VAT UPDATE
JANUARY 2015

Covering material from September – December 2014

Notes prepared by Mike Thexton MA FCA CTA

VAT Update January 2015

Contents

1. INTRODUCTION

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

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

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

1.1 Appeals pending

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

The HMRC website section which reports the progress of appeals 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 16 October 2014 after a gap since June.

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

UK appeals awaiting hearing (or announcement of decision):

- *Associated Newspapers Ltd*: HMRC are applying to the UT for permission to appeal against the FTT's interpretation of SI 1993/1507 on gifts of business services.
- *British Film Institute*: HMRC are considering whether to appeal to the Court of Appeal against the UT's confirmation of the FTT's decision that the Institute was entitled to rely on the cultural services exemption in the period 1990 – 1996 in support of a *Fleming* claim.
- *Brockenhurst College*: HMRC have been granted leave to appeal to the Court of Appeal against the UT's confirmation of the FTT's decision that supplies of meals to outsiders were an essential part of the education of the students who prepared and served the meals (appeal scheduled for February 2015).
- *CCA Distribution Ltd*: HMRC have been granted leave to appeal in relation to 4 of 8 stated grounds against FTT's finding that fraud was

not the only explanation of transactions in a MTIC case (hearing date set at 29 June – 1 July 2015).

- *Colaingrove Ltd*: HMRC's list includes separate entries for
  - TC02715 (removable contents/definition – UT decision in last update, HMRC's appeal allowed in part; further appeal in CA will be heard at some point between November 2014 and March 2015).
  - TC02701 (removable contents/apportionment – appeal stayed pending decision in TC02715, HMRC now applying for permission to appeal).
  - TC02534 (fuel – UT hearing listed 18/19 June 2014, decision awaited).
  - TC02701 (verandas – UT hearing listed 10/11 November 2014).
- *Davis & Dann Ltd and Precis (1080) Ltd*: HMRC have received leave to appeal to the Court of Appeal against the Upper Tribunal's decision that the companies did not have the means of knowing that their transactions were connected with fraud.
- *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 date now stated as "stayed", without an explanation why).
- *DPAS Ltd*: HMRC have been granted leave to appeal to the Upper Tribunal after the FTT accepted that a VAT planning arrangement to circumvent the *AXA* judgment was effective and not abusive (hearing listed for 6/7 May 2015).
- *Finmeccanica Group Services Spa*: HMRC have been granted permission to appeal to the UT against the FTT's decision that services were not subject to UK VAT (hearing listed for 3 June 2015).
- *GMAC UK plc v HMRC*: HMRC have written to the UT for directions on the progress of this case; their list acknowledges that the judgment of the CJEU (Case C-589/12) went against them.
- *Investment Trust Companies*: HMRC have appealed to the Court of Appeal against the High Court's ruling that claimants had a direct cause of action against HMRC where they cannot recover overcharged output tax from the trader who made the supply to them (hearing listed for 20 – 21 October 2014; discussed in R&C Brief 15/2013).
- *Iveco Ltd*: HMRC have been granted leave to appeal to the Upper Tribunal against the FTT's ruling that a claim for repayment was not subject to the cap.
- *Littlewoods Retail Ltd*: HMRC are appealing the decision on compound interest to the Court of Appeal – see R&C Brief 20/2014 (hearing listed for 23 March 2015).
- *Mercedes-Benz Financial Services UK Ltd v HMRC*: HMRC have applied for leave to appeal to the Court of Appeal against the

decision that the Agility product involved a supply of services rather than goods.

- *MG Rover Group Ltd*: HMRC have been granted leave to appeal against the FTT's decision about who is entitled to claim a refund where an overpayment was made on a group VAT return.
- *National Exhibition Centre Ltd*: HMRC have been granted leave to appeal to the Upper Tribunal against the FTT's ruling that services were exempt payment processing (hearing listed for 21 – 22 April 2015).
- *Newey (t/a Ocean Finance)*: HMRC appealed to the Upper Tribunal after the FTT held that a scheme was effective in reducing irrecoverable VAT on advertising costs by moving a loan broking business to the Channel Islands – HMRC regard the CJEU judgment (Case C-653/11) as being 'in their favour'; UT to reconsider the case in the light of the judgment (listed for hearing 4/5 November 2014).
- *Pendragon plc v HMRC*: HMRC have applied to the Supreme Court for leave to appeal against the Court of Appeal's ruling that the Upper Tribunal had incorrectly overturned the FTT's decision that the company's arrangements were not abusive. The Supreme Court gave leave to appeal on 30 January 2014, but no hearing date yet.
- *Royal College of Paediatrics and Child Healthcare & Coleridge Ltd*: HMRC are appealing against the FTT's decision that a transfer of property constituted a VAT-free TOGC (UT hearing listed for 8 – 9 December 2014).
- *The Chancellor, Masters & Scholars of the University of Cambridge*: HMRC have appealed against the FTT's decision that the costs of managing the endowment fund were residual and partially recoverable (hearing listed for 17 March 2015).
- *The Open University*: HMRC have appealed to the UT against the FTT's ruling that the OU was entitled to exemption in respect of supplies by the BBC (hearing listed 18 – 19 November 2014).
- *Vodafone Group Services Ltd*: HMRC have applied for leave to appeal against the FTT's decision that the trader could replace the reasons for an in-time but disputed claim with the grounds for an accepted but out-of-time claim.
- *Wakefield College*: HMRC have been granted leave to appeal against the FTT's decision (itself a finding on remittal from the UT) that the college's buildings were used for non-business purposes (hearing date to be confirmed).

The list also contains the following interesting comments on two cases which will not be appealed further:

- *Alexandra Countrywide Investments Ltd*: HMRC have decided not to appeal, and will issue an updated R&C Brief once a review of the policy in relation to conversions of mixed use buildings into dwellings has been completed – it appears this still has not happened.
- *Kumon Educational UK Co Ltd*: HMRC have decided not to appeal against the FTT's decision that printed matter was supplied separately

from educational/franchise services because the FA 2011 change to the law means that there are no further implications going forward; for the same reason, they will not issue a R&C Brief on the subject.

The following cases have disappeared from the HMRC website list, but do not appear to be resolved yet:

- *AN Checker Heating & Service Engineers*: the taxpayer will appeal to the UT against the FTT's decision that none of its supplies of boiler installation qualified for the lower rate as the installation of energy-saving materials. The hearing has apparently been stood over pending the UT's decision in the *Colaingrove* (fuel) case.
- *Finance and Business Training Ltd v HMRC*: taxpayer is applying for leave to Court of Appeal (hearing of request for leave commences 28 October 2014) against UT's upholding of FTT's decision that it was not an "eligible body" by being so closely connected with the University of Wales that it became a "college of the university".
- *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.
- *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 High Court (which will in 2014 consider the effect of the CJEU's judgment in Case C-591/10).
- *Leeds City Council v HMRC*: taxpayer council's appeal to the Court of Appeal against the UT's decision that the three-year cap validly blocked a number of claims for repayment will commence in early December 2014.
- *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.
- *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.

The current update includes the latest developments in the following cases from HMRC's list:

- *Lok'n'Store Group plc*: HMRC have decided not to appeal the UT's confirmation of the FTT's decision in favour of the taxpayer's special partial exemption method. R&C Brief included in this update.
- *Longridge on the Thames*: the UT has dismissed HMRC's appeal against the FTT's ruling that a charity was not in business and could receive building services zero-rated.
- *Lees of Scotland Ltd*: HMRC have decided not to appeal against the decision about snowballs and have issued a R&C Brief.

- *University of Huddersfield Higher Education Corporation*: HMRC successfully appealed against the FTT's long-delayed decision that the university's planning arrangements were not abusive.

Other developments on appeals that have been reported include:

- *Alpha Sim Communications Ltd (In Compulsory Liquidation) and others v Caz Distribution Services Ltd and others*: this is a civil claim for damages made by the liquidators of some companies against other companies which it is alleged were involved in carousel frauds. The High Court found in favour of the plaintiffs; an appeal to the Court of Appeal will commence on 15 October 2014.
- *Esporta Ltd v HMRC*: the Supreme Court has refused the taxpayer leave to appeal against the Court of Appeal's judgment that its cancellation charges were VATable.
- *Fonecomp Ltd v HMRC*: in a MTIC case, the taxpayer has applied for leave to appeal to the Court of Appeal against the UT's upholding of the FTT's finding that the company had the means of knowing that its transactions were connected with fraud. This was scheduled to proceed to the Court of Appeal in October 2014.
- *Reed Employment Ltd v HMRC*: the Supreme Court has refused the taxpayer leave to appeal against the Court of Appeal's judgment that its repayment claim was barred by the defence of unjust enrichment and the three-year cap – it was not possible to argue further that the ruling that the amendment of the unjust enrichment rule in 2005 did not infringe the principle of equal treatment.
- *South African Tourist Board v HMRC*: HMRC do not intend to appeal the UT's decision in respect of the claim for input tax in relation to supplies made for consideration to overseas businesses and the South African government.
- *Sub One Ltd (t/a Subway) (in Liquidation) v HMRC*: the taxpayer appealed to the Supreme Court against the finding that its meatball marinara and toasted sandwiches were standard rated. However, leave to appeal has been refused.
- *TJ Charters LLP*: neither side will take this case further – as reported in the last update, the FTT confirmed that *Lennartz* accounting was appropriate even though the taxpayer had not formally chosen to apply *Lennartz*, but allowed some reduction of HMRC's assessed figures.

Lastly, HMRC's list retains a handful of cases where a decision has been taken and the list merely reports HMRC's response:

- *Bridport & West Dorset Golf Club*: the HMRC list simply refers to the issue of R&C Brief 25/2014, even though that does not resolve the issues raised by the CJEU decision.
- *European Tour Operators Association*: this case was remitted by the Upper Tribunal to the FTT for further findings of fact – the FTT confirmed the original decision, and HMRC have decided not to appeal further, because the scope of the case is narrow.

2. OUTPUTS

2.1 Scope of VAT: linking supplies to consideration

2.1.1 Off-street parking

The Upper Tribunal has dismissed an appeal by the Isle of Wight Council and three other appellants against the FTT's decision that treating off-street parking as a non-taxable activity of local authorities would create a significant distortion of competition.

The judges noted that the dispute has a long history – the first decision (in favour of the councils) was given by the VAT Tribunal in 2006; it was referred back to the Tribunal by the High Court, then referred to the CJEU after the Tribunal found for the councils again. In Case C-288/07, the court gave the following guidance to the UK High Court on how the matter was to be determined:

1. ... the significant distortions of competition... must be evaluated by reference to the activity in question, as such, without such evaluation relating to any local market in particular.

2. The expression 'would lead to' is, for the purposes of the second paragraph of art 4(5) of the Sixth Directive, to be interpreted as encompassing not only actual competition, but also potential competition, provided that the possibility of a private operator entering the relevant market is real, and not purely hypothetical.

3. The word 'significant' is... to be understood as meaning that the actual or potential distortions of competition must be more than negligible.

The case was then referred back to the FTT for further findings of fact to apply these principles to the case. After a directions hearing and a substantive hearing, Sir Steven Oliver (with two other panel members) finally found for HMRC, releasing the decision in October 2012.

The councils appealed, arguing that the FTT had incorrectly accepted that the incidence of taxation was an important factor in the pricing of local authority off-street parking – they claimed that pricing policies are wholly driven by other considerations. This, they said, had led the FTT to a conclusion that amounted to an error of law.

The UT examined the FTT decision in detail, noting the reasoning that had been applied. It was agreed that the FTT had identified the issues correctly; it appeared to have taken into account all the relevant factors, and the UT was not persuaded it had wholly misunderstood the relevant law on the pricing of off-street parking services. The decision appeared to be one of fact rather than one of law, and the appellants' attempts to undermine it on legal grounds did not change that. The UT was satisfied that the decision – that non-taxation would lead to potentially significant distortions of competition in pricing and in outsourcing of off-street parking provision – was a reasonable one justified by the findings of the FTT. The appeals were dismissed.

Upper Tribunal: *Isle of Wight Council and others v HMRC*

2.2 Disbursements

Nothing to report.

2.3 Exemptions

2.3.1 Insurance

A company was formed in 2000 to provide introductions and improved terms to insurance brokers who subscribe to its services. Its income comes from subscriptions and from commissions paid by insurers who issue policies through its subscribers. It enabled small brokers to group together into an "alliance" to secure better terms for their own commissions and for their clients' premiums.

HMRC decided that the supplies to insurance companies, remunerated by commission, were exempt. Although by the time of the FTT appeal hearing HMRC's representative suggested that this might be incorrect, the Tribunal could not rule on it, as it was not the subject of the appeal; however, they could not regard anything relating to HMRC's concession of this issue as binding in their consideration of the other.

The issue under appeal was whether the subscriptions paid by member brokers were exempt as consideration for a service which could be regarded as an intermediary one in relation to insurance contracts. The company had asked for clearance on the matter in 2009, and HMRC had refused to give it; eventually this led to a notice of compulsory registration to take effect in 2005.

The FTT (TC02532) considered a number of precedent cases, most importantly Case C-8/01 *Assurandor-Societet, acting on behalf of Taksatorringen v Skatteminmsteriet*. The CJEU commented that "*As to whether such services are 'related services performed by insurance brokers and insurance agents', it must be stated, as the Advocate General has pointed out in para 86 of his opinion, that this expression refers only to services provided by professionals who have a relationship with both the insurer and the insured party, it being stressed that the broker is no more than an intermediary.*"

Further, the judgment of Etherton LJ in Insurancewide.com was cited as defining the scope of the exemption for insurance intermediaries:

(1) The insurance intermediary exemption should be interpreted so far as possible, consistently with its terms, in a way that reflects the jurisprudence of the ECJ and the United Kingdom's obligations under the Sixth Directive and the 2006 VAT Directive. To do otherwise would, as Ms Foster pointed out, risk infraction of EU legislation by the United Kingdom.

(2) The exemption in art 13B(a) must be interpreted strictly since it constitutes an exception to the general principle that VAT is to be levied on all services supplied by a taxable person. This does not mean, however, that the words and expression in art 13B(a) and the insurance intermediary exemption are to be given a particularly narrow or

restricted interpretation. It is for the supplier to establish that it and its activities come within a fair interpretation of the words of the exemption.

(3) the exemption for 'related services' under art 13B(a) only applies to services performed by persons acting as an insurance broker or an insurance agent. Although those expressions are not defined by EU legislation, they are independent concepts of the common system of VAT.

(4) Whether or not a person is an insurance broker or an insurance agent, within art 13B depends on what they do. How they choose to describe themselves or their activities is not determinative.

(5) The definitions of 'insurance broker' and 'insurance agent' in the Insurance Directive are relevant to the meaning of the same expressions in art 13B(a), to the extent, but only to the extent, that they should be taken into consideration as reflecting legal reality and practice in the area of insurance law. It is not necessary, in order to invoke the exemption in art 13B(a), for the taxpayer to perform precisely the description of activities in art 2(1)(a) or (b) of the Insurance Directive.

(6) On the other hand, the mere fact that a person is performing one of the activities described in art 2(1)(a) or (b) of the Insurance Directive or the definition of 'insurance mediation' in the Insurance mediation Directive does not automatically characterise that person as an insurance agent or insurance broker for the purposes of art 13B(a).

(7) It is an essential characteristic of an insurance broker or an insurance agent, within art 13B(a), that they are engaged in the business of putting insurance companies in touch with potential clients or, more generally, acting as intermediaries between insurance companies and clients.

(8) It is not necessary, in order to claim the benefit of the exemption in the art 13B(a), for a person to be carrying out all the functions of an insurance agent or broker. It is sufficient if a person is one of a chain of persons bringing together an insurance company and a potential insured and carrying out intermediary functions, provided that the services which that person is rendering are in themselves characteristic of the services of an insurance agent or broker.

(9) All the above principles are capable of being applied, and must be applied, to the insurance intermediary exemption in Sch 9 to VATA 1994.

The FTT decided that the services provided by the company constituted access to structures and facilities which enabled insurance brokers to sell insurance on more favourable terms, but that was not enough to constitute 'acting in an intermediary capacity'. It was more akin to the support services of *Arthur Andersen* in Case C-472/03. HMRC's decision in respect of the supplies to member brokers – that the subscriptions were taxable – was upheld.

The company appealed to the Upper Tribunal, arguing that:

(1) The FTT should have classified Westinsure as an insurance intermediary.

(2) The only true and reasonable conclusion from the facts is that the services Westinsure provides are insurance-related services.

(3) For the FTT to classify Westinsure's services as 'administrative and support services' was irrational.

(4) There is no judicial authority for the restriction on the type of related services which qualify for the exemption which the FTT relied on.

(5) The result reached by the FTT does not accord with commercial realities.

The UT examined a number of precedent cases on the insurance exemption, both domestic and European, before reviewing each of these arguments in turn. In respect of the first, the judge noted that "insurance intermediary" was not identical in meaning to "insurance agent or broker". Agents and brokers are intermediaries, but the reverse is not necessarily true. The FTT conclusion that the appellants relied on to suggest that Westinsure was an intermediary did not carry that much weight: it only said that the company did not breach some of the conditions which would have ruled out that classification, not that it met all the conditions required.

As regards the fourth argument, which was the other main one, the UT rejected the criticism of the FTT's approach. The FTT was entitled to find that the services supplied by Westinsure to its broker members did not themselves constitute the services of a broker or agent. It brought together insurers and brokers, but other kinds of business could do that (for example a conference organiser). It did not bring them together in the way that a broker would.

The other arguments were considered less significant. There was no doubt that the services were related to insurance, but they were not sufficiently related to particular transactions to qualify for the exemption. The FTT had not found that the company provided administrative or support services: it commented that the services were "more akin" to such services, comparing it to *Arthur Andersen*, in putting it outside the scope of the exemption. And although it would be logical in principle to exempt the whole of the insurance market in order to reflect the commercial reality that Westinsure's business "oozed insurance", that was not what the Directive did – it drew a line around the exemption, and Westinsure was outside that line.

The appeal was dismissed.

Upper Tribunal: *Westinsure Group Ltd v HMRC*

2.3.2 Postal exemption

The reference to the CJEU in *R (on application of TNT Post UK Ltd) v HMRC* (Case C-357/07) led to a new understanding of the scope of the exemption for postal services, and a revision of the UK law so that only services provided by the Post Office company as part of the "universal service obligation" were exempt.

The same applicant, now renamed, returned for new judicial review proceedings, arguing that the scope of the exemption was still wrong. The company is given access to Post Office services in that the PO provides it with "final mile" delivery to individual addresses; the applicant negotiates contracts for collection of bulk mail, sorting and delivery to PO regional centres, and pays the PO to carry out the final sort and local delivery. This continues to be exempt. Presumably the applicant believes that there is irrecoverable VAT reflected in the charges it pays to the PO for this service, so it would prefer it to be taxable.

The High Court examined the detailed wording of the CJEU's decision in the earlier case, and noted that it did not simply reflect the opinion of the Advocate-General. It appeared that the court had deliberately left the scope of the exemption a little wider than simply carrying out the USO itself. There might be other services, carried out under the unique conditions that applied to it as universal service provider, that would also fall within the exemption. The court was satisfied that the UK had correctly implemented the CJEU decision.

High Court: *R (on the application of Whistl UK Ltd (formerly TNT Post UK Ltd)) v HMRC*

2.3.3 Pension fund management services

As promised earlier in the year, HMRC have issued a Brief to follow up the CJEU decision in *ATP Pension Service* (Case C-464/12). In light of the ATP judgment, HMRC now accept that pension funds that have all of the following characteristics are SIFs for the purposes of the fund management exemption so that the services of managing and administering those funds should be, and always should have been, exempt from VAT:

- they are solely funded (whether directly or indirectly) by persons to whom the retirement benefit is to be paid (i.e. the pension customers);
- the pension customers bear the investment risk;
- the fund contains the pooled contributions of several pension customers;
- the risk borne by the pension customers is spread over a range of securities.

In addition to funds that contain the pooled assets of defined contribution occupational pension schemes, such as that at issue in *ATP*, HMRC accept that funds that contain the pooled assets of personal pension schemes and that have all of the above characteristics will also fall within the VAT exemption for fund management services.

The Brief considers the position of:

- personal pension funds where the individual investor exercises an option to direct how the fund is to be invested (will not count as pooled, so not a SIF);
- pension schemes that pay members' contributions into several different funds (necessary to consider the characteristics of each fund);
- management services supplied to a scheme with a number of funds (necessary to consider the characteristics of the recipient of the service, and the question of whether there is a single supply or separate supplies capable of having different liabilities).

Services constituting "management" remain those accepted as such following the cases of *Abbey National* (Case C-169/04) and *GfBk* (Case C-275/11). The CJEU in *Abbey National* confirmed that the fund

management exemption does not apply to fund supervisory services, and this remains the case.

The usual guidance is given on making retrospective claims. UK law will be amended in due course.

R&C Brief 44/2014

2.3.4 Supplies linked to education

HMRC have issued a Brief to explain its position following the Upper Tribunal's decision to uphold the FTT's ruling in the *Brockenhurst College* case, that supplies of catering and artistic performances which were an essential part of the education of students were covered by the exemption in Sch.9 Group 6 even if they were supplied to paying customers who were not students.

HMRC are appealing the decision to the Court of Appeal (hearing scheduled for February 2015), but recognise that they will have to deal with claims in the meantime. They will not review their policy until after the CA judgment is released; they still regard this type of supply as properly taxable. However, HMRC will consider claims and make appropriate repayments based on the UT's decision where the circumstances are exactly the same. They will are not make repayments in other circumstances such as where the supplies in question are linked to fully grant funded education.

Such repayments will be matched by protective assessments to claw the tax back if the CA decides for HMRC, but such assessments will not be enforced until and unless that happens.

Revenue & Customs Brief 39/2014

2.3.5 Educational?

An individual ran a yoga studio at which a number of instructors, including himself, taught yoga. HMRC issued a ruling that his supplies were taxable; he appealed, arguing that he qualified for the exemption in item 2, Group 6 Sch.9 VATA 1994 for "private tuition". HMRC argued that yoga is recreational rather than educational; and, to the extent that it is taught in schools and universities, the aims and objectives of the appellant's teaching are different from those educational courses.

The appellant referred to a number of precedent cases, and provided evidence that yoga is taught in a number of UK schools. The Tribunal set out the following principles:

52. On the one hand the exemption does not cover the teaching of something which is purely recreational. It must develop the pupil's or student's knowledge and skills. (Haderer). We would add that the reference to knowledge and skills in this context must we think mean more than knowing how to do the recreational activity itself otherwise recreational activities would probably always be educational too and the distinction would be meaningless. Also, it is not enough to show that because an activity is taught in a school or university that it is covered by school or university education as recreational activities may be undertaken in schools or universities.

