VAT UPDATE
JULY 2014

Covering material from April – June 2014

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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 says that it will be updated monthly, but it appears to be less frequent or regular than that. The latest update appeared on 2 June 2014 after a gap since 20 March, but the previous updates were on 20 January 2014 and on 20 June 2013.

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

Awaiting the CJEU:

- *GMAC UK plc*: HMRC appealed to the Upper Tribunal after the First Tier Tribunal held that the company was entitled to go back for many years in a bad debt relief claim because the UK rules were too restrictive – in a preliminary decision, the UT decided not to refer questions to the CJEU but to proceed with a substantive hearing; one issue will now be referred to the CJEU (Case C-589/12), with questions for reference being agreed (and HMRC are considering whether to appeal further on the others, once the CJEU has given its judgment)

UK appeals awaiting hearing (or announcement of decision):

- *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 have appealed against the FTT's decision that tickets qualified for exemption before the UK had implemented the cultural services exemption (hearing 12 May 2014, decision awaited)

- *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 to be confirmed)
- *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
- *Colaingrove Ltd*: HMRC's list includes separate entries for
    - TC02715 (removable contents/definition – UT decision in this update).
    - TC02701 (removable contents/apportionment – appeal stayed pending decision in TC02715).
    - TC02534 (fuel – UT hearing listed 18/19 June 2014).
    - TC02701 (verandas – UT hearing listed 10/11 November 2014).
- *David Finnamore t/a Hanbridge Storage Services*: HMRC have been granted leave to appeal to Upper Tribunal after First-Tier decided that a trader was supplying a licence to occupy land rather than storage services (hearing 12 – 13 February 2014, decision awaited)
- *Davis & Dann Ltd and Precis (1080) Ltd*: HMRC are seeking 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 (the Upper Tribunal refused permission to appeal)
- *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 date to be confirmed)
- *European Tour Operators Association*: case remitted by the Upper Tribunal to the FTT for further findings of fact
- *Finmeccanica Group Services Spa*: HMRC are applying to the UT for permission to appeal against the FTT's decision that services were not subject to UK VAT
- *GB Housley Ltd*: HMRC have appealed against the FTT's decision that they had effectively approved a self-billing system by conduct (hearing scheduled for 4/5 March 2014, decision awaited)
- *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)

- *Littlewoods Retail Ltd*: HMRC are appealing the decision on compound interest (covered in this update) to the Court of Appeal – see R&C Brief 20/2014
- *Lok'n'Store Group plc*: FTT approved a special method which gave the self-storage company 99.98% input tax recovery; HMRC have been granted leave to appeal to the Upper Tribunal (hearing 11 December 2013 – decision awaited)
- *Longridge on the Thames*: HMRC have appealed to the UT against the FTT's ruling that a charity was not in business and could receive building services zero-rated (hearing listed 13 – 14 October 2014)
- *MG Rover Group Ltd*: HMRC have applied to the FTT for leave to appeal against the decision, covered in this update, 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)
- *The 'Spotting the Ball' Partnership & Others*: HMRC have appealed to the UT against the FTT's ruling that the company ran a game of chance which would be exempt from VAT (hearing listed for 29/30 April 2014)
- *University of Huddersfield Higher Education Corporation*: HMRC have appealed against the FTT's long-delayed decision that the university's planning arrangements were not abusive (hearing listed for 22 – 23 July 2014)

- *Wakefield College*: HMRC have appealed 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
- *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

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
- *Finance and Business Training Ltd v HMRC*: taxpayer is applying for leave to Court of Appeal 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".
- *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.
- *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 has applied for leave to appeal to the Court of Appeal against the UT's decision that the three-year cap validly blocked a number of claims for repayment.
- *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 list also contains the following information about cases which are decided:

- *Bridport & West Dorset Golf Club Ltd*: HMRC have now issued a R&C Brief on the decision (in late June – the decision came out before Christmas)

The following cases have moved from the HMRC list (or previous lists from the update) into this quarter's update:

- *Birmingham Hippodrome Theatre Trust Ltd v HMRC*: taxpayer's appeal against Upper Tribunal's and FTT's decision that HMRC were entitled to offset the effect of overclaimed input tax from different periods against overpaid output tax which the company was claiming back was rejected by the Court of Appeal
- *Marcus Webb Golf Professional v HMRC*: the taxpayer applied to the Court of Appeal for leave to appeal against the UT decision that he was not assisted by the concept of fiscal neutrality – the Court refused leave, concluding that the appeal had no realistic prospect of succeeding
- *Sub One Ltd (trading as Subway) v HMRC*: taxpayer has lost its appeal to the Court of Appeal against rulings by the FTT and UT that it was not entitled to zero-rate certain sandwiches; UT confirmed the FTT's decision, even though the judge ruled that the FTT had applied the wrong legal test.

Other news on appeals includes the following:

- *Esporta Ltd v HMRC*: it has been announced that the taxpayer is applying for leave to appeal to the Supreme Court against the Court of Appeal's decision that fees collected from people who cancelled gym membership and therefore no longer had access to the facilities were nevertheless taxable.
- *HMRC v Rank Group plc*: the Supreme Court has granted the company leave to appeal against the Court of Appeal's ruling that its income from gaming machines was taxable under the UK law where a random number generator was separate from, but connected to, a number of playing machines.

2. OUTPUTS

2.1 Scope of VAT: linking supplies to consideration

2.1.1 Grant or consideration?

A charity which ran a museum claimed that it was making taxable supplies to a local authority under a service agreement, and could therefore recover input tax based on making those supplies. HMRC ruled that the activities were outside the scope of VAT, and the charity appealed.

The history was unusual: the charity had been registered for VAT since 2003. Later that year, it entered into an agreement with the local council; HMRC ruled that this was outside the scope and the charity appealed, but withdrew the appeal before a hearing. On a visit to the premises in September 2011, HMRC discovered that the charity had nevertheless been charging VAT to the local council throughout. The decision under appeal was a 2011 confirmation that HMRC still stood by their 2003 decision. Assessments were also raised, but an appeal against them was stood over pending the liability hearing.

The Tribunal noted that the charity had been chosen to run a museum which the local council had been planning to open for some 10 years – the council had sought suitable premises to house a collection of artefacts in its ownership, and a suitable organisation to manage it. The council owned the premises, which it leased to the charity for 99 years at an annual rent of £1. The building was refurbished and opened to the public in 2007.

The charity also provided the council’s visitor information service. The chairman noted in passing that this might not be within the charity’s official objects, but HMRC took no point in relation to that.

The Tribunal heard evidence from the council’s chief executive. He explained the council’s objectives in establishing the museum, and the background to the contract which the charity and the council had entered into. The charity’s representative argued that the facts were similar to those in *Edinburgh Leisure* and *Bath Festivals Trust*: what the charity did was to provide services to the council in return for the payments under the agreement.

HMRC’s representative responded that:

- To establish that it is providing services for consideration within the scope of VAT, the Appellant must show that WBC received a specific benefit for itself for the monies that it pays. Alternatively, it must show that the benefit is to specific persons and WBC supply third party consideration.
- The service contract had features which might be found in a contract for the supply of services for consideration, but these might equally well be found in an agreement for the payment of a grant.
- There was no evidence of specific benefits being provided for the council. In particular, the council was not under a duty to provide a museum; it had the power to do so, and considered it beneficial to do

so as part of a general objective to improve the culture and social well-being of the area, but that was less than a requirement.

There were other features which HMRC argued counted against the payment being VATable. It was a fixed annual sum, unrelated to the quantity or cost of the service provided; there was no competitive market-place in which the charity could be said to operate; the payment had been described in council plans as "annual revenue support". They referred to several decisions on charities (which HMRC have not agreed with in the past) in support of the proposition that charities may not run businesses (*Donaldson's College*, *Quarriers* and *St Paul's Community Project*). They also referred to other cases on services provided on the basis of council funding – *Hillingdon Legal Resources Centre Ltd* (VTD 5,210) and *Wolverhampton CAB* (VTD 16,411).

The Tribunal opened its conclusion with the following remarks:

We have taken on board both representatives' submissions that we must look at all the circumstances in the round in this case. We have considered not only the black letters of the Agreement between WMACC and WBC but also the history of the Museum project, WBC's statutory powers, its policy initiatives, the financial reality of the relationship between the parties, WMACC's status as a charity, and the context within which the Agreement was signed.

We have also considered carefully the European and domestic law governing the VAT treatment of the arrangements between the parties and the case law to which we were referred by the parties' representatives.

The Tribunal decided that the agreement had "at its heart the mutuality of obligation which is characteristic of a contract". This had been absent in the *Hillingdon* and *Wolverhampton* cases. The charity would have been liable to the council in breach of contract if it did not fulfil the agreement's terms.

The Tribunal also found that the services were of direct benefit to the council. This covered not only the running of a museum to house the council's existing collection of artefacts, but taking over – at reduced cost – the existing visitor information service.

Thirdly, although the relationship between the parties was close, it was not uncommercial in nature. There was no element of sham. It was not uncommon for there to exist such a special relationship between a council and its suppliers.

Lastly, the Tribunal rejected an argument that the *Finland* case applied – that the payment was not related to the cost of providing the service but to something else, and therefore could not be consideration for the supply. The amount had been agreed in the hope that it would cover the annual costs of the charity; that had not yet happened, but it did not stop it being related to the service.

The appeal was allowed.

First-Tier Tribunal (TC03315): *Woking Museum Arts and Crafts Centre*

2.2 Disbursements

Nothing to report.

2.3 Exemptions

2.3.1 Discount cards

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

Advocate-General Kokott gave an opinion that the issue and sale of such cards does not qualify for exemption. As with a number of other recent opinions, this was available in 20 different European languages, but not in English (even though, as in other cases, the UK made representations to the court). The French version appeared to indicate that the A-G did not consider that these cards are sufficiently similar to those documents that clearly are exempted, and are more similar to those that are excluded from exemption.

The full judgment is available in English, and confirms the opinion. A Granton card is not a means of payment, but an entitlement to a discount. It is not an "other security", which would have to be of a similar kind to the specific securities mentioned in the provision. It is not within the sphere of financial transactions and instruments, and is not a "payment instrument" because it does not operate as a way of transferring money, unlike payments, transfers and cheques. It was therefore not within art.135 PVD.

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

2.3.2 Higher education

HMRC have issued a Brief to confirm that the government has decided not to proceed with proposals first aired in 2012 to extend the VAT education exemption to commercial providers of higher education and further education. There was a lukewarm response to the initial consultation, and a further consultative workshop in 2013 failed to identify a solution that was acceptable to a majority of the for-profit educational sector while also meeting government objectives.

The factors which weighed more heavily in the decision not to extend the VAT exemption for education to for-profit providers included:

- a lack of evidence that the change would bring more providers into the market, or increase price competition within the sector;
- the impact on commercial providers who would need to exempt their education supplies and not be able to recover input tax, and also the

impact on businesses purchasing training who would no longer be able to recover the VAT charged on training, and would likely be faced with higher costs;

- recognition that a few commercial HE providers have achieved university status, and therefore benefit from the VAT exemption;
- extending the exemption would be to create a number of winners and losers, and may not create an entirely level playing field;
- the cost to the Exchequer of extending the exemption.

Revenue & Customs Brief 18/2014

2.3.3 Golf tuition

TC00323 concerned two golf professionals. One provided tuition as a member of a partnership (exempt) and as a director of a company (taxable); the other as a sole trader (exempt) and as an employee of the partnership. The company appealed against HMRC's refusal to treat its supplies as exempt.

The appellant's representative (BJ Rice, who won a case in the Court of Appeal in the 1990s) argued that the principles of fiscal neutrality were infringed by the different treatment of what were essentially identical supplies.

The First-Tier Tribunal concluded that the EU law was clear in its meaning, even if the reason for the distinction between employment and self-employment was not obvious. Mr Rice was trying to use a principle "to override a rule rather than to interpret a rule. This is not permissible." The FTT was satisfied that the UK law had correctly transposed the Directive.

The partnership appealed to the Upper Tribunal. The judge opened by expressing regret that the FTT did not set out in more detail its findings of fact about the relationship between the partnership, the 'employee' and the clients. The FTT had a considerable amount of material before it, including a statement from the HMRC officer and most of a morning's oral evidence from the individual concerned; as these relationships were the heart of the dispute, the very brief summary (said by the FTT 'not to be in dispute') was not helpful in considering the appeal.

The judge went on to consider the CJEU precedents, in particular *Haderer* and *Eulitz*, and concluded that the FTT had come to the correct conclusion on the law. The professional had not been acting on his own account, but in satisfaction of a triangular contractual arrangement – he contracted with the partnership so that the partnership could fulfil its contracts with its customers. That was not 'private tuition'.

The judge observed that it did not particularly matter whether the individual was employed by the partnership under English law, or was acting in the course of his own profession; he was certainly not contracting directly with the clients, and therefore he was not acting on his own account.

The judge also commented in passing: '*No point has been taken by HMRC in the present case that the golf tuition provided by Mr Webb fell outside the concept of "school or university education" as thus elucidated by the*

ECJ. I confess to finding that a little surprising, but as the point is not in issue I say no more about it.' HMRC have accepted that golf tuition is 'education' for many years – maybe this will encourage them to look at this policy again.

The taxpayer applied to the Court of Appeal for leave to appeal further, but leave was not granted. Patten LJ concluded that the appeal had no realistic prospect of success. In a brief judgment, he fully agreed with the UT that the principles of *Haderer* and *Eulitz* showed that the different circumstances of a private tutor and someone contracting indirectly were to be treated differently under the Directive: the principle of fiscal neutrality could not override the clear words of the law.

Court of Appeal: *Marcus Webb Golf Professional v HMRC*

2.3.4 State regulated?

A company running a children's play area claimed back £24,196 relating to a three year period from 1 August 2008 to 31 July 2010. It argued that it was providing "welfare services" and should therefore have exempted its entry fees (which were charged to children, but accompanying adults were admitted free).

The company registered with Ofsted in 2012. The director claimed that before that date it was "state regulated" within the meaning of Note 6 Group 7 Sch.9 VATA 1994 because it was exempt from registration – that is, it was carrying on the kind of activity that might require registration, but enjoyed a specific exemption under the Childcare Act 2006. The Tribunal considered the arguments in detail and did not agree; while avoiding any comment on the correctness or otherwise of its regulatory position in the past, the Tribunal concluded that it did not fall within any of the statutory exemptions available under the Childcare Act. It was therefore neither registered nor exempt from registration in the period which was the subject of the claim, and could therefore not benefit from the exemption.

More fundamentally, the company did not provide "welfare services", which had to be "directly connected with the care or protection of children and young persons". Although the company generally supervised the behaviour of children on its premises, the direct responsibility for their care remained with their accompanying adults. It therefore failed to meet the requirements for exemption, and its appeal was dismissed.

First-Tier Tribunal (TC03639): *Slide & Seek Ltd*

2.3.5 Golf club claims

HMRC have, as promised for some time, published a Brief to explain their attitude to claims for repayment of output tax on supplies of sporting services supplied by non-profit making bodies following the *Bridport and West Dorset Golf Club* decision in the CJEU.

They have confirmed that they will now pay claims to any club which has a similar claim already lodged, provided that the club has made arrangements to repay the output tax to those people who paid it in the first place in accordance with s.80A VATA 1994.

Clubs which do not propose to make reimbursement arrangements will be considered later. They too will need to adjust for input tax, and consider the effect of the capital goods scheme where relevant.

Where a claim has been refused and no appeal has been made to the Tribunal, no appeal will now be possible. A new claim could be made, subject to the normal time limits.

Contact details are given for following up existing claims and for making new claims.

Given that in many cases reimbursement will not be possible, HMRC are clearly intending to delay repayments as long as possible.

Revenue & Customs Brief 25/2014

2.3.6 Cost sharing exemption

A company limited by guarantee was formed by a group of 22 colleges of further and higher education to access grant-funding from the EU and other sources. It accounted for VAT on payments to it by the members between 2008 and 2011, then claimed for this (£102,000) to be refunded on the grounds that it qualified for the cost-sharing exemption in art.132(1)(f) PVD, now implemented in the UK in Sch.9 Group 16 VATA 1994.

The questions before the Tribunal were whether each member made "exact reimbursement of its share of the joint expenses" and whether there was any likelihood that exemption would cause a distortion of competition.

Past and present executives of the organisation gave evidence. They explained how the colleges contributed to the cost of the company's activities; some supplies were of benefit to individual colleges and were charged individually, but they were not the subject of the reclaim. Most activities were of benefit to all members. A reserve fund had to be kept to cover the possibility of going into liquidation, but this became the property of all the members and would be returned to a member who left the group.

