.9.6 Security

A trader appealed against a notice to deposit security. It was not the usual 'connection with previous insolvent registrations' situation: the trader had been registered since 1989, but had not filed returns for the periods from June 2010 to September 2012, nor paid centrally issued assessments totalling over £41,000. The security required was set at around the same figure for monthly returns, or slightly more for quarterly returns.

The trader did not attend the appeal hearing, but the Tribunal considered his grounds of appeal from correspondence. He claimed that the arrears had arisen because of a disputed assessment following a control visit; this had now been resolved, the outstanding VAT was agreed, and he was making arrangements to pay it off by instalments. The main point that could have been relevant to a security decision was a stated intention to change the nature of his trade – he intended to cease trading through a pub and hotel on 1 January 2013 and develop the sites for residential dwellings. This would change the nature of the business and probably make him a repayment trader. HMRC refused to amend the security requirement on the basis of this stated intention.

The Tribunal does not specifically comment on the relevance or otherwise of this change of trade. It only records that it considered all the facts carefully, including the outstanding returns and VAT, and concluded that HMRC reached their decision reasonably: they did not ignore relevant material or take anything irrelevant into account.

First-Tier Tribunal (TC02940): *Christopher Parsonage*

Southend Football Club has a poor record of VAT compliance. Since December 1999 as many as 76 default surcharges have been imposed on it and its poor compliance record has led to its being required, since 2004, to submit monthly returns. In addition on several occasions HMRC have taken enforcement action, including the service of statutory demands and the commencement of winding up proceedings.

In July 2012 HMRC served the club with a notice of requirement to deposit security for £104,700, which was in effect three months' estimated VAT liability. The club appealed.

The Tribunal heard evidence from the officers who raised the notice and upheld it on review. It was noted that the club's receipts were mainly in cash, but it still paid its VAT late; this suggested that the money was being used for other purposes, which meant there was a real risk of non-

payment. In addition, there were two outstanding returns at the time the requirement was issued; although the assessed amount had been paid, there was a risk that the true liability would be greater (this was confirmed when the return for one of the periods was submitted – the assessment was £80,000 too small).

The club argued that security should be required where there was a history of non-payment, rather than merely late payment, which was adequately dealt with and punished by the default surcharge regime. The Tribunal did not agree; late payment suggested a risk of future non-payment, and it could not be said that the decision to require security had been unreasonably reached. The appeal was dismissed.

First-Tier Tribunal (TC03095): *The Southend United Football Club Ltd*

6.9.7 Notice updates

HMRC have published a revised version of their Notice *Disclosure of VAT avoidance schemes*. It reflects legislative changes made since the last version to the meaning of 'tax advantage', the 'duty to notify' rules, and the range of 'listed schemes' and 'hallmarks'. It also corrects some minor errors and expands on the guidance to help taxpayers identify the schemes that must be notified.

Following restructuring within HMRC, the address for disclosing a notifiable arrangement has also been changed.

Notice 700/8