53. As to what the term "recreational" means it encapsulates something which is carried out for the enjoyment and satisfaction of the participants (including their satisfaction through performance rather than for their intellectual development in terms of expanding or deepening their knowledge). (Cheruvier at [50].)

54. It must be educational, but education not in the general sense of broadening the mind but a specific and structured form of training of some kind (Zoological Society).

55. On the other hand it is not restricted to just formal or academic subjects leading to qualifications (Haderer).

56. Relevant factors to consider include the following:

(1) the degree of formality or structure (Colin Beckley), (although Cheruvier acknowledges that recreational activities may be pursued in a structured way and pursued with diligence and care (see [49] and [50] of decision))

(2) whether what is taught is taught to standards that are externally set or capable of being reviewed and examined or assessed by external bodies (Cheruvier)

(3) the environment in which the subject is taught (the lack of class room component was noted in Cheruvier).

The appellant argued that the inclusion of the words "subject" and "ordinarily" in the UK legislation made it stricter than the Directive. The Tribunal disagreed: it was intended to cover the same ground. Nevertheless, the Tribunal considered the issue of whether exemption applied by reference to both versions of the law.

The Tribunal concluded that the way in which yoga was taught by the appellant was indicative of a recreational activity – customers could drop in ad hoc, rather than enrolling on a formal course. The evidence also suggested that yoga was an unusual subject in schools and universities – it was taught in several, but not many. The UK definition was not met, and the Directive's reference to "covered by school or university education" did not assist the appellant.

The appellant also raised the question of golf tuition, which HMRC accept as within the exemption. The Tribunal noted that it was not strictly relevant to the decision, but commented that it was surprising that HMRC regarded the kind of golf lessons referred to as educational – they would be subject to the same principles as the appellant's classes. Perhaps HMRC will revisit the issue.

First-Tier Tribunal (TC04071): *Stuart Tranter t/a Dynamic Yoga*

A similar decision was reached in a case concerning a leading instructor in Pilates. After considering the CJEU decision (and Advocate-General's opinion) in *Haderer*, the Tribunal disagreed with HMRC's contention that to be educational the activities must be undertaken within a structured course. On the other hand, if something was purely recreational, the fact that it was "taught" would not make it educational.

The judge expressed the test as follows:

The requirement is, first, that the subject or activity should be one that is commonly taught in schools or universities, and not one that is purely recreational; it must be part of school or university education. Secondly, the supply must be one of tuition in that subject or activity, in the sense of a transfer of knowledge or skills. The tuition must be educational in character but, beyond that, there is no test of comparability (between how the subject is taught in schools and universities, and how it is taught in the disputed case).

The judge quoted from the *Cheruvier* decision on belly dancing and disagreed with that Tribunal's explanation of the scope and purpose of the exemption: "*...supplies made in the course of the provision of education by an educational institution are exempt from VAT, and, for consistency and to avoid distortion in the market, supplies by an individual giving private tuition are likewise exempt if what is taught accords with what is taught in an educational institution.*" In this judge's view, the Directive's expression "tuition... covering school and university education" was wider than such a close comparison would allow.

What mattered more was how the subject was taught, both in schools and universities, and by the appellant. The judge accepted that the evidence from various school curriculum reports suggested that Pilates was taught in an educational sense, and was not purely recreational; the appellant's private tuition was on the same side of the line.

However, it was also necessary for the subject to be commonly, or not uncommonly, taught in schools and universities. It was not necessary for the subject to be a universal part of such education, but if it was unusual, it would not fall within the exemption. The evidence suggested that, at the present time, Pilates was not a common subject in UK schools and universities, and it was therefore not exempt.

The judge declined to make a reference to the CJEU. In his view, the decision was based on the application of the Directive, and there was no question of the UK law being incompatible with it. The principle of legal certainty was not infringed.

First-Tier Tribunal (TC04130): *Christine Joy Hocking*

2.3.6 More education

Church of Scientology Religious Education Inc ("CSR") is an Australian charity. The churches of Scientology in England, where Scientology is a recognised religion, are part of CSR, which is registered for VAT in the UK. CSR largely makes exempt supplies of education, but also makes some taxable supplies. Its parent charity, Church of Scientology International ("CSI"), is based in California. A dispute arose between CSR and HMRC about the liability of supplies of services from CSI to CSR. Before 1 January 2010, these were outside the scope and therefore their liability was irrelevant; after that date, it became important for CSR that they were exempt supplies of education, because they were located in the UK and potentially subject to the reverse charge. In HMRC's view, the supply by CSI was more akin to a management service: "supply of overall governance and specific assistance for churches and/or giving ecclesiastical direction to all churches of Scientology worldwide, seeing the orthodoxy of the Scientology religion is maintained and providing worldwide ecclesiastical management of the church as a whole".

Both parties agreed that the supply was a single composite one, with a single liability. However, the FTT disagreed. It examined the long list of different services that were comprised in the agreement between the parties: they were "eminently divisible", even though they were all covered by the same relationship.

There was also insufficient evidence about CSI's constitution to support a finding that it was an "eligible body" for the purposes of the UK VAT law. It was exempt from US federal taxes, but that did not necessarily translate directly into the equivalent UK provisions on not-for-profit bodies. The parties were directed to consider this point further, and to reach agreement if possible.

The FTT made a preliminary and provisional ruling that a specified list of supplies made by CSI to CSR did not fall within Sch.9 Group 6 in any case, and were therefore standard rated under the reverse charge; the hearing was stayed for six months for the parties to consider the question of apportionment of the supplies under the agreement. The parties could apply to the Tribunal for a further determination, or for an extension of time if necessary.

First-Tier Tribunal (TC04157): *Church of Scientology Religious Education College Inc*

2.3.7 Dental supplies

Advocate-General Kokott has given an opinion on the VAT treatment of dental prostheses supplied across EU borders and on importation. The PVD exempts the intra-community acquisitions and the importations of goods where the in-country supply of such goods is also exempt. The PVD also exempts "the supply of dental prostheses by dentists and dental technicians" (art.132(1)(e)), but Dutch law does not include the condition on the nature of the supplier.

A Dutch entity, which was not itself a dental technician, bought prostheses from another EU Member State and supplied them to dentists in the Netherlands. It claimed to recover input tax on the acquisition on the basis that it was taxable under the Directive, but exempted the onward supply on the basis of national law.

Another Dutch entity which was a dental technician claimed that the acquisitions across border were exempt, so there was no need to account for acquisition tax (which would have been irrecoverable because the onward supply was exempt).

The A-G considered that the judgment in *MDDP* (Case C-319/12) showed that a trader could not claim the benefit of a non-compliant national exemption and the benefit of deduction at the same time. Either the output was exempt under the national law and the input tax was non-deductible, or the output was taxable under the Directive and the input tax was likewise deductible.

The A-G went on to consider whether the importation of prostheses is exempt. The PVD exemption in art.143(a) refers to "final importation of goods of which the supply by a taxable person would in all circumstances be exempt within their respective territory". As the exemption in art.132(1)(e) is conditional on the nature of the supplier, this could not apply. Importations of dental prostheses are therefore VATable. This

view was supported by reference to the Commission's proposals for the 6th Directive in the 1970s, which gave a great deal of detail about what was intended to be exempt on importation.

The exemption for acquisitions in arts.140(a) and (b) cross-refers to art.143, and therefore cannot apply for the same reason. However, the A-G considered that, on grounds of free movement of goods and prevention of distortion of competition, exemption should be extended to intra-community transactions where the supplier was a dentist or dental technician. Supplies from outside the community were not subject to the same principles because the supplier would not be governed by the treatment in the Directive.

Lastly, the A-G considered the situation in which some Member States continue to tax supplies of dental prostheses under transitional provisions. In her opinion, the exemption should apply to intra-community transactions which fitted the description in the PVD, even if the national law in the supplier's Member State would tax such a supply.

CJEU (Case C-144/13) (A-G): *VDP Dental Laboratory NV, Staatssecretaris van Financiën*

2.3.8 Sport

The Value Added Tax (Sport) Order 2014 amends Group 10 Sch.9 VATA 1994 in line with the CJEU decision in *Bridport & West Dorset Golf Club*. The references to a membership scheme are deleted from item 3 and note 2. The effect is that exemption will extend to all supplies of sporting services by an eligible body to an individual of services closely linked with and essential to sport or physical education in which the individual is taking part.

The legislation comes into force on 1 January 2015, but HMRC have acknowledged in R&C Brief 25/2014 that it has retrospective effect. However, it seems that HMRC are still delaying the payment of claims made on the basis of the *Bridport* decision: no formal response has been made to representations from the CIOT and others pointing out that HMRC's stance is indefensible.

SI 2014/3185

2.4 Zero-rating

2.4.1 Snowballs

HMRC have accepted the decision of the Tribunal on the VAT liability of "snowballs". In a Brief, they comment as follows:

HMRC consider that the borderline between confectionery and cake causes few problems, but with the ever changing selection of confectionery available there will always be some products whose status as cakes is not necessarily self-evident. These snowballs are an example of this type of product. The Tribunal has made its decision based upon the particular facts before them and HMRC have accepted that decision and will be updating their guidance in respect of this type of snowball in due course.

The Brief refers to Notice 700/45 for the correction of errors by those who have accounted for output tax on "snowballs that are the same as those in this case" – the change of policy appears only to relate to products which are called snowballs, rather than more generally applying to the borderline between cakes and confectionery.

Revenue & Customs Brief 36/2014

2.4.2 Cars for disabled persons

A supplier of motorhomes was assessed to over £700,000 in respect of the periods 03/07 to 09/10 for incorrectly zero-rating supplies to disabled customers. Penalties for careless inaccuracy were added for the periods 03/09 to 09/10, totalling £47,600.

The adaptations made by the company comprised only the addition of handles to assist entry and exit. They were not relevant to the manner of driving the vehicle or of being carried in it. The Tribunal considered the wording of the law in Sch.8 Group 12 and concluded that the condition for zero-rating required that the particular purchaser (as opposed to a theoretical handicapped person) had to be a person who used a wheelchair most of the time, and the adaptations had to enable them to use the vehicle – they had to be necessary for the particular purchaser. The adaptation also had to be substantial and permanent.

HMRC argued that the conditions for zero-rating are that the handicapped person concerned must need the adaptation to be able both to enter the vehicle and also either to be able to be carried in it or to drive it. The judge commented that this would make most of HMRC's published guidance on the subject seriously misleading, and would render the policy wholly incoherent. After analysis of the expression "to enter, and drive or otherwise be carried in, the motor vehicle", the judge concluded that an adaptation could qualify if it enabled any of these three separate things – it did not have to enable all of them.

In line with earlier decisions, the Tribunal concluded that a "substantial" adaptation was one that had a significant effect: if the user could not enter the vehicle without the handles but could do so with them, the adaptation was substantial. The handles could be removed, but holes would be left in the vehicle unless the whole panel was replaced: that meant they were permanent, and certainly more permanent than the wheel spinners that HMRC accepted were enough to make a vehicle qualify.

Accordingly, the assessments were discharged along with the penalties. For completeness, the Tribunal also ruled on the question of carelessness:

In light of the facts about the frequent visits by officers who raised no questions and the wording of the Public Notice set out and commented on above it is plain that the appellants were not careless. They followed the respondents' own statements and although the respondents now wish to resile from those statements (wrongly so as we have held) a member of the public who follows the published guidance given by the respondents cannot be said to have been careless in doing so. It was frankly ridiculous to hear it said on behalf of the respondents that the appellants should have taken their own professional advice and ignored what they were told about, for example, 'spinners'. The example of a spinner or steering wheel knob that had less substance than the grab handles in this case and made no contribution to enabling entry to the vehicle would have satisfied any reader of the public notice that requirements for substance and permanence were satisfied by the handles and that the entry, driving and being carried were not cumulative conditions.

The judge noted that a Notice cannot determine the correct treatment under the law, but it is certainly relevant to whether a person has been careless.

HMRC were also criticised for appearing to try to persuade the business to accept the basic liability by offering to suspend the penalty if it did not appeal. This was regarded as an abuse of the penalty regime.

First-Tier Tribunal (TC04081): *Tyne Valley Motorhomes*

HMRC have published a summary of responses to a consultation on the VAT relief for adapted motor vehicles. The government intends to introduce legislation in FA 2016 to prevent abuse of the relief. This will restrict zero-rating to one car every three years, and will impose further mandatory record-keeping requirements on dealers; but there will still be no minimum cost of adaptations. There may instead be a review of the terms "substantially" and "permanent".

www.gov.uk/government/consultations/vat-relief-on-substantially-and-permanently-adapted-motor-vehicles-for-disabled-wheelchair-users

2.5 Lower rate

Nothing to report.

2.6 Computational matters

2.6.1 Article

In an article in *Taxation*, Neil Warren discusses the important difference between a taxpayer recharging its own expenses to a client, or recharging disbursements of the client's expenses.

Taxation, 16 October 2014

2.7 Discounts, rebates and gifts

2.7.1 PPDs

HMRC have published a summary of responses to their consultation about the introduction of new rules on prompt payment discounts from 1 April 2015. Many of the respondents commented that a requirement to make adjustments by credit note would impose a significant additional administrative burden. HMRC have accepted this, and have issued guidance (below) on how the rules can be followed without the need for an extra document. However, they do not accept that it is unreasonable to make the change with effect from 1 April 2015 – some respondents suggested that this was too soon for staff to be trained, systems to be changed etc.

HMRC have also accepted that the estimate of "costs of the change to business", given at £8m in March, was too low – it has been revised to £23m, with annual increased costs of £5m.

www.gov.uk/government/consultations/vat-prompt-payment-discounts

HMRC have issued detailed guidance on the operation of the new PPD rules from 1 April 2015. Traders who offer discounts must show the full undiscounted price on the original invoice, and will initially account for output tax on it. That output tax will be adjusted to the VAT fraction of the amount actually received, if the customer takes up the discount.

The Brief emphasises that the way in which the adjustment is done must comply with reg.38 SI 1995/2518 if it happens in a later return period to the original sale. This implies that accounting can be simpler if the discount period does not straddle the end of a return period. However, traders are likely to want to institute a single system that will apply to all sales.

The Brief offers a choice of procedures, of which the trader is supposed to choose one and apply it consistently. Either a credit note can be issued when the customer takes up the discount and pays a reduced amount; or the original invoice can set out both the full and discounted prices and VAT details on each basis, together with wording such as:

A discount of X% of the full price applies if payment is made within Y days of the invoice date. No credit note will be issued. Following payment you must ensure you have only recovered the VAT actually paid.

Bank records should then be cross-referenced to the invoice by both the supplier and the customer to justify the amount accounted for as output tax and input tax, and any adjustments made.

The Brief also points out that s.21(3) VATA 1994 has not changed: the value of imported goods is still calculated on the assumption that any PPD will be taken up.

Lastly, the Brief comments on the situation in which a lower amount is paid but outside the PPD period. This is not a PPD; if the supplier accepts the lower amount, it can be adjusted by issuing a credit note later – but not using the "two price invoice" procedure described above, because that only applies where the PPD terms are met. If the supplier does not accept the lower amount, the difference will become a bad debt in due course,

but the time limits for bad debt claims will delay relief for the excess output tax paid.

R&C Brief 49/2014

2.8 Compound and multiple

Nothing to report.

2.9 Agency

2.9.1 Article

In an article in *Taxation*, Kate Roberts explains how TOMS can apply to businesses that are not in the holiday or tourism sectors. As the "simplification" scheme is mandatory where it applies, it can apply to non-tourism businesses that buy-in and recharge transport and other costs for travellers.

Taxation, 30 October 2014

2.10 Second hand goods

Nothing to report.

2.11 Charities and clubs

2.11.1 Charitable purpose

A charity had as its object "the advancement of education in water, outdoor and indoor activities for young people generally". It engaged a builder to construct a new training centre on land it owned by the River Thames. HMRC ruled that the construction was standard rated. The charity appealed, arguing that the building would be used for a relevant charitable purpose. The VAT at issue was over £135,000.

HMRC's view was that the charity carried on a business, in that it charged participants for courses. The charity argued by contrast that the centre was fundamental to the fulfilment of its charitable objects, and the courses were heavily subsidised by donation income. Viewed in context, the consideration charged for the courses was not enough to make the activity a "business".

The FTT (TC02574) examined the facts in detail, including the financial information available on the costs and revenues from various activities. In many cases, courses were deliberately provided at a loss, in accordance

with the charitable objects. In other cases, a surplus arose, for example on "corporate days". A schedule was provided to show the use of the disputed building. Over a period of 18 months, some 5,800 people used it, of whom just over 4% were "corporate teams".

The appellant argued that it did not satisfy the criteria of a "business" according to the *Lord Fisher* tests. Even if part of its activities were a business, the business use of the building was below the 5% de minimis test. The precedent cases of *Yarburgh Children's Trust* and *St Paul's Community Project* should be applied.

HMRC argued that the onus was on the appellant to show that it was not carrying on a business, given that it was providing services for a consideration. The VAT Directive stated that a business existed regardless of the purpose or results of the activity; and there was an implication, in the list of exemptions for charitable activities in art.132, that charities were within the scope of VAT where they provided services for consideration that were not exempt.

HMRC's counsel had the following to say about *Yarburgh* and *St Paul's*:

In the Commissioners' submission the Appellant cannot rely on the Yarburgh and St Paul's Community Project cases, where the facts were quite different, with cooperative ventures run by beneficiaries (and in the St Paul's Community Project case, the nursery undertaken for the social reasons of providing nursery education for disadvantaged and difficult children). Those cases (in the High Court) are concerned only with whether the tribunal could reasonably reach the conclusion that it did on the facts, and to the extent that they decide that a charity is not carrying on a business if its predominant concern in carrying on a particular activity is to pursue its charitable purposes, then they are wrongly decided: the question is whether the activities objectively are of a business nature, regardless of the purpose for which they are undertaken. In neither of those cases was the court directed to Articles 132 and 133 of the Directive.

The FTT was more willing to follow the reasoning of the judges in those cases. The reasoning of both was examined, and the *Lord Fisher* tests were applied to the current case. This was the conclusion:

Expressing the point by reference to the Lord Fisher case indicia, it is the case that the Appellant's activity is a serious undertaking earnestly pursued with reasonable continuity; and that the enterprise is substantial in size and value, and the supplies it makes (or something similar) are made by commercial enterprises; and that it adopts and applies prudent financial management. However, there are features of its activities which are not consistent with sound business principles (most obviously its use and reliance upon volunteers and its reliance upon donations to meet part of its operational costs and to meet all its capital costs); and its predominant concern is not to make taxable supplies to consumers for a consideration, but to carry out its activities in a manner which furthers its charitable objectives. The making of supplies for a consideration is incidental to its predominant concern of furthering its charitable objectives in that it is one means (admittedly an important one) by which its predominant concern is achieved.

After deciding that the overall activity of the charity was not the carrying on of a business, the Tribunal further considered the use of the building. Although the use of the upstairs for various activities which were not within the charitable objects made the question less straightforward, the Tribunal was satisfied that the overall use was for charitable purposes. The appeal was therefore allowed.

HMRC appealed to the Upper Tribunal. Counsel for the taxpayer argued that the FTT's decision was one of fact which the UT should not overturn; HMRC's counsel argued that the error of law lay in focussing on the pricing (and loss-making) as indicative of non-business activity, when it had been recently confirmed by the CJEU in the *Finland* case (Case C-246/08) that an activity does not have to be profit-making to be "economic activity" for VAT purposes. He also argued that *Finland* showed that the *Yarburgh* and *St. Paul's* decisions were suspect.

The judge did not regard *Finland* as supporting a general principle that analysis of prices charges was wholly irrelevant to the question of whether a business was carried on. It appeared that the FTT had considered the facts of the case and had understood that it was making a decision as to which side of a line this entity fell on the basis of those facts; this was something the FTT was entitled to do.

The judge also rejected HMRC's argument that the existence of exemptions for various charitable activities in the PVD necessarily implies that such activities are always economic (if they were not, an exemption would not be required). It was proper to ask first if there was an economic activity; it was possible for something to fall below the threshold that would make it so, in which case exemption would be irrelevant, or to go over the threshold, in which case the application of the exemption would be a separate question.

The judge held that the FTT had applied the correct test, and there were no grounds for disturbing its conclusion.

Upper Tribunal: *HMRC v Longridge on the Thames*

2.11.2 Business activities

A charity's objects included promoting Islam, the relief of need, the advancement of education among Muslims in the north-west of England, and the provision of social welfare services. The charity developed and operated a cultural centre comprising a mosque and multi-purpose halls and rooms used for educational, welfare and social purposes.

The charity registered for VAT in 2011, backdating the effective date to 2007. In its first return it accounted for output tax of some £2,750 and claimed input tax of £129,000, most of it relating to the construction of the centre. HMRC visited the centre and, following correspondence, refused the claim. They notified an intention to deregister the charity, on the basis that it was not making supplies in the course or furtherance of a business.

When the centre was built, the charity gave the builders a certificate of relevant charitable use, i.e. there would be no significant business use of the building. HMRC subsequently visited the builders and (apparently following a disclosure by them) discovered that the work should have been standard rated – not because the certificate was incorrect, but

because it related to the extension of an existing building rather than the construction of a new one. The charity appeared to have reluctantly decided to register for VAT in order to recover the VAT it was unexpectedly being charged as a result.

The charity's registration application stated that its taxable supplies would consist of the provision of catering. It provided meals for visitors, who were mainly but not exclusively Muslims, and received some grant funding from Liverpool City Council in respect of social services offered to the public. This grant did not cover the cost of the food, but subsidised salaries and other costs.

HMRC put forward many of the arguments that they are trying to defeat in the *Longridge* case. The FTT judge came to the same conclusion as the FTT and UT in *Longridge*: five out of six of the *Fisher* indicia were satisfied, but given the context and scale of the catering operation, it could not be said that the charity was "predominantly concerned with making supplies for a consideration".

One of the HMRC letters suggested that the decision to deregister was made on the basis that the amount of income from meal sales was small. The judge agreed with the appellant that this could not be the determining factor: a trader with small sales was entitled to register. However, the small amounts in the context of the rest of the charity's activities did confirm that the activity was not in the course of business.

An alternative possible source of taxable income was also rejected – there was insufficient linkage between donations made and the provision of books "in return". Books were made available freely; there was no set price. The money received was simply put in a "general donations" box. This was analogous to the *Tolsma* case.

The judge was satisfied that the decisions to refuse the input tax claim and to deregister the charity were both reasonable. The appeal was dismissed.

First-Tier Tribunal (TC04169): *Liverpool Muslim Society*

2.11.3 Updated Notice

HMRC have updated their Notice *Charities*, replacing the May 2004 version. The update does not specifically identify the changes that have been made, but sets out the purpose of the Notice as to cover:

- what a charity is;
- how VAT affects charities;
- how a charity's income is treated for VAT purposes;
- what VAT reliefs a charity can obtain on its purchases whether or not it is registered for VAT.