The Tribunal noted that there was a lack of an audit trail to verify the "exact reimbursement" condition. It appeared that there was some element of cross-subsidy. HMRC's guidance suggested that audit trail was absolutely required; the Tribunal commented that the lack of documentary evidence suggested that there had not been "*even detailed deliberations, far less a considered agreement as to the apportionment of expenditure. The oral evidence falls short of this: it tends to support simply some agreement as to sharing expenditure, perhaps reflecting largely a degree of goodwill. The evidence does not seem even to support an awareness at the material time of the true nature of the test.*"

The burden was on the appellant to satisfy a "high test" (the word "exact" had to be given its natural meaning); the appeal was refused.

First-Tier Tribunal (TC03746): *West of Scotland Colleges Partnership*

2.4 Zero-rating

2.4.1 Sub to go

The representative Subway franchisee has had no success appealing the Upper Tribunal's decision that its disputed sandwiches were "heated for the purpose of enabling them to be consumed at above the ambient temperature". The Court of Appeal confirmed that the Upper Tribunal had applied the correct test in the correct way.

The Upper Tribunal

The Upper Tribunal came to the expected decision for a surprising reason. The FTT had decided that, contrary to the contention of the franchisee, the toasted subs in question were heated for the purpose of enabling them to be consumed at above the ambient temperature, and were therefore standard rated. The FTT had applied the test from precedent cases dating back to *John Pimblett* – it was the subjective intention of the trader that determined whether the statutory words applied, but that intention had to be established from all the evidence, not just what the trader said.

The trader, representing a large number of other franchisees, appealed to the Upper Tribunal on several grounds. These included:

- on a point of law, that the FTT had applied the correct test in determining whether the sandwiches should be treated as hot, but had then asked itself the wrong question in order to reach the answer;
- that the FTT had reached a conclusion that was irrational based on the evidence;
- that the FTT's conclusions created a breach of EU law, in that objectively similar supplies which competed with each other were given different VAT treatments;
- that its supplies were goods, not services, and therefore should not be treated as 'catering' following the *Manfred Bog* decision of the CJEU.

The Upper Tribunal judge dismissed the appeal on all grounds. However, he also departed from the long-standing method of determining whether food was hot. He regarded the statutory test as an objective one, not a subjective one: whether the food was above the ambient temperature at the time of supply because it had been heated for the purpose of enabling to be consumed hot, or because it had been heated for some other purpose.

The decision started with a consideration of the argument that the UK's approach has not complied with UK law, in particular the principle of fiscal neutrality. The judge examined sections of the Preamble to the Directive, the EU Treaty, and the transitional provisions which authorise the UK's zero-rates. The Commission challenged some of these in Case 416/85, on the basis that they did not meet the conditions of being for clearly defined social reasons and for the benefit of the final consumer.

The judge went on to consider the purpose underlying the exclusions of the two types of 'catering' – previous judgments have tended to avoid trying to discern a purpose in the legislation:

44. It can be seen that in general Group 1 item 1 zero-rates "food of a kind used for human consumption". The policy behind this is obvious, namely not to tax food since human beings have to eat to survive.

45. It can also be seen that the legislature has made a number of exceptions to this policy. One exception is for "a supply in the course of catering". This exception includes the two types of supply defined in Note (3). The first type is a supply "for consumption on the premises on which it is supplied". This differentiates between food for consumption on the premises and food for consumption off the premises. That is why VAT is charged on a sandwich for consumption on the premises, but not on a sandwich for consumption off the premises even if it is the same sandwich. This type of supply is excepted from zero-rating regardless of whether the food is cold or hot. Again the policy is clear, namely that human beings don't have to go out to restaurants, bars or cafés to eat. If they choose to do so, they will be taxed for the privilege.

46. The second type is a supply of "hot food for consumption off [the premises on which it is supplied]", or colloquially "hot takeaway food". This type of supply is excepted from zero-rating only if the food is "hot". It is not hard to discern the policy behind this, namely that human beings don't have to buy hot takeaway food since they can cook food themselves. If they choose to buy hot takeaway food, they will be taxed for the privilege. It is obvious why the exception does not apply to cold food, since then it would catch all food purchased from shops.

47. It can be seen that the second exception applies regardless of how far "off" the premises the food it is to be eaten. Thus it applies whether the food is to be eaten in the street immediately outside the premises in question, in a nearby park or in the consumer's home.

In the next section, the judge analysed the definition of 'hot food': it must be above the ambient air temperature, and must have been heated for the purpose of enabling it to be eaten hot. He stated that 'purpose' is not the same as 'intention', although he did not say why; and he discussed the reasons for heating food and for eating it hot. He then stated, quite briefly:

51. The second observation [that is, that the draftsman used the word purpose rather than intention] *immediately suggests that the draftsman must have intended an objective test. If he had intended that the test should depend on the subjective intention of the supplier, surely he would have said so.*

As a useful reminder of how often this problem has been debated over the years, the decision included the following table of decisions since *Pimblett*:

Cases which have applied zero-rating to similar products to the Appellant's:	
Great American Bagel Factory VTD 17018	Toasted bagels
Tuscan Foods [2004] UK VAT V18716	Quizno's toasted baguettes
Warren [2006] UKVAT V19902	Grilled filled Paninis
Pure Atma Ltd VTD 18716	Toasted baguettes

Ainsley's of Leeds VTD 19694	Ciabatta melts
Waterfields [2008] UKVAT V20761	Ciabatta melts and Toastie Melts
Cases which have applied standard-rating to similar products:	
European Independent Purchasing Company and Sub-Retail Unit [2008] UKVAT V20697	Melt and Italian BMT sandwiches by Subway
Coffee Republic [2007] UKVAT V20150	Grilled filled Paninis
Pret a Manger (Europe) Ltd VTA 16246	Filled croissants
Other types of food zero-rated:	
Pimblett [1988] STC 358	Pies
Deliverance v RCC [2011] STC 1049	Falafels and crispy duck pancakes
Greenhalgh's Craft Bakery VTD 10955	Pies
Three Cooks Ltd VTD 13352	Pies
The Lewis' Group Ltd VTD 4931	Roast chickens sold in department store
Stewarts Supermarkets Ltd VTD 13338	Cooked chicken pieces from supermarket
A Leach (t/a Carlton Catering) VTD 17767	Cooked lunches supplied to schools
Lutron Ltd VTD 3686	Cornish pasties
W D Readhead VTD 3201	Waffles
Other types of food standard-rated:	
Malik t/a Hotline Foods [1998] STC 537	Takeaway curry
P & S Catering VTD 6382	School meals
P J Bridgewater VTD 10491	Meals on wheels
P A Marshall (t/a Harry Ramsbottoms) VTD 13766	Chip butties
Domino's Pizza Group Ltd No 1 VTD 18010	Dips to accompany pizza
Domino's Pizza Group Ltd No 2 VTD 18866	Pizza

The judge commented on the lack of consideration of European law in these cases (including *Pimblett*). It appeared that the parties had agreed before this appeal that Note (3)(b)(i) was not consistent with the EU principles of fiscal neutrality and fiscal certainty if it relied on the subjective intention of the supplier.

HMRC argued, and the judge agreed, that the UK is permitted to define the scope of zero-rating: as it is a UK relief within the bounds permitted by the Directive, it is for the UK legislature to exclude or include particular types of supply. However, the principle of fiscal neutrality means that the UK cannot treat differently supplies which are objectively similar and in competition.

The two sides did not agree on whether it was possible to construe the UK law so that it complied with EU law, or what the consequences of this should be. However, the judge held that it could be interpreted in a manner that was compliant: it should be taken as imposing a wholly objective test:

First, Note (3)(b)(i) must be interpreted as imposing a wholly objective test, the subjective intention of the supplier being immaterial. That will ensure that supplies which are objectively the same are not treated differently merely because of a difference in the subjective intention of the supplier, still less because of a difference in the willingness of tribunals to disbelieve or discount the supplier's evidence as to its subjective intention. Secondly, the question to be addressed is whether, on an objective assessment, the food is hot (above ambient temperature) at the point of supply because it has been heated for the purposes of enabling it to be consumed hot or because it has been heated for some other purpose. Thirdly, in answering that question, account must be taken of the reasons why consumers prefer to eat food hot, as discussed above. Finally, the tribunal must use its common sense and avoid artificial distinctions.

Because the FTT had followed the method of the Court of Appeal in *Pimblett*, it had 'through no fault of its own' applied the wrong test. Although this might often require a case to be remitted, the judge said that the very full findings of fact enabled him to apply the proper test and come to a decision. He repeated the findings of fact about the toasted subs and meatball marinara and concluded that it was 'beyond dispute' that they were both heated with the purpose of enabling them to be eaten at above the ambient temperature – the subjective intention of the supplier was irrelevant.

Another unusual ground of appeal was that HMRC and the UK government were responsible for the incorrect application of EU law for the 25 years since the *Pimblett* decision, and in some way this ought to benefit this appellant. The judge reviewed the arguments and concluded that HMRC had not 'positively promoted a subjective interpretation' but had rather 'acquiesced in certain tribunal decisions'. He did not believe that HMRC's guidance had caused any contravention of the principles of fiscal neutrality or effectiveness. HMRC had argued that this was not a proper ground of appeal, but there was no case to answer anyway.

The *Bog* decision was held to be completely irrelevant in the UK (as HMRC have maintained from the outset). The exclusion from zero-rating is not 'catering services' but 'supplies in the course of catering'. That was apt to cover supplies of goods in the course of catering as well as catering services (which would not in any case be within Group 1 Sch.8 – supplies of services are not 'food').

Lastly, the 'irrationality' of the FTT decision depended on the rejection of the clearly stated subjective intention of the trader. Presumably the FTT could have spelled out more clearly that they did not believe her; but, in the absence of such an aggressive finding, the appellant argued that the FTT's decision ought to have followed the stated intention of the supplier. The judge dealt with this briefly – as he had decided that the subjective intention was not relevant, this ground of appeal fell away. In any case, the FTT had set out in detail why it did not accept the trader's stated intention in the light of all the other evidence, and it appeared that there was ample reason for it do so.

The judge also refused to admit some supplementary evidence which the appellant wanted to introduce – a witness statement concerning zero-rated products sold by a competitor, and another from the liquidator of the company giving an opinion that it failed because of the VAT

discrimination. The judge did not believe that these statements would materially assist the appeal, and the first one in effect only confirmed facts that were considered anyway in the FTT.

Court of Appeal

The taxpayer appealed to the Court of Appeal, arguing that the Upper Tribunal's decision created a fiscal distortion: it was inconsistent with other decisions of the Tribunals on practically identical products; and that the UT had been wrong to interpret the legislation as imposing an objective test.

The Court held that it was possible to interpret the UK legislation in such a way that an objective test was required. This would be the conforming interpretation (in accordance with the *Marleasing* principle), as it was clear from later decisions of the CJEU that *Pimblett* had applied an incorrect principle under EU law.

Although the Act, properly construed, was in accordance with EU law, the Tribunals had come to decisions that were not so over many years. The government had not attempted to clarify the law until 2012, even though the failure to comply had been apparent. It was true that the toasted sandwiches were indistinguishable from products that had been held to be zero-rated, and fiscal distortion would result. That was not true of the meatball marinara, which was not similar to other such products.

However, the principle of fiscal neutrality could not help the appellant. While it had been held in the past that identical products should benefit from the same reliefs as other products which qualified under the law, there was no precedent or justification for allowing a relief to a product just because some identical products had incorrectly been granted the same relief. The earlier cases had given an unjust windfall to those appellants; that would not be extended to others in the future.

In addition, the cases had not created a legitimate expectation or general practice of applying a subjective test. They had been relatively insignificant as individual decisions; the only one from a higher court was *Pimblett*, which would have been decided for the taxpayer even if the right test had been applied.

The appeal was dismissed again.

Court of Appeal: *Sub One Ltd (t/a Subway) (in Liquidation) v HMRC*

There is an article by Mike Truman analysing the decision in *Taxation*.

Taxation, 19 June 2014

2.4.2 Snowballs

Two companies have succeeded in appeals about reclassification of particular products as "cakes" rather than "confectionery". One claimed a repayment of £2.06m, the other £806,000.

A 1995 Tribunal decided that these products, produced by a different manufacturer, were confectionery. HMRC issued rulings to these suppliers that they should account for standard rated VAT on sales. They did not challenge the ruling at the time, but they now argued that the decision was unsound.

The legislation excludes "sweetened prepared food which is to be eaten with the fingers" from zero rating, but it excludes "cakes" from the exclusion. So the question for the Tribunal was whether the products were "cakes". The factors relevant to such a decision were:

(i) Ingredients;

(ii) Process of manufacture;

(iii) Unpackaged appearance (including size);

(iv) Taste and texture;

(v) Circumstances of consumption (including time, place and manner of consumption);

(vi) Packaging;

(vii) Marketing;

(viii) shelf life;

(ix) name/description;

(x) "how it behaves" after it is removed from packaging.

The first 7 were agreed by the parties before the hearing, and the other 3 came out in the course of the appeal.

The Tribunal members and a witness "*were each provided with a plate comprising a number of confections including one each of a Jaffa cake, Mr Kipling Bakewell Tart, Waitrose meringue, a tea cake manufactured by each appellant, a Lees snowball and a mini jam snow cake. We found that the plate looked like a plate of cakes. We were also left with samples of all of these together with Tunnock's snowballs. We tasted all of them, in moderation, either at the hearing or thereafter.*"

The Tribunal considered that the decision had to be largely based on the facts, using an informed understanding of the law. As Lord Woolfe said in the *Ferrero Rocher* appeal, questions of fact should not be elevated into questions of principle. The Tribunal considered that the most important factors in its decision were:

- a snowball looks like a cake, and is not out of place on a plate full of cakes;
- it has the mouth feel of a cake;
- it would be eaten in the same way and on similar occasions to cakes;
- most people would prefer to be sitting while eating a snowball, and it would be unlikely to be eaten while walking down the street.

Although the view would not be universal, the Tribunal was satisfied that a snowball has sufficient characteristics to be characterised as a cake, and the appeals succeeded.

First-Tier Tribunal (TC03754): *Lees of Scotland Ltd; Thomas Tunnock Ltd*

2.4.3 Removable contents

There are several outstanding appeals involving *Colaingrove Ltd*, examining different issues in the taxation of caravan sales and caravan

rentals. In TC02715, the FTT considered in some detail the different items that may be fitted in a caravan and which might fall to be treated as "removable contents". The judge made some findings of principle in relation to a list of fittings and invited further submissions from the parties.

The FTT's principles were based on a two-fold test: first, to consider whether the removal of the item would leave the caravan "habitable", and second, to consider the difficulty of removing the item. The FTT divided the items into three classes:

- items that were clearly removable contents and not building materials such as venetian blinds, the washing machine and the three piece suite;
- items where the FTT could not assess how easily removable they were and hence where it concluded that the item would be removable contents if it were easily removable but not otherwise, such as a wall mirror, a picture and various storage units;
- items which were not removable contents either because their removal would not leave a habitable caravan or because it would cause significant damage to the structure (such as glued down carpets).

The FTT went on to consider whether some of the items were "fitted furniture", in which case they would be standard rated, or not, in which case they would be "building materials" and zero-rated.

HMRC appealed, contending that the two-fold test was wrong. In particular, it did not matter how easy or difficult it was to remove the items. HMRC also argued that all the items were fitted furniture.

The Upper Tribunal allowed the appeal in part. The test of whether the caravan was "habitable" was not required or justified by the legislation in Group 9 Sch.8 VATA 1994. Zero-rating applied to the shell of the caravan together with ordinary building materials; everything else was removable contents or fitted furniture. Picking his way through the definitions and exceptions in the law, the judge commented that "carpets and finished furniture are excluded building materials because they are taken outside the definition by subparagraph (a) and (d) of Note (22) whereas waste disposal units and fitted kitchens are ordinary building materials because they are added back into the definition by the proviso at the end of subparagraph (a) and by subparagraph (c)(ii)."

HMRC's appeal was therefore allowed in respect of the carpets, the oven and the hob, which were not of a kind with building materials. However, the FTT had found that six items were of a kind with building materials; in that case, they were covered by the zero-rating relief. That was a decision of fact which the FTT was entitled to come to on the evidence, and HMRC's appeal was dismissed in respect of these items. These included the kitchen work surface, which as part of a fitted kitchen is "ordinary building materials". The other items were all cupboards or storage units, which it appears must have incorporated the walls of the caravan sufficiently not to constitute "fitted furniture".

Upper Tribunal: *HMRC v Colaingrove Ltd*

2.4.4 Books

The Finnish court has referred questions to the CJEU on the question of whether it is acceptable for Finland to charge standard rated VAT on books in electronic form (including on CD or memory stick) while allowing the lower rate to identical content in printed form. The question is also relevant in the UK, although the additional question would arise of whether bringing electronic books within Sch.8 would contravene the "standstill" provisions which allow the UK to keep zero-rating.

The Advocate-General's opinion has not been made available in English, but the essence is that different rates are justifiable if the national court is satisfied that the different products meet different needs of the average consumer. If the product is effectively indistinguishable for the consumer, the same rate should be charged.

CJEU (A-G) (Case C-219/13): *K Oy*

2.4.5 Dog food

A manufacturer of food for dogs treated a number of products as standard rated. In 2009 the company submitted a repayment claim for nearly £7m in respect of sales of 5 products between 1980 and January 2009, arguing that they constituted food for "working dogs" rather than pets, and should therefore have been zero-rated.

The director of the company gave evidence to the FTT in 2012 that the products were developed with working dogs in mind: he had seen this as a niche market in which the company might build a successful business. The suitability of the products for working dogs was examined by the Tribunal, as well as the way in which they were advertised and held out for sale.

The products were clearly "animal feeding stuffs" within Group 1 Sch.8 VATA 1994; the legal argument concerned whether they fell within the excepted items as either "pet foods, packaged or prepared" or "meal for dogs".

The FTT (TC02201) considered the meaning of the word "pet", and concluded that most dogs in the UK are pets – but that gundogs, prison dogs, farm dogs and other working dogs are not within the definition. The FTT also considered whether HMRC's public guidance was relevant – the appellant complained that it had been misleading, and if it had correctly reflected other Tribunal decisions, the company would have been better able to make sure that its products qualified for zero-rating.

The FTT concluded that meeting the conditions depended on the subjective intention of the supplier, objectively determined (the intention of the purchaser being here irrelevant). Based on the history of the products, four of which had been phased out and replaced with other food that was specifically marketed as for working dogs, the FTT concluded that the intention in relation to those four lines was not to sell pet food.

A further detailed examination was made of the expression "meal for dogs". The chairman decided that it meant "a mixer for use with meat or canned dog food made primarily from wheat flour with other ingredients and baked; and in particular made from the same or similar ingredients to

a dog biscuit and baked in the same way but crumbled or broken up rather than cut into shapes", and these products did not fit that description.

Accordingly, the appeal was allowed in respect of the four products that were discontinued, but dismissed in relation to the fifth product that had apparently been marketed as suitable for all dogs.

HMRC appealed to the Upper Tribunal, arguing on a number of grounds that the FTT should have found that all the products were "pet foods". The grounds of appeal were summarised by the judge as falling under the following headings:

(a) the significance of composition;

(b) the significance of packaging;

(c) the significance of customer intentions;

(d) the holding out of the products at issue;

(e) Waveney Gold and Crane (two of the products);

(f) findings as to the customer base.

Under the first heading, the judge commented that the FTT's finding was consistent with the High Court decision in *Fluff Ltd (t/a Mag-It)*: "one must look not just at the nature of the material but the way in which it is supplied." The fact that something could be eaten by a pet dog did not mean that it was necessarily pet food.

In respect of packaging, the judge did not consider that the FTT had erred in law by looking at the whole of the way in which the company presented its products to the market, rather than considering only the packaging, which HMRC argued supported their view that it was pet food.

It was common ground before the FTT that the subjective intentions of individual customers were not relevant to the liability of the supply, but the FTT had commented that the intentions of a large majority of the customers provided evidence about the objective intention of the supplier. The judge did not consider this to be an unjustified or undue emphasis on the intentions of the customers.

HMRC also argued that the FTT had come to unjustified conclusions in applying the principles to the evidence, in relation to the way the products were held out in leaflets and on the company's website. The judge did not consider that the FTT's conclusions were demonstrably unjustified.

The two particular products were supplied to other businesses for "own brand labelling". The FTT had commented that it did not have much evidence about those products, but the UT still confirmed that it had been justified in reaching the conclusion that it did.

Lastly, HMRC argued that a finding about the customer base being mainly owners of gundogs and working dogs was inconsistent with other findings. The UT judge did not agree with this interpretation, and came to the overall conclusion that the FTT was entitled to arrive at the conclusions it did on whether the products at issue were "pet foods".

HMRC also disputed the FTT's interpretation of the expression "meal for dogs" as referring to a mixer, rather than a complete foodstuff. Again, the

judge reviewed the basis for the decision, and concluded that it was reasonable on the basis of the evidence before the FTT.

HMRC's appeal was dismissed.

Upper Tribunal: *HMRC v Roger Skinner Ltd*

2.4.6 Prescription of medicines

The Value Added Tax (Drugs and Medicines) Order 2014 has amended Sch.8 Group 12 to add physiotherapists and podiatrists to the list of practitioners entitled to treat supplies of drugs and medicines they prescribe as zero-rated for VAT purposes with effect from 21 May 2014.

SI 2014/1111

HMRC have issued a Brief to comment on this change. It follows from a 2013 amendment to the Human Medicines Regulations 2012 to allow physiotherapists and podiatrists to zero-rate certain drugs in their own right, without reference to a doctor.

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2.5 Lower rate

2.5.1 Energy saving

A company installed polycarbonate panels and of radiation strips for conservatory roofs, and appealed against HMRC's decision that these did not qualify for the 5% lower rate as 'energy-saving materials'. HMRC regarded the polycarbonate panels as 'an alternative form of double glazing' rather than 'insulation for roofs' (which is listed in Note 1, Group 2 Sch.7A VATA 1994). They regarded the radiation strips as a means of regulating the heat rather than preserving it.

In the FTT (TC02283) Sir Stephen Oliver considered the evidence, including technical specifications of the materials, and ruled that HMRC's interpretations were too narrow. The wording of Note 1 was not restricted to 'panels to be attached to existing roofs', but included 'all types of roofing insulation including those designed for use as a roof or as component parts of a roof'. The panels were not double glazing, and served to insulate the roof; they were within the Note. There was also nothing in the law to prevent an energy-saving material from also serving another function, and the strips also fell within the Note. The appeal was allowed.

HMRC appealed to the Upper Tribunal, accepting the decision on radiation strips but disputing it in relation to roof panels. The Upper Tribunal decided that the correct interpretation of the expression "insulation for roofs" was that it could not extend to the roof itself: it could only refer to insulation that was attached to or applied to a roof. The list in Note 1 Group 2 Sch.7A was exhaustive, and it was not possible for something similar (such as a roof with energy-saving properties) to enjoy the relief if it was not specifically listed.

It has been announced that the appellant will not take the case further.

Upper Tribunal: *HMRC v Pinevale Ltd*

Following *Envoygate (Installations) Ltd and related appeal* (TC03361), another case has been heard by the FTT concerning the possibility of charging the lower rate of VAT on installing "draught stripping" for sash windows. Although on the face of it this is a very similar decision, it appears to go into much more detail, and comes to some slightly different conclusions.

The trader stated, and the Tribunal accepted, that most customers decided to buy its services because their sash windows were draughty. However, the company usually carried out general renovation of the windows at the same time. HMRC argued that there was a single supply of "renovation", to which the draught-stripping was incidental.

The Tribunal considered the principles of determining whether something is a single or a mixed supply as set out by the Upper Tribunal in the *Middle Temple* case. It decided that the important point was what the customers intended to buy – the nature of the bargain between the parties, objectively assessed, would determine the VAT treatment. There was little evidence available of this: the nearest thing to evidence was the wording on the invoices, which probably reflected what the customer thought was being bought. Although the *CPP* case established that charging a single price would not be conclusive evidence of a single supply, the Tribunal decided that it was a reasonable interpretation here. Where a separate price was shown on the invoice for the draught-stripping, it would be eligible for the lower rate; where it was not, there was a single supply that should have been standard rated.

The Tribunal also commented that the overhauling of windows and the draught-stripping were not ancillary or for the better enjoyment of each other: they were independent supplies in principle, but if they were supplied together in a single operation agreed as a single bargain, they would have a single liability. The Tribunal referred to the difference between *CPP* (where two independent supplies could be compounded together because one was for the better enjoyment of the other) and *College of Estate Management* (where one supply was subsumed in the other so that it had no separate identity).

HMRC had also charged a penalty for "careless" submission of the returns. The Tribunal held that the trader had relied on the August 2006 version of Notice 708/6, together with conversations with the Advice Line, for most of the supplies, and that guidance led to the reasonably held and honest belief that the treatment was correct. However, a reasonable trader (according to the Tribunal) would have noted the different and clearer guidance in the November 2011 version of the Notice; the return being filed at the end of November 2011 should have taken this into account, so that return was careless. The mitigation for cooperation was also increased.

Overall, the assessment and the penalty were both significantly reduced, but not quashed altogether.

First-Tier Tribunal (TC03645): *Itchen Sash Window Renovation Ltd*

2.5.2 Infringement proceedings

The Commission has commenced infringement proceedings against the UK, objecting to the application of the lower rate to the installation of energy-saving materials in residential accommodation. The PVD allows the lower rate to be applied to the "provision, construction, renovation and alteration of housing, as part of a social policy" and "renovation and repairing of private dwellings, excluding materials which account for a significant part of the value of the service supplied". The Commission contends that the UK's rule does not meet a social policy. The UK has already withdrawn lower rating of such supplies for charitable properties, but has decided to defend this rule.

CJEU (Application) (Case C-161/14): *Commission v UK*

2.6 Computational matters

2.6.1 Party plan sales

A company reclaimed some £14m of VAT, complaining among other things that the UK's rules on "party plan sales" in Sch.6 para.2 VATA 1994 are in breach of several EU legal principles. The FTT was invited to consider this proposition in principle, without regard to the detailed calculations of the amounts involved for any period.

The rule is operated under a derogation authorised by the EU Council in 1985. The effect of the derogation has been to permit the United Kingdom to require traders selling through such representatives to compute their output tax liability by taking the open market retail sales prices receivable by the representatives in place of the lower consideration actually received on the prior sale to the representatives by the traders. The grievance was that the derogation completely disregarded any costs incurred by the representatives, and thus disregarded any input tax in respect of these costs which would have been deductible had the representatives been VAT-registered.

The principles that were alleged to have been breached were those of the neutrality of the tax for businesses, in that it created "sticking tax", and therefore proportionality in that the total VAT collected would exceed the appropriate fraction of the amount paid by the final consumer. The company argued that the cost to it exceeded the VAT that might have been avoided under the previous rules, which meant that the derogation could not have been justified.

Although the sticking tax point would apply in principle to any VATable costs incurred by the sales representatives, the appeal was advanced in particular in relation to one that was fundamental to the business model: sales of demonstration products by the company to the representatives. These were undoubtedly an input of the representatives in making their sales; charging output tax both on the full retail selling price of the products they sold, and on the demonstration products used in making those sales, clearly imposed a VAT cost at the business level.

The Tribunal saw a problem in devising a remedy for the company. The derogation was granted in terms which clearly envisaged the legislation as it stands, so any unfair result had been authorised by the Council. It was therefore inevitable that a reference to the CJEU would be required.

The Tribunal noted that HMRC had agreed variations on its original Notice of Direction under Sch.6 para.2 to reflect the fact that:

- some products were sold for the representative's own use – these should only be charged to VAT on the amount paid, not the retail price;
- some representatives gave a discount to their own customers – these should only be charged on the discounted price, not on the full retail price.

These amendments were not in contention; the Tribunal simply noted them to record that the parties were in agreement about the need for practical measures to adapt the Direction to fit the circumstances.

The Tribunal was "astonished" to find that HMRC and the company had agreed, to an accuracy of two decimal places, the proportion of demonstration products that had been:

- bought by representatives for their own use – the VAT was not a sticking cost at the business level, because the representative was in effect a final consumer;
- bought and used for demonstration purposes – although it was already agreed by HMRC that the Direction should not apply to these, because they were not for sale, the output tax charged to representatives who were not VAT-registered contravened the principles of the tax.

HMRC apparently suggested that the problem would "go away" if the company gave its demonstration products to the representatives rather than selling them at a profit, as Boots does to its employees. The Tribunal described this suggestion as "completely misplaced", because Boots' employees were not a separate person in a chain of supply. In any case, there were sound business reasons for the way the company operated, and HMRC's alternative was impractical.

HMRC also suggested that all Avon ladies could become VAT-registered, which the Tribunal described as "even more extraordinary". This would surely lead to most of them ceasing to be Avon ladies, with the resultant disappearance of the whole business.

The Tribunal noted that Portugal has a derogation for similar businesses which transfers the responsibility for VAT accounting from the representative to the main business. Although the situation is different, in that the lower registration threshold means that the representatives are likely to be taxable persons, the end result was the coherent one that Avon wanted in the UK: the main business could deduct the input tax incurred by the representatives.

The Tribunal accepted the appellant's contention that Sch.6 para.2 created unfair competition in that companies selling cosmetics to registered retailers such as Boots and other high street stores did not suffer the same sticking cost. The Tribunal considered that fair competition required

similar businesses acting in the same way to be taxed in the same way. It was possible for traders to choose to carry on their business in a different way and be taxed differently as a result, but that was not the case here. It might be that the derogation had originally been introduced to prevent unfair advantages to party plan sellers, but it appeared to have swung the pendulum the other way.

The company asked for the "simplest solution", which was to give an effective deduction for the VAT in the demonstration goods, probably by implying into any Notice of Direction a requirement to make an adjustment for such goods in calculating the uplifted output tax. The Tribunal noted that a "principled approach" would take into account all VATable costs incurred by agents, not just the demonstration goods.

The Tribunal concluded that HMRC's defence of the current treatment was "completely untenable". The effect of the system was "unfair", not "in some vague manner", but in the very specific sense of creating a fiscal distortion.

"*What we mean by unfair is that the derogation does not counteract the perceived avoidance of VAT in the case of sales through non-VAT registered representatives in a proportionate manner. It imposed more additional tax than any realistic calculation of the VAT said to be 'avoided'. It occasioned 'sticking tax', or a lack of neutrality by not reflecting the inputs associated with the purchase of demonstration items, in the ultimate calculation of VAT payable by the Appellant. It created an element of potential unfair competition between the Appellant and its representatives and all other entities selling through taxable retailers. The derogation therefore needlessly and wrongly undermined two fundamental tenets of the VAT system in order to occasion this unfairness, and there has not been mentioned to us any conceivable reason why that was thought necessary or appropriate.*"

The Tribunal concluded that it would be necessary to seek guidance from the CJEU on how to deal with what appeared to be the UK's compliance with a derogation that contravened fundamental principles of VAT and which therefore should not have been granted in the terms it was. HMRC declared that they would appeal to the UT to try to prevent a reference; the Tribunal questioned whether that was a matter on which an appeal to the UT was possible, and it would defer considering the terms of reference to the CJEU until it was clear whether HMRC would appeal.

First-Tier Tribunal (TC03311): *Avon Cosmetics Ltd*

HMRC have subsequently issued a Brief confirming that they will not make any such appeal, and the terms of reference are presumably now being considered. HMRC's position is that the derogation has been correctly applied in the UK, but they acknowledge that the CJEU (alone) has jurisdiction to consider whether an EU legal measure is lawful. They note that the remedy initially sought by Avon – to direct HMRC to exercise a power to allow Avon a deduction for the tax on the demonstration items – was rejected by the Tribunal as depending on a power that HMRC do not have under the law.

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2.6.2 More sales through agents

A completely different dispute arose in relation to another Sch.6 para.2 direction. The company sold cosmetics through representatives. It charged separately for the goods and for delivery on its invoices, for example charging £72 plus £5. If the retail price of the goods was £95, it accounted for output tax for many years on £95 plus £5. It then made a claim for repayment of over £200,000 relating to three years' worth of sales, arguing that there should not have been a separate liability in relation to the delivery charge. The item was a single supply of "delivered goods", which would typically be handed over to the end consumer in person.

The Tribunal agreed. It would be wholly artificial to divide up the company's supplies into "goods" and "delivery". The valid comparison was therefore between a discounted price of £77 and the retail price of £95. The appeal was allowed. Other issues between the parties had been stayed pending the Avon decision.

First-Tier Tribunal (TC03581): *Oriflame UK Ltd*

2.7 Discounts, rebates and gifts

2.7.1 Consultation on prompt payment discounts

HMRC have opened a consultation on the changes to the VAT treatment of prompt payment discounts. The closing date for comments is 9 September 2014.

The consultation envisages a general requirement to account for VAT on the consideration finally received. Where a VAT invoice is required, it will initially show the undiscounted price and VAT on that; if the discount is given, a credit note and an adjustment will be required.

Businesses are asked to comment on any problems they foresee with the implementation of this new procedure.

www.gov.uk/government/uploads/system/uploads/attachment_data/file/320780/VAT_prompt_payment_consultation.pdf

2.7.2 Refunds made by manufacturers

HMRC have issued an Information Sheet to explain the changes which take effect from 1 April 2014 to allow manufacturers to adjust their VAT accounts where they provide certain refunds direct to final consumers. It explains that the new rule will apply to:

- payments in relation to "money back" promotions;
- payments for faulty products;
- payments for damaged products;
- payments made where the customer is generally dissatisfied with a product rather than being able to demonstrate a fault or damage; and

- payments made in connection with product recalls for safety, health or quality issues.