It also includes a glossary of terms.

VAT Notice 701/1

2.12 Other supply problems

2.12.1 Vouchers

A company offered access to genealogical websites which it owned or in respect of which it held licences. Access could be by way of a subscription, which lasted for a certain period, but which was not otherwise limited as to use. Alternatively the sites could be accessed by a Pay As You Go system ("PAYG"): a lump sum was paid, for which a number of units or vouchers giving opportunities to download information were issued, and which had to be used up within a certain time.

The company reclaimed output tax on unused PAYG credits for the period from 09/08 to 10 May 2012. It argued that there had been no taxable supply and therefore no liability for output tax. The claim totalled £434,000. On 10 May 2012 the law changed with respect to the issue of "single purpose vouchers" to make it clear that the time of supply fell on issue, not on redemption.

The appellant argued that the face-value voucher rules before that date should have been applied: there should have been no tax point on issue of the PAYG "vouchers", but rather VAT should have been accounted for on use.

The Tribunal agreed with HMRC that in reality the company supplied a package of services that was taxable at the time of purchase, and it was not possible to separate out any unused element that should be treated as subject to the FVV rules. The documents issued by the company were in reality simply receipts, not vouchers for redemption. A number of other precedents, including *BUPA*, were considered, but none helped the company in its efforts to delay the tax point.

First-Tier Tribunal (TC04133): *Brightsolid Online Technology Ltd*

2.12.2 Article

In an article in *Taxation*, Neil Warren reviews the decision in *Pontardawe Inn Ltd* (TC03563) and discusses the potential problems of business sale transactions for VAT, including whether the transaction is a TOGC or not, and the advisability of opting to tax any property comprised in the transaction.

Taxation, 6 November 2014

2.12.3 Carrier bags

HMRC have issued a Brief to comment on the new minimum 5p charge for supply of a single-use carrier bag in Scotland. As for the similar provisions elsewhere in the UK, the 5p is consideration for the supply of the bag, and output tax is due (as well as regarding the proceeds as subject to corporation or income tax on profits).

Revenue & Customs Brief 38/2014

3. LAND AND PROPERTY

3.1 Exemption

3.1.1 Catering concession

A local authority owned a car park. It permitted an ice cream salesman to park his van and trade from that site. HMRC ruled that this was a standard rated supply of facilities; the council claimed it was an exempt supply of land.

The council argued that the concession was not a licence to park a vehicle – it granted permission for "cold catering", rather than relating particularly to the van. The council did not charge for parking at the seaside.

HMRC responded by contending that the licence did not have all the characteristics of a true licence to occupy – the area of land was not defined, and the licensee could not exclude or admit people as if the owner. HMRC separately argued that the supply of land was ancillary to a supply of the opportunity to sell, and that it involved parking a vehicle.

The Tribunal agreed with HMRC on all points. The van could be parked anywhere in the car park. There was a prime site which the trader would wish to occupy, but he did not have to use it, and he would have no recourse if someone else was already parked there. He would still have to pay the rent. It followed that he did not have the rights of owner as required by CJEU precedent case law.

In addition, "parking was parking" – the trader argued that "parking the van in order to sell ice cream without leaving the vehicle" was somehow "not parking", but the Tribunal preferred to regard the term as including any act of "rendering a moving vehicle stationary".

First-Tier Tribunal (TC04129): *Fareham Borough Council*

3.1.2 Wedding services

A company rented out a stately home for weddings. Catering services were supplied separately by a different company, and the rental business therefore regarded its income as VAT-exempt – rental of the bare land. HMRC disagreed, ruling that there was a composite supply that used land but was not "of land". The company appealed.

The judge noted that certain potentially important matters were not covered by the evidence presented: in particular, the relationship between the appellant, the catering company and the individual who had exclusive rights to provide disc jockey services. It was also surprising that the owner's husband gave evidence when he only had limited involvement; his wife, who was much more involved, did not attend the hearing. The judge said that he would not go so far as to draw an adverse inference from this, but would take it into account in weighing the evidence that had been provided.

The judge considered the evidence available, including contracts and publicity material issued by the company, and testimonials on its website from satisfied customers. All of these suggested that the company, through the owner, provided a much more active service than the mere

provision of the building. The Tribunal decided that the economic reality of the contract between the company and a customer was for the planning and organisation of weddings, which was a composite supply that was standard rated. The hirers did not have the "right to behave as owners" for the duration of their letting; there were too many restrictions imposed on them, including the use of a single permitted catering company.

On the basis of all the foregoing, the appeal was dismissed.

First-Tier Tribunal (TC04172): *Willant Trust Ltd*

3.1.3 Student accommodation

An Oxford college set up a subsidiary to supply accommodation during term-time to students. The college argued that its supplies of rooms, whether to the subsidiary or to the students, were standard rated as being "similar to a hotel". HMRC contended that the subsidiary only provided the rooms as agent of the college, and the supplies were exempt as "closely related to a supply of education by an eligible body".

The judge considered that it was necessary to consider all the circumstances in order to conclude on the nature of the supply and the identity of the supplier. This was in line with the "economic reality" approach of the *SecretHotels2* decision. In *Newey,* the CJEU posed the following questions for determination of that question:

(a) Whether the person who makes the supply as a matter of contract is under the overall control of another person?

(b) Whether the business knowledge, commercial relationship and experience rests with a person other than that which enters into the contract?

(c) Whether all or most of the decisive elements in the supply are performed by a person other than that which enters into the contract?

(d) Whether the commercial risk of financial and reputational loss arising from the supply rests with someone other than that which enters into the contracts?

(e) Whether the person making the supply, as a matter of contract, sub-contracts decisive elements necessary for such supply to a person controlling that first person and such sub-contracting arrangements lack certain commercial features?

The Tribunal decided that (b) was neutral and (e) was not relevant to the facts it had found to subsist in the case. The other factors suggested that it was the college, not the company, that supplied the accommodation. The company was acting as a disclosed agent.

Having decided that, it was relatively easy to find that the supply by the college was exempt as "closely related to education".

In case it was wrong on this point, the Tribunal considered some of the other arguments. It agreed with the appellant that the nature of the subsidiary's interest in the land – a mere licence, if anything – did not prevent it making a supply to the students that was capable of being exempt. It was not necessary for it to own or grant a lease. The Tribunal was satisfied that the students had the right to occupy their rooms "as owner" within the meaning of the European precedents. After considering

a number of previous cases, the judge concluded that the students were not "visitors" when in the college – it was their home. It was therefore not "similar to a hotel", and the supply of the rooms would therefore be exempt even if they were not closely related to education.

First-Tier Tribunal (TC04181): *The Principal & Fellows of Lady Margaret Hall*

3.2 Option to tax

Nothing to report.

3.3 Developers and builders

3.3.1 Substantial reconstruction

A building contractor claimed the benefit of zero-rating for works involving the demolition and reconstruction of a separate garage at a protected building, carried out at the same time as other works which amounted to a substantial reconstruction.

The case turned on the meaning of part of a note in the legislation which allows zero-rating of construction of "a garage (occupied together with the dwelling) either constructed at the same time as the building or where the building has been substantially reconstructed at the same time as that reconstruction". The garage in this case was constructed at the time of the substantial reconstruction in 2010, but the garage it replaced had been constructed in the 1980s, long after the building of the original house. The expression could be interpreted either way – it included or excluded the present situation.

The Tribunal analysed the law and how it should apply to various ways in which a protected building might acquire a garage. It concluded that a separate garage that was constructed as part of a substantial reconstruction would become part of the protected building for the purposes of the note. The 1980s project did not satisfy the conditions for "substantial reconstruction", so the garage could not fall within the note. The appeal was dismissed.

First-Tier Tribunal (TC04107): *A D Trevivian*

3.3.2 Village hall?

A community association appealed against a decision by HMRC refusing to allow construction of a new pavilion, car park and all-weather pitch to be zero-rated as "for a relevant charitable purpose". The association provided facilities for the local community to engage in a number of activities. It contended that the use would be "as a village hall or similar". HMRC responded that the users would be only a segment of the community (those interested in sports etc.) and not the community as a

whole. Alex Salmond, the local MSP, wrote to HMRC in support of the association's appeal.

The Tribunal considered that four tests were appropriate.

1) Were the facilities provided for the local community?

2) Was the facility owned, organised and administered by the local community?

3) Were social or recreational facilities provided or reasonably capable of being provided?

4) Was the use similar to the use of a village hall?

After detailed examination of the project, the precedent cases and the arguments of the parties, the Tribunal concluded that most of the building was suitable only for use as a sports pavilion, which was not similar to a village hall. Only one small committee room qualified for zero-rating, amounting to 4.4% of the total.

First-Tier Tribunal (TC04124): *The New Deer Community Association*

3.3.3 One project or more than one?

A college carried out a significant redevelopment of its campus. HMRC ruled that zero-rating was not available on the building work because it did not involve "construction", and also disputed whether the "relevant charitable purpose" condition was satisfied. The Tribunal considered only the first of these two issues.

The project was carried out in three phases, the third of which was delayed while funding was secured. In the first two phases, new buildings were constructed but were attached to an existing college building; this was demolished and replaced as part of the third phase. The college argued that the project should be looked at as a single whole; the old buildings had been demolished and replaced. It had been necessary to keep some of them during the work (which took several years) in order to maintain operations, but the intention had always been to create a whole new structure.

The Tribunal agreed with HMRC that this was not a permissible approach. Liability to VAT had to be determined at the time the supply was made. Although there might have been an intention to carry out the third phase from the beginning, it clearly could not be certain until the funding was secured. As the project had proceeded, the first two phases created extensions to the original building, and the third phase created an extension to the first two phases. None of the work qualified for zero-rating.

First-Tier Tribunal (TC04151): *Central Sussex College*

3.3.4 Relevant residential purpose

A charity, founded in 1249 to provide relief for the poor and needy of Norwich, established a subsidiary company in 2009 and entered into a contract with it to construct buildings on land owned by the charity. The charity argued that the whole site should be considered as a construction for a relevant residential purpose; HMRC ruled that the residential units

were dwellings, which secured zero-rating for part of the work, but would mean that other works would not qualify.

The Tribunal had to consider the meaning of "institution" and "residential accommodation with personal care". The head of the charity gave evidence about the services provided to residents, and the conditions of their occupation. HMRC responded that the unit was not self-contained, so it could not be an institution in its own right; the services were laundry and minor repairs, which HMRC did not consider to be "personal" enough. Although the expression is not defined in the VATA, other legislation suggests that it involves help with bodily functions such as feeding and washing.

The judge decided that the framework of rules and regulations surrounding the occupation by the residents were enough to make the unit an "institution". The level of control exercised by the charity was more consistent with the idea of institutional living than wholly independent living. There was nothing in the law or binding authority to suggest that an institution had to be self-sufficient – and even if that were true, the laundry in this unit served other facilities of the charity, rather than the reverse.

The judge also decided that the range of services provided free to residents did constitute "personal care" for the purposes of the RRP definition. The needs of individual residents were assessed when they applied to move in, and appropriate provision was made to meet them. There was no need for a rigid definition to be imported from other legislation.

The question of RRP use was decided in favour of the appellant.

First-Tier Tribunal (TC04132): *TGH (Construction) Ltd*

3.4 Input tax claims on land

3.4.1 DIY

A chartered accountant and town planning consultant claimed £15,844 under the DIY builders' scheme. He accepted HMRC's refusal of £2,397 of this, but appealed about a further £885 which he considered ought to be allowed as essential constituents of the house. The problem was that the invoices related to equipment hire, JCB hire, scaffolding tower hire, digger hire, skip hire and disposal of excavated materials.

The appellant argued that these elements would have been allowable if they had been incurred by a building contractor and absorbed in the general supply of building services; it made no sense to disallow them just because they had been supplied on their own. He argued that the purpose of the legislation was served by a more generous interpretation of the word "materials".

The judge was unimpressed: the law was clear, and HMRC's guidance was entirely in accordance with it. Regardless of the underlying purpose of the legislation, the law did distinguish between supplies of goods and supplies of services. Under the DIY scheme, only goods could be claimed.

First-Tier Tribunal (TC04069): *Alan Johnson*

TC02818 concerned the issue of whether a planning restriction to 'occupation by an employee of a local business' was a 'restriction on separate use or disposal'. The employer was an equestrian business in Northern Ireland. The planning consent containing the restriction was issued in 2003, but a new consent was obtained in 2012 from which the restriction had been removed. The appellant had completed his DIY builders' project in the meantime, and had submitted his claim in January 2011.

The FTT examined the precedent cases, including several of the recent string of decisions which have gone in either direction. HMRC argued that *Wendels*, which the taxpayer relied on, was wrongly decided. However, the Tribunal ruled that the wording of this particular restriction (in the 2003 version) did not go so far as to place a prohibition on separate use. In particular, it envisaged that an employee's dependants might reside in the property, which the Tribunal held to indicate that there was no prohibition on use.

The Tribunal also considered whether the costs were incurred in connection with the equestrian business itself, which would have ruled out a DIY claim, and concluded that they were not. The appeal was allowed.

HMRC appealed to the Upper Tribunal, arguing that the FTT had erred in law by regarding the condition as not prohibiting use separately from the equestrian business.

The UT decided that the description of the property as "equestrian facilities' manager's residence" was not enough to constitute a prohibition on "separate" use. It restricted the class of occupant, so it was a constraint on use, but it was not linked to the use or disposal of any other land.

However, the planning permission did link the occupancy to specific land by requiring that the occupant worked at a specified location – the nearby

equestrian business. That was a prohibition on use separate from the specified location, and it engaged Group 5 Note 2(c). HMRC's appeal was allowed.

Upper Tribunal: *HMRC v Shields*

An individual made a claim for some £20,000 on the conversion of a dilapidated building on a Scottish estate into a dwelling. Not knowing the implications, he described it as a "garage" in the claim form. HMRC ruled that a garage occupied with a dwelling is residential, so it did not satisfy the conditions for a residential conversion.

The individual presented a well-argued and detailed case to the Tribunal, showing the history of the building back to the 1800s, and contending that the possibility of car storage did not make a building into a garage. It was not within the curtilage of another building, so it was not "occupied with a dwelling".

The Tribunal did not accept the individual's arguments about what constitutes a garage. It was clear that it had been used for car storage, and alterations had been made to the building to make it suitable for that. However, it was not entirely a garage, and the Tribunal considered precedents that suggested an apportionment was possible. The appeal was allowed to the extent of the costs of converting the part of the building that had not been in use as a garage. The parties were invited to come to an agreement about this.

First-Tier Tribunal (TC04147): *V A Dunlop*

3.5 Other land problems

Nothing to report.

4. INTERNATIONAL SUPPLIES

4.1 E-commerce

4.1.1 Commission guidance

The Commission has launched a new area on the Europa website providing information about changes to the VAT rules across the EU affecting supplies of broadcasting, telecommunications and electronic (BTE) services from 1 January 2015. The intention is to help businesses opting to use the Mini One Stop Shop to adapt to the new place of supply rules for such services when supplied to final consumers.

The portal has sections on:

- Current rules
- New rules from 2015
- Report on feasibility of new rules 2015
- The Explanatory Notes for 2015 (available in 26 languages)
- One Stop Shop guidelines for 2015 (available in 26 languages)
- Information on selected national VAT rules
- National contact points for 2015 EU VAT changes
- Events related to the new rules
- Legislation now and after 2015

ec.europa.eu/taxation_customs/taxation/vat/how_vat_works/telecom/index_en.htm

The Commission issued the following statement on 16 December, acknowledging the difficulties posed by the new system, but apparently only recognising the particular issue faced by traders at risk of losing the benefit of the UK's high registration threshold (in effect, accepting HMRC's solution set out in R&C Brief 46/2014 – see 4.1.4 below):

The new VAT rules were designed primarily to benefit businesses and they follow extensive consultation with all EU member states, including the UK.

We are aware of the concerns of online micro-businesses in the UK. Based on the new information from the HMRC, these businesses will now only have to pay VAT on sales made to other EU countries. For all domestic sales, their current VAT-free threshold remains in place. Some online businesses will need to adapt their websites to take account of the change, but we are hopeful that the administrative burden will remain low.

The European Commission will evaluate the implementation of the new VAT rules in the context of a possible future extension of the One Stop Shop and would be open to proposing adaptations based on the feedback it will receive in this context.

ec.europa.eu/taxation_customs/resources/documents/taxation/vat/how_vat_works/e-services/vat_supply_rules_online_micro-businessesuk.pdf

4.1.2 UK guidance

HMRC have also created a new section on the .gov.uk website to explain what UK businesses should be doing under the new regime. The guidance was updated on 19 December 2014 to include more information for micro-businesses (see 4.1.4 below), as well as a flowchart to help businesses decide whether they are affected by the new rules. It has sections on:

- Overview
- Registration
- Businesses currently below the UK VAT Registration threshold
- VAT Groups
- VAT MOSS de-registration
- VAT MOSS returns
- European Community Sales Lists
- MOSS payments, underpayments and overpayments
- Compliance: audit and penalties
- VAT on e-Services Scheme (the old "special scheme" to be replaced by the non-union VAT MOSS).

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

4.1.3 Changes to legislation

The Value Added Tax (Place of Supply of Services) (Exceptions Relating to Supplies Not Made to Relevant Business Person) Order 2014 has amended Sch.4A VATA 1994 to move the place of supply of B2C supplies of "BTE" services to "where the customer belongs". The new para.15 reads:

15. (1) A supply to a person who is not a relevant business person of services to which this paragraph applies is to be treated as made in the country in which the recipient belongs (but see paragraph 8).

(2) This paragraph applies to

(a) electronically supplied services (as to the meaning of which see paragraph 9(3) and (4)),

(b) telecommunication services (as to the meaning of which see paragraph 8(2)), and

(c) radio and television broadcasting services.

Some parts of para.16 (supplies to non-business person belonging outside the Member States) are deleted, because such supplies of BTE services will now be taken outside the scope of VAT by para.15 in any case.

The explanatory notes contain a detailed breakdown of the PVD provisions on which the POSMOSS system is based.

SI 2014/2726

4.1.4 Business splitting?

A radical development in the UK MOSS system was first announced by HMRC on Twitter and through the Daily Telegraph on 3 December. At the time, it seemed too good to be true: traders would be entitled to the benefit of the UK registration threshold in respect of their UK digital sales, and would be able to use the UK MOSS to account for output tax elsewhere from 1 January 2015.

Daily Telegraph, 3 December 2014

On 10 December, further information was issued by HMRC in the form of a Brief. This provides some further guidance on what is meant by "digital services", but goes on to explain HMRC's policy on the use of the UK registration threshold by a micro-business selling digital services.

Scope of the rules

Examples of services not affected by POSMOSS include:

- using the internet, or some electronic means of communication, just to communicate or facilitate trading;
- supplies of goods, where the ordering and processing are electronic;
- supplies of physical books, newsletters, newspapers or journals;
- services by lawyers and financial consultants who advise clients through e-mail;
- booking services for entertainment events, hotel accommodation or car hire;
- educational or professional courses, where the content is delivered by a teacher over the internet or an electronic network;
- offline physical repair services of computer equipment;
- advertising services in newspapers, on posters or on television.

The following list of examples of affected e-services is given:

- images or text, such as photos, screensavers, e-books and other digitised documents e.g. pdf files;
- music, films and games, including games of chance and gambling games, and of programmes on demand;
- on-line magazines;
- website supply or web hosting services;
- distance maintenance of programmes and equipment;
- supplies of software and software updates;
- advertising space on a website.

Such services will be "electronically supplied" where the sale of the digital content is entirely automatic – for example where a customer clicks the 'buy now' button on a website and the content downloads onto their device, or the customer receives an automated e-mail containing the content. By contrast, a pdf document that is manually e-mailed by the seller is an electronic service, but it is not covered by the new rules.

Registration threshold

The guidance for micro-businesses should be read in full, because it contains a number of uncertainties and surprises:

If you supply digital services to a customer in another EU member state, you must account for VAT to the tax authorities in that member state and at that member state's VAT rate.

So you do not have to register for VAT in every member state where you have customers, HMRC has developed a MOSS service for UK-based suppliers of digital services. You can find guidance on MOSS at Register for and use the VAT Mini One Stop Shop.

Although it is a condition of registering for the MOSS that you must have a UK VAT registration number to identify the business, you will not lose your UK VAT registration threshold.

Who will this affect?

These simplified VAT registration arrangements will only be available to you if:

- *you are a UK-based supplier of digital services*
- *you wish to use the VAT MOSS*
- *your UK taxable turnover is below the UK-VAT registration threshold (currently £81,000)*

How will this work?

If you make taxable supplies of digital services to customers in other EU member states, and your UK taxable turnover is below the UK VAT registration threshold, you may use the VAT MOSS to account for the VAT due in other EU member states but you do not need to account for and pay VAT on sales to your UK customers.

In these circumstances, you must:

- *apply for UK VAT registration (see below)*
- *restrict any VAT refund claims you submit to HMRC to amounts directly attributable to your cross-border EU sales activities on which you will be accounting for VAT through MOSS (see Reclaiming VAT on your expenses and purchases below)*

Applying for VAT Registration

You must apply for UK VAT registration.

When you are prompted to search for the correct business activity, you should select:

- *search by business activity and then enter digital services in the following text box*
- *you will then be directed to select the business activity entitled supplies of digital services (below UK VAT threshold) under MOSS arrangements*

Only follow this procedure:

- *if you supply digital services to customers in other EU member states*

- *you wish to use the MOSS to account for VAT on those supplies*
- *your UK taxable turnover is below the VAT threshold*

If these conditions do not apply, you should choose the Business Activity that best describes your business.

Following this process will ensure that HMRC can deal with your VAT registration application quickly.

Reclaiming VAT on your expenses and purchases

As you will not be charging VAT on your UK sales, any VAT you reclaim on your business expenses and purchases (see completing VAT returns below) must be either wholly attributable to your cross-border digital service supplies accounted for through MOSS, or only that proportion which is attributable to those sales.

For example, you might purchase a computer which you use to make all of your sales. If 60% of your sales are UK sales, and 40% of your sales are to customers in other EU member states, you would be able to recover 40% of the VAT charged on the purchase of the computer.

Please see further guidance on Reclaiming VAT.

You may also reclaim VAT on any business expenses incurred in other EU member states, provided these are directly related to your cross-border sales of digital services. To do this, you will need to complete a cross-border VAT refund application. There is guidance at VAT: refunds for UK businesses buying from other EU countries.

Completing VAT returns

UK VAT return

You will need to complete a UK VAT return each quarter even if you are not charging VAT on your UK sales.