It will not apply to:

- payments to third parties to repair the goods with or without a free supply of parts to effect a repair – the test is whether the customer has received a refund against the consideration they paid for the goods and, if that is unaltered, then there is no adjustment to be made;
- payments to customers covering the cost of repairs the customer paid to third party repairers – this is "out-of-pocket" compensation to the consumer for additional expenditure and the original cost of the goods remains unaltered;
- payments for consequential loss (e.g. damaged carpet following a washing machine leak, delayed delivery causing a customer to take a day off work);
- cases where the goods are repaired, exchanged or replaced without any refund of part of the purchase price;
- payments in connection with the customer doing something material for the manufacturer, for example completing a survey or feed-back form (this does not include the simple action of returning a money-off coupon).

Other issues covered include cross-border refunds and changes of VAT rate.

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2.8 Compound and multiple

2.8.1 Exotic dancing

An "adult entertainment club" made available six booths in which exotic dancers gave private performances to patrons. They were self-employed, and kept any tips paid by the punters; they paid the club for the hire of the facilities. The club claimed that this income was wholly or partly exempt as a letting of land, while HMRC ruled that it was wholly taxable.

The dancers paid the club a "house fee" of £20 (£40 on a weekend) plus 25% commission on anything they received while performing in the booths. The club accepted (after correspondence) that the house fee was paid in return for a VATable supply. Some dancers did not pay the house fee: they pre-booked a booth for a pre-arranged time and met their client at the club. They did not dance on the main stage.

The argument was about whether the letting was in whole or part a "licence to occupy land". The dancer had the right to exclude or admit people during the period of occupation, subject to an overriding right of management to enter to prevent illegal activities such as drug-taking, or in an emergency.

There were three sets of documents reflecting the agreements between dancers and the club. The first were based on those used by Spearmint Rhino; the others were adaptations brought in when it was found that the Spearmint Rhino method of operation was not successful in Norwich. The Tribunal considered it likely that the first two versions did not properly reflect what happened in practice; the amendments were an attempt to adapt the written agreements to the developing reality of the business.

The Tribunal was sceptical about the reliability of a "pre-booking notebook" in which the use of the booths was allegedly recorded. There were a number of factors which suggested that it recorded actual use after the event rather than pre-booking, or something else entirely.

The Tribunal analysed what was provided to the dancers for the money they paid to the club. There were a number of significant services in addition to the mere occupation of the booth, including the benefit of the music in, lighting, cleaning and, no doubt, maintenance and heating of, the booths and the other areas of the club and the benefit of the security and management oversight provided by the club.

The Tribunal considered the principles set out by the Upper Tribunal in the *Middle Temple* case for determining whether a supply involving land was single or multiple. It also referred to the CJEU decision in the *Deutsche Bank* case (Case C-44/11), where something that would on its own be "pointless" from the view of the average consumer (here, the dancer) was held to be indicative of compound supplies.

The Tribunal found that the use of the main floor (for which only small tips were earned) would be "pointless" without the availability of the booths (for which much higher amounts were charged). Although it was possible that dancers might use one without the other, and in spite of the apparent separate charges being made, the realistic view was that they were in practice a single supply.

The Tribunal went on to decide that the nature of that single supply was not the passive provision of a right over land. The club provided "advertising, music, lighting, heating, cleaning, management, security and the use, in common with others, of the upper floor and its facilities. It added value to the simple provision of land. That was to our minds a supply properly characterised as the provision of services rather than the passive supply of land." It was therefore taxable, and the appeal was dismissed.

The Tribunal rejected an alternative HMRC argument that the provision of the booth fell within the exception at Sch.9 Group 1 Item 1(l) for "the grant of any rights to occupy a box, seat or accommodation at a sports ground, theatre, concert hall or other place of entertainment." It was not within the normal understanding of those terms.

First-Tier Tribunal (TC03473): *Dazmonda Ltd t/a Sugar & Spice*

2.9 Agency

2.9.1 Taxis

A partnership running a taxi firm was assessed to nearly £108,000 covering 14 VAT quarters. This related to income which was received from account customers and handed over to the drivers who earned those fares. The firm appealed, arguing that it received the money as agent for the driver, who would not be registered for VAT.

The firm owned and maintained a fleet of cars, which it hired out to self-employed taxi drivers. The hire charges were based on the mileage travelled.

HMRC accepted that income from cash customers properly belonged to the driver for VAT purposes. This extended to "cash" customers who paid by credit card – the customer had to telephone the office to make the payment by card, and the firm would then credit the income against the driver's mileage-based hire charge.

Account customers were billed monthly on a document that did not identify the drivers, and only carried the trading name of the firm. It also showed the firm's VAT number, but did not add VAT and did not amount to a VAT invoice. The driver suffered any bad debt risk, and there was no difference in price for an account or a cash customer.

The Tribunal considered a number of precedent cases, where the decisions have gone either way depending on the different facts. It concluded that in this case, there was no material difference between the arrangements for cash and card customers on the one hand, and account customers on the other; in other cases where the firm had been held to be acting as a principal, there had been such differences. The Tribunal concluded that the firm was acting as an agent in collecting fares from account customers just as it did in relation to card customers, and allowed the appeal.

First-Tier Tribunal (TC03493): *Roger Frederick Lafferty*

2.10 Second hand goods

Nothing to report.

2.11 Charities and clubs

2.11.1 Charitable construction?

A charity operated a residential centre at which it ran various courses to promote the Christian faith. It constructed a new conference hall, and claimed that the work involved should be zero rated as the building was for a relevant charitable purpose. HMRC considered that charges made to people attending the courses meant that business use was too significant to qualify for the relief.

The question was whether the charity's use of the building, and in particular the charging for courses, was "economic activity". The charity based its arguments on the *Finland* case, claiming that there was not the required link between the service provided and the amount paid by the recipient. The Tribunal also considered four UK cases where a payment had been held not to be consideration for an economic supply:

- *Lord Fisher* (private shooting parties);
- *ICAEW* (regulatory activities);
- *St Paul's Community Project* (running a nursery for disadvantaged children);
- *Yarburgh Children's Trust* (renting a hall to a nursery).

The Tribunal decided that:

(1) the exceptions to the general rule arise where the inherent nature of the activity is not economic, and the circumstances and nature of an organisation may be relevant to this;

(2) if the nature of what is received is that it is not consideration for the supply or adequately linked to the supply there will be no economic activity either because the general rule is not satisfied or because that affects the nature of what is done; and

(3) the Lord Fisher indicia, as we understand them, remain a useful tool in deciding whether or not an activity is economic.

The Tribunal also had to consider whether the ground floor of the hall was used as "residential accommodation for students", which would qualify for zero rating as a relevant residential purpose. It set out a number of factors which it regarded as relevant in defining "residential" and "students or school pupils".

Having set out these principles, the Tribunal examined the facts and attempted to apply the principles to them. Although the organisation did not try to make a profit, the students made payments and received something in return for them; the fees were lower than they would have been had the organisation been commercial, but they were not so low that they could be regarded as not being consideration.

The use of volunteers was considered as something that might affect the decision, but the Tribunal held that a subsidy in kind was not different from a financial subsidy. It was not enough to change the intrinsic nature of the organisation's activities, which were the provision of a service in return for payment. The *Lord Fisher* criteria also did not suggest that the organisation was one of the exceptional cases which would be outside the scope of VAT.

The occupation of the residential parts was not similar to those activities normally considered to be "relevant residential". The occupants were not students on a formal course leading to any examination or qualification; they were only in residence for short periods, akin to the type of stay that might be enjoyed in a hotel. The participants were serious about their learning, but it seemed that they came for a holiday as well as study, and they could not really be called students.

Use of the upper floor for worship was not an economic activity, but the whole of the building was used at some time for the paid courses. None of it could therefore qualify as being for a relevant charitable purpose.

The appeal was dismissed.

First-Tier Tribunal (TC03750): *Capernwray Missionary Fellowship of Torchbearers*

2.12 Other supply problems

2.12.1 Adjustment of consideration

A firm of solicitors decided that it was entitled to amend its VAT account in the period July 2007 in respect of errors and adjustments to earlier supplies. HMRC disagreed, refusing to repay £224,483 and demanding a further £193,830 – the total amount in dispute was £418,313. The firm appealed.

The firm had acted for a number of South Africans in personal injury claims against their former employer. It accounted for output tax on interim payments of over £2.8m received from the Legal Services Commission (i.e. legal aid) between 1997 and 2003; subsequently it received 75% of a £2.75m agreed settlement of legal costs from the employer's insurers. At that point, it repaid the interim payments to the LSC; but, after a negotiation, it was repaid £1.875m by the LSC in respect of the shortfall of its costs compared to the award.

As nearly all the plaintiffs in the case were resident in and belonged in South Africa, the fees should all have been outside the scope of VAT. This was discussed at a control visit in October 2006; following discussion, HMRC instructed the firm to issue a credit note to the LSC and make an adjustment in its next VAT return. Accordingly, it issued a credit note for £418,313, which it established in its accounts as a credit to be set against future claims for legal aid from the LSC; and the resulting adjustment to the VAT return led to a repayment claim for £224,483. HMRC refused to pay it.

HMRC's grounds were that the firm was out of time to correct an error within reg.34 SI 1995/2518 (correction of errors through the VAT account) and reg.38 was not applicable, because that related to changes in consideration including an amount of VAT. However, they did not raise a formal assessment; in order to collect the £193,830, they would have to show that an assessment was in fact raised in 2007. They claimed that this was satisfied by a letter sent to the firm on 19 October 2007.

The Tribunal analysed the issues as involving:

- the "liability error" – that the services should have been treated as outside the scope;
- the "adjustment issue" – that the amount of the consideration was changed after the services had been provided.

The firm accepted that, if the liability error had been the only point at issue, it was out of time by 2007 to correct its mistake. However, they

argued that the adjustment issue effectively reopened the matter, and an adjustment should also take into account the incorrect charge to VAT on the consideration that was now been adjusted.

The reasoning was that, on conclusion of the litigation in 2006, the firm had repaid all the interim payments to the LSC, making the consideration received from the LSC nil. The consideration was then set after further agreement at £3.9375m, of which £1.875m was paid by the LSC. The firm claimed that all the conditions of reg.38 were met – in particular, the consideration included an amount charged as VAT, even though it should not have been. HMRC disagreed – they contended that reg.38 could only apply if the consideration was actually VATable.

The Tribunal agreed with HMRC. It did not accept that the consideration had been reduced to nil and then increased – it had been reduced, once only, to £3.9375m. It noted the decision in "*CCE v McMaster Stores (Scotland) Ltd [1995] STC 846, in which the Court of Session held that Regulation 38 could not be used to correct an error which was also within the scope of Section 80, VAT Act 1994. The Court of Session emphasized that the purpose of Regulation 38 was to enable adjustments to the VAT account to reflect increases or decreases in the consideration, and that purpose must be respected, whether or not there has been (coincidentally) a liability error.*" This was followed by the VAT Tribunal in *The Robinson Group of Companies Ltd* (VTD 16,081). The Tribunal considered itself bound by the Court of Session decision.

Even if it was wrong on this point, it concluded that the firm had failed to meet the time limits imposed in reg.38. Accounting entries have to be made within 3 years of the adjustment of consideration. The consideration appeared to have been adjusted in 2006, but accounting entries were only made in 2013. Although no formal evidence was produced that would enable a positive finding about the accounting entries, the firm had failed to discharge the burden of proof that it had complied with reg.38.

The Tribunal went on to consider whether the letter of 19 October 2007, sent to the firm's VAT advisers, was an "assessment". HMRC submitted "that the letter meets all the requirements for an assessment as set out in the *House* judgment. It contains, in reasonably clear and unambiguous terms (a) the taxpayer's name, (b) the amount of tax due, (c) the reason for the assessment, and (d) the period of time to which it relates. Although it was sent to Baker Tilly, they were Leigh Day's advisors, and it is not disputed that the letter came to the attention of Leigh Day subsequently."

The Tribunal concluded that the letter met all the conditions for being an assessment, but it was not sent to the taxpayer as required by the legislation. It was not enough to send it to the advisers, and subsequent references to it in correspondence with the taxpayer could not rectify this failing. Accordingly, the appeal was allowed in respect of this part of the dispute.

The firm applied for costs under the transitional provisions, as its appeal had been made before 1 April 2009. The Tribunal considered the guidance of the Upper Tribunal in *Atlantic Electronics v HMRC* [2012] STC 931 in such cases, and concluded that it should not exercise its discretion to award costs. Although the appeal was made before April 2009, the great majority of the costs would have been incurred after that

date, including those relating to the hearing itself. It therefore ought to be considered subject to the new rules rather than the old. No order as to costs was made.

First-Tier Tribunal (TC03554): *Leigh Day (formerly Leigh Day & Co) (a firm)*

2.12.2 Goods or services?

An appeal arrived in the FTT in July 2012 relating to a ruling on a proposed product which was requested and given in 2006. The company had proceeded on the basis that its interpretation of the product was correct: the product – a new type of finance contract called 'Agility' – was offered to customers from 1 August 2007, so the company was therefore appealing against assessments rather than merely the ruling. The amounts involved up to 2008 exceeded £10m.

The FTT decision

The question was whether the contract constituted a supply of goods (in effect, hire purchase) or a supply of services (in effect, leasing). The company considered it to be different from its existing financial arrangements, offering a customer a choice of three options at the end of the normal lease term: purchase, return, and purchase plus part-exchange.

HMRC argued that the law regarded such a contract as a supply of goods, because the contract envisaged that title could pass at the end of the agreement. The company stated that this was only a possibility, not an inevitability, and it therefore made a supply of services – the contract was a rental agreement which would only become a supply of goods if the customer chose that particular option at the end.

Art.14 PVD provides that '*the actual handing over of goods pursuant to a contract for the hire of goods for a certain period, or for the sale of goods on deferred terms, which provides that in the normal course of events ownership is to pass at the latest upon payment of the final instalment*' is to be treated as a supply of goods. The company argued that 'in the normal course of events' did not apply to the Agility contract, because it was not the most likely outcome.

HMRC responded by arguing that this was a misinterpretation of art.14. The phrase 'in the normal course of events' only referred to when the title would transfer under the particular contract, not whether it was more likely than not that tile would be transferred. Agility involved handing over goods pursuant to a contract for hire; in the normal course of events, title would transfer – if it transferred at all – upon payment of the final instalment.

The Tribunal quoted extensively from the recent CJEU decision in *Eon Aset Menidjmunt OOD* (Case C-118/11), in which it was decided that a lease contract is normally a supply of services, but could in certain circumstances be treated as a supply of goods. The company argued that the CJEU had considered the commercial perspective when giving guidance on the borderline between goods and services, and had also suggested that the accounting treatment was relevant. Under accounting standards, in distinguishing between a finance lease (treated as a transaction in goods) and an operating lease (treated as rental), a

judgement had to be made at the outset whether the transfer of title was more likely than not.

By contrast, HMRC relied on the same decision, noting that, in setting out the features of a finance lease, the CJEU had apparently only required that the transfer of ownership is provided for as a possibility in the contract. HMRC also drew support from the GMAC litigation, in which a contract which provided different terminal options was nevertheless at all times treated for VAT as a supply of goods.

The company presented a detailed explanation of the commercial rationale for the Agility product. It was not designed with the VAT treatment in mind, and the uncertainty over the VAT treatment did not affect its introduction: the company considered that it should be treated for VAT in a manner consistent with the commercial reality and accounting treatment, i.e. as rental.

The Tribunal considered the different interpretations of 'in the normal course of events'. It did not agree with the company's proposal that it involved a greater than even probability that the option to purchase should be exercised; it also rejected HMRC's suggestion that it qualified only the time at which title would pass. The Tribunal preferred to regard the expression as referring to the transfer of title as something that was central to the contract – that was envisaged by the contract as a normal outcome, not as something that would be abnormal.

The Tribunal also considered that the company's argument would offend against the principal of legal certainty, in that it would be impossible to determine whether the supply was goods or services until the conclusion of the contract.