Unless you wish to reclaim VAT on business expenses or purchases in relation to your EU sales, you should enter '0' in every box on the return. If you do wish to reclaim VAT in relation to EU sales, you should complete boxes 4, 5 and 7.

You can find further guidance on completing the UK VAT return at VAT Returns.

VAT MOSS Return

You must declare any supplies of digital services to EU customers on the VAT MOSS return. You can view the guidance at Register for and use the VAT Mini One Stop Shop.

VAT MOSS return periods are calendar quarters (e.g. the first return period runs from 1 January to 31 March). Provided - when you registered for VAT – you selected the Business Activity entitled Supplies of digital services (below UK VAT threshold) under MOSS arrangements, HMRC will ensure that your UK VAT return period is aligned with the VAT MOSS return period, so you can complete both the UK return and the MOSS return at the same time.

What if my UK turnover exceeds the VAT registration threshold?

It is important that you monitor your UK taxable turnover. If you exceed the VAT registration threshold (currently £81,000), you will need to start accounting for VAT on UK sales. There is information about how to calculate taxable turnover at Calculate VAT taxable turnover.

If you do not start to account for UK VAT at the right time, HMRC may assess any additional tax due.

MOSS registration

The Brief contains the following guidance on registration under the MOSS:

You can wait until you sell your first digital service cross-border before applying to register. From 1 January, provided you notify HMRC and submit your VAT MOSS registration application by the 10th day of the month following your first digital service sale, the registration will be back-dated to the date of the first cross-border digital services sale. For example, if you sell your first cross-border digital service on 8 January 2015, you have until 10 February 2015 to submit your MOSS registration application to HMRC.

The first MOSS return will be due for the quarter to 31 March 2015, and will include the 8 January sale.

Record-keeping

The Brief offered the following guidance (since superseded) on what records should be kept to justify the treatment adopted for each supply:

MOSS registered businesses are required to collect and to keep in their records two pieces of evidence of where each customer normally lives. This helps demonstrate, if asked by the tax authorities, that the business has charged the correct rate of VAT to the customer. For many micro and small businesses this requirement can sometimes present a challenge. So, if you use a payment service provider to obtain payment for your digital service, HMRC suggests the following two step approach:

Step 1

When the customer places their order ask them to confirm either:

- *the EU member state they usually live in*
- *their billing address*

Step 2

When the customer pays for the product using the payment service provider, arrange for that provider to transmit the following two pieces of evidence to you:

- *the customer's billing address*
- *the country code of the customer's bank or registered credit card*

For confidentiality the payment service provider can remove the house number and street name from the billing address.

If the information on the EU member state where the customer is normally resident tallies, that will be sufficient to define the customer's location and you can record the details in your accounting records. However, if the information does not tally, you do not need to cancel the sale, but you

must contact the customer and ask them to reconcile the discrepancy between the two sources of information.

R&C Brief 46/2014

4.1.5 Detailed guidance: at the last minute

HMRC's detailed guidance was updated on 29 December 2014. It appears that representations have been made about the difficulty of obtaining information about where the customer belongs in an automated system that may use intermediaries such as Paypal standing between the seller and the customer. The guidance contains the following sections:

- EU VAT rule change
- Scope of rule change
- Determining the place of supply and taxation
- Defining digital services
- Sales not affected by the change
- Defining 'electronically supplied'
- Bundled or multiple supplies
- Determining whether the customer is in business (a taxable person) or is a private consumer
- Determining the place of supply and taxation
- Support for MOSS registered micro-businesses until 30 June 2015
- Place of supply of educational services
- VAT rates and obligations in other EU member states (EU VAT Web Portal)
- VAT accounting options for businesses supplying digital services to consumers
- Digital portals, platforms, gateways and marketplaces

The particular relaxations for micro-businesses using payment service providers are as follows:

Businesses using payment service providers

A business which makes cross-border digital service supplies must obtain and keep 2 pieces of information to evidence where a consumer normally lives. This demonstrates that the correct rate of VAT has been charged and will be accounted for to the correct member state tax jurisdiction. For many micro and small businesses this requirement may be challenging. So, for micro and small businesses that use payment service providers, we suggest the following approach:

1. At the point of sale, ask the consumer to provide details of either their:

- *billing address, including the member state*
- *telephone number, including the member state dialling code*

2. When the consumer pays for the digital service, obtain from the payment service provider a notification advice containing the 2 digit

country code of the consumer's member state of residence as listed in their records.

If the 2 pieces of information tally, that will be sufficient to define the consumer's location and you can record the details in your accounting records. However, if the information doesn't tally, you must contact the consumer and ask them to reconcile the discrepancy between the 2 pieces of information.

Support for MOSS registered micro-businesses until 30 June 2015

UK micro-businesses that are below the current UK VAT registration threshold, and who register for the VAT Mini One Stop Shop (MOSS) may, until 30 June 2015, base their 'customer location' VAT taxation and accounting decisions on information provided to them by their payment service provider. This means the business need not require further information to be supplied by the customer. As payment service providers already collect and hold a minimum of 2 pieces of information about the member state where the customer usually resides, the transitional period, until 30 June 2015, will give micro-businesses additional time to adapt their websites to meet the new data collection requirements.

www.gov.uk/government/publications/vat-supplying-digital-services-to-private-consumers

4.2 Where is a supply of services?

4.2.1 Establishment

The CJEU has given a potentially significant judgment in a case about the meaning of "another fixed establishment". However, it is not entirely clear how it will be applied, because it is for the national court to determine various factors as usual.

A Cypriot company (B) ran an auction website in the Polish language. It concluded an agreement with a Polish company (A) which wanted to sell goods by auction using the website. The two companies were part of the same group. The auction operated in an unusual way: potential purchasers had to make a payment in order to bid, which payments were revenue of the Cypriot company. The Polish company received the proceeds of the actual sale, plus a commission on the "bids" sold by the Cypriot company.

The question arose of whether the use of the Polish company created another fixed establishment of the Cypriot company located in Poland, which would affect the place of supply of various services. The main effect would be that A would have to charge Polish VAT on its supplies of advertising, servicing, provision of information and data processing to B because they would be regarded as supplied in Poland, rather than treating them as outside the scope B2B supplies made to A in Cyprus.

Questions were referred to the CJEU by the Polish courts. The Advocate-General's opinion was not made available in English, but her opinion was that B used A's human and technical resources in Poland to run the website. It was not necessary for the main establishment to own the

resources of another fixed establishment; as long as there is a structure that possesses a sufficient degree of permanence which can be used in the same way as if they were owned, that structure will constitute a FE.

The full court reiterated that the principles of *Berkholz, Faaborg-Gelting Linien* and *ARO Lease*, as codified in the Implementing Regulation, remain applicable. A business established in another Member State will not have another fixed establishment elsewhere unless it has a structure of some sort, characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to receive and use the services supplied to it for its own needs.

The court noted: "*In its written observations and at the hearing the Polish company argued that the infrastructure it makes available to the Cypriot company does not enable the Cypriot company to receive and use for its business the services supplied to it by the Polish company. According to the Polish company, the human and technical resources for the business carried on by the Cypriot company, such as computer servers, software, servicing and the system for concluding contracts with consumers and receiving income from them, are situated outside Polish territory. It claims that those factual circumstances were not verified in the main proceedings.*"

It is for the national court to determine such facts. The CJEU said that, if the Polish company's assertions were found to be factually correct, the Cypriot company would not have a fixed establishment in Poland.

The fact that the economic activities of the two companies are linked is not relevant: it is necessary to draw a distinction between the services supplied by the Cypriot company to the Polish consumers and the supplies by the Polish company to the Cypriot company. They are distinct supplies of services which are subject to different schemes of VAT.

The formal answer to the question referred was:

A first taxable person who has established his business in one Member State, and receives services supplied by a second taxable person established in another Member State, must be regarded as having a 'fixed establishment' within the meaning of Article 44 [PVD], in that other Member State, for the purpose of determining the place of taxation of those services, if that establishment is characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to receive the services supplied to it and use them for its business, which is for the referring court to ascertain.

CJEU (Case C-605/12): *Welmory Sp. z o.o. v Dyrektor Izby Skarbowej w Gdansku*

4.3 International supplies of goods

4.3.1 Conforming to the contract

A foundry specialised in high pressure die-casting. The products were produced by the company in Italy, but sent to sub-contractors in other countries for a final application of paint. The case concerned a particular

supply to a French customer; the goods were despatched to a French sub-contractor for painting, after which they were sent on to the final customer.

The question was whether the Italian company had made an intra-community despatch of goods to the final customer, entitling it to claim a refund of the VAT on the painting work under the 8th Directive, or whether its supply of goods was made in France when the goods were sent by the sub-contractor to the final customer. If that was the case, it would have to register for VAT in France.

Advocate-General Kokott gave an opinion that favoured the French viewpoint. She considered that goods could only be "supplied" when they conformed to the contract between the supplier and the customer. The transport of the unpainted goods from Italy to the French sub-contractor could not therefore be part of the supply.

She noted that this might interfere with the proper functioning of the internal market, because it could lead to suppliers favouring the use of sub-contractors in their own country. However, it was logical and necessary in order to maintain safeguards against possible fraud involving intra-community supplies.

The full court has agreed with this opinion. The formal answer to the question referred was:

Article 8(1)(a) [6th Directive] must be interpreted as meaning that the place of supply of goods sold by a company established in a Member State to a person established in another Member State, and on which the vendor, to make them fit to be supplied, has had finishing work carried out by a service provider established in that other Member State, before having them dispatched by the service provider to the person to whom they are being supplied, must be deemed to be in the Member State where the latter is established.

CJEU (Case C-446/13): *Société Fonderie 2A v Ministre de l'Économie et des Finances*

4.3.2 Inward processing

A company claimed deferment of duty (£1,041) and VAT (£3,588) on import of a camera and lenses on 19 October 2011. The relief claimed was Inward Processing Relief, which required the filing of a discharge certificate within 30 days of the expiry of the six months during which the goods should have been re-exported from the UK. The company failed to do so; it appealed against an assessment, but notified the Tribunal before the hearing that it would not be attending as it had realised the case was hopeless; however, the appeal had not been withdrawn, so the hearing proceeded anyway.

It appeared that the company had entered into similar transactions a number of times and had not suffered the consequences. On the immediately preceding occasion that this had happened, HMRC had issued a warning, exercising discretion to allow the late notification on that occasion but stating that a further late filing would lead to loss of the relief. In respect of this transaction, HMRC wrote to the trader at the six-month deadline pointing out that, if the goods had been re-exported, notification should be made within 30 days. The Tribunal agreed with

HMRC that failure to heed these warnings constituted clear negligence by the trader, and the relief was properly withdrawn.

Although this might be regarded as only a formal requirement for filing paperwork, the Tribunal considered that HMRC's powers and actions were within the scope of a Member State's rights to impose conditions for the prevention of fraud and evasion. The appeal was formally dismissed.

First-Tier Tribunal (TC04131): *Hitachi Kokusai Electric Europe*

4.3.3 Intrastats

The annual threshold for Arrivals Intrastats rose from £1.2m to £1.5m on 1 January 2015.

SI 2014/3135

4.3.4 Evidence for despatch

A question has been referred by the Bulgarian court to determine whether Bulgarian rules aimed at preventing fraud are in accordance with the Directive. National law requires a supplier, who claims for the exemption for intra-community transactions, to determine the authenticity of the acquirer's signature and establish whether it comes from a person representing the acquirer.

The questions referred are:

1. Are the principles of 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?

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

CJEU (Case C-403/14) (Reference): *'Vekos trade' AD v Direktor na Direktsia „Obzhalvane i danachno-osiguritelna praktika", Varna, pri Tsentralno Upravlenie na Natsionalnata agentsia za prihodite*

4.3.5 Evidence

A Northern Ireland trader was assessed to £28,000 in respect of a single supply to an Irish trader which was deregistered in April 2009. The actual date of cancellation of the registration was September 2010; HMRC agreed to remove transactions between these two dates from the assessment because of the retrospective nature of the deregistration, but the trader appealed against the remaining liability.

The trader argued that its checks had been adequate:

- it had originally obtained the customer's VAT number when trading commenced;
- that number was checked on the Europa Website;
- it made regular checks to ensure the number was still valid at intervals of approximately every two to three years;

- due to the level of on-going trade between the appellant and the customer and, because this exceeded normal VAT thresholds, it had not been put on notice of any irregularity until the HMRC visit itself and therefore had properly zero rated the supplies that had been made.

HMRC argued that the company would have discovered that the VAT number was not valid if it had made checks at any time after 12 October 2010, and it was therefore not entitled to zero-rate supplies from that date onwards.

After considering a number of factors in the case, including the fact that neither HMRC nor the correspondence on file with the tax authorities in Ireland could explain why the other trader had been deregistered – when his business continued, and had since located to Northern Ireland where he was registered for VAT and was continuing to make VATable purchases from the appellant – the judge decided that the appellant had carried out reasonable checks. All the trader's grounds suggested that there was no reason to suspect a problem with the customer's Irish VAT registration until HMRC notified them of the deregistration. The appeal was allowed.

First-Tier Tribunal (TC04077): *Fleming Agri-Products Ltd*

4.3.6 Military equipment

Group 13 Sch.8 VATA 1994 zero-rates, among other things, "*The supply to or by an overseas authority, overseas body or overseas trader, charged with the management of any defence project which is the subject of an international collaboration arrangement or under direct contract with any government or government-sponsored international body participating in a defence project under such an arrangement, of goods or services in the course of giving effect to that arrangement.*" A company claimed the benefit of this provision in relation to sales of military reconnaissance equipment to the US Defense Department for onward sales to the governments of Greece and Poland.

The Tribunal examined the arrangements under which the sales were made and concluded that they did not amount to an "international collaboration agreement" because they were a unilateral scheme run by the US government; the UK government was not involved. The appeal was dismissed.

It is not clear whether the US Government would then be able to recover the VAT that the UK traders were obliged to charge.

First-Tier Tribunal (TC04125): *Goodrich Corporation and related appeal*

4.3.7 Updated Notice

HMRC have issued an updated version of their Notice *Imports*. The only changes listed are noting that the C18 team have moved from Grimsby to National Clearance Hub (NCH) Salford and a paragraph about Isle of Man VAT registered importers has been deleted.

Notice 702

4.4 European rules

4.4.1 Definitive VAT regime

Nearly 40 years after the 6th Directive, and more than 20 after the implementation of the Single Market, the Commission has published proposals for the implementation of a "definitive" VAT regime. The intention is to achieve a simpler, more effective and more fraud-proof VAT system tailored to the Single Market. Algirdas Šemeta, EU Taxation Commissioner, said: "Over the past few years, the Commission has pushed forward many improvements to the VAT system. We have put forward measures to make it more business-friendly, and to better protect it against fraud. However, there comes a point when it is time to buy a new car, rather than tinkering with spare parts. We need to redesign the EU VAT system from scratch, and today we have presented first ideas on how this could be done."

The document published by the Commission has outlined five possible proposals in respect of taxation at destination:

- The supplier would be responsible for charging and paying the VAT, and supplies would be taxed according to where the goods are delivered;
- The supplier would be responsible for charging and paying the VAT, and supplies would be taxed according to where the customer is established;
- The customer – rather than the supplier – would be liable for the VAT, and taxation would take place where that customer is based (Reverse Charge);
- The customer – rather than the supplier – would be liable for the VAT, and taxation would take place where the goods are delivered;
- The status quo would be maintained, with some modifications.

The Commission is now undertaking an in-depth assessment of the various options to determine the possible impact on businesses and on Member States. It will present the possible way forward in Spring 2015 once it has considered the result of this assessment.

Another Commission document sets out other possible reforms to the VAT system, including the scope of the tax (changing the status of public bodies) and the rate structure (simplifying and making fairer and more comprehensible).

http://ec.europa.eu/taxation_customs/taxation/vat/future_vat/index_en.htm; http://europa.eu/rapid/press-release_IP-14-1216_en.htm

4.4.2 Formal or substantive?

Italian law required a person making an acquisition from another Member State to record the purchase invoice in two different registers. A trader failed to do so, and was penalised in the amount of 100% of the VAT, effectively denying the right to deduct. Questions were referred to the CJEU as to whether this recording was a "formal requirement" imposed by the Member State that could not override the basic Directive right to

deduct, or a "substantive requirement", breach of which meant that the penalty was appropriate.

The obligations were imposed under arts.18 and 22 6th Directive. The Court considered that precedents such as *Bockemühl* (Case C-90/02) and *Collée* (Case C-146/05) showed that such requirements should not exceed what is strictly necessary for the purposes of verifying the correct application of the reverse charge procedure or to prevent fraud, and must not undermine the neutrality of VAT.

The substantive requirements for deduction of the VAT are given in art.17 6th Directive. A string of precedent cases cited by the CJEU shows that the neutrality of the tax requires deduction to be allowed where these are satisfied, even if there are breaches of some of the formal requirements. The substantive requirements are that the acquisitions must have been effected by a taxable person, that that person must also be liable for the VAT payable on those acquisitions, and that the goods in question must be used for the purposes of his taxable transactions.

The answer to the question was that arts. 18(1)(d) and 22 6th Directive must be interpreted as containing formal requirements relating to the right to deduct, failure to comply with which, in circumstances such as those at issue in the main proceedings, cannot result in the loss of that right.

CJEU (Case C-590/13): *Idexx Laboratoires Italia srl and other v Agenzia delle Entrate*

4.4.3 Subscription services

The Bulgarian tax authorities refused a claim for input tax made by an investment company that had paid a retainer to a consulting firm for services to be provided over a period. The ruling was based, surprisingly, on the contention that the services had not been performed so no input tax was due. The case has been referred to the CJEU to determine whether there is any relationship between the VAT liability for a subscription service and the actual use of the services during the subscribed period. There would be little doubt about the interpretation of the rules in the UK.

CJEU (Case C-463/13) (Reference): *Asparuhovo Lake Investment Company OOD v Direktor na Direktsia 'Obzhalvane i danachno-osiguritelna praktika' Varna pri Tsentralno Upravlenie na Natsionalnata Agentsia za Prihodite*

4.4.4 Taxable amount

The Portuguese court has referred a question to the CJEU about the proper treatment of a "land use tax" paid by a gas distributor. The question appears to relate to the way in which the distributor can recoup that cost from a final consumer – whether it can be recharged without the addition of VAT, or whether it has to be included in the taxable amount for supplies.

CJEU (Reference) (Case C-423/14): *Fazenda Pública v Beiragás — Companhia de Gás das Beiras SA*

4.4.5 Compulsory registration

The Hungarian authorities ruled that an individual should be registered for VAT in respect of sales of goods on the internet, even though he had not exceeded the Hungarian registration threshold and did not wish to be registered. They also charged a penalty. The Hungarian court has referred questions to the CJEU to find out if this is permissible.

CJEU (Reference) (Case C-424/14): *Jácint Gábor Balogh v Nemzeti Adó- és Vámhivatal Dél-dunántúli Regionális Adó Főigazgatósága*

4.5 Eighth Directive reclaims

4.5.1 Updated Notice

HMRC have issued a new version of their Notice *Refunds of VAT in the European Community for EC and non-EC businesses*. The main amendments are updated telephone and fax numbers for the Overseas Repayment Unit, as well as two new statements with the force of law concerning application forms for making claims.

Notice 723A

5. INPUTS

5.1 Economic activity

5.1.1 Abuse

HMRC have succeeded in the Upper Tribunal in their appeal against the FTT's decision (TC02823) that the arrangements entered into by the University of Huddersfield, which were considered by the CJEU (Case C-223/03) in a combined hearing with *Halifax plc* (Case C-255/02) and *BUPA Hospitals Ltd* (Case C-419/02), were not abusive.

It was clear from the CJEU decision that the court considered the *Halifax* scheme to be contrary to the purpose of the VAT Directive: an exempt financial institution should not be able to arrange its affairs so that it obtained full or nearly full relief for the VAT incurred on the construction of buildings. However, this was not so clear in relation to an educational organisation, as this case has shown.

The University was a mainly exempt trader providing education. In 1995, it decided to refurbish two leasehold buildings (W and E) for the general purposes of its business, and its accountants devised a scheme to improve the VAT recovery on the refurbishment work. The scheme operated as follows:

- on 27 November 1995, a discretionary trust was established by deed;
- on the same date, the University entered into another deed indemnifying the trustees against any liabilities arising;
- the University opted to tax building W and granted an underlease for 20 years to the trust, with provision that the lessor could break the lease on the 6th, 10th or 15th anniversary;
- the trust opted to tax and granted a subunderlease to the University for 20 years less three days;
- the rent on the first lease was £500,000 (trust to pay to University), and on the second was £520,000 (University to pay to trust);
- the idea was that all the VAT on the refurbishment work could be recovered in respect of the first VATable rentals paid to the University by the trust, but the lease and leaseback would be collapsed long before 20 years had passed, so the irrecoverable VAT on the £520,000 rentals would be much lower than the input tax recovery on the works.

The scheme for the other property was similar, except that the rents were nominal. A subsidiary of the University invoiced it for future construction services on this building in the quarter to January 1997, and input tax of £612,500 was recovered by the University at that time; the work was completed and the building was occupied on 7 September 1998.

The University asked Customs for a ruling that the later termination of the underlease under its cancellation terms would not give rise to any supply by either party. In response, Customs ruled that the whole arrangement was uncommercial and artificial, and on 26 January 2000, an assessment was issued to recover the £612,500 of input tax claimed in the January 1997 return.

In the original dispute, the appellant argued the following:

- the scheme was on all fours with the case of *Robert Gordon's College*, and Customs were trying to use the Tribunal's initial decision in *Halifax* to overrule a House of Lords precedent;
- the decision in *Halifax* had been overturned by the High Court and remitted to the Tribunal, which had referred it to the ECJ, so there was no precedent authority on which Customs could rely;
- the transactions were not "entered into solely or predominantly for the purpose of tax avoidance", and even if they were, that would only bring them within the ambit of any anti-avoidance legislation, of which there is none in the UK in this area.

The definition of tax avoidance is important. The appellant argued that it was merely involved in tax *deferral*, as the rents paid on W would give rise to irrecoverable VAT at a later date. Customs argued that there were three possibilities:

- the arrangements would be collapsed very quickly, leading to an immediate absolute VAT saving rather than merely a deferral;
- the arrangements would be collapsed later, so there was a deferral with the possibility of an absolute saving later;
- even deferral could be tax avoidance.

The VAT Tribunal agreed with Customs. The scheme involved features which were absent in *Robert Gordon's College* – the ability to collapse the arrangements meant that there was likely to be an absolute saving, and not merely a deferral. The transactions were entered into solely with the intention of creating a fiscal advantage, or the possibility of one, and this did not (in the Tribunal's opinion) constitute a business purpose.