It is interesting that the company asked for specific findings on 11 questions, and the Tribunal obliged, even though it commented that most of these matters were irrelevant to the eventual decision. Presumably these findings of fact will be pored over by lawyers in the case of an appeal. They were as follows (there appear to be only 10, but one may combine two points raised by the company):

Appellant's Proposed Finding of Fact	Tribunal's Comment
The objective purpose of Agility is the hiring of a Mercedes Benz motor vehicle to a customer who wishes to keep his options, regarding ownership of the motor vehicle, open until maturity. This is reflected in the name of the product, implying flexibility, and this is how Agility is advertised/described to customers.	The Tribunal disagrees. In relation to its determination (see paragraph 79 above, and to wider circumstances see paragraph 103 above) Contradictory marketing evidence (see paragraph 101 above)
And Agility is recommended both online and at dealerships to customers who wish to keep their options open; alternative products are recommended to customers who decide at the outset that they do or instead do not wish to own the motor vehicle	HMRC challenged the accuracy of this statement because the Appellant adduced no evidence to substantiate it. The Tribunal ruled that HMRC was not entitled to do this because it was an agreed statement of fact. The Tribunal, however, considers this agreed statement of fact has to be weighed against the commercial rationale (see paragraph 99 above).
The purpose of Agility is reflected in its terms: the customer hires the vehicle for a fixed period in return for monthly	The Tribunal disagrees. See its findings at paragraphs 79 and 80.

payments, and at maturity he has an option to purchase for a fixed price which is calculated at the outset to be equal to the market value of the vehicle at maturity.	
The calculation is genuine and expert estimate of the residual value of the vehicle; it is made partly be reference to external guides e.g. Glass's guide, and partly by reference to Mercedes Benz own knowledge about forthcoming developments which are likely to affect future values, for example, new models	Agreed. The Tribunal, however, questions its relevance for the Appellant's case of flexibility based on the wider circumstances.
The typical period of an Agility contract for a new vehicle is 3-4 years; for a second hand vehicle it is slightly less. For new and second hand vehicles, the period of an Agility contract is always substantially less than the useful life of the Mercedes Benz motor vehicle. This means that the residual value is substantial not a nominal sum.	An agreed statement of fact. The substantial sum has to be weighed against the evidence which showed that the customer's contribution in respect of monthly payments with interest and deposit exceeded the residual value by a significant sum. In the Tribunal's view, the amount already paid was important in relation to the characterisation of the agreement and the customer's decision to exercise the option.
Merely by entering into the Agility agreement, and merely by paying the obligatory monthly payments, the customer is not commercially committing himself to becoming the owner of the vehicle.	The Tribunal does not understand the term commercially committing. The Tribunal accepts that the customer has to exercise an option to purchase before ownership is transferred. The Tribunal, however, considers the monthly payments represent a significant investment in the vehicle by the customer.
Statistics show that the purpose of Agility is in fact achieved; on average around 50 per cent of vehicles are purchased and 50 per cent are returned	Hire purchase have similar high rates of return
The Appellant is neutral as to whether or not an Agility customer decides at maturity to purchase or not to purchase, the motor vehicle.	The Appellant carries no risk if the vehicle is returned.
However, because there is a very real prospect of the customer returning the vehicle, Agility, obliges the customer at maturity to pay for damage to the vehicle, and to pay for excess mileage, and also obliges him to service the vehicle at Mercedes-Benz approved workshops only.	Agreed statement of fact. Relevant to the Tribunal's characterization of Agility as a contract for sale of a vehicle (see paras 79 and 80 above).
Having regard to the terms of Agility there is no expectation at the outset that a typical Agility customer will purchase the vehicle	Tribunal disagrees. Its findings on the agreement and wider circumstances demonstrate that Agility is portrayed as an affordable means to purchase the vehicle.

The decision itself (to dismiss the appeal) was summarised as follows:

(1) The words of Article 14(2)(b) should be read straightforwardly which direct attention to what is provided for in the contract, not on the wider circumstances.

(2) The description of the agreement as hire purchase, the provision for a deposit payment, the specified financial information including the cash price for the vehicle, the substantial capital payment inherent in the

contract structure, and the option to purchase are compelling indicators of Agility being a contract of sale of a car

(3) On a proper analysis the sole realistic option under Agility is to purchase the vehicle

(4) In the normal course of events is to be construed as a question of whether the passing of ownership was normal under the terms of the contract, rather than abnormal,

(5) The fact that ownership might not transfer under the Agility contract did not preclude it from being a contract for sale. The passing of title is central to Agility which meant that ownership would normally pass under its terms.

The Tribunal is satisfied on its findings that Agility is a contract for the sale of goods on deferred terms, which provides that in the normal course of events ownership is to pass at the latest upon payment of the final instalment. Article 14(2)(b) of the VAT Directive, therefore, applied to Agility.

The Upper Tribunal decision

The company appealed to the Upper Tribunal, which decided that the FTT had made errors of law, and overturned its decision.

First, to come within art.14(2)(b) PVD, the acquisition of the goods at the end of the contract had to be *the* normal outcome, not just *a* normal outcome.

Second, the agreement could not be characterised as, in effect, a contract for sale of a vehicle. It was a contract for hire with an option to purchase; that would only be deemed to be a contract for sale of goods if the option was normally exercised. The FTT had reached a conclusion, or a characterisation of the contract, that was not justified by its findings of fact.

A third ground of appeal, that the Tribunal had made findings of fact which had not been contended for by HMRC and had acted unfairly in so doing, was rejected.

The judge noted that there are no CJEU cases directly about art.14(2)(b). The *Eon Aset Menijdmunt* case refers to it, but is not directly relevant to the point at issue here. The judge made the following points of general application:

(1) As recital (1) to the Directive shows, the Directive is intended to harmonise the laws of the Member States relating to turnover taxes and provide for a "uniform basis of assessment".

(2) It is therefore not surprising that the ECJ has said that the notion of supply of goods is not to be determined by national law: the purpose of the Directive might be jeopardised if the requirements for a supply of goods were to differ according to the civil law of the Member State concerned: see Atktiebolaget NN v Skatteverket Case C-111/05 at [32].

(3) The concept of supply of goods is objective in nature. It applies without regard to the purpose or results of the transactions concerned and without its being necessary for the tax authorities to carry out inquiries to determine the subjective intention of the taxable person in

question: see Newey v Revenue and Customs Commissioners Case C653/11 ("Newey") at [41]; Dixons Retail plc v Revenue and Customs Commissioners Case C-494/12 ("Dixons") at [21].

(4) Consideration of the economic and commercial realities is a "fundamental criterion" for the application of the common system of VAT. Since the contractual position normally reflects the economic and commercial reality of a transaction, the relevant contractual terms constitute a factor to be taken into consideration; but sometimes contractual terms do not wholly reflect the economic and commercial reality of a transaction, in particular if it becomes apparent that the contractual terms constitute a purely artificial arrangement which does not correspond with the economic and commercial reality of the transaction: Newey at [42]-[45]. This passage has very recently been referred to and relied on by the Supreme Court in Secret Hotels2 Ltd v Revenue and Customs Commissioners [2014] UKSC 16 at [29] per Lord Neuberger.

(5) In a passage cited by Jonathan Parker LJ in Tesco plc v Customs and Excise Commissioners [2003] EWCA Civ 1367 ("Tesco") at [41], the Advocate General (Tizzano) said this in his opinion in Customs and Excise Commissioners v Mirror Group plc Case C-409/98 and Customs and Excise Commissioners v Cantor Fitzgerald International Case C-108/99:

[quotation from judgment]

Jonathan Parker LJ later in his judgment made the point that the "economic purpose" here referred to by the Advocate General is not the same as "economic effect": two transactions may have the same economic effect but that does not necessarily mean that they are to be treated in the same way for VAT purposes: see Tesco at [159].

(6) In MBNA Europe Bank Ltd v HMRC [2006] EWHC 2326 (Ch) ("MBNA"), Briggs J referred to the same passage from Advocate General Tizzano's opinion in saying (at [35]) that the Court is not hidebound by the labels which the parties have chosen to apply to their transactions but must where necessary ascertain the "essential character of the transaction in issue".

The judge noted that it was not possible to decide what would be the "normal" outcome with hindsight: the very first Agility contract was, in principle, either goods or services on the day it was entered into, and that had to be decided on the information available at that time. For the judge, the critical fact was that the option payment was substantial – that distinguished the contract from "standard HP" where at the end of the term the customer had effectively paid the whole price, including interest, and would be foolish not to pay the very small final payment to take up the option to purchase. In the case of Agility, there was a real choice at the point the option could be exercised. It was not, as the FTT had concluded, illusory.

Upper Tribunal: *Mercedes-Benz Financial Services UK Ltd v HMRC*

2.12.3 TOGC

A company operated a public house. It sold the property to an unconnected company and accounted for no output tax. The other company later submitted a planning application to convert the pub into a residential care home. HMRC assessed the vendor company on the basis that the transfer was not a TOGC; the disposal of the property itself was exempt, but there was a capital goods scheme adjustment, and output tax on other assets.

In the negotiations leading up to the transaction, and in the contracts, it was clear that the parties intended it to be treated as a TOGC. Completion of the sale took place in January 2007. In December 2006 the purchaser applied for permission to "extend" the property into a hotel, and this was granted in February 2007. However, in August 2007 a different application was made, to convert the property into a residential care facility; this was rejected by the council in February 2008, and the property was subsequently marketed as a site for development.

There were notes of a VAT visit at which an officer appeared to accept that the transaction was a TOGC, and a letter which appeared to accept the same. However, the appellant did not seek to argue that these estopped HMRC from arguing the opposite. It depended on the facts and the intention of the purchaser.

The Tribunal set out a number of principles derived from legislation and case law, in particular *Zita Modes*. It was not essential that the transferee carried on the business, or even carried on a business, after the transfer; but it must have intended to do so, and have purchased a totality of assets that was capable of being carried on as a business.

HMRC based their argument on the contracts, which appeared to allocate the equipment to the owners of the purchaser company. If that was the case, the company had not acquired an undertaking which was capable of operation – the equipment was essential to the running of a public house. Even if there was an understanding that the owners would make the equipment available for the company to use, from the vendor's point of view it could not qualify – it had not transferred the totality of the assets to a single person who would operate the business.

HMRC argued that there were many features which suggested that the purchaser always intended to develop the property, and no evidence that it either intended to or did carry on the trade of a public house. The Tribunal rejected this argument, finding as a fact that the purchaser intended to carry on the trade of a public house, but it also found that it was not capable of doing so. Only an asset had been transferred, without the means to carry on a trade, and HMRC's assessments were valid.

The appeal was dismissed.

First-Tier Tribunal (TC03563): *Pontardawe Inn Ltd*

2.12.4 Reverse charge

HMRC have issued a Brief to explain the new reverse charge for wholesale trading in gas and electricity which was announced in the March Budget. It will apply from 1 July 2014. The measure is intended to prevent missing trader intra-community fraud in the wholesale gas and electricity sectors. The details are only relevant to businesses that buy or sell wholesale gas and electricity in the UK.

Revenue & Customs Brief 23/2014

The Value Added Tax (Section 55A) (Specified Goods and Excepted Supplies) Order 2014 specifies the goods to which the new domestic reverse charge for wholesale trading in gas and electricity applies with effect from 1 July 2014 and those supplies which are excepted.

SI 2014/1458

The Value Added Tax (Amendment) (No 2) Regulations 2014 relieve those suppliers of gas and electricity to which the new domestic reverse charge for wholesale trading in gas and electricity applies, from the requirement to make reverse charge sales statements.

SI 2014/1497

3. LAND AND PROPERTY

3.1 Exemption

3.1.1 Parking or renting?

A marina operator granted a licence to an individual permitting him to leave his boat for 12 months on the concrete hardstanding next to the marina, and later granted a similar licence for 6 months allowing the boat to be moored beside the bank in the marina. Work was carried out to the boat during both periods, and the individual lived on it.

The individual argued that the supplies of land should be exempt rather than standard rated. He believed that this was in accordance with the VAT Act, but if not, he argued that there had been breaches of the Human Rights Convention or the Equality Act 2010; he had already taken his case "*before various courts, including Mr. Justice Sales in the High Court, and that the Appellant had complained that each court has contended that his complaint should more properly be dealt with by some other court or tribunal*." The judge noted that the FTT was still the wrong place: the claim was in reality that the landlord had overcharged the appellant, who had not paid any VAT directly to HMRC. However, to resolve the matter and to avoid further hearings in other courts, the Tribunal agreed (with HMRC's consent) to determine the liability of the supplies.

The mooring licence was excluded from exemption by Group 1 Sch.9 Item 1(k). The appellant's argument that words should be read into the legislation to allow exemption for mooring of residential boats could not succeed.

The land-based licence was not within Item 1(k). However, the marina operator had opted to tax. The question was therefore whether the option was disapplied by Sch.10 paras.5, 8 or 9. The boat could not qualify as a "houseboat", because the statutory definition in Sch.8 Group 9 requires that a houseboat does not have the means of self-propulsion – this boat had a motor. The contentions that the licence could relate to a "dwelling" or to a "caravan" were "not remotely tenable". The option was therefore not disapplied.

The Tribunal considered whether the Human Rights Act was relevant, and decided that "discrimination against water-dwellers" could not be brought within its provisions. Nor did the categories of people covered by the Equality Act include the appellant. Even if the FTT was wrong on that, it did not have the jurisdiction to give an appellant a remedy based on the contention that the UK VAT Act was inconsistent with the Human Rights Convention. This could only be decided by a higher court. Whether the FTT's decision that the case was groundless will stop him appealing the point further remains to be seen.

There was a separate dispute about the provision of some parts for the boat, which the individual claimed should have been zero-rated under Sch.8 Group 8 para.2A. HMRC accepted that the boat in question was, in principle, a "qualifying ship" for this purpose: it weighed over 15 tons and, being fitted out for residential use, it was not used "for recreation or pleasure". However, the Tribunal noted that no evidence had been brought about the nature and identity of the parts, or even whether VAT

had been charged on their supply. In addition, any claim would lie against the suppliers, not against HMRC. The appeal in respect of the parts was dismissed.

However, the Tribunal confirmed the decision in principle that "ship-like" parts should be zero-rated, and encouraged the appellant to write to suppliers who were VAT-registered to recover VAT charged. The appellant's criticism of HMRC's policy on "ship-like" fittings was rejected.

First-Tier Tribunal (TC03623): *Nicholas Brown*

3.2 Option to tax

3.2.1 Validity of option

A property development company sold a building in July 2009. In February 2012, HMRC assessed the company to VAT of £41,739 on the basis that an option to tax had been made. The company had registered for VAT in 2004. HMRC enquired into its first return and disallowed some input tax; in the following year the company's VAT consultants submitted notification of options to tax and requested repayment of the input tax that had been disallowed. VAT was charged on the rent paid by the tenant of the particular property that later became the subject of the current appeal.

The sole director and employee of the company claimed that he had not made a valid option to tax in respect of this company. He explained the history of the company and its property holdings, and stated that he had signed the forms without completing them or understanding their effect. He believed that his VAT advisers had been under the mistaken impression that he intended to opt all his property holdings. In fact, he had a policy of making '*an election in respect of residential buildings but not on student accommodation because he understood that these buildings were "VAT adverse". Therefore it did not make commercial sense for him to opt to tax Pace House as this was intended for student accommodation. He had opted to tax other properties such as Honduras Wharf because this was intended for residential use.*' The director argued that there had been a notification of an option, but no 'positive intention' to make one in respect of this property.

The Tribunal accepted that it was necessary to have such a positive intention. However, the evidence suggested that the director had had such an intention, and was now trying to "hide behind his advisers" to reverse the effect of a decision taken at the time. The Tribunal considered the evidence under four headings:

(i) The documentary evidence;

(ii)The explanation of any witnesses;

(iii) Any circumstantial evidence;

(iv) How the property was dealt with.

Under each heading, the balance of probabilities indicated that there had been a positive intention to opt at the time. The taxpayer relied on the decision in *Grenane Properties Ltd* (TC00494), but in that case VAT had not been charged on rent to the tenant. Here, not only had VAT been charged, but the director had met the tenant to notify them of the fact. There was no contemporaneous evidence of any misunderstanding between the director and the advisers. The appeal was dismissed and the assessment confirmed.

First-Tier Tribunal (TC03706): *Honduras Wharf Ltd*

3.2.2 Impact of the option

HMRC have published the findings of a research report they commissioned to assess the impact of the option to tax on businesses which use it. The report's conclusions are generally predictable (concerning the experience of suppliers and recipients in meeting opted and unopted property). The report included the following interesting observations:

Approximately 60% of those who had been suppliers in relation to the option to tax reported having used external advisors. The main reasons mentioned for seeking external advice were to ensure the action taken is correct and in line with the law, to obtain specialist knowledge generally, and to ensure VAT is recoverable.

The median costs reported in relation to using external advisors for the option to tax were £1,000 per option for both ' Large business suppliers' and 'SME suppliers' and £500 per option for 'Recipients'. Median average internal costs reported were £500 per option for 'Large business suppliers', £200 for 'SME suppliers' and £100 for 'Recipients'.

On the whole businesses reported a good understanding of the option to tax: 91% of 'Large business suppliers' stated that they understood the rules well, 76% of 'SME suppliers' and 71% of the 'Recipients' category.

The key challenges mentioned by supplier businesses in relation to the option to tax were evaluating the costs and benefits of opting, ensuring compliance with the rules, finding information, and keeping up to date with legislation.

Just over a quarter of 'Large business suppliers', a fifth of 'SME suppliers', and one in ten 'Recipients' reported that they were familiar with Real Estate Elections; hence most organisations are unaware that an alternative to taking individual options is available.

www.gov.uk/government/publications/impact-of-the-option-to-tax-measure

3.2.3 Updated Notice

HMRC have issued an updated version of their Notice *Opting to tax land and buildings*, replacing the June 2013 version. The only matter identified in the "what's changed?" section is to the helpline contact details.

Notice 742A

3.3 Developers and builders

3.3.1 Demolition and construction

A company carried out building work which involved the demolition of an existing building, apart from the party walls and the front and side facades, and the construction of a new building with commercial premises in the basement and ground floor, and a residential unit on the first, second and third floors. HMRC ruled that the residential part of the project qualified for the lower rate because it was a conversion rather than a new construction. The company (represented in the appeal by the owner of the building) argued that the residential part was properly zero rated.

HMRC disputed whether it was an explicit requirement of the planning consent that the facades were retained, and whether the rear elevation had also been retained (as zero rating is only permitted where just two adjacent facades are retained – Sch.8 Group 5 Note 18).

The Tribunal described the argument about the rear facade as a "game of spot the brick" when comparing photographs before and after the project. Although HMRC's representative argued that similarities between the photographs suggested that parts of the rear elevation had been retained, the FTT was satisfied that it must have been completely demolished, as contended by the appellant.

The judge also commented that HMRC's argument about the need that an explicit requirement (to retain the facades) should be stated in the planning consent "*is a line that HMRC have taken in a number of cases, and has consistently been overturned by Tribunals*". The judge commented that people planning developments are aware of planning requirements and frame their applications accordingly; if the planning authority "*merely consents to the applicant's desire to retain the facades*", the statutory words are still satisfied. HMRC's view that the condition had to be imposed on an unwilling developer had no merit.

The appeal was allowed.

First-Tier Tribunal (TC03622): *BS Design & Management Ltd*

3.3.2 Listed building renovation

A company carried out a renovation of a Grade II listed residential property in Cambridge. It was the only development that the company has so far carried out. It claimed that the project should be zero rated in accordance with Group 6 Sch.8 as the "substantial reconstruction" of a protected building. HMRC refused to register the company, ruling that its eventual supply of the renovated building was exempt.

The company's director argued that the precedents of *Cheltenham College Enterprises Ltd* (TC00429) and *Lordsregal Ltd* (VTD 18,535) supported its claim that the building had been substantially reconstructed. HMRC's view was that the work constituted "renovation, modernisation and refurbishment", but that is not the same as "reconstruction".

The Tribunal reviewed the arguments, and noted that the *Cheltenham* decision contained a thorough analysis of the law and precedents and its correctness was not in dispute. The judge summarised the principles derived in that case as follows:

a) The phrase 'substantially reconstructing' is used in the legislation with its normal everyday meaning.

b) The tests in note (4)(a) and (b) are additional.

c) The works at issue must be works of reconstruction and amount to substantially reconstructing the building.

d) The phrase 'substantially reconstructing' does not envisage total rebuilding, nor does it necessarily mean the same as 'constructing'.

e) 'Reconstructing' may carry the implication that the rebuilt property is the same or very similar to the one that existed before.

f) The Oxford English Dictionary definition is relevant and includes 'to construct or put together again, esp. following damage or destruction, or by way of renovation'.

g) Something may very well remain of the original building.

h) Where the original building materials are used, the work can still be a reconstruction, and may be a complete replica.

i) Minimal changes to the layout of the building, and alterations being kept to the minimum, are not relevant to the question of 'substantially reconstructing'.

j) Construction of new extensions (i.e. not rebuilding something previously in place) is not work of reconstruction

k) Works can be included in a reconstruction even if they are not structural.

l) Installing new services or reinstalling services such as gas, electricity and drainage are works of reconstruction.

m) Extensive repairs can amount to reconstruction if, viewed as a whole, the building was reconstructed.

n) 'Substantially' qualifies 'reconstructing' and has a meaning apart from the tests in note (4), and a building may be 'substantially reconstructed' but not come within note (4)(a) or (b).

o) 'Substantially' means of the most part, in the main, or at least more than 50%.

The Tribunal noted that it is difficult to apply these principles to particular facts, but nevertheless it is necessary to do so. Examining the list of works done to this property, it was clear that they were major and significantly altered every part of the interior. However, they were in the main only the kind of repair that might ordinarily be carried out on a property after years of neglect; it could not be said that more than 50% of the house had been "reconstructed", so the appeal could not succeed.

First-Tier Tribunal (TC03726): *Brunswick Properties Ltd*

3.3.3 Conversion?

An individual engaged builders to carry out conversion works which were described in the planning application as refurbishment of the existing single family dwellinghouse and the addition of a two-storey extension. The extension was built in place of a self-contained "granny flat" which

had existed next door, with no internal access between the two. Utilities for the flat were billed to and routed through the house, but they were treated as separate properties for council tax and given different rating bands.

The dispute under appeal related to the rate of VAT applicable to the builder's supply of services. HMRC ruled that it was standard rated building work; the property owner, appealing as recipient of the supply, argued that it qualified for the reduced rate as a "qualifying conversion". That would require the conversion to turn a single building containing two dwellings into a building with a different number of dwellings (i.e. one). The question was therefore whether:

- there was a single building beforehand which comprised two separate dwellings, which was converted into a building containing just one building – lower rated; or
- there were two separate buildings beforehand – standard rated; or
- there was only one dwelling beforehand – standard rated.

The Tribunal considered that the separate council tax assessments were strong evidence for there being two separate dwellings before the conversion. There was certainly only one afterwards.

The Tribunal did not consider that the physical links between the flat and the house were sufficient on their own for them to be regarded as a single "building" before the work. However, it did seem from the planning documentation that the council regarded them as such. If the flat had been a separate building, its demolition would have required a separate planning application. On balance, therefore, the Tribunal was satisfied that there had been two dwellings in a single building, and the claim succeeded.

First-Tier Tribunal (TC03757): *Daniel Nabarro*

3.3.4 Barn conversions

In an article in *Taxation*, John Ward examines opportunities arising from changes to the planning permission procedures for redundant barns from 6 April 2014, and sets out a flowchart to help identify the various VAT issues with conversion projects.

Taxation, 3 April 2014

3.3.5 Student accommodation and dining halls

HMRC have announced that extra-statutory concessions for construction of new student accommodation and dining halls will be withdrawn with effect from 1 April 2015. These give permission for Higher Education Institutions to ignore vacation use in determining how new student accommodation will be used when considering the 95% RRP test, and allowing dining rooms and kitchens to be zero-rated if they are "predominantly" used by the living-in students.

In a new Brief, they have announced a widening of the transitional rules for projects in progress. Certificates which rely on the concession to meet the "solely" for a relevant residential purpose test (as student accommodation) will still be valid where:

- for construction services, the first supply is made before 1 April 2015 and relates to a meaningful start to the construction of the building by that date, and the works are expected to progress to completion without interruption (demolition or site clearance works will only be accepted where construction starts immediately afterwards).
- for the first grant of a major interest in new student accommodation, either:
  - a meaningful deposit (for example, on exchange of contracts) has been paid to the vendor (or their solicitor) before 1 April 2015 (options to purchase will not be accepted irrespective of intention);
  - an Agreement for Lease (or purchase) has been signed with the vendor or landlord before 1 April 2015 and a meaningful start to the construction of the building has taken place by that date, and the works are expected to progress to completion without interruption (demolition or site clearance works will only be accepted where construction starts immediately afterwards).

There are further details for single projects that involve the construction of a series of buildings, where some may be able to rely on the transitional provisions even if that particular building was not in progress on 1 April 2015.

Revenue & Customs Brief 14/2014

3.3.6 Ancillary buildings

A listed cottage had within its curtilage a number of outbuildings which were also listed under a different number. "Approved alterations" were carried out to the outbuildings; HMRC ruled that the works did not qualify for zero-rating because the outbuildings were not dwellings in their own right.

The Tribunal considered the relationships between the buildings and decided that the outbuildings were not stand-alone buildings as in the *Zielinski Baker* case; they provided "ancillary dwelling accommodation" and were therefore effectively part of the main dwelling. The works therefore satisfied the requirements of Sch.8 Group 6 (at the time) and the appeal was allowed.

First-Tier Tribunal (TC03504): *MIM Construction (a firm)*

3.3.7 Updated Notice

HMRC have issued an updated version of their Notice *Buildings and Construction*, replacing the October 2013 version. It incorporates recent clarifications to policy about students that were explained in Revenue & Customs Brief 03/2014, as well as the following:

- Sub-paragraph 2.1.3 states that sub-contractors must standard-rate the supply of disabled adaptations and mobility aids for over-60s.
- Subparagraph 4.6,1 amended to confirm that zero-rating is not affected by any sale of, or long lease in, the site before the building was constructed.

- Subparagraph 5.6.1 amended to explain that zero-rating is not affected by any sale of, or long lease in, the building before it was constructed.
- Sub para 13.9.1 sixth bullet point states that only intelligent lighting systems (and not lighting systems as a whole) are treated as articles not ordinarily incorporated in dwellings.
- Section 15 now deals with "relevant residential purpose accommodation that is designed as dwellings", as described in Revenue & Customs Brief 04/2014 and Information Sheet 02/2014, and subsequent sections are renumbered.

Notice 708

3.4 Input tax claims on land

3.4.1 DIY

An individual proposed to carry out works to convert an existing building into a dwelling. The formal planning consent was headed "two storey extension"; however, on further examination, it became clear that the structure was unsound and the building would have to be demolished. The individual met with the planning officer who agreed with this, but required that the two visible walls be retained. This was not set down in a formal revised planning consent, but the Tribunal was satisfied that it was lawful and that it had happened as described by the individual.

HMRC refused a DIY claim on the basis that the structure was not a "new building", based largely on the written planning consent. The Tribunal found that the facts satisfied the expression "or similar permission" in the legislation, and allowed the appeal.

First-Tier Tribunal (TC03454): *Jack Wilson*

An individual made a DIY claim in relation to the conversion of what had previously been a residential care home for children and teenagers into a family home. He argued that the commercial use meant that it had not been in "relevant residential" occupation, but the Tribunal disagreed. His claim for a DIY refund was refused, because a conversion of an existing building only qualifies if it was previously in non-residential use.

First-Tier Tribunal (TC03556): *Paul Salter*

3.5 Other land problems

Nothing to report.

4. INTERNATIONAL SUPPLIES

4.1 E-commerce

4.1.1 Updates for 1 January 2015

HMRC have issued a statement to those currently using the VAT on e-Services (VOES) special registration to alert them to the changes coming on 1 January 2015. They will receive more details in the summer on how to re-register for the new "Non-Union VAT MOSS" which will operate in parallel to the VAT MOSS for businesses established somewhere in the EU.

http://tinyurl.com/pn8w3px

HMRC have published a more detailed guide to the place of supply of digital services and mini one-stop-shop from 1 January 2015. It is an essential starting point for anyone who sells electronic services to consumers, but more detailed consideration and more detailed guidance is likely to be required before the new rules come into force.

Matters covered include:

- determining who is making the supply
- determining the status of the customer and the place of supply
- evidence required
- transitional measures
- VAT invoices and exchange rates
- the MOSS and the effect on existing non-EU MOSS traders
- MOSS returns, including submission, correction and payment

http://www.hmrc.gov.uk/news/one-stop-shop.pdf

The European Commission has issued guidelines on audit procedures for the MOSS. This is aimed at tax authorities, recommending ways of contacting businesses as part of an audit, and at businesses, recommending ways of providing the information requested.

Initial contact should be routed through the tax authorities in the "member state of identification" (MSI). Most member states (BE, BG, DK, EE, ES, FI, HR, IE, LT, LU, LV, NL, PL, PT, RO, SE, SI, UK) have agreed to apply this guideline. The guidance goes on to recommend that normal national procedures for contacting its resident traders should be used to initiate an enquiry, and that e-mail is used for initial contact of non-EU traders registered with it.

A "standard audit file in xml format" is being developed as a possible way of exchanging information involved in the enquiry.

ec.europa.eu/taxation_customs/resources/documents/taxation/vat/how_vat_works/telecom/one-stop_add_guidelines_en.pdf

4.1.2 Commission report on POSMOSS

The Commission has published a report directed to the Council on the implementation of the new place of supply rules. It includes a number of recommendations about how the rules should be operated by Member States from 1 January 2015. This includes urging Member States to "take a pragmatic approach with regard to transitional measures".

Art.221 PVD allows Member States to require the issue of VAT invoices to consumer customers. The Commission notes that this can cause problems for businesses making supplies across borders (but does not say "this goes against the ethos of internet trading"), and "considers that Member States should not require" such B2C invoices where the MOSS applies.

The Commission also notes that there is no formal procedure in place to resolve double taxation issues; Member States have been reluctant in the past to establish one, and the Commission has no power in this area. The report simply urges Member States to "*establish an easily accessible contact point and to communicate details to the Commission services so that a comprehensive list can be published on its website. This would be a first port of call in the search for solutions to cases of double taxation due to divergent assessments by national tax administrations.*"

ec.europa.eu/taxation_customs/resources/documents/taxation/vat/how_vat_works/telecom/com(2014)380_en.pdf

4.1.3 Article

In an article in *Taxation*, Neil Warren considers practical problems with the POSMOSS regime. First, a MOSS registration requires the trader to be registered in the member state; a UK trader benefiting from the high registration threshold here would be faced with a choice between separate registrations in all other states (i.e. no MOSS) and voluntary registration for all supplies (having to account for output tax on UK supplies that would otherwise be outside the scope).

Second, a late single return in the MOSS state might (it appears) be subject to penalties from each relevant foreign authority.

Taxation, 14 June 2014

4.1.4 E-trader updates

HMRC have published the usual schedule of exchange rates for e-traders to use for their returns for the quarter to 31 March 2014.

VAT Information Sheet 4/2014

HMRC have also issued an Information Sheet to inform traders that the rate of VAT in France increased from 19.6% to 20% with effect from 1 January 2014.

VAT Information Sheet 5/2014

4.2 Where is a supply of services?

4.2.1 Fixed establishment

Nearly 30 years after the *Berkholz* decision of the CJEU on gaming machines aboard ships, a similar case has come before the FTT, with interesting results. The appellant company entered into a licence agreement to operate casinos and gaming machines on board certain domestic and internationally bound ships operated by P&O Ferries, in return for which the appellant makes payments to P&O. HMRC ruled that there was a single supply in relation to gambling provision for all the ships covered by the agreement, and that supply was made where the business was established (i.e. the UK), on the grounds that the ships were not "fixed" and could not therefore constitute a "fixed establishment".

The company argued that it made separate supplies in respect of each ship, and that each ship constituted a fixed establishment because of the presence of its croupiers, casino equipment and gambling machines on board. Accordingly, when the ships left UK territorial waters, the supplies would be outside the scope of UK VAT.

The Tribunal began by considering whether there was a single supply. The company argued that the existence of features common to the different supplies did not turn them into a single supply; the situation was akin to a landlord letting a number of buildings to the same tenant under similar but distinct leases. The Tribunal observed that there could be "*a number of potential permutations of supply. There are potentially 3 levels (a global supply to all routes, supplies on a per route basis, and supplies on per ship basis) at which 2 types of supply (gambling services, or gaming machine and casino separately) may be provided.*"

The Tribunal considered the types of supply from the point of view of the customer, and decided that there was a significant difference between gaming machines and live gaming tables. The fact that some routes only had gaming machines while others also had casinos was also suggestive of a difference.

After considering whether it would be artificial to split the supplies between the different routes or the different ships, the Tribunal concluded that it would not be artificial: there were separate supplies of casino licences and gaming machine licences, and these supplies were made separately in respect of each ship.

In deciding whether a ship could be a fixed establishment, and whether they were in this case, the Tribunal made extensive reference to the Implementing Regulation 282/2011. The first question was whether the UK's law on fixed establishment could be relevant given that it referred to the existence of establishments in "more than one country" – which might not include "the high seas, i.e. in no country". The Tribunal concluded that the wording of the Directive (which refers to "place" rather than "country") supported the appellant's argument; HMRC argued that the FE rule only operated to resolve problems where a transaction might be taxed in more than one country, so it was not required where the issue was between "one country" and "no country", but the Tribunal disagreed. The law should be read as allowing a FE to be situated outside the EU.

HMRC argued that the *Berkholz* and *Faaborg-Gelting Linien* cases did not directly conclude that a ship can be a fixed establishment, because the eventual decisions were made on other grounds. However, the Tribunal considered that statements of the CJEU in *Berkholz* were clearly suggestive of the view that a ship could have been a FE, had the conditions for a FE been satisfied in respect of the trader's activities on that ship.