The case so clearly depended on the view of the CJEU in *Halifax* that it was referred to the court and heard along with that case. However, the court's decision concentrated on *Halifax* (where it clearly regarded the arrangements as artificial and abusive) and *BUPA* (where the arrangements were ineffective). The court did accept that the Huddersfield transactions were 'economic activity' that would, in principle, give rise to the normal VAT consequences under the law, unless they were found to be abusive.

The University continued to dispute whether the outcome of its scheme was contrary to the purpose of the Directive. In the event, the leases had not been collapsed at such an early stage that there was an overall saving: the net outcome had been more output tax payable to Customs than input tax recovery. The University argued that this tax deferral was acceptable and not abusive.

The same judge, David Demack, heard the case on its return to the FTT. It was not explained why this took place in February 2013, when the VAT Tribunal reference was made in July 2002 and the CJEU decision was handed down in February 2006.

Judge Demack considered the arguments put forward by HMRC and the University in detail. He noted that there had been several other decisions on abuse of rights since 2006, in particular *Weald Leasing Ltd* (Case C-

103/09), in which the CJEU had circumscribed the concept of abuse. He agreed with the University's representative that there was an important distinction between a mere deferral of VAT and an attempt to obtain an absolute advantage; the CJEU in *Weald* had effectively affirmed the principle that traders were entitled to structure their operations in such a way that VAT could be recovered up front and paid back later by lease and leaseback transactions. The tax advantage obtained by the University was one that was entirely consistent with the domestic legislation, and the judge concluded that they were not abusive. The CJEU had remitted that point to the referring Tribunal; the appeal was therefore allowed.

HMRC argued that it was not possible to wait until the leases were collapsed in 2004 to raise an assessment: the mere possibility of an abusive absolute saving should have been enough to justify the raising of an assessment to disallow the input tax claimed as the work progressed. The judge disagreed: in his view, HMRC would be free to raise an assessment after the collapse of the leases, calculating the absolute VAT saving which could be shown to be contrary to the purpose of the legislation (being more than a mere deferral of VAT), and they would be entitled to raise an assessment at that time.

HMRC appealed to the Upper Tribunal, arguing that the FTT's approach to the tax saving scheme had been flawed. If they succeeded in persuading the UT that the scheme was abusive, it would also be necessary for the UT to consider how to recharacterise the transactions to cancel the tax advantage.

The UT disagreed with Judge Demack's interpretation of *Weald*. That decision was not a justification for a principle that the abusive nature of a scheme, or the extent of a tax advantage accruing, could only be determined after the event – in this case, once the leases had been collapsed. The CJEU in *Weald* had envisaged the possibility that a scheme could be cancelled with the refund of output tax and the clawback of input tax.

The FTT had also erred in regarding the collapse of the leases as somehow separate from the scheme as a whole. If the scheme had been created to generate a tax advantage, then the collapse of the leases was part of that tax advantage.

Overall, there were sufficient objective factors to show that the scheme had been designed to create a tax advantage. That was artificial in that the scheme had created a taxable supply that had no purpose other than to generate a deduction of input tax in circumstances when no deduction would normally be allowed. That was contrary to the purposes of the 6th Directive.

The scheme should be recharacterised by removing the abusive transactions and regarding the refurbishment as carried out for the purposes of the general business of the taxpayer, rather than for the purpose of the lease. Input tax on the refurbishment would therefore be recoverable in line with the partial exemption method of the university in force at the time. No output tax was due on the lease, because it would be disregarded.

Upper Tribunal: *HMRC v University of Huddersfield Higher Education Corporation*

HMRC issued a press release to comment on the result:

Jennie Granger, Director General Enforcement & Compliance, HMRC, said:

"This case offers further evidence that HMRC pursues those who avoid tax and won't hesitate to litigate if a satisfactory settlement can't be reached through discussion.

"The Upper Tribunal's ruling also backs a key argument used by HMRC to tackle abusive VAT avoidance. Anyone tempted by avoidance schemes should think long and hard because we have a great record in defeating them in the courts."

www.mynewsdesk.com/uk/hm-revenue-customs-hmrc/pressreleases/university-brought-to-book-over-tax-avoidance-1063498

5.1.2 Single Farm Payment Entitlements

A company ran a farming business in Aberdeenshire. It was allocated an initial entitlement to Single Farm Payments, then purchased more SFPEs for £7m plus VAT of just over £1m. To be entitled to the payments, the holder had to have "at its disposal" one hectare of land in "Good Agricultural and Environmental Condition" (GAEC) for each unit of entitlement. The company entered into agricultural leases with other farmers to secure this extra land, but under leaseback agreements the other farmers continued to carry on the farming activity on the land.

HMRC regarded the purchase of the SFPEs was a non-business activity on which no input tax could be claimed. The director of the company responded that the purchase (and occasional sale) of SFPE units was an essential part of the financial management of the farm. All the money generated by the payments had been retained in the business and was used for expanding and diversifying it. The purchase of the units was an overhead of the business similar to the sale of a going concern in *Abbey National* and the share issue costs in *Kretztechnik*: there was no exempt supply or private use that would interfere with the right of deduction.

HMRC's representative pointed out that the payments themselves were outside the scope of VAT (in line with the CJEU decision in *Mohr*). The activity of buying SFPEs was therefore not "predominantly concerned with making taxable supplies". The costs were not components of any outputs. The trader had leased 35,000 hectares of land to support the extra entitlements, but carried on no farming activities on them. The farm itself was only 200 hectares.

The Tribunal agreed with the taxpayer that the purchasing of SFPEs was not a separate activity, but an integral part of the farming business. Given that the purchase was carried out in the context of a fully taxable business, there was no reason to deny the deduction of input tax. It was a fully recoverable overhead cost.

First-Tier Tribunal (TC04179): *Frank A Smart & Son Ltd*

5.2 Who receives the supply?

Nothing to report.

5.3 Partial exemption

5.3.1 Banking supplies for consideration?

Two Dutch companies were members of a UK VAT group with a UK registered company. The group made voluntary disclosures between 2006 and 2011 claiming back input tax of £6m in total for the periods 10/02 to 03/11.

The company carried on a retail banking business in the UK, taking deposits from private individuals and paying interest. Its profit came from making investments with the deposited money. It was regulated by the Dutch financial authorities, and depositors were protected by the Dutch deposit protection scheme.

The company noted that the costs of attracting deposits were high, and many were VATable (e.g. advertising, construction and operation of call centres, IT services). By contrast, the VAT incurred on the investment side of the business was much less significant. The company charged no fees to depositors, and offered a higher rate of interest than most of its competitors. There were no branches – all interaction with the customers was by telephone or internet. Costs were kept low by offering few facilities – no cheque books, no debit cards, no ability to make payments to third parties.

The group agreed a special method in June 2004 to take effect from 1 April 2003. This noted that the banking operation only generated exempt income, and could therefore not recover any input tax.

The company's claim to recover VAT was based on the fact that some of its investments were made in non-EU interest-bearing bonds. It argued that these constituted "specified supplies" within SI/1999/3121, and therefore justified input tax recovery. HMRC regarded those investments as non-economic activity; the input tax incurred in the UK remained attributable to the exempt supply of banking services to retail customers, rather than to the use of the deposited money for making specified supplies.

The judge (Barbara Mosedale) noted that there was no real dispute about the law: "*Fundamentally, the dispute between the parties was whether IDUK made supplies for consideration to the depositors. It was assumed (rightly) that if IDUK made a supply of banking services to its depositors, then the costs IDUK incurred on its deposit taking activity had the most immediate and direct link to those banking services. Those banking services, if made, would be exempt and the attributable input tax irrecoverable.*"

The appellant argued that "receiving a loan" (i.e. the deposit) does not constitute a supply, nor is it consideration for a supply. There were references to this in the CJEU *BLP Group plc* decision (Case C-4/94), although it was not part of the basis of the judgment in that case. The

funds were being raised to use in the business, so *Kaphag* (Case C-442/01) and *Kretztechnik* (Case C-465/03) were authority for the proposition that the input tax was attributable to all the business activities, rather than to any specific exempt supply.

The judge had to consider the proposition that the bank made no supply to its customers, or if it made a supply of services, that supply was not made for a consideration; or, if there was a consideration, it could not be valued in monetary terms. There was authority in the High Court's 2006 decision in *MBNA Europe Bank Ltd* to show that a debtor does not make a supply merely by promising to repay the money lent.

HMRC pointed to a 1995 Tribunal decision, *Bank of Scotland* (VTD 13,854), in which Sir Stephen Oliver held that a bank did supply services to its customers. The appellant argued that this had been wrongly decided. The judge distinguished the situations: in the earlier case, there were other banking facilities (e.g. bill payments, cheque books) that constituted a service.

HMRC also argued that the existence of the exemption for retail banking activities in the Directive ("transactions, including negotiation, concerning deposit and current accounts, payments, transfers, debts, cheques") implied that they were within the scope of VAT but exempt. The judge agreed with the appellant that this did not logically follow: it was necessary to determine first whether a banking transaction constitutes a supply, and only then to consider whether the exemption applies.

The judge also agreed with the appellant that a person who accepts a service provided to them (in this case, the bank accepting the supply of money by the depositor) does not necessarily make a supply of that mere acceptance. However, there could be a barter of services. The judge found that "*depositors could (subject to doing so in the right form) deposit and withdraw money at will; they were provided with an interface to give the bank instructions on withdrawals and deposits and could check their balance when they chose. Statements were provided. I consider that these facilities were valued by depositors.*" This constituted a service provided by the bank to the depositors, as it went well beyond what an ordinary debtor would provide to a lender.

The appellant's representative argued that there could be no consideration, as the bank's contracts emphasised that there were "no fees, no charges, no exceptions". If the judge found that there was consideration, this would amount to saying that the contract was a sham. The judge did not agree: the contract only said that there were no fees or charges, not that there was no consideration at all. The provision of the deposits was non-monetary consideration for the reciprocal supply of banking services.

The appellant's counsel went on to argue that the CJEU decision on *Kuwait Petroleum* (Case C-48/97) meant that the consideration could not be attached to the banking services.

122. The contract in Kuwait can be rendered diagrammatically as:

Cash for A + B

where A = petrol and B = vouchers for free gifts.

123. The contract in this case can be rendered diagrammatically, very similarly, as:

Non-cash (loan) for A + B

where A = interest and B = banking services

124. The judgment in Kuwait makes it clear that it is wrong, says Mr Prosser, to say that because contractually the supplier is bound to provide A + B in return for the consideration (whether cash or non-monetary), the consideration is necessarily 'for' both A + B in the VAT sense.

The judge distinguished the *Kuwait* case on the basis that the customers there only paid cash, rather than being engaged in barter. To her it was obvious that the bank supplied a service, and received consideration for it; the deposits were clearly valuable to the bank, and it was willing to pay interest (as well as incur considerable costs) in order to obtain them. An argument that the subjective value to the bank was "nil" was also rejected. The judge considered how it would be valued, and decided that it was possible (using the principles of *Empire Stores*) but unnecessary.

HMRC's argument that the "specified supplies" were non-economic activity were rejected – the holding of investments was "a direct, permanent and necessary extension" of its business. However, this did not help the appellant, because its inputs were directly linked to making exempt supplies in the UK, rather than being costs of the specified supplies. The appeal was dismissed.

First-Tier Tribunal (TC04051): *ING Intermediate Holdings Ltd*

5.3.2 Residual input tax after *Lok'nStore*

HMRC have issued a Brief to comment on the UT's dismissal of their appeal in the *Lok'n'Store* case. HMRC consider that the decision was specific to the facts of the case; they will not appeal, but will also not change their policy that floor space special methods are not usually appropriate for the retail sector.

HMRC note that the UT had some criticisms of the FTT's decision, but "was not convinced that this led to an incorrect result". The following comments are significant:

In the LnS case, the FTT found that the VAT bearing costs in question were only cost components of insurance to a very slight extent. Where VAT bearing costs are used only slightly for exempt supplies, then HMRC agrees that a method which results in almost full recovery is appropriate.

However, the decision could be interpreted to suggest that a cost can only be a cost component of an output supply if the price of that output was set by reference to the cost. HMRC would not agree with that interpretation.

Even where the price of an output transaction is not set by reference to particular costs, those costs can still be incorporated into the price in that they contribute to its value. This was the conclusion of the Tribunal in TLLC Ltd v HMRC [2013].

Businesses wishing to apply for a new or amended PESM similar to that in LnS will need to demonstrate that the overhead costs are not cost components of their exempt supplies, and that they do not intend to recover those costs through their exempt outputs.

Revenue & Customs Brief 35/2014

5.4 Cars

Nothing to report.

5.5 Business entertainment

Nothing to report.

5.6 Non-business use of supplies

5.6.1 Pension fund management costs

As promised earlier in the year, HMRC have issued a Brief to further explain their policy following the decisions in *PPG Holdings* (Case C-26/12) and *ATP Pension Service* (Case C-464/12). HMRC summarise their previous policy as follows:

Until now, HMRC policy has been to distinguish between costs incurred in relation to the:

- *setting up and day to day administration of occupational pension schemes*
- *investment management relating to the assets of occupational pension schemes*

HMRC previously allowed employers to deduct VAT incurred in relation to the administration of an occupational pension scheme on the basis that these costs were overheads of the employer and thus had a direct and immediate link to the employer's business activities.

In respect of investment management costs, HMRC considered these costs to relate solely to the activities of the pension scheme. To the extent that these inputs were deductible, they were deductible by the scheme.

In some cases a single invoice was received covering both the administration of the pension scheme and the management of the investments. In such circumstances HMRC allowed the employer to claim 30% of the VAT as relating to the administration of the scheme and the pension scheme to claim 70% as relating to the investment management as an administrative simplification.

The new policy is set out in detail as follows:

As a result of the PPG judgment, HMRC is changing its policy on the recovery of input tax in relation to the management of pension schemes. This means that there are circumstances where employers may be able to claim input tax in relation to pension schemes where they could not do so previously.

VAT which is incurred on goods and services supplied to a taxable person is deductible if it is used for the onward taxable supplies of that person. The first stage in deciding whether the VAT on services may be deductible

by an employer is to determine whether the services in question are supplied to the employer.

In the case of occupational pension schemes, there are normally two potential recipients of the supplies: the employer and the pension scheme through its trustees. The Courts have made clear that determining which of two persons is the recipient of a supply of services is a highly fact sensitive question that will depend upon consideration of all the circumstances in which the transaction in question took place. A fundamental criterion to be considered is economic reality and the most useful starting point is to examine the agreements between the parties. In this context, whilst the fact that a party pays for the supplies is not decisive, and payment may be third party consideration for supplies made to another party who is the actual recipient of the supplies, payment is an important indicator, particularly in cases where two parties use the services.

Accordingly, HMRC will not accept that the VAT incurred in relation to a pension scheme is deductible by an employer unless there is contemporaneous evidence that the services are provided to the employer and, in particular, the employer is a party to the contract for those services and has paid for them.

HMRC accepts that there are no grounds to differentiate between the administration of a pension scheme and the management of its assets, therefore there is no longer a need for any administrative simplification to deal with supplies involving both elements. In each case the employer will potentially be able to deduct input tax if it receives the supply of services.

In order to deduct, a business will require a valid VAT invoice. Where an employer is engaged in non-business activities or makes exempt supplies, it will need to take these into account when deducting any VAT incurred and restrict its deduction accordingly. Further information on the treatment of non-business activities can be found at chapter 4.6 of Notice 700, The VAT Guide and on partial exemption in Notice 706, Partial exemption.

If an employer receives a taxable supply of administration and investment management services and recharges them to the pension scheme, that recharge is consideration for an onward taxable supply. VAT is due accordingly. This amount is potentially deductible by the pension scheme to the extent that it is engaged in taxable business activities.

VAT Notice 700/17 Funded Pension Schemes will be updated shortly to reflect these changes in VAT treatment.

The Brief extends until 31 December 2015 the transitional period allowed in R&C Briefs 6/2014 and 22/2014 for businesses to continue with the old policy. For that period, businesses may continue to apply the 70:30 split as set out in Notice 700/17.

The usual guidance is given on making retrospective claims.

R&C Brief 43/2014

5.7 Bad debt relief

5.7.1 Bad debt or credit note?

A company traded as a trademark attorney. Over a 5 year period it issued invoices totalling £871,000, including £127,000 in VAT, to a customer. The customer did not pay any of this amount. The company had accounted for all the output tax to HMRC, and never made a bad debt claim. It issued proceedings against the customer in 2011; it ceased trading later that year and was deregistered for VAT in January 2012; and finally settled its claim out of court on 30 November 2012, in a much reduced amount. A credit note was issued to the customer to reflect the reduction. In January 2013 the company applied to HMRC for repayment of the reduction in the VAT (£82,000). HMRC refused, and the company appealed.

Judge Mosedale noted that art.90 PVD is reflected in s.36 VATA 1994 in respect of bad debts, and in reg.38 SI 1995/2518 in respect of "adjustments in the course of business". The 3-year time limit that had appeared in reg.38(1A) was repealed with effect from 1 April 2009 after the Tribunal in *GMAC* held it was unlawful. HMRC's position was that this was simply a bad debt rather than a true reduction in consideration, and it was too late for the company to claim under s.36. They relied on *Castle Associates Ltd* (VTD 3,497), a case in which the VAT Tribunal had concluded that a credit note did not reduce consideration but merely reflected a bad debt.

The judge did not accept that this earlier decision was correctly decided. She said that as a matter of law the debtor no longer owed anything to the creditor after the agreed payment of a lesser amount; therefore there could only be a reduction in consideration, not a bad debt. The better case law was in *Cobojo Ltd* (VTD 4,055) and *Cumbria CC* (TC01463).

HMRC also argued that the time limit for such a claim after the trader has deregistered runs from the original time of supply. The judge found no legislative support for this view. There was no time limit in reg.38 any more; the only question was how the requirement in reg.38 to enter the adjustment in the VAT books of the trader could be reflected by a deregistered company.

Reg.38(6) requires an insolvent person to make the adjustment retrospectively, in the return period in which the original supply was made. This would mean that the only possible claim would be under s.80 VATA 1994, which would introduce its own time limit. Although the appellant was not insolvent, it could not use reg.38(5), which required an adjustment in the current period. HMRC argued that it was subject to the same time limit problem as an insolvent trader.

Judge Mosedale disagreed. Art.90 gave a directly effective right which was not time-limited. VAT was properly accounted for on the original invoiced amounts – there was no amount of VAT that was not properly due for the period at the time. An adjustment could not be made until the credit note was issued. If a credit note was issued more than 4 years after the original supply, HMRC's interpretation would deny the trader a directly effective right. HMRC argued that the trader could have made an in-time bad debt relief claim, but Judge Mosedale disagreed again – there

was no bad debt, either before or after the issue of the credit note, because the trader initially regarded the debt as recoverable.

The appeal was allowed.

First-Tier Tribunal (TC04070): *Barlin Associates Ltd*

5.7.2 Late registration and unpaid VAT

A doctor operated a business providing medico-legal services, initially as a sole trade, and later through a company. She believed that her services were completely exempt from VAT, but HMRC disagreed. After correspondence during 2011, HMRC issued a notice of retrospective registration back to 1 December 2008. This covered the last few months of the sole trade, and meant that the company was registrable from its incorporation. Some 40% of the services were properly exempt, but the rest were taxable, and the records did not clearly distinguish between the two.

The doctor and the company then issued VAT-only supplementary invoices to clients who had long ago already paid what they regarded as a final fee for the work; unsurprisingly, most of them did not pay. The taxpayers claimed bad debt relief for the full amount of the outstanding VAT, which would cancel the liability altogether. HMRC refused, and both taxpayers appealed, relying on the Upper Tribunal decision in *Simpson & Marwick* – it was clear that the customers had paid the net amount in full, and the bad debt was only the VAT element. This was suggested as one of the unlikely consequences of that decision. If the argument succeeded, the bad debt claim would exactly cover the VAT due (although a related belated notification penalty was not in dispute).

The appellants also pointed out that many of their clients were funded by legal aid. If VAT had been included in the bills at the time, they would have been paid in full; requiring the appellants to pay VAT in arrears, when it could not be collected, would result in unjust enrichment for the State.

Surprisingly, the decision does not refer to the reversal of the Upper Tribunal's decision in *Simpson & Marwick* – it simply concludes that the trader's view is mistaken. The point about unjust enrichment was rejected: the assessments for VAT on the VAT-inclusive supplies were upheld as being valid and correctly calculated. There is no reference to the possibility of a smaller amount of bad debt relief (the VAT fraction of the VAT fraction ought to be claimable).

First-Tier Tribunal (TC04109): *Dr Alice Duncan and related appeal*

5.7.3 The other side

HMRC assessed a company under s.26A VATA 1994 in respect of input tax claimed on supplies by an associated company in relation to a property lease, where it appeared that the consideration had not been paid within 6 months of the due date. The company appealed.

It appeared that the company had been set up by the owner's brother ("ZM"), who also provided loan finance and premises through a larger company owned by himself. The business did not prosper; in the process of winding it up, the brother found some rental invoices on which input

tax had never been claimed. Those relating to the last four years were entered on the final VAT return as a claim for £10,400. The property development company had gone into liquidation earlier.

HMRC asked for evidence that these amounts had been paid; the company's director responded that they would be settled by accounting entries through the director's current account.

The Tribunal was not satisfied with ZM's reliability as a witness. There were contradictions in what he said had happened; there were suggestions in some submissions that the invoices had been fabricated. The Tribunal did not need to rule on this point. It was clear that the invoices had not been paid to the supplier in money, and the accounting entries did not constitute payment for the purposes of s.26A. The appeal against the assessment was dismissed.

First-Tier Tribunal (TC04163): *Heanor Motor Company Ltd*

5.8 Other input tax problems

5.8.1 Evidence for despatches

A Bulgarian trader exempted despatches to a Greek trader. At the time, the VIES database showed that the customer was registered for VAT in 2005, and the Bulgarian authorities accepted that the documentation justified the treatment. Later, it became apparent that the customer did not declare the acquisitions in Greece and did not account for VAT there. The VIES database showed that the registration had been cancelled with effect from 2006. The Bulgarian authorities therefore assessed the supplier to recover the VAT that had not been accounted for on the despatches. The authorities said that the trader had proven neither the authenticity of the signature on the documents submitted in support of its declaration in respect of the supply it claimed to be exempt, nor that the person who signed those documents on behalf of the purchaser had the authority to represent the purchaser.

The CJEU referred back to cases including *Teleos* (Case C-409/4) and *Mecsek-Gabona* (Case C-273/11). The principles of effectiveness and legal certainty precluded a Member State from introducing extra requirements for a trader, after documentation had been accepted, because there had been a discovery of a fraud of which the trader did not and could not have knowledge. It was contrary to the principle of proportionality to hold a supplier liable for deficiencies in the VIES database when a number was cancelled with retroactive effect.