HMRC further argued that the Regulation requires that supplies can only be made to "a" FE if there is only one FE involved; if there are several FEs which receive a supply, that supply must be treated as made to the central business establishment. The Tribunal did not have to decide on this directly, because it had concluded that each of the ships constituted a separate FE receiving a separate supply; however, it also commented that it did not agree with HMRC's view. If a supply was being made to a number of FEs for their own use, it should be apportioned between them on a just and reasonable basis.

Lastly, the Tribunal had to consider whether the definition of a FE was satisfied in respect of the supplies being made. The appellant argued that it had the necessary size, permanence and suitable structure of human and technical resources to qualify under both *Berkholz* and the Regulation. In particular:

(1) Casinos are located on fixed locations on board the ships

(2) Access is controlled by the croupiers

(3) Signs indicate the appellant runs the business

(4) There are two croupiers on board at any one time who run the casinos

(5) The croupiers work for the appellant

(6) The croupiers have responsibilities regarding the gaming machines to clean and to supervise the cash collection

(7) There are a significant number of gaming machines on each ship – 35 to 40

HMRC argued that the croupiers were self-employed on short-term contracts, so they were not a permanent human presence of the appellant on the ship. The Tribunal did not agree: their status as employees or not was not relevant.

On the other hand, the operation of the gaming machines did not appear to require or involve the permanent presence of human resources. The croupiers cleaned the machines and supervised their emptying by land-based staff, but servicing was carried out by the latter. The machines were situated throughout the ships. It made sense for the casino area to be a fixed establishment of the appellant in respect of the casino licence, but the whole ship could not become a fixed establishment just because the machines were spread throughout it.

The overall conclusion was therefore that:

- the casino supplies were made to and by a fixed establishment of the appellant in that specific part of the ship, and had to be apportioned according to how long the ships were outside the UK's territorial waters;

- the gaming machine supplies were not made to or by a fixed establishment of the appellant, so they were all made to or by the main establishment of the company, i.e. in the UK.

First-Tier Tribunal (TC03408): *Astral Marine Services Ltd*

4.2.2 Establishment

A Cypriot company ran an auction website in the Polish language. It concluded an agreement with a Polish company which wanted to sell goods using the website. The question arose of whether the use of the Polish company created a fixed establishment of the Cypriot company located in Poland, which would affect the place of supply of various services. Questions were referred to the CJEU by the Polish courts.

The Advocate-General's opinion has not been made available in English, but her opinion is that the Cypriot company used the Polish company's human and technical resources 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.

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

4.2.3 Guernsey builders

A company operated a pub in Devon. It engaged a company incorporated in Guernsey to carry out a reconstruction. HMRC initially registered the building company, but then decided that it did not "belong" in the UK, having no fixed establishment here, so the reverse charge procedure should apply to its supplies in respect of the pub. The registration was cancelled from the outset, and the customer was assessed in respect of the reverse charge. VAT charged by and paid to the Guernsey company was disallowed.

The Tribunal had to consider a number of issues. In respect of whether the Guernsey company "belonged" in the UK, it considered the full range of precedent cases and EU legislation. It was clear that the company had its establishment in Guernsey; after considering the facts in detail, the Tribunal concluded that its presence in the UK was not sufficiently "fixed or stable" to constitute a fixed establishment. As a result, s.8 applied to the supplies, and the supplier was deemed not to have made them.

As a second argument, the appellant contended that the assessments were defective, in that they assessed the output tax on the reverse charge without giving credit for the necessarily matching input tax. In effect, the assessments were raised to disallow the input tax that should not have been deducted on the supplier's invoices because the supplier was not chargeable; but they had stated a different reason. The Tribunal had to consider whether this invalidated the assessments; in the judge's view, s.73 does not require such precise formality. "*What is required is a notification to the taxpayer of what HMRC consider the position to be and why they take that view.*" The assessments in this case satisfied that requirement.

The appellant further argued that the input tax on the supplier's invoices was deductible because they had been raised at a time when the supplier was registered in the UK. The Tribunal agreed that HMRC's subsequent retrospective deregistration of the supplier could not invalidate an input tax claim, if the supplier had made supplies at the time. However, the effect of s.8 was that the supplier was deemed not to have made any supplies. The invoices themselves could not create an entitlement to deduction where no supply had taken place.

The appeal was dismissed.

First-Tier Tribunal (TC03689): *Muster Inns Ltd*

4.2.4 Hotel supplies

A couple ran a hotel on the Isle of Wight. They accounted for output tax on all their supplies of accommodation. In late 2010 HMRC sent them an EC Sales List; from this they concluded that they should not have charged VAT on supplies to travel agents based elsewhere in the EU, and made an adjustment to their VAT return for the quarter to October 2011 to recover output tax previously charged on such supplies.

Surprisingly, HMRC officers corresponding with and visiting the trader appeared to have been confused (and to have given conflicting advice) about the liability to account for VAT on such supplies and to submit Sales Lists where VATable UK supplies were made to foreign VAT-registered businesses. Nevertheless, when they realised what had happened, they raised an assessment to recover the VAT on the proper basis.

The Tribunal recognised that this confusion was unfortunate, and also noted that the law was complex and had been subject to changes over recent years. However, that was not a reason to ignore its clear application: VAT had been properly due on the supplies, and Sales Lists were not required. The appeal was dismissed.

First-Tier Tribunal (TC03615): *Mr & Mrs Baldwin t/a Ventnor Towers Hotel*

This decision was later set aside and replaced by a new decision which took into account further representations made by the appellants after the hearing in a letter. This had been misfiled and was not brought to the attention of the judge before the first decision was issued.

The letter made the point that HMRC had effectively "started the claim situation" by sending the Sales List and by making confusing statements. If HMRC officers "all over the country" could not understand the law, it was unreasonable to expect the trader to do so. The judge observed that this could not help the appellants: the law was the law, and the Tribunal had to apply it. Misleading statements from HMRC might be taken into account when considering a penalty, but not the underlying liability to tax.

In such circumstances, Tribunals sometimes recommend that the appellant should take up a complaint with the Adjudicator, but the judge does not do so on this occasion.

First-Tier Tribunal (TC03755): *Mr & Mrs Baldwin t/a Ventnor Towers Hotel*

4.3 International supplies of goods

4.3.1 Small consignments

The EU VAT Committee has released a guideline which questions how the exemption for importations of small consignments should be applied. Where the goods arrive in an EU country which is not their final destination, and are then transported on to the private customer, the Committee considered ("with a large majority/almost unanimously") that there were two taxable events – the importation (art.30 PVD) and the onward despatch (art.33 PVD) – and only the first could be exempted as a small postal consignment under art.23 of Directive 2009/132/EC.

taxud.c.1(2014)1870542 – 798; http://ec.europa.eu/taxation_customs/index_en.htm

4.3.2 Import rules

An individual purchased a Hewlett Packard Touchpad from a "grey market" distributor in the UK. When it malfunctioned, to get it repaired under warranty she had to send it to HP in the US via a family member living there. HP decided not to repair it but to replace it, and the replacement was mailed from the US to the individual in the UK. HMRC imposed import VAT (although not customs duty, because it appears to have been below a threshold).

The individual appealed, arguing that she had paid VAT twice on the same goods. The Tribunal ruled that they were not the same goods: a replacement is a distinct item, and is subject to VAT separately.

First-Tier Tribunal (TC03543): *Lynette Shaw*

4.3.3 Temporary importation

An individual sent some works of art from the USA to be exhibited for sale at a London gallery. Import VAT was paid on their entry. Just over a year later, the unsold items were returned to her. Two months after that, she applied to HMRC for a refund of the VAT on the basis that the goods had been a "temporary importation". The goods qualified for a zero rate of import duty and an effective rate of VAT of 5%.

The Tribunal considered that HMRC had the power to grant a retrospective amendment to the customs entry, allowing the goods to be classified within the simplified temporary import procedure. However, a claim for that treatment had to be made within a year of the original entry. Outside that time limit, HMRC did not have any authority to grant the individual's request. Her appeal against their refusal to do so was dismissed.

The judge noted that the treatment of artworks imported for exhibition with a view to sale has been clarified with effect from 30 June 2013. HMRC have now stated that such goods can be entered as temporary imports. However, this was too late for the appellant, whose goods were in the UK during 2011/12.

First-Tier Tribunal (TC03674): *Shafaq Ahmad*

4.3.4 Fraudulent declarations

An American company operated a website which offered goods for sale to Italians. These goods were sourced in the USA, collected in Miami and sent by air freight to Heathrow, where they were declared to UK Customs. The documentation accompanying the goods stated that they were low-value computer parts, but when the packages were opened, they were found to contain designer clothes, cameras and other items (the total was 530 packages weighing 934 kilos) of a much greater value. They were all seized by the Border Agency.

In such circumstances, the owner of the goods has a month to apply for restoration of the goods. One of the Italian purchasers appealed to the FTT against a refusal by the Border Agency to restore them, claiming that he had acted in good faith in paying an amount that was represented to him as covering all costs including import taxes. He offered to pay the correct duty if only he could have his goods.

The Tribunal had some sympathy, in particular in relation to the short time given for appealing against seizure. It might be that the Italian purchasers would not know that their goods had been confiscated in transit until the time limit had expired. It was also not clear why goods intended for Italy had arrived in the EU at Heathrow rather than anywhere else. However, on the facts, the appeal had to fail: the only basis on which it could succeed would be a finding that the decisions to seize, and to refuse restoration, were made unreasonably, and this could not be sustained.

The supplier company has disappeared.

First-Tier Tribunal (TC03624): *Amadeo Maria Gagliardio*

4.3.5 SIVA

HMRC refused to authorise a company for Simplified Import VAT Accounting. HMRC normally require a three-year trading history before authorising SIVA; the company had not been trading for that long, and did not support its application with any information about its financial standing. On appeal, its managing director argued that the 3-year policy was discriminatory and unnecessary, and that HMRC should have used their discretion.

The Tribunal considered that its jurisdiction was supervisory. The decision did not appear to have been made without considering the circumstances, and in the absence of financial information was reasonably made. However, it appeared that a fresh application with up-to-date information might now be favourably treated.

First-Tier Tribunal (TC03475): *Excip Ltd*

4.3.6 Seizure of luggage

An individual was stopped in the green channel on arrival at Birmingham Airport. She was found to be carrying two sets of four gold bangles and a gold pendant which were confiscated, along with three cartons of cigarettes. She claimed restoration of the jewellery.

The Tribunal reviewed the circumstances and decided that the decision to seize, and the further decision on review to refuse restoration, were within

the range of reasonable decisions that could have been made. It was clear that the individual had entered the green channel with goods on which no duty had been paid, and they were worth considerably more than the £390 limit. Explanations that she had given in support of her request for restoration had turned out to be untrue. A list of "exceptional circumstances" offered to the Tribunal could not change the reasonableness of the officer's decisions.

First-Tier Tribunal (TC03734): *Nazia Saleem*

4.3.7 NOVA

HMRC have issued an Information Sheet providing updated (June 2014) guidance on the online Notification of Vehicle Arrivals system. Changes include the bulk notification spreadsheet facility, which is available from 30 June 2014 for businesses importing large numbers of vehicles.

VAT Information Sheet 6/2013

4.4 European rules

4.4.1 OECD guidelines

The governments of 86 countries, meeting at the OECD Global Forum on VAT, have agreed on new guidelines on applying VAT to transactions across borders. The guidelines aim to set standards to make sure that VAT is not suffered by businesses, in order to maintain fiscal neutrality, and to ensure that B2B services are taxed in the country of the recipient rather than the supplier.

The forum also discussed the use of reduced rates or exemptions for social purposes. It concluded that this is a more expensive way of providing support to the poor than making targeted cash transfers.

www.oecd.org/ctp/consumption/statement-of-outcomes-on-vat-gst-guidelines.pdf

4.4.2 Definitive VAT regime?

The EU has been moving towards a "definitive VAT regime" since the implementation of the 6th Directive, with the last major step forward being the introduction of the Single Market in 1993. The Commission's VAT Expert Group has now published new broad common principles for establishing this regime for transactions in goods by 2019. The Commission is now considering five alternative taxation models, and has invited businesses and other groups to take part in a survey to consider the impact of the possible changes.

The following comments are of interest:

1. The transitional VAT system is a barrier to trade because:

- *it is more difficult to trade within the EU than to export goods to or import goods from non-EU countries;*
- *it specifically hinders small and medium-sized enterprises to expand across borders.*

2. The transitional VAT system is creating high costs and significant administrative burdens to doing business:

- *by the cash flow impact on business where traders have to wait for VAT refunds to be made;*
- *as the cost of compliance has become disproportionate;*
- *because the use of technology to lower costs of compliance to the maximum extent is missing, as the efficient use of technology requires a clear, certain, simple and uniformly applied EU VAT system;*
- *as the cost of collection is increasing for tax administrations (see Green Paper Consultation and White Paper action items of the Commission).*

3. The transitional VAT system generates high and disproportionate risks for business, the unpaid tax collectors, due to:

- *non-legitimate traders committing fraud. Fraud-prevention measures taken increase the complexity of the current VAT system for legitimate traders, create legal uncertainty when doing business in the EU and shift risks to legitimate traders;*
- *"inflating" the number of VAT disputes and litigation in the Member States and at the Court of Justice of the EU owing to non-harmonisation, resulting in complexity and the legal uncertainty.*

The principles on which a new system should be founded are:

1) legal certainty and simplicity. Clear and uniform rules should be easy to comply with for business, the unpaid tax collectors, and easy to apply for tax administrations;

2) neutrality and proportionality;

3) efficiency, thereby safeguarding VAT revenues, easing collection and reducing the administrative burden for businesses. Simplicity should allow efficiencies to be achieved through the effective use of technology;

4) effective enforcement and collection by the Member States in close cooperation with each other, including dispute resolution mechanisms.

ec.europa.eu/taxation_customs/taxation/vat/key_documents/expert_group/index_en.htm

4.4.3 Taxing the digital economy

The EU expert group on taxing the digital economy has presented its report to the Commission. Among the main conclusions of the report are:

- The digital economy does not require a separate tax regime. Current rules may need to be adapted to respond to the digitisation of our economy.
- Digitisation greatly facilitates cross border business. Removing barriers to the Single Market, including tax barriers, and creating a more favourable business environment through neutral, simplified and coordinated tax rules is therefore more important than ever.
- The upcoming move to a destination-based VAT system for digital services is commended, along with the simplification that the mini-One Stop Shop will bring for businesses (see IP/13/1004). The report recommends that this could be further expanded to all goods and services (in business-to-consumer transactions) in the future.
- To ensure neutrality and provide a level playing field for EU business, the Group recommends the removal of the VAT exemption for small consignments from non-EU countries. This would be supported by a One Stop Shop and a fast track customs procedure.
- In the area of corporate taxation, the G20/OECD Base Erosion and Profit Shifting (BEPS) project will be fundamental to tackling tax avoidance and aggressive tax planning globally. The report strongly recommends that Member States take a common position to ensure a favourable outcome for the entire EU.
- Priority areas for the EU within the BEPS project, according to the report, are countering harmful tax competition (i.e. countries should not facilitate nor encourage the use of mismatch arrangements), revising transfer pricing rules and reviewing the concepts for defining and applying taxable presence (permanent establishment for direct tax, fixed establishment for VAT).
- The Common Consolidated Corporate Tax Base (CCCTB - see IP/11/319) provides an opportunity for the EU to expand on new international standards (such as transfer pricing profit split methods) and achieve additional simplification within the EU.
- More radical reforms of the tax system could also be looked at in the longer term, including a destination-based corporation tax.

IP/14/604; ec.europa.eu/taxation_customs/resources/documents/taxation/gen_info/good_governance_matters/digital/report_digital_economy.pdf

4.4.4 Self-supplies

The Netherlands court referred a question about the treatment of a building which a local authority had had constructed on its own land and taken first occupation of, where it was to be used 94% for its purposes as a public authority, 5% for taxable business activities and 1% for exempt business activities without the right of deduction.

The authority wanted to treat the first occupation as a taxable self-supply, which would entitle it to deduct the input tax incurred on the construction project. The resulting self-supply charge would be recoverable according to the rules for local authorities and partial exemption.

Advocate-General Sharpston has given an opinion that the authority is not allowed to use the *Lennartz* approach – treating the self-supply as 100% for taxable purposes and then accounting for output tax on self-supplies after that. However, the self-supply rules require the first occupation to be required as a taxable output, with the input tax being recoverable only to the extent that the building is used for taxable business transactions.

CJEU (A-G) (Case C-92/13): *Gemeente's-Hertogenbosch v Staatssecretaris van Financiën*

4.4.5 Corrections

A Hungarian case was referred to the CJEU for guidance on the scope and effect of art.90 PVD where the national law did not provide for the possibility of reducing the taxable amount in the case of cancellation, refusal or non-payment, or reduction of consideration after the taxable event.