As usual, the facts were for the national court to determine: if it could be established that the supplier knew, or had the means of knowing, that the transaction was connected to fraud, then the right to deduct input tax would be lost. There was nothing in the order for reference to suggest that this might be the case.

Art.138(1) PVD had direct effect, so the trader was entitled to rely on the exemption for intra-community despatches in that provision.

CJEU (Case C-492/13): *Traum EOOD v Direktor na Direktsia 'Obzhalvane i danachno-osiguritelna praktika' Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite*

5.8.2 Missing traders

Questions were referred by the Dutch courts to establish whether the tax authorities of a Member State have powers to counter missing trader fraud when such powers are not explicitly set out in national law. The Advocate-General has given an opinion that there is a general principle that traders will act in good faith in relation to VAT. If they do not, then the authorities have wide powers to deny them the rights that they have abused (*Halifax*, Case C-255/02 on input tax and *Mecsek-Gabona*, Case C-273/11 on exemptions).

The absence of national legislation did not restrict the application of this general principle by the national authorities. It did not make any difference if the fraudulent transactions were carried out in different jurisdictions.

CJEU (A-G) (Case C-131/13): *Staatssecretaris van Financiën, other party: Schoenimport 'Italmoda' Mariano Previti*

Yet another appeal has reached the FTT in relation to denial of input tax for periods 05/06 and 06/06 – in this case, £1.326m in relation to 16 purchases of mobile phones. It was agreed that all the deal chains led to missing traders, and that the onus lay on HMRC to prove knowledge or means of knowledge.

The company had been in existence since 1986 and had been engaged in import and export of other goods. Other features that set it apart from other fraudulent traders were the absence of a First Curacao International Bank account, and variations in the margins it made on its transactions. It had obtained inspection reports on all the deals and paid for insurance.

The Tribunal decided that the director was "an intelligent and sophisticated businessman" who could provide no logical explanation of the commercial rationale behind the deals. This was convincing evidence that there was none; the decision goes through a long list of reasons for concluding that the director actually knew of the connection between deals 2 to 16 and fraud, and that he ought to have known of such a connection in relation to deal 1.

First-Tier Tribunal (TC04075): *Prizeflex Ltd*

A trader in a MTIC appeal applied for adjournment of the substantive hearing on the grounds that it had no legal representation and its main witness was unwell. This application was initially rejected because it did not make clear why the solicitors had ceased to act, or why a director could not represent the companies instead. A second application was made, giving additional reasons. During the hearing of this application, the director fell ill and called an ambulance for himself to be taken to hospital.

It appeared that the director's illness was caused by the anxiety and stress of appearing before the Tribunal. In that circumstance, it was possible

that he would never be fit to attend. The judge considered HMRC's arguments for proceeding with the hearing in the director's absence, and agreed, issuing a number of directions to protect the appellant from an unfair decision.

First-Tier Tribunal (TC04097): *Westminster Trading Ltd, SGL International Ltd, Westminster Import & Export Ltd*

HMRC assessed Citibank NA for £10m in respect of input tax claimed in period 09/09 on July 2009 transactions in EU emissions allowances. HMRC alleged that the bank should have known that these transactions were connected with fraud. The assessment was raised in August 2013; the bank appealed both on the substantive ground, and also on the basis that the assessment was out of time. HMRC carried out separate reviews on the two issues and upheld the assessment on both.

HMRC lodged a statement of case (SOC) on 22 April 2014; the appellant lodged a request for further and better particulars on 23 May, but HMRC did not respond. The question of whether the SOC was sufficient came before Judge Mosedale in the FTT.

The judge considered what ought to be set out in a SOC. The appellant is entitled to have the respondent's case set out in its SOC and it is no answer for HMRC to say that they will rely on their as yet unserved witness statements to remedy any defects in the SOC. If fraud is to be alleged in the hearing, that allegation must be made plain in the SOC so the appellant can prepare an appropriate defence.

HMRC's counsel argued that the SOC did not use the word "dishonesty" or any similar word because that was not alleged. The *Kittel* principle did not require the trader to have a dishonest state of mind, even though HMRC would argue that the bank knew its transactions were connected with fraud. Judge Mosedale considered this position to be contradictory: advance knowledge that transactions were connected to a fraud on HMRC would necessarily involve a dishonest intention.

This lack of clarity meant that the SOC was seriously flawed. Judge Mosedale listed 9 separate criticisms, and suggested that if HMRC wanted to amend it, they should apply to do so earlier rather than later; if they failed to amend it, they might be restricted in what they could plead in the substantive hearing.

First-Tier Tribunal (TC04156): *Citibank NA*

In a preliminary hearing, the FTT considered the refusal of a claim for £500,000 in respect of the 04/06 period. The hearing examined one issue on the basis of assumed facts, without hearing from witnesses or examining evidence to support those facts, to determine whether a line of defence could be effective in principle.

The trader argued that it had been defrauded by an agent to which it had subcontracted the due diligence work on purchases and sales of mobile phones. HMRC argued that the knowledge of an agent had to be imputed to the principal, so the defence was ineffective.

The principles of the defence are based in long-standing UK case law, not in VAT law. In general, a principal cannot hide behind an agent to deny wrongdoing – the principal has "constructive knowledge" of the agent's activities; however, where the agent has deceived the principal, a "fraud

exception" applies. This was considered in the context of MTIC fraud in 2012 by the Upper Tribunal in the *Greener Solutions* case. There, the FTT had concluded that the trader did not have "the means of knowledge"; but the Upper Tribunal reversed that decision, concluding that the exception did not apply.

The current appellant tried to distinguish *Greener Solutions* by pointing out that the agent had carried out a wider fraud than the agent in that case. It had not merely put the company in the position to claim fraudulent VAT credits and taken its share of that; it had raided the company's bank account, leaving it with debts of £3m. HMRC argued that the two matters were not directly connected – the MTIC fraud was squarely within the principles of the *Greener Solutions* case, and if there had been a theft from the company's bank account, that was a separate matter that would not assist the appellant.

The Tribunal interpreted *Greener Solutions* as restricting the fraud exception to circumstances in which the fraudulent acts of the agent have to be directly linked to the acts of which the principal is accused. On the basis of the assumed facts there was not a sufficient connection between the alleged fraudulent acts of the agent and the disputed VAT transactions. The fraud on the bank account related to different transactions to the fraud that generated VAT repayments.

The appeal on the preliminary issue was dismissed.

First-Tier Tribunal (TC04178): *Mobile Sourcing Ltd*

In TC02404, two related companies which had traded in the legitimate grey market in mobile phones were denied claims totalling over £5.25m in respect of 17 deals in April, May and July 2006. The Tribunal agreed with HMRC that these trades were not genuine, and the company at the very least had the means of knowing that its transactions were connected with fraud. Some of the deals were described as '*not only "too good to be true", but manifestly ludicrous*.' Its appeal to the FTT failed.

The companies appealed to the UT, alleging a misapplication of the legal test by the FTT and bias in the FTT judge's approach. There were 13 individual grounds of appeal, but the UT judge considered them under these two main headings, with a long list of "other grounds" examined more briefly.

The UT judge considered that the FTT had correctly understood and applied *Kittel* and *Mobilx*. It had found that, in the majority of deals, the directors had actual knowledge of the fraud, and on any understanding of the *Kittel* test, that denied the right to input tax. In respect of the other deals, the finding was that there was the means of knowledge, and that finding was reasonable on the evidence.

Specifically, the UT rejected an argument based on the *Mahageben* decision of the CJEU. This was that the invoices showed the basic information required by the PVD, and the absence of further detail could not be held against the appellant. The judge disagreed: the FTT was entitled to treat the lack of detail in the invoices for the very high value transactions in this case (some millions of pounds) as relevant to the question as to the appellants' state of knowledge as to uncommercial and artificial transactions.

As regards bias, the UT examined in detail a number of remarks and exchanges between the judge, the representatives and the witnesses that the appellants argued showed a predisposition towards HMRC's case. The UT judge noted that the FTT hearing had taken nearly a month and had produced 1,400 pages of transcripts. The remarks complained of were a tiny proportion of that. A fair-minded observer, sitting at the back of the Tribunal for the whole of the hearing, would not have formed the conclusion that the judge was biased. Some of his language was forceful, and some of his comments (such as mild jokes about Polish inspectors and Greek tax authorities) were "injudicious". However, these were not reasons to overturn his decision.

Each of the grounds of appeal was considered in turn and in detail, and all were dismissed.

Upper Tribunal: *GSM Export (UK) Ltd & Sprint Cellular Division Ltd v HMRC*

5.8.3 Runners buying phones

Another company has failed in an appeal about the peculiar business of buying individual iPhones from Apple stores and reselling them at a profit. The trader does not have the required evidence to support an input tax deduction, because the till receipts from the Apple stores do not bear the trader's name. The grounds of appeal are that the alternative evidence available should persuade HMRC to use their discretion to allow a deduction under reg.29 SI 1995/2518.

As usual, the appeal failed. In this case, the judge emphasised that the "runners" who bought the phones must have been "agents acting in their own name". They were therefore treated as principals under s.47(2) VATA 1994; the trader had made a purchase from a non-taxable person, and could not therefore claim any input tax.

First-Tier Tribunal (TC04105): *Xpress Telecom Ltd*

5.8.4 Museums and galleries

The Value Added Tax (Refund of Tax to Museums and Galleries) (Amendment) Order 2014 has added some new bodies entitled to refunds of VAT, and updated the existing entries for other bodies.

SI 2014/2858

5.8.5 Government bodies and other refunds

The Autumn Statement included an announcement that a number of "specified bodies" will be added to those currently able to recover VAT on expenses under s.33 VATA 1994. As these bodies are government funded, their funding will presumably be adjusted downwards to take account of the VAT reduction. The Treasury will have the power to designate "specified bodies" under a new s.33E VATA 1994.

There will also be a new s.33C and s.33D VATA 1994 allowing "search and rescue charities" (e.g. the RNLI or air ambulance charities) to claim refunds of VAT on supplies, acquisitions and importations of goods and services which are used by the charity for non-business. The refund right will apply from 1 April 2015.

The Highways Agency is to be replaced by a new body under the Infrastructure Bill. The Agency's right to reclaims under s.41(3) VATA 1994 will be transferred to the new body from 1 April 2015 by listing it in s.41(7).

6. ADMINISTRATION AND PENALTIES

6.1 Group registration

6.1.1 Skandia

HMRC issued a preliminary response to the CJEU judgment in *Skandia America Corp* (Case C-7.13). It observes that the Swedish grouping rules are different from those in the UK, so the decision has no direct application. However, HMRC are considering the decision carefully and will issue a further update in due course.

Revenue & Customs Brief 37/2014

6.1.2 Article

In an article in *Taxation*, Mike Thexton reviews recent developments in HMRC's attitude to holding companies and input tax recovery, including *BAA Ltd*, *Norseman Gold*, and R&C Brief 32/2014. In his view, HMRC appear either not to understand or not to accept CJEU precedents such as *Cibo Participations*. Holding companies should be entitled to recover input tax in circumstances that HMRC guidance suggests would be contested by the department.

Taxation, 4 December 2014

6.2 Other registration rules

6.2.1 Agricultural flat-rate scheme

It is rare for any appeal to feature the agricultural flat-rate scheme (AFRS). HMRC decided to cancel a farmer's AFRS registration for the protection of the revenue. The trader appealed, arguing that HMRC had no power to do that.

HMRC put forward figures showing that the trader was enjoying a large and increasing benefit under the AFRS. In the year to 30/6/2012, HMRC calculated that it had benefited by nearly £137,000. It had lost out because of capital works on the farm in the years to 06/07 and 06/08, but overall it was making a great deal of money, and the amount was increasing year by year.

The Tribunal held that the ability of HMRC to exclude a trader from the AFRS was clearly in accordance with the PVD, which gave Member States leeway to design their own schemes but required them to restrict the benefit to the amount of input tax that would otherwise be claimed. The size and nature of this appellant's business was such that it obtained a financial benefit that could not be reconciled with fiscal neutrality.

The Tribunal declined to refer a question to the CJEU because, in the opinion of the judge, the answer was obvious.

First-Tier Tribunal (TC04057): *Shields & Sons Partnership*

6.2.2 Registration

An individual traded as a plumbing and heating engineer, mainly as a subcontractor within the Construction Industry Scheme for income tax. HMRC reviewed his self-assessment income tax return for the year to 5 April 2009 and concluded that he should be registered for VAT. After correspondence, HMRC concluded that he was registrable between 1 August 2008 and 30 June 2009. They raised an assessment for £5,650 and a late notification penalty of £466 (after mitigation).

The trader argued that he had only exceeded the threshold because his invoices had included materials, which he bought for the job but charged on at cost. His "value added" comprised only the charges for his own time, which remained less than the threshold. The judge could not accept this: it was clear that the invoices were for composite supplies of "services and materials", and the material element could not be excluded, regardless of whether a profit was made.

Exception from registration could only be claimed on the basis of what HMRC knew at the time that registration liability arose. In the absence of notification, it was not possible to claim exception retrospectively.

There were also some exceptional, round sum receipts in respect of which it was suggested at the hearing that they might relate to supplies at different times, changing the results of the registration tests. The judge ruled that HMRC were only required to act on the basis of the evidence that was put before them; the assessments had been raised to best judgement and were therefore justified.

First-Tier Tribunal (TC04065): *Brian Bilsby*

The owner of a restaurant submitted a self-assessment return showing income above the registration threshold. HMRC issued a notice of compulsory registration, an assessment and a 15% penalty. The trader's accountant attempted to amend the tax return to show lower figures, but there was no evidence either for the original amounts or the revisions. At the appeal hearing, the accountant gave evidence that the judge found "appalling" – he appeared to provide a completely unprofessional service to his client and showed no respect for HMRC or the requirement to provide accurate figures. At one point he said, "I knew I was getting false figures... It is up to VAT [officers] to catch them, not us accountants." Although the assessment was held to be valid, the Tribunal mitigated the penalty to only 5% on account of the taxpayer's likely reliance on professional help that fell short of an acceptable standard.

First-Tier Tribunal (TC04134): *Mohammed Imran*

6.2.3 Article

In an article in *Taxation*, Neil Warren reviews some of the reasons for traders to be grateful for the VAT system in the UK – the flat rate scheme, which can "make money"; the availability of zero-rating, which is more generous than the rule anywhere else; and the highest partial exemption de minimis threshold in the EU at £7,500pa.

Taxation, 18 December 2014

6.3 Payments and returns

6.3.1 Online filing

Judge Mosedale has dismissed an appeal in which a company applied to file its VAT returns on paper on religious grounds, and HMRC refused that application. The decision is as detailed as usual: the judge considered that the director objected to internet filing on various grounds, but these were not religious, and his claimed affiliation with a Plymouth Brethren sect was not believed. He therefore could not benefit from the statutory exemption.

The judge also discussed criticisms put forward by the HMRC representative of her decision in the *Bishop* case, that a company could base an appeal on the infringement of the human rights of its directors. She accepted that it is not acceptable in all circumstances to lift the corporate veil in this way, but she maintained that it was appropriate where the company was the "alter ego" of the directors and shareholders. Otherwise their rights could not be protected.

First-Tier Tribunal (TC04191): *Exmoor Coast Boat Cruises Ltd*

6.3.2 Standard VAT return?

It has been reported that the Commission's project to introduce a standard VAT return form across all the Member States has stalled after the UK and some other countries refused to participate. The UK complained that the proposed form (with 60 boxes) is too burdensome.

Daily Telegraph, 3 November 2014

6.4 Repayment claims

6.4.1 Centrally issued assessment

An individual paid a centrally issued assessment for the period 02/05. The following year, he incorporated his business and transferred his registration to it. He finally submitted the outstanding return in 2012, showing no VAT payable, and claimed back the £3,250 paid in 2005.

The time limit in s.80(4) applied: the transfer of the business could not create a more extensive right to repayment than that enjoyed by the transferor. HMRC were not liable to make any repayment.

First-Tier Tribunal (TC04020): *APN Business Consultants Ltd*

6.4.2 *Fleming* claim clawback

A car dealer incorporated part of his business in 1985. The company ceased to trade in 1996, and he ceased to trade in 2008. He made a *Fleming* claim in respect of demonstrator, rental and courtesy cars for the periods 1981 to 1985 (as a sole trader) and from 1985 onwards (as a company). HMRC paid £48,655 plus interest to the trader personally (the decision does not record what happened to the company's claim). In 2011 HMRC wrote to the appellant about the possible relevance of the

Nordania Finans decision on the correctness of the repayment; although HMRC decided not to pursue that point, they reviewed the information in their possession and concluded that the right to any repayment claim would have been transferred to the company in 1985, so they had been wrong to make any *Fleming* repayment to the trader as an individual. They issued clawback assessments for the full amount repaid.

The appellant argued that the transfer to the company contained no explicit transfer of rights to any repayment. As he had overpaid the VAT, he was entitled to claim it back, unless he had expressly transferred that right to someone else.

The trader had transferred his registration number to the company. The effect of the regulations was that the transferee was regarded as having done everything that the transferor had done; this included overpaying the VAT. As a result, only the company could make the claim. The appeal against the clawback assessments was dismissed.

First-Tier Tribunal (TC04022): *Robert Cross*

6.4.3 Adjustment of consideration

A company supplied services to the trustees of the pension funds of a group of companies to which it belonged. It recharged pension department costs, salary and dependant costs, and pension investment costs; VAT was added only to the third of these. The company decided in 2010 that VAT should not have been charged to the trustees on the administration element (estimated at 30%) of the pension investment costs. A credit note was issued for £6m + VAT, covering the period from 1973 to 2010, and output tax of £1m was recovered. HMRC decided that the conditions of reg.38 SI 1995/2518 were not satisfied, and raised an assessment to claw back the £1m.

The appellant's witness believed that "not recharging VAT on 30% of the costs" was a reasonable interpretation of HMRC's policy set out in Notice 700/17. The Tribunal disagreed: that Notice only related to the recovery of input tax by an employer, not to charging output tax.

The Tribunal considered the scope of "reduction in consideration" in reg.38. Giving several examples, the judge concluded that the following factors could be present:

- the price adjustment can take place after the supply has been made,
- it may not be provided for in or arise from a breach of the terms of the original agreement for the supply, and
- it may be voluntary or agreed between the parties.

However, none of these factors were present in this case. It was clear that the parties believed that the correct amount net of VAT had been charged to the fund over the years; the only change was in the view of the amount of VAT that should have been charged. It appeared to the Tribunal that the gross consideration had only been adjusted in order to satisfy the words of reg.38 – but without the underlying reasons, that was not enough to do so.

The appeal was dismissed. The judge concluded with a number of comments about the accounting treatment, the possibility that the fund had

received a gratuitous benefit that might properly be regarded as an additional contribution, and the impact of the economic and commercial reality of the situation on the decision.

First-Tier Tribunal (TC04152): *Rio Tinto London Ltd*

6.5 Timing issues

Nothing to report.

6.6 Records

Nothing to report.

6.7 Assessments

6.7.1 Missing income

The Tribunal had to sift through contradictory and incomplete evidence to try to establish what had happened in a case involving a transport business that had admittedly underdeclared its income. The question was what supplies had been omitted, their nature, and over what period.

After examining the known facts and the accounts of the owner of the business and the investigating officers, the Tribunal decided that the understatement had not been going on as long as HMRC suspected. The assessments were cancelled in respect of the first four periods, and the assessment in respect of the last period was reduced by two-thirds, because the Tribunal was satisfied that the problem had stopped after one month of that quarter.

First-Tier Tribunal (TC04055): *Roland Barton Transport*

6.7.2 Evasion?

An individual appealed against assessments for underdeclared VAT, income tax and NIC, together with penalties, amounting in total to about £220,000. He worked as a joiner in Northern Ireland, and the assessments covered the period from 2006 to 2009.

HMRC claimed that the trader had used a Republic of Ireland VAT number to buy "zero-rated" windows and doors from a Northern Irish supplier, and had made further purchases that were not recorded in his records. He denied this: he contended that he had recorded all the purchases and had charged output VAT on all his sales, including fitting work. Sometimes the supplier had not provided a VAT invoice, and as a result he had not been able to reclaim input tax, but nevertheless he had charged output tax.

HMRC's case relied heavily on information provided by the supplier, who did not attend the hearing as a witness. The Tribunal considered that this was hearsay; although HMRC were satisfied that the supplier was reliable, there was some doubt about whether someone who had made supplies against a "borrowed" Irish VAT number would have been complicit in any fraud. Although there were aspects of the trader's story that were unsatisfactory, overall the judge concluded that HMRC had not discharged the onus of proof. The appeal was allowed.

First-Tier Tribunal (TC04108): *Brendan Kelly*

6.8 Penalties and appeals

6.8.1 Default surcharge – successful appeals

A company appealed against three surcharges for periods 02/13, 08/13 and 11/13. It was within the payments on account regime. It was late with the second POA and the balance for 02/13, and suffered a penalty of £53,924 at 15% (having been late some 8 times before). The company claimed that a TTP arrangement had been put in place on 27 February in respect of the second POA, so HMRC reduced the surcharge to be based only on the balancing payment.

The company argued that it had just agreed a new major contract with a high street retailer, and had an exceptional amount of cash tied up in working capital. The director had contacted HMRC about the balance before the due date and had said that it would be paid on 15 May (it only managed half on that day). HMRC had rejected a further TTP application because they had said that the previous one was the last.

The Tribunal examined the circumstances in detail and decided that they did constitute a reasonable excuse for this period. The company had acted diligently and proactively, and had been overcome by a combination of difficulties that were unforeseen and inescapable. The Tribunal could not understand why TTP was not granted, although it accepted that this was a matter within the discretion of HMRC.

With respect to the 08/13 period, the Tribunal concluded that it was reasonable for the trader to believe that TTP had been agreed (apart from in respect of the first POA, because TTP was not applied for until after the due date).

A similar conclusion was drawn in respect of 11/13. The course of dealing between the company and HMRC over many periods led the director to the reasonable belief that TTP had been agreed, and to the extent that this was adhered to, the surcharge should not be applied. HMRC will presumably be clearer in future that they have not agreed.

First-Tier Tribunal (TC04049): *Fogarty (Filled Products) Ltd*

A company suffered surcharges for 10/10, 01/11, 07/11 and 10/11, rising from 2% to 15% over the period and amounting in total to nearly £54,000. For the last period, the director had tried to set up a direct debit, but because the return had already been submitted, the DD was not applied. He was aware of this and corrected the situation with a CHAPS transfer

one day late, but then received a surcharge of £25,000. The Tribunal accepted that this constituted a reasonable excuse.

However, the excuses offered for earlier periods – including illness of the director, and various administrative failings of HMRC in addressing the surcharge notices to the right place – were not accepted as sufficient to negate the surcharges. The appeal was therefore allowed in part.

First-Tier Tribunal (TC04059): *Bayleaf Cleaning Ltd*

A company appealed against surcharges of £6,581.72 for the period 09/11, £7,018.33 for period 12/11 and £5,739.31 for period 12/12. It had been in the surcharge regime since 09/08 and had received 12 SLNs before the first of the periods concerned in the appeal.

The company's representative explained the background to the company's problems: a long-standing business had been acquired by the company, owned 50:50 by the original trader and an outsider. The original owner became a "sleeping partner" and did not realise that the business was getting into financial difficulties. After a dispute between the parties, he tried to recover control of the business and restore its fortunes. He paid off substantial debts to HMRC to negate a winding-up petition, then started to pay the VAT on time – however, just before the fourth successive quarter (12/12) which would have removed the company from the VAT regime, he received a visit from a debt management officer demanding payment of VAT from periods that he thought were settled. He paid these amounts, but was then unable to meet the VAT for the current period, so suffering another 15% surcharge and falling back into the system. The owner also failed to realise that he would have been better off paying the current VAT liability and negotiating for time to pay the old liabilities, where surcharges had already been incurred and would not increase.

The judge considered all the circumstances and concluded that the owner had acted with reasonable diligence in difficult circumstances. However, in respect of the two earlier periods, there was nothing that could constitute a reasonable excuse, and those surcharges were confirmed. The unexpected VAT liability being collected just before the due date for the 12/12 quarter was held to fall within *Steptoe*: that surcharge was cancelled, and presumably that meant that the company was finally back to a clean slate from that point onwards.

First-Tier Tribunal (TC04088): *Trunkwell Leisure Ltd*

An Orkney-based trader appealed against surcharges of £406 and £61 for the periods 02/13 and 02/14. At the hearing HMRC accepted that the payment and return for the second of these periods had been received on time and the surcharge had been cancelled. The trader had missed the deadlines for payment for quarters 11/10, 11/11 and 08/12, but the resulting surcharges at 2% and 5% were below £400. Missing the deadline for 02/13 incurred a surcharge at 10%.

The trader explained (in correspondence, being unable to afford to attend the Tribunal from Orkney) that two normally prompt-paying customers had gone on holiday at the time the 02/13 payment was due. As soon as they returned from holiday they paid, and the VAT was immediately paid to HMRC. There was evidence to support this story in the form of bank statements. The trader also explained that they had tried to arrange for an

extended overdraft to pay the VAT on time, but had discovered that lending decisions were no longer taken on Orkney and it had not been possible to speak to someone with the authority to grant a loan.

The Tribunal noted that it was possible to criticise the trader for failing to contact HMRC and discuss TTP. However, the combination of two unforeseen events, together with the action that the appellant had tried to take, did constitute a reasonable excuse. The appeal was allowed.

First-Tier Tribunal (TC04110): *J Bews & Sons*

A company appealed against surcharges for 5 out of 6 periods to 07/13, totalling £15,300. The company had undergone a long-running enquiry which required reconstruction of records after a burglary, and had persuaded HMRC to reduce an original estimated assessment from £56,000 to £18,000, which was paid under a TTP agreement over 6 months from September 2012. However, no TTP agreement had been entered into for the current VAT; the director was told this was not possible while the enquiry was ongoing.

The company had also suffered problems with one customer extending its payment terms without warning, and the loss of another customer after some items of clothing imported from China turned out to be sub-standard, even after quality assurance procedures had been followed.

The Tribunal considered that the extension of the payment terms by a significant customer constituted a reasonable excuse for the period immediately after that happened, but the excuse was exhausted by the due date for the next period. The catastrophe with the sub-standard products also constituted a reasonable excuse for one period, but not the last one. The apparent inability to agree a TTP agreement was not considered to be a reasonable excuse.

The appeal was allowed in part, including the knock-on reduction of the rates of surcharge for later defaults – the amount that remained payable was just over £8,200.

First-Tier Tribunal (TC04182): *Playful Promises Ltd*

6.8.2 Default surcharge – unsuccessful appeals

A property development company was within the payments on account regime. It should have paid £736,346 on 30 April 2012; it was two days late, and suffered a 5% penalty amounting to £36,817. The company argued that removing the 7-day grace period when it moved onto POA in 2011 was unfair and discriminatory; the Tribunal decided it did not have discretion to consider fairness, and that in fact the late payment was simply because the company failed to prioritise the payment of the VAT on the due date. The money was in the bank account but the director was in a board meeting until after the deadline for same-day transfers. There was no reasonable excuse.

First-Tier Tribunal (TC04021): *Kuig Property Investments Ltd*

A trader entered the surcharge regime after being late paying for the quarter to 02/11. The 2% surcharge for 05/11 was below £400; 5%, 10% and 15% surcharges were incurred for 08/11, 02/12 and 05/12. The trader claimed to have a reasonable excuse, but he did not specify any particular unforeseen or inescapable events in correspondence, and did not attend

the hearing. As a cash-based retailer, he should have always received the VAT from his customers before having to pay it to HMRC. A separate argument based on proportionality was also rejected.

First-Tier Tribunal (TC04034): *Colin Robinson t/a Caran d'Ache*

A company supplied cleaners to commercial organisations. It was repeatedly late with its VAT payments, and could offer nothing more specific than general cash flow problems as an excuse. Its appeal was dismissed.

First-Tier Tribunal (TC04037): *Mid West Services (UK) Ltd*

A trader's direct debit for VAT was cancelled because two DDs were returned unpaid. As a result, he failed to pay the next quarter's VAT on time, and suffered a surcharge. He blamed HMRC for not collecting the VAT on time, but the Tribunal did not agree – he should have realised that he had not replaced the DD facility. His other objections did not amount to a reasonable excuse, and his appeal was dismissed.

First-Tier Tribunal (TC04045): *Kitchens & Bathrooms (London) Ltd*

A company suffered a 5% surcharge of £13,000 for its period to 03/13. The VAT was paid in 7 instalments from 13 May to 10 July. The trader did not attend the hearing, and although there were some references in correspondence to matters that could have been a reasonable excuse, there was insufficient evidence to find that the circumstances justified such a finding. The appeal was dismissed.

First-Tier Tribunal (TC04050): *C K Direct Peterborough Ltd*

A firm of solicitors appealed against surcharges for three successive periods totalling £25,000 and charged at 5%, 10% and 15%. They argued that they were reliant on the Legal Services Commission paying their legal aid bills; their cash flow difficulties were due to late payment by a branch of government.

The Tribunal gave the firm extra time to develop a "*Steptoe* defence", but was not satisfied that it had provided sufficient evidence about its finances to bring itself within that precedent. There was nothing to prove that legal aid fees were received 6 months late. No attempt was made to agree TTP before the due dates. The partners had not acted as a reasonable trader would in anticipating the difficulty and taking steps to attempt to deal with it. Accordingly, the appeal was dismissed.

First-Tier Tribunal (TC04064): *Meldrum Solicitors LLP*

A company appealed against a surcharge of £8,000 for late payment of VAT for the period 11/13. The director impressed the judge as a witness, being clearly knowledgeable about his business and his cash management. It was clear that the company had suffered a number of unforeseeable difficulties with customers paying. However, it also appeared from the bank statement evidence that the company had sufficient overdraft resources to pay the VAT on the due date. Not doing so might have been a decision taken for prudent reasons, but it was nevertheless a decision that the trader had deliberately taken, and there was insufficient connection between the problems with customers and the failure to pay the VAT on time. The appeal was dismissed.

First-Tier Tribunal (TC04066): *Select Windows (Home Improvements) Ltd*

A trader appealed against surcharges levied for the periods 11/08, 02/09, 05/09, 08/09, 11/09, 02/10, 05/10 and 08/10. The total charged was £8,399.13. The business had had long-running cash problems after a dispute over inheritance between the owner and his brother. There was also a history of the business attempting to agree Time To Pay, and failing to keep to such agreements as were made.

The judge had some sympathy with the trader, because it appeared that HMRC had not dealt with his efforts to agree TTP efficiently and clearly. However, the case did not appear to be within *Steptoe* because the inheritance dispute was too long before the defaults; and it did not appear to be similar to other disputes where a belief that TTP had been agreed negated the surcharge, because in this case whatever agreement had been reached, it had not been adhered to.

The appeal was dismissed "with regret", and the judge observed that the trader might try a complaint to the Revenue Adjudicator.

First-Tier Tribunal (TC04074): *Jason Michael Ledger*

A company appealed against surcharges of £7,070 for the period 07/13 and £3,436.05 for the period 10/13. The company ran two public houses; its reasons for late payment amounted to "difficult trading conditions". There was no reasonable excuse, although the judge expressed sympathy for the director as a man "making sterling efforts to maintain the company's two businesses and act as a caring and responsible local employer." The judge welcomed a suggestion from HMRC during the hearing that they could still reach a TTP agreement to improve the company's position going forward.

First-Tier Tribunal (TC04102): *Linnpin Ltd*

A company appealed against a surcharge of £3,419 for its period to 09/13. There had been four defaults in the periods 03/11 to 09/12, so the next default would be charged at 15%; but three periods had been filed and paid on time. The director failed to comply by a few hours, having had difficulty obtaining an internet connection from his location in North Devon.

The appellant was unaware of the *Steptoe* principle; when asked by the judge, he accepted that it would not apply to the 09/13 period, but might have done so in relation to some of the earlier defaults. The judge suggested he should go away and put forward evidence to HMRC to find out if that would reduce the percentage for the 09/13 surcharge, with recourse to the Tribunal if an agreement could not be reached. The trader was also unaware of the availability of Time To Pay agreements.

The poor internet connection was not a reasonable excuse: the director accepted that it was not unpredictable. The money was in the bank account ready to be sent, but it was not sent; the instruction should not have been left to the last minute. The only defence offered was, in effect, the disproportionality of the penalty; the Tribunal could not allow that, even though the surcharge would wipe out the whole of the company's profit for the year and some of the preceding period as well.

First-Tier Tribunal (TC04116): *Carrek Ltd*

A company appealed against a 5% surcharge of £8,093 for the 03/14 period. It had entered the surcharge regime in 03/13; the 2% surcharge fell below £400, and the next two periods were covered by TTP. The company pleaded a number of difficulties including the loss of a significant customer, but the Tribunal accepted HMRC's view that these were "normal hazards of trade" and did not reach the threshold for a *Steptoe* defence.

First-Tier Tribunal (TC04137): *Alma Products Ltd*

A company appealed against a 5% surcharge of £440. It paid by direct debit, which meant that the tax for the period 03/14 would normally be collected on 10 May; it was a day late submitting the return – on 8 May – and as a result the DD was only called for on 13 May.

In one case some time ago, this was held to constitute a reasonable excuse – that is, HMRC had the return but did not act on it immediately – but in this case it was not. The judge was satisfied that the late submission of the return caused the late payment of the VAT, and there was no reasonable excuse for either.

First-Tier Tribunal (TC04141): *Lewis Site Services Ltd*

A company appealed against surcharges for 09/12, 03/13 and 09/13 totalling £13,432. The decision notes that "*Contentys did not submit that there was a reasonable excuse for these late payments. Contentys had used staff to make the payments who had not been reasonably competent and in particular the bookkeeper had misunderstood the length of time which it would take using ordinary banking procedures for the VAT payments to reach HMRC. In none of the periods had there been any insufficiency of funds as far as Contentys was concerned.*" The defence amounted to "disproportionality", and that could not succeed, even though the surcharges were more than half the company's net profit for the year. The judge did not regard it as an exceptional case.

First-Tier Tribunal (TC04145): *Contentys Ltd*

A trader appealed against two surcharges totalling £650. His main defence was continuing ill-health over a long period. The judge (and HMRC) expressed sympathy, but concluded that such an excuse could not last forever – it appeared that he was able to run the business in spite of his ill-health, and the submission and payment of VAT returns should be one of the things he could do. The Tribunal noted that HMRC had incorrectly treated one payment as received on time when it was not (they allowed the extra 3 days for a DD when it was an electronic payment by the taxpayer). The trader had therefore escaped surcharges totalling £980; the £650 assessed by HMRC was confirmed.

First-Tier Tribunal (TC04150): *Trevor Boyd t/a Boyd's Transport*

A hotelier appealed against a surcharge of £3,596 levied for the period to 01/12. The appeal was lodged late, but the appellant pleaded that this was following two bereavements and an injury to his son, and HMRC raised no objection to the appeal being admitted. The hotelier accepted that there had been a series of defaults and he had not objected to earlier surcharges; this particular one he believed to have been caused by a banking problem, as his wife had attempted to make the payment on the

due date by "Faster Payments" but for some reason it had not gone through until two days later.

The Tribunal called for evidence from the trader to back up his version of events. This was slow in coming, and not conclusive, but what was clear was that he had arranged a short-term loan to help pay the VAT – however, the funds had arrived on the due date itself, "at the very last moment". The rest of the evidence did not establish that there was a bank problem: the burden of proof was not satisfied, and the surcharge stood.

First-Tier Tribunal (TC04168): *Stirling Hunter Stewart t/a Nether Abbey Hotel*

A company appealed against surcharges for 3 successive periods totalling just over £7,000. The appellant was not represented at the hearing. The grounds of appeal in correspondence appeared only to relate to the financial situation of the company and the effect of such a heavy penalty on it. This was in effect an appeal based on "disproportionality", which could not succeed; the judge referred to the *Trinity Mirror* decision, and commented that this was very different because the company had been in default 7 times in total, and the payments were much later. The appeal was dismissed.

First-Tier Tribunal (TC04194): *MSL Interiors Ltd*

6.8.3 Penalties

A trader appealed against an assessment in relation to undeclared VAT of £406,989 with a penalty of £284,892. He disputed that his sales of children's clothes had not been properly recorded but, even if they had, as the sales were zero rated no VAT needed to be paid and the assessment and penalty were not due. HMRC argued that the trader had not established, on a balance of probabilities, that the sales were of children's clothes.

The Tribunal examined the details of a dispute that had been running since 2008. It was satisfied that retaining over £500,000 in a bank account without telling HMRC was dishonest; there was insufficient evidence that the clothes concerned fell within the statutory definition of what qualified for zero-rating. The appeals against both the assessment and the penalty were dismissed.

First-Tier Tribunal (TC04024): *Tariq Mahmood t/a Port Street Fashion*

An unusual penalty was considered in a case in which HMRC imposed a £300 charge under paras.39 and 46 Sch.36 FA 2008 for failing to allow the inspection of premises. The trader argued that there had been no obstruction.

HMRC officers had visited a restaurant several times in order to carry out an inspection. The staff told them that they had been instructed not to speak to anyone from HMRC but instead to refer them to their accountants. HMRC applied to the Tribunal for approval of a Notice of Inspection under paragraphs 10 and 13 Schedule 36 FA 2008 on 13 December 2013. The visit was authorised to take place between 5 and 10 March in normal business hours, and the Notice specified what the officers could do. The officers turned up at 2200 on 7 March, and were

again turned away, twice, after presenting their Notice and after the staff had consulted with a director.

The Tribunal had no difficulty in deciding that the penalty was due. The trader's representative argued that the officers had "inspected" the premises in that they had entered and had been able to observe the restaurant from where they stood; however, the Tribunal did not accept that this was "allowing an inspection" in the sense meant by the legislation.

First-Tier Tribunal (TC04047): *V8680 Ltd*

6.8.4 Time limits

A trader received an assessment in the absence of a VAT return in January 2000. In March 2007 his wife wrote to HMRC, saying that he had been out of the country at the time and the shop had been closed. He finally appealed against the assessment in November 2013.

He argued that a change of address around the time of the assessment meant that he did not know of its existence until HMRC started to chase it in 2007. The consequences of having to pay it would be very serious. The Tribunal commented that this seriousness did not make him do anything about it for another 6 years. His chance of displacing the assessment this long after the event were in any case remote; the appeal was struck out.

First-Tier Tribunal (TC04068): *Assaf Ali Butt*

A Northern Ireland partnership appealed in 2014 against various decisions and assessments dating from 2004, mainly relating to increases in declared output tax because HMRC did not accept that some "despatches" qualified for zero-rating.

The trader's representative raised the novel argument that the letters communicating HMRC's decisions were not "assessments". On the one hand, he argued that there was no time limit for disputing a "decision"; on the other, he appeared to argue that the Tribunal did not have jurisdiction over a "decision amending a VAT return".

HMRC responded by referring to the procedure for correcting errors in returns in regs.34 and 35 SI 1995/2518. A direction to amend a VAT return was issued under reg.35, and "amounted to an assessment".

The Tribunal judge considered in particular the Upper Tribunal precedent of *Benridge Care Homes Ltd v HMRC* (2012). In that case, the Tribunal had decided that HMRC did not have a general power to amend VAT returns: under reg.35, the only thing they could do was to direct the trader to do so. The Tribunal concluded that HMRC had a power to reduce a VAT repayment claim to nil without issuing an assessment – in effect, the decision would require the trader to make that adjustment, and if the trader wanted to pursue the repayment claim, it would be necessary to appeal against the decision. However, if HMRC wanted to demand payment of VAT, they would have to formally issue an assessment. They could not do so "by accident".

Even so, the decision letters in the present case satisfied the conditions to be treated as "assessments". "*They clearly determined an amount of VAT which was due from the Appellant. The officer writing the letters had*

calculated the amount of VAT she considered to be due from the Appellant and had clearly taken a decision to assess that amount. Objectively, that was the whole purpose of the Decision Letters."

The judge then reviewed the history of the dispute, in which the trader had gone out of business 9 years before the hearing. Although there were some unsatisfactory aspects about HMRC's handing of the matter, there was simply no explanation, let alone a satisfactory one, for the long delay by the trader in lodging an appeal. There was also little possibility of a meaningful examination of the facts if a hearing were to proceed. Leave to appeal out of time was refused.

By way of postscript, the judge noted that HMRC's representative told him that the appellant's debt had been written off. Perhaps the aim of the appeal was to reinstate the repayment claims; that would have been a very optimistic venture.

First-Tier Tribunal (TC04078): *Forge Alliance*

A trader applied for permission to make late appeals against direct tax assessments, a closure notice, VAT assessments and penalties. At the start of the hearing HMRC announced that they were withdrawing one of the VAT assessments, and associated penalties, because it had not been notified to the trader within the statutory time limits (although it had technically been "raised" in time).

The remaining VAT assessments had been issued in 2011 and 2012. The direct tax assessments were issued at various dates in 2012 and 2013. The appeal was made on 5 March 2014.

An accountant acting for the trader had agreed to the various direct tax amendments in December 2012. HMRC had written to the trader setting out the consequences of this agreement, and explaining what the trader should do if he had changed his mind and decided to withdraw from the agreement. The Tribunal considered that the accountant would have had authority to make such an agreement, and the trader had had an opportunity to resile from it; he could not now appeal in March 2014.

A new firm of accountants started to represent the taxpayer in 2013. They argued that the reason for the delay in appealing against the VAT assessments was that they had not been given sufficient information by HMRC to make an appeal. The judge did not consider this to be an acceptable reason for the delay; the correspondence showed that they were at least aware of the assessments, and should have pursued an appeal at an earlier stage. In the absence of an adequate explanation for the delay, the application for an extension of time was refused.

First-Tier Tribunal (TC04123): *Kevin Marshom*

A golf club made a *Fleming* claim for £101,781 in respect of green fees paid by non-members. It was rejected by HMRC in August 2009, but the club did not take any further action until 2014. The club's treasurer argued that the appeal had not been pursued in 2009 because of the possible costs involved, particularly if it had been chosen as a test case. The club's finances at the time had been precarious. HMRC had subsequently been shown to be wrong in law on the point, and it was reasonable that the club's case should be reviewed.

The judge had some sympathy for this point of view, but noted that simply appealing and asking to be stood behind *Bridport* would not have involved significant expense. It seemed that a deliberate decision had been taken not to pursue the appeal, and it could not be reopened now. HMRC's application to have the appeal struck out was granted.

First-Tier Tribunal (TC04161): *Preston Golf Club*

A partnership submitted a late application to appeal to the UT against an April 2013 FTT decision (TC02627) confirming surcharges amounting to £6,760 for the periods 02/08 to 11/10. The partnership had been in dispute with HMRC over a number of matters since 1993; the FTT concluded that there were problems with how HMRC had dealt with the taxpayer, but they were too remote from the current defaults to constitute a reasonable excuse.

The appellants applied for this decision to be "reviewed" in July 2014, claiming that "new evidence not before the Tribunal" had come to light. The judge noted that the time limit for appealing to the UT had expired more than a year before the application was made. There was also a fundamental contradiction in the application: the "new evidence" related to facts, and an appeal to the UT about findings of fact could only succeed if it could be shown that the FTT had come to an unreasonable decision on the basis of the evidence before it. It was not possible to introduce new evidence of facts before the UT to undermine the findings of the FTT. The appeal was therefore extremely unlikely to succeed, and for this reason, as well as others set out in the *Data Select* case, the application was refused.

First-Tier Tribunal (TC04175): *Prime & Co*

6.8.5 Strike-out and barring

An appellant applied to have HMRC's statement of case (SOC) struck out, or alternatively to have a direction requiring HMRC to provide further and better particulars of their pleaded case. There were opposing applications by HMRC and the appellant about how the requirement for disclosure of documents would operate.

The trader's case was that the SOC suggested that the company was at the centre of a MTIC fraud; but if that was the allegation, different standards of proof would apply, and the SOC did not meet them. The allegations were too vague, which made it impossible for the company to respond to them. The alternative request for further and better particulars contained 175 specific matters which the trader wanted to be clarified. The case involves 300 separate deal chains.

The judge concluded that he could not strike out HMRC's statement of case – he could only direct them to make it more specific, if he concluded that it did not adequately set out their position. However, he considered that it did so, and a direction for further and better particulars was premature. HMRC's application for a direction concerning disclosure was accepted; the appellant should study the witness statements and other evidence carefully once they had been provided by HMRC, and come back with more focused requests if it remained unclear what HMRC's arguments were.

The judge was minded to award costs to HMRC, because he had allowed their application and refused the appellant's.

First-Tier Tribunal (TC04026): *Ebuyer Ltd*

After Judge Mosedale barred HMRC from any further involvement in an appeal for failing to observe Tribunal directions, HMRC applied to a different judge (Timothy Herrington) for the barring order to be lifted. The judge considered the basis of Judge Mosedale's decision and HMRC's criticisms of it, and concluded that it was only appropriate for the FTT to lift the barring order if:

(1) Factual circumstances have changed since Judge Mosedale's decision; or

(2) There was an obvious error of law in the decision.

The judge could find no such obvious error of law, and refused to lift the barring order. However, HMRC succeeded with their appeal to the Upper Tribunal (see below).

First-Tier Tribunal (TC04031): *BPP University College of Professional Studies Ltd*

HMRC appealed to the Upper Tribunal against the barring order. The Upper Tribunal judge (Colin Bishopp) agreed that Judge Herrington was correct not to lift the barring order; the proper place for a review of Judge Mosedale's decision was the UT, not the FTT.

HMRC's representative accepted that HMRC had failed to comply with Judge Hellier's original directions, and could not offer an explanation or an excuse for this. However, she claimed that there was no significant prejudice to BPP in the delay, which had been rectified before the hearing to consider the barring order. Such prejudice as there was could be remedied by an award of costs; the barring order had the effect of handing BPP an unwarranted windfall.

She went on to put forward five different criticisms of Judge Mosedale's decision. The first of these was that the judge had incorrectly applied the principles of the *Mitchell* case to the case before her. Judge Bishopp agreed that this was a material flaw in her reasoning – that was not her fault, because there were further developments in that line of case law after she had heard the application, and these showed that it was not applicable in the way that she had thought. In order to allow for the substantive appeal to proceed in the FTT in November, Judge Bishopp did not refer the matter back to the FTT, but instead "re-made" the decision in the UT.

He was highly critical of HMRC's failures in the case, but concluded that it was not appropriate to bar them from the proceedings. It was unsatisfactory that the FTT had so few sanctions to enforce its directions; but it should not necessarily impose the ultimate sanction for want of anything else. He did not make an order for costs at this time, but invited applications from the parties. He made the following comment in conclusion:

Miss Simor argued that I should instead make a direction for indemnity costs in HMRC's favour, since it should have been apparent to BPP, once the judgment in Denton and my own decision in Leeds City Council were

released, that it should have agreed to the lifting of the bar. I do not think there is any merit in this argument. First, it does not seem to me that a party can be lightly criticised for defending a position in which it finds itself. Second, this was not a case of an inadvertent slip quickly corrected, or of an error, even if not quickly corrected, which was innocent and of little real consequence. It is a case in which there has been a prolonged failure to do what, as Judge Mosedale rightly said, it should have been obvious to any lawyer ought to be done. The prejudice to BPP of HMRC's conduct is not great, but it is real. It does not seem to me that BPP should be exposed to the costs of this application, and certainly not on the indemnity basis.

The decision of the FTT in the substantive appeal is awaited.

Upper Tribunal: *HMRC v BPP Holdings Ltd and Others*

An individual re-employed a former salesman in his business, and handed over the running of the business to him when he suffered a bout of ill-health. It transpired that the salesman was already on bail in connection with VAT frauds, and he now used this business to commit further frauds. The individual continued to sign the VAT returns; when HMRC investigated and prosecuted the salesman, the owner pleaded guilty to "recklessly submitting a false return". However, he now sought to appeal against the VAT liability arising on that return, on the basis that he had not been aware of its falsity, and he had been the victim of the fraud, not the perpetrator.

HMRC argued that he could not reopen something on which he had previously entered a guilty plea. The judge did not agree that he was trying to resile from his plea or overturn his conviction; the liability for the VAT was a separate matter. However, the judge considered that the appeal had no reasonable prospect of success, and therefore should be struck out on that ground. Precedent cases showed that "knowledge or means of knowledge" in relation to fraud did not require only the owner of a sole trade to know – if an employee knew about the connection, that knowledge was ascribed to the owner. In this case, clearly the salesman knew, and he was an employee. The *Kittel* test would obviously be satisfied, and the appeal could not succeed.

First-Tier Tribunal (TC04122): *Lester Stacey (t/a Lazydays Motorhomes)*

An extraordinary dispute was heard by Judge Barbara Mosedale. An individual wrote to HMRC to argue that a phone call he had made to Canada should have been charged to VAT on only 50% of the cost (of £1.28) because it was "used and enjoyed" 50:50 in each country. HMRC replied, referring to a public notice. The individual appealed against this "decision".

HMRC applied to have the appeal struck out, not on the grounds that it had no reasonable prospect of success, but on the twin grounds that there was no appealable decision, and that the appellant did not have sufficient interest in the matter to appeal ("locus standi").

The judge examined the correspondence and concluded that, objectively, the letter did not amount to a decision. It was a general statement of principle, and did not state a position. She went on to discuss whether this denied the appellant a remedy, as he claimed. She said that he could apply in the County Court for restitution against the supplier (Talk Talk) –

precedent cases such as *Earlsferry Golf Club* have established that this is the correct course for a customer pursuing VAT overcharged, and is in accordance with EU law.

However, as his contract specified that the prices included VAT, and he did not receive a VAT invoice specifying the amount of VAT, she did not think he could succeed with such a claim. As usual, the judge goes into great detail over a number of legal questions, and produces a clearly reasoned explanation of her decision to strike out an appeal over half of one-sixth of £1.28.

First-Tier Tribunal (TC04155): *Adam Mather*

6.8.6 Procedure

In a MTIC appeal, the FTT (Judge Demack) directed that expert evidence for HMRC should be admitted, but in a redacted form. The evidence was a generic description of the grey market in mobile phones; the appellant considered it irrelevant (because it was not directed to the specific trades under dispute) and prejudicial. The FTT decided that it should be admitted, but agreed that "negative factors" should be struck out – that is, the expert's description of "factors that might indicate knowing connection with fraud".

HMRC appealed to the Upper Tribunal. The appellant was barred from being represented before the UT, having failed to comply with directions. The judge examined the FTT decision and a number of precedents, and concluded that there was no rational basis for the decision. If the expert evidence was relevant at all – which it appeared to be – then it made no sense to delete the negative side only. It was not a discrete area that was being removed as irrelevant; it was the other side of the same coin.

HMRC's appeal against the FTT's direction was allowed.

Upper Tribunal: *IA Associates Ltd*

A company appealed against denial of input tax credit in relation to 66 purchases of palladium and platinum. HMRC's statement of case said that the company's transactions were actually connected with fraud and the directors ought to have known of a connection "to fraud in general". The Tribunal described this wording as "novel". The company applied for a direction requiring HMRC to supply further and better particulars of their case.

The judge examined the appellant's criticisms of the HMRC case and made a number of specific directions. The substantive hearing will follow later.

First-Tier Tribunal (TC04135): *Vale Europe Ltd*

HMRC applied to have an appeal struck out on the grounds that the appellant had failed to cooperate with the Tribunal to such an extent that the appeal could not be dealt with fairly and justly. The appellant countered by applying for the admission of further evidence, to which HMRC objected.

The background was a dispute about alleged MTIC fraud in 06/06 and 12/06. There was a history of changes of professional adviser leading to adjournments, some of them agreed by HMRC, but some leading to

"unless" directions by the FTT, going back to 2012. The director of the company sought to blame the company's advisors; the judge considered this to be a false statement, having heard evidence from the adviser which contradicted it. He preferred the adviser's evidence. That indicated a failure to cooperate with the Tribunal, and HMRC's application for strike-out was granted.

First-Tier Tribunal (TC04083): *Nutro UK Ltd*

A trader applied for an order setting aside a 2009 VAT Tribunal decision (VTD 20,946) on the basis that the appellant had not had notice of the hearing and had not been represented. The facts under dispute related to 2003, and HMRC had assessed for underdeclared VAT and a dishonesty penalty totalling nearly £100,000 in 2004. The trader received warnings of bankruptcy proceedings in 2011 if the determination was not paid, and engaged representatives to carry on arguing – it seemed that none of them were aware that the matter had already been decided on by the Tribunal.

The judge reviewed the limited information available (some of HMRC's and the Tribunal's files had been destroyed, given the length of time involved). There were unsatisfactory aspects in the history of the case, but there was a combination of a lack of engagement from the taxpayer, and the low probability of a substantive appeal succeeding after so long – the matter would not be reinstated.

First-Tier Tribunal (TC04087): *Bujar Mustafa t/a Orsa Deli Foods*

A company is involved in an appeal against excise duty and VAT assessments issued after it had entered liquidation. It applied for the Tribunal to issue a witness summons to its original liquidator, who had ceased to act and had moved to a different firm. She objected to the application, arguing that she had already cooperated to a significant extent, had already given all the information required in various interviews and in correspondence, and it would now be difficult to remember precisely events from five years previously.

The judge considered a number of factors and decided that the Tribunal would be assisted, in the substantive hearing, by receiving evidence directly. The company's request for a witness summons to the former liquidator was granted.

First-Tier Tribunal (TC04101): *Abbey Forwarding Ltd (in liquidation)*

In what has now become termed a "box consolidation case" – about the purchasing of iPhones and similar items from retail outlets and then selling them on at a profit – HMRC applied for the appeal to be struck out because the appellant had failed to comply with various directions of the Tribunal. The judge noted that the appellant had in the course of the appeal already asked for and been granted several extensions of time, and had offered no explanation for failing to meet the most recent time limits. HMRC's application for strike-out was granted.

First-Tier Tribunal (TC04128): *Platinum Connect Ltd*

In *Nuffield Health* (TC02697), the FTT refused a *Fleming* claim for repayment of input tax in respect of supplies of drugs and prostheses made in private hospitals by a charity from 1974 to 1986. The FTT declined to follow the CA decision in *Wellington Private Hospital*, ruling that it had been overridden by the subsequent *Card Protection Plan* judgment of the

CJEU. The patients were receiving a single supply of healthcare that it would be artificial to divide; the input tax was therefore not recoverable.

The case had been designated as a lead case under rule 18(5) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. Another company (GHG) applied not to be bound by the decision on the basis that the lead case direction specified only common or related issues of law, and not of fact. The FTT decided that this question should be considered at a hearing: to the extent that the facts could be shown to be materially different, it would be possible for the FTT to come to a difference decision; but if the same decision was reached on the applicable law, GHG could only dispute the matter further by appealing to the Upper Tribunal.

The differences identified by GHG related to the patients' choice of prosthetics, contractual arrangements between the hospital and the consultants, and the invoicing arrangements for insured patients. The judge could not detect any significance in any of these matters, and dismissed the appeal. The company was bound by the lead decision in the earlier case.

Costs were awarded to HMRC. The judge commented also that the parties had produced a time estimate for the hearing of 3½ days, when in fact the hearing only took a single day.

First-Tier Tribunal (TC04176): *General Healthcare Group Ltd*

6.8.7 Costs

A DIY claimant succeeded in the FTT, but HMRC overturned the decision in the Upper Tribunal. The FTT had granted an adjournment so the appellant could obtain retrospective planning permission for the works; the UT pointed out that this could not help, as the claim had not been made with the required supporting documentation within the time limit for making it. HMRC applied for costs of the UT hearing.

Judge Colin Bishopp noted that costs normally "follow the event" in the UT. However, there are occasions when this would be unfair; in this case, the appellant had succeeded before the FTT, where if he had lost he would have suffered no award of costs. It was hardly his fault that he had found himself in the UT and subject to the costs-shifting regime; in the course of the appeal HMRC had changed their argument, and in the event the UT had overruled the FTT on the basis of something that was not even HMRC's main ground of appeal. There had been no warning of a costs application in HMRC's statement of case to the UT. The judge declined to make an award of costs.

Upper Tribunal: *HMRC v Patel*

A trader appealed against a VAT assessment; the appeal was withdrawn twice and reinstated twice; evidence was heard over four days in 2013 and 2014, but was not concluded. It had to be adjourned because of the non-appearance of the appellant's accountant as a witness and the illness of the proprietor. When the hearing was reconvened, the appellant withdrew for a third and final time.

HMRC applied for costs. The Tribunal examined the history of the appeal and concluded that the behaviour fell within both para.(a) and para.(b) of Rule 10(1) of the Tribunals Rules: "wasted costs", which are costs incurred as a result of "improper, unreasonable or negligent" acts or omissions by a representative, or costs which are considered "unreasonable" for the incurring party to pay; and the situation in which a party or their representative "has acted unreasonably in bringing, defending or conducting the proceedings".

Costs were directed to be paid from a specific date, at which it should have been apparent to the appellants that their action had no reasonable prospect of success.

First-Tier Tribunal (TC04180): *Simply Local*

A judge has commented on the meaning of "necessary expenses of attendance" which the Tribunal may order to be paid when a witness is summoned to appear. The expression should encompass direct consequential losses to the witness, such as lost income, as well as out-of-pocket expenses. The judge set out the principles to be applied and awarded £174 for 5 hours' loss of time and £100 to cover travelling.

First-Tier Tribunal (TC04190): *Abbey Forwarding Ltd (in liquidation)*

6.8.8 Hardship

In a MTIC appeal with a long history, a company appealed against a refusal of the FTT to allow a hardship application – that is, to permit the appeal to proceed without a deposit of the disputed VAT. That refusal had been made by the FTT in 2009, just after the change in the appeals procedure; there followed a dispute up to the CA to establish that this changeover should not have removed the taxpayer's right to appeal the FTT's decision, because that right had existed when the proceedings commenced. Having established a right of appeal, the taxpayer returned to the FTT to ask for permission, which was refused in April 2013, but granted by the UT in May 2013.

The company is engaged in appeals against two assessments to claw back input tax claimed, totalling nearly £1.5m, and also appeals about refusal to pay input tax for later periods, totalling over £2.8m. Mr Justice Nugee examined the earlier decisions – both by the FTT and the High Court, where a judge refused an initial application for judicial review – and the appellant's criticisms of them, and could find no basis for disturbing them. The decision is a comprehensive review of the way in which an appellant should go about demonstrating hardship for the purposes of the VAT law. The appeal was dismissed again.

Upper Tribunal: *ToTel Ltd v HMRC*

6.8.9 Information notices

In an anonymised decision, Judge Berner explained the way in which the FTT will apply the rules on "third party information notices" in para.3 Sch.36 FA 2008. A third party notice, requiring someone other than the taxpayer to produce information and documents relevant to a person's tax affairs, can only be issued by HMRC after "the taxpayer has been given a summary of the reasons why an officer of HMRC requires the information

and documents". This can be set aside if the Tribunal is satisfied that complying with it would prejudice the assessment and collection of tax.

The judge explained that the summary has to contain all the reasons, not just some of them. HMRC's application to the Tribunal for approval must be accompanied by all relevant information, including all the reasons for the requirement, and all reasons why HMRC might apply to set aside the disclosure to the taxpayer. These could include the protection of a whistleblower, or the prevention of "tipping off" someone who could then take action to frustrate the proper assessment of tax.

First-Tier Tribunal (TC04044): *HMRC, ex parte a taxpayer*

An individual was convicted of tax fraud in failing to declare income of some £80,000pa for either income tax or NIC. He was sentenced to five years' imprisonment. 3 years later, HMRC contacted him for a further discussion about whether he should have been registered for VAT. He declined to cooperate, saying that he had very little income. An information notice was issued to him, but he did not respond. HMRC issued penalties, and the individual appealed.

The FTT noted that the individual had been very uncooperative. However, HMRC's notice had been vague, and it was likely that he had a reasonable excuse for not complying with it; he claimed that the police still had all his documents, so he could not provide any of the information requested. The FTT decided that the simplest course was to allow his appeal and to allow HMRC to start again with a better notice and an eye to the possibility that the police had the files.

First-Tier Tribunal (TC04089): *Victor Tee*

6.9 Other administration issues

6.9.1 Tax gap

HMRC issued a statement analysing the "tax gap" in the UK in the 2012/13 fiscal year (to March 2013). The total difference between expected and actual receipts was £34 billion, 6.8% of expected tax liabilities. This was an increase from 6.6% the previous year, but a fall from the first year of measurement, 2005/06, when it was 8.5%. HMRC blamed an increase in illegal trade in tobacco, and VAT receipts growing more slowly than expected, without any specific factor being identified. The VAT gap on its own rose from 10.4% to 10.9%, but provisional data from the following year suggests that it has fallen again.

The gap from tax avoidance fell from £3.4 billion to £3.1 billion.

HMRC Release 16 October 2014; www.gov.uk/government/publications/hmrc-issue-briefing-calculating-the-2012-to-2013-tax-gap

The Commission published a report on 23 October estimating the 2012 "VAT Gap" across the whole EU at €177 billion (16% of expected revenues). This is the amount of theoretical revenue that was lost due to non-compliance or non-collection. The lowest gaps were recorded in the

Netherlands (5% of expected revenues), Finland (5%) and Luxembourg (6%). The largest gaps were in Romania (44% of expected VAT revenues), Slovakia (39%) and Lithuania (36%). 11 Member States decreased their VAT Gap between 2011 and 2012, while 15 saw theirs increase. Greece showed the greatest improvement between 2011 (€9.1 billion) and 2012 (€6.6 billion), although it is still one of the Member States with a high VAT Gap (33%).

The UK is in the top half of the table (equal 8th) at 10%, but in absolute terms (€16.6bn) it is 4th behind Italy, France and Germany.

europa.eu/rapid/press-release_IP-14-1187_en.htm

6.9.2 Office of Tax Simplification

The Office of Tax Simplification has commented on the UK's ranking of 14th in the World Bank's table of the efficiency of tax administration. The OTS made several recommendations for further improvements to move the UK into the top 10, but recognised that a much higher ranking would require the elimination of some taxes and/or a reduction in the rates of taxation, which might not be practical.

The principal recommendation relating to VAT was for the development of ways of giving greater certainty over VAT treatment for smaller businesses.

www.gov.uk/government/publications/competitiveness-of-uk-tax-administration-review

The OTS has also reported on a review of tax penalties. The Director, John Whiting, observes that a "post implementation review" is desirable after the major reforms that followed the merger of the Inland Revenue and Customs & Excise and their respective penalty regimes. The VAT-related recommendations are:

- HMRC should implement Sch.55 and Sch.56 FA 2009 in place of default surcharge – Sch.55 imposes penalties for late payment in a similar way to DS, but at 2%, 3% and 4% rather than rising to 15%, and Sch.56 imposes penalties for late filing even if there is no late payment (unlike DS);
- in order to prevent unnecessary late filing penalties being issued, the VAT register should be reviewed for businesses that should no longer be on it, and they should be removed.

www.gov.uk/government/publications/tax-penalties

6.9.3 Draft legislation

The government has published draft clauses for Finance Bill 2015 for consultation until 4 February 2015. The VAT content is not extensive – it includes:

- prompt payment discounts (see 2.7.1);
- the provisions relating to VAT refunds for departmental bodies and search and rescue and air ambulance services (see 5.8.5).

www.gov.uk/government/news/draft-tax-legislation-published

6.9.4 Campaigning HMRC

HMRC have opened one of their campaigns to find avoidance and evasion, this time aimed at traders who accept payment by debit and credit card, but who have not declared all transactions. Traders who wish to put their affairs in order can notify HMRC that they wish to make a disclosure, then make that disclosure within 4 months, paying any outstanding tax. Reduced penalties will apply to full and accurate disclosures made under this campaign. Anyone not taking advantage of it, who is discovered later, will suffer the normal higher penalties.

www.gov.uk/government/publications/credit-card-sales-campaign-your-guide-to-making-a-disclosure

HMRC have launched a disclosure campaign aimed at solicitors who need to bring their tax affairs up to date. Reduced penalties of between 0% and 20% are offered, against the possibility of 100% penalties and possible criminal investigation for those who fail to come forward. Notification of an intention to take part has to be made by 9 March 2015, and the disclosure and payment is required by 9 June. However, this only relates to direct taxes and NIC, and VAT is not covered by the disclosure opportunity. Presumably anyone coming forward with undisclosed income could find themselves in further trouble over the VAT consequences of that disclosure.

www.gov.uk/solicitors-tax-campaign

Seven individuals, six of whom were employed at the Gambian High Commission, have been found guilty of evading £4.8m of excise duty and VAT on tobacco they brought into the UK for sale rather than for their personal use. One defendant was acquitted.

Crown Prosecution Service release 8 December 2014

6.9.5 Powers of entry

The Protection of Freedoms Act 2012 obliges each cabinet minister to review relevant powers of entry for which that minister is responsible. HMRC have examined 39 powers; 9 were found to belong to other departments or were powers to inspect rather than to enter, 25 should be retained in their current form, and 5 will be amended.

The report of the review describes the various powers and how often they are used or how important HMRC believe them to be.

www.gov.uk/government/publications/hmrcs-powers-of-entry-review-final-report

6.9.6 Waiving VAT

George Osborne confirmed on 15 November that he had told Bob Geldof that the Government would "waive" the VAT on the Band Aid anniversary single. This is not permitted under EU law, so presumably it will be achieved by making an equivalent grant from another source.

www.gov.uk/government/news/chancellor-to-waive-vat-on-band-aid-anniversary-single

The Government decided to use some of the fines collected from banks in respect of the LIBOR-fixing scandal to donate an amount equivalent to the

VAT on the sale of the Tower of London poppies to six charities which provide support to injured service personnel and their families.

www.gov.uk/government/news/chancellor-to-waive-1-million-vat-on-tower-of-london-poppies

6.9.7 Winding-up petition

HMRC applied for an order to wind up a company which, the department claimed, owed £7.8m of unpaid VAT. The company's appeal against the assessments was pending a hearing in the FTT, but the Companies Court appointed a provisional liquidator. The company applied for the liquidation to be cancelled or stayed pending its appeal, and also applied for various commitments to pay damages to be made by HMRC.

The High Court refused all the company's applications. The Companies Court had the jurisdiction to appoint a provisional liquidator and had done so on good grounds; as the company had long since ceased to trade, it made sense to continue with the liquidation. No order would be made against HMRC in respect of damages.

High Court: *Re Parkwell Investments Ltd; Parkwell Investments Ltd v Wilson and another*

HMRC is moving towards issuing "integrated" claims to insolvency practitioners from 1 December 2014 covering all HMRC debt, both direct and indirect taxes. Practitioners should continue to complete form VAT 769, which should be sent either to Newcastle or Worthing, depending on the type of insolvency involved. HMRC is likely to take longer to issue integrated claims which include VAT debts than has been the case when notifying insolvency practitioners of VAT debts in the past.

A Brief has been issued to explain the changes in more detail.

R&C Brief 42/2014

6.9.8 Security

A trader appealed against a notice of requirement to deposit security. The appeal to the Tribunal was then withdrawn, on the basis that the trader had reached an agreement with HMRC on how the security was to be provided. Later the trader applied to have the appeal reinstated, claiming that HMRC had broken the agreement by insisting on monthly VAT returns rather than quarterly.

The Tribunal decided that it was appropriate to allow the appeal to be reinstated, in order to deal "fairly and justly" with a situation in which the director appeared to have misunderstood the basis of HMRC's offer. However, the substantive appeal was then dismissed. Although the trader had claimed in correspondence that HMRC had taken into account irrelevant factors, these had not been identified, and the company sent no representative to the hearing to explain them. HMRC had the usual factors to put forward as the basis of their decision – connection of the principals to previous businesses that failed owing HMRC money – and the Tribunal could not find any reason to regard their decision as unreasonable.

First-Tier Tribunal (TC04121): *Lilo Grill & Juice Bar Ltd*