The appellant had sold some goods to a customer which did not pay. It was agreed between the parties that as a result the goods remained the property of the seller, but before they could be repossessed, they were seized (presumably by other creditors). The seller then issued a credit note cancelling the transaction, and applied for a refund of the VAT. The authorities refused this application, arguing that the transaction had not been cancelled – the goods had been supplied and had not been returned. There was no right to bad debt relief in Hungarian law.

The PVD allows Member States to derogate from the requirement to repay VAT in cases of total or partial non-payment, but not in cases of refusal or cancellation. The CJEU commented that this was because the circumstances were different: where there was non-payment, there had been a supply, and it was for the national courts to decide whether the debt had definitively become irrecoverable. Where a supply was cancelled or refused, the supply had not taken place.

The CJEU ruled that a Member State can exclude bad debt relief, but only if the rest of art.90(1) is properly implemented. It is for the national court to determine whether the derogation has been correctly carried through. Where the national law imposes formal requirements for a bad debt claim, these should not go beyond what is reasonably necessary to make sure that the consideration has definitely not been received.

CJEU (Case 337/13): *Almos Agrarkulkereskedelmi Kft v Nemzeti Ado-es Vamhivatal Kozep-magyarorszagi Regionalis Ado Foigazgatosaga*

4.4.6 Intragroup invoicing

An American company had a branch in Sweden. The American company bought in services relating to the worldwide IT processes of the insurance group to which it belonged, and charged an appropriate share of the cost to the Swedish branch, which would supply the services to members of its corporate group (which also appears to have been VAT group registered)

in Sweden. The Swedish authorities assessed a reverse charge on the transaction between the head office and the branch.

The Advocate-General first considered that it is not lawful to allow a branch to join a VAT group independently of the entity of which it is a part: only legally independent persons should be entitled to join a VAT group. It would be for the national court to determine the consequences of that illegality. The A-G provided four possible ways of dealing with this:

(i) disapply the decision of the tax authorities;

(ii) interpret the facts in conformity with EU law by considering that it is the US company and not the branch that is a member of the Swedish VAT group;

(iii) decide that neither the US company nor the branch is a member of the group; or

(iv) justify the taxation of the transactions between the US company and its EU branch by the objective to fight tax evasion.

The A-G also considered that the Swedish branch should be treated as receiving a supply of its share of the underlying purchases of services by its head office. Instead of being charged on a transaction between head office and branch (which was ruled out by the *FCE Bank* decision), it should be taxed on the entity's purchase of services which were for its use.

CJEU (A-G) (Case C-7/13): *Skandia America Corporation*

4.4.7 Denial of input tax

Questions have been referred by the Bulgarian court about the legality of a provision which denies input tax deduction to a trader who cannot prove the origin of the goods that have been purchased and sold on to a third party. The question suggests that there is "no proof that the previous supplier possessed goods of the same kind", but also refers to there being no "suspicion of involvement in tax fraud having been expressed and/or objective evidence provided by the tax authorities" – as usual, it appears that the authorities are relying on a blanket disallowance, rather than attempting to follow the principles of the *Kittel* case.

CJEU (Reference) (Case C-123/14): *Itales*

4.4.8 Input tax apportionment

Questions have been referred by the German court on the method of apportionment of input tax where costs are incurred by holding companies in procuring capital for subsidiaries; and also whether the grouping provisions should properly be limited only to companies, or could be extended to partnerships.

CJEU (Reference) (Case C-108/14): *Beteiligungsgesellschaft Larentia + Minerva mbH & Co. KG v Finanzamt Nordenham*

4.4.9 Postal exemption

The Commission has applied for a declaration that Sweden is in breach of the PVD by not exempting the universal service obligation postage supplies (e.g. stamps) of its national carrier.

CJEU (Application) (Case C-114/14): *Commission v Sweden*

4.4.10 Reverse charge

Questions have been referred by the Bulgarian court in relation to a situation in which a trader purchasing services wrongly applied the reverse charge, believing that the supplier had no fixed establishment in the country, when in fact it did. The question is whether the purchaser is entitled to a refund. There are further questions about the proper way to correct errors.

CJEU (Reference) (Case C-111/14): *'GST — Sarviz AG Germania' v Direktor na direktsia 'Obzhalvane i danachno-osiguritelna praktika' Plovdiv pri Tsentralno upravlenie na NAP*

4.4.11 Valuation of land

Questions have been referred by the Dutch court in relation to the valuation of land for a self-supply. It appears to relate to the inclusion or exclusion of rent payable for the duration or remainder of a lease.

CJEU (Reference) (Case C-128/14): *Staatssecretaris van Financiën v Het Oudeland Beheer BV*

4.4.12 Return of property

The Slovenian court has asked for guidance on the application of art.90 PVD to a situation in which the lessee of immovable property has failed to fulfil all its obligations and the lessor appropriates the property back for sale. It appears that the underlying contract was in effect a finance lease, and the court is concerned to know whether the lessor should be liable for output tax twice – both on the sale of the goods to a third party, and on the amount treated as recovered from the sale in relation to the unfulfilled obligations under the lease.

The UK has specific provisions to exclude one or other of these transactions from the scope of VAT where goods subject to a finance lease are repossessed and then sold.

CJEU (Reference) (Case C-209/14): *NLB Leasing d.o.o./République de Slovénie – Ministrstvo za finance*

4.4.13 Problem for freight forwarders

The Danish court has referred a question which appears to relate to a problem that has featured in the UK Tribunals several times: where a freight forwarder acts as importer of record and is therefore liable for VAT on the importation of goods, but does not own the goods, it appears that no one can deduct that import VAT. The Danish court has asked for confirmation that the Member State is entitled to deny a deduction to the freight forwarder who has paid it to the authorities.

CJEU (Reference) (Case C-187/14): *Skatteministeriet / DSV Road A/S*

4.4.14 Public body?

The Portuguese court has referred questions about the status of a limited company owned by a public authority and carrying out functions delegated to it by the public authority. The court wants guidance on whether it is permissible to regard consideration received for services as outside the scope because the company is not a taxable person under art.13(1) PVD.

CJEU (Reference) (Case C-174/14): *Saudaçor — Sociedade Gestora de Recursos e Equipamentos de Saúde dos Açores S.A. v Fazenda Pública*

4.5 Eighth Directive reclaims

4.5.1 Serbian VAT refunds

HMRC has announced that the Serbian Tax Administration will refund VAT incurred by UK businesses since 1 January 2013, provided that legitimate claims for the calendar year 2013 were received by 30 June 2014. The Information Sheet contains links to the Serbian language claim form and a translation. Claims have to be submitted with copies of all relevant invoices.

VAT Information Sheet 6/2014

5. INPUTS

5.1 Economic activity

5.1.1 Holding companies

A UK company appealed against an assessment to claw back £81,000 of input tax recovered in its VAT returns from 10/07 to 01/09. The FTT's decision of principle would also apply in other periods, but these were not considered directly.

HMRC had concluded that the company was not carrying on any economic activity and was therefore not entitled to be registered. It was a UK registered company, listed on the Alternative Investment Market (AIM). Its operating subsidiaries carry on gold mining activities in Australia.

When the company applied for registration in 2007, it stated that its activities were "mining". Following correspondence with HMRC it was accepted that this was a mistake: it was the company's own activity that was relevant, not that of the group. HMRC must have been satisfied by the responses given concerning management services being supplied to the Australian subsidiaries, because they registered the company under the classification "management consultancy".

The judge was satisfied that the directors of the holding company spent material amounts of time in managing the subsidiaries' activities. In principle, therefore, it was possible that the holding company was "active" and making taxable supplies of management services. However, at the time that the "supplies" were made, no price or payment terms had been agreed. Although the facts of *Tolsma* were somewhat different, the judge agreed with HMRC that the principle was of assistance: any payment would have been voluntary, and would therefore not have been consideration for a supply. The agreement of payment terms only finally took place after the last of the disputed periods, and that could not change the correct treatment, which should be based only on the conditions subsisting at the time the claims to input tax were made.

A separate argument about whether the assessments were in time was also considered. The appellant claimed that HMRC had had sufficient information to raise assessments following a meeting more than a year before they were raised in August 2010. According to the company, no new information had been obtained by an officer who visited the company in August 2009; in particular, the officer had discovered for the first time that the holding company was not itself operating a gold mine, but that information was already in HMRC's possession. The time limit depended on what "the Commissioners" knew, not a particular individual officer.

The Tribunal disagreed. Although the officer might have found out about the activities of the company by reading the correspondence rather than the initial registration application, his discovery at the meeting led him to ask further questions about the arrangements between the holding company and the subsidiaries. It was this further information that led to the assessments – he found out, which no one at HMRC previously knew, that there were no formal arrangements in place to enforce payment for

the management services. The assessments were therefore not raised outside the statutory time limits.

First-Tier Tribunal (TC03698): *Norseman Gold plc*

A similar dispute arose in relation to a company which was incorporated to hold shares in African mining subsidiaries. The company had registered for VAT in 2005 but was deregistered in 2010 with an assessment of £25,400 of input tax overclaimed; it applied to be reregistered in 2011, describing its activities as "acting as a holding company for mineral exploration subsidiaries in Africa and providing services and finances to such companies". It appealed to the FTT against the assessment and against HMRC's refusal of its reregistration application.

The holding company had made loans to the subsidiaries on which 4% interest was accruing, but no interest had yet been paid. The appellant's representative argued that there was economic activity in the holding company's involvement in the management of the subsidiaries, and this was done with a view to profit, even though the group had not yet made such a profit. There was a realistic prospect that the debts would be paid in due course.

HMRC argued that the company was merely a funding vehicle in the UK (also listed on AIM) which sought to recover its VAT on costs by claiming to be carrying on an economic activity. Case law showed that there were three types of holding company funding: a holding company acting in its capacity as a shareholder which is not an economic activity; a holding company making loans to subsidiaries, which is also not an economic activity; a holding company making loans to subsidiaries with a view to maximising the return on funds on a commercial basis, this is an economic activity. HMRC said that this company's lending fell into the second of these types.

The Tribunal balanced the arguments under a number of different headings. It decided that charging a flat 4% interest rate without a definite term or any sure date on which the interest would be paid was not commercial, and was therefore more like equity funding than economic lending. Some management services which were charged to one of the subsidiaries could constitute economic activity; however, it was clear that the fees were set at a level which the holding company thought the subsidiary could afford, and payment was deferred indefinitely by adding the charges to inter-company debt. This meant that, under the *Finland* and *Tolsma* case principles, it was not consideration, and the appeal failed.

First-Tier Tribunal (TC03705): *African Consolidated Resources plc*

5.2 Who receives the supply?

Nothing to report.

5.3 Partial exemption

5.3.1 Museum costs

A charitable museum was in dispute with HMRC over £2,600 of input tax which it had originally attributed to exempt supplies, but now claimed was "residual" and half recoverable. HMRC refused the claim and the trustees appealed.

At the same time, the trustees raised another matter which had not yet occurred at the time of the original claim. The museum had engaged design consultants in relation to an exhibition and a major refurbishment of the premises, recreating Roald Dahl's "writing hut" in its museum in London. It claimed that the VAT on their fees would be residual; HMRC ruled that it would be exclusively attributable to making exempt supplies of admissions. Both parties agreed that the fees would be residual if there was a direct and immediate link to any of the museum's taxable supplies. The subject of the appeal was only the £2,600 relating to "general exhibition expenses" from previous years, but the principles established would then apply to further input tax of £100,000 incurred after that claim had been refused.

The Tribunal examined a number of precedents on attribution, from *Midland Bank* to *BLP Group*, *Mayflower Theatre Trust* and *Southern Primary Housing*. The judge also listed the taxable products sold in order to look for something to which the inputs could be linked. The company's arguments for general books, for corporate room hire and postcards showing pictures of the displays were rejected – the links were too tenuous.

The Tribunal was persuaded that a particular book sold in the museum shop contained photographs of items in a display and an explanation of those items provided that link. The book was an integral part of the exhibition that the consultants had designed; the book was used in the museum as part of the display and was sold in the shop as a taxable supply. The input tax on the fees was therefore residual.

The Tribunal did not accept that there was sufficient evidence about the attribution of the £2,600 to find that it was residual, and stated that it had no jurisdiction to give any ruling on future supplies that were proposed and had not yet been received. However, the museum won its appeal in respect of the major item of expenditure that had already been incurred.

First-Tier Tribunal (TC03445): *Roald Dahl Museum and Story Centre*

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 costs

Following the issue of R&C Brief 06/2014 to discuss the recovery of VAT on pension fund management costs after *PPG Holdings BV*, they have issued another Brief to update their view after *ATP Pension Services*. They have decided that further review of the VAT treatment of pension scheme administration and fund management services to take account of both the *PPG* and *ATP* decisions. Further guidance will be issued in the autumn, on how both judgments are to be implemented, and in the meantime businesses can follow the guidance outlined in R&C Brief 06/2014.

Revenue & Customs Brief 22/2014

5.7 Bad debt relief

5.7.1 Time bar for bad debt claims

BT made a claim for bad debt relief on 30 March 2009. The claim covered the period from 1 January 1978 to 31 March 1989, when – according to subsequent judicial decisions – the UK law did not comply with EU law on bad debt relief. In particular, relief should be given where the payment was not received, instead of requiring the claimant to demonstrate that the customer was insolvent (a condition of the UK law at the time). The amount claimed was some £92m plus interest. HMRC ruled that the claim was time-barred by s.39(5) FA 1997, and that the taxpayer's directly enforceable EU legal rights had not, in this case, been contravened by the introduction of that time-bar.

The Upper Tribunal held in 2012 that the introduction of the cap for bad debt relief in 1997 had been flawed, so the old law continued until properly amended. The caps in s.80 VATA 1994 and s.121 FA 2008 had no application, because the claim was effectively made under s.22 VATA 1983. The claims were not time-barred when made in 2009.

HMRC appealed to the Court of Appeal, arguing that the taxpayer had not had any directly effective EU rights. The insolvency condition had been a reasonable and proportionate measure that did not mean the UK law failed to comply with EU law. If the trader had had directly enforceable EU rights, it should have had some obligation to exercise them within a reasonable time; it could have done so at any earlier stage, and could not plead that the introduction of the cap in 1997 had prevented it from doing so.

The taxpayer cross-appealed, arguing that s.122 FA 2008 should apply to its claim – a "*Fleming* transitional period" should apply to bad debt claims as it did to output tax and input tax claims.

The Court rejected the first two parts of HMRC's argument. The insolvency condition had been wrong, in focusing on the situation of the debtor rather than of the supplier who had not received consideration; the Directive had obviously intended to give relief for small bad debts, which

were generally impractical to pursue to the point of satisfying the UK's original conditions for relief. The trader had directly enforceable rights. There was also nothing in the Directive to imply that there should be a time limit – or that claims had to be brought within "a reasonable time".

However, the Court found for HMRC on the crucial issue of whether the introduction of the cap in 1997 had been lawful. It decided that there was nothing wrong with introducing such a cap with four months' notice. It was counter-intuitive to consider that a trader should be allowed to make a claim 12 years after the introduction of such a cap, when it had done nothing in the previous 19 years to protest that its EU rights were being infringed.

The Court also confirmed that s.122 FA 2008 had no relevance, because the claim was nothing to do with s.80 VATA 1994. The trader's appeal was therefore dismissed.

In the Upper Tribunal, the case was heard with that of *GMAC*, which was referred to the CJEU. It remains to be seen how that case will proceed, and whether the answers of the CJEU will have any further impact on this case.

Court of Appeal: *HMRC v British Telecomunications plc*

5.7.2 More bad debt relief

A company made supplies in October 2005 and between January and June 2006. According to HMRC, no bad debt claim was made within the required period. The company argued that it had made a claim by letter of 1 July 2009; HMRC said they had not received it; they questioned whether a claim had really been made, and also argued that a claim was not made unless it was received. The company asserted that the letters had been posted on the dates that they bore, and claimed that posting the letters was enough to "make" the claim. The amount in dispute was over £4m.

It seems that the company did not consider making any claim until 2009, when its entitlement to input tax credit in respect of certain unpaid purchase invoices had been questioned by HMRC. It issued reminders to several debtors, but these did not produce any payments. The company produced copies of letters on the company's notepaper, dated 1 July 2009, which the director said were sent by special delivery to HMRC (not to the Liverpool office specified on the enclosed form 427, but to local offices in Leicester and Blackburn, one of which had dealt with the company at the time of supply, and the other of which was the current VAT office).

The company claimed to have sent reminders to HMRC at the same addresses on 10 August 2009, and a further reminder on 14 September. The Tribunal did not find this account plausible. If a letter claiming £4m was sent by special delivery, surely the sender would first check whether it had been delivered, before sending a reminder – there was no evidence that this had been done or considered.

The Tribunal took evidence about the way in which incoming post was dealt with at HMRC offices. Although it refused to accept an assertion that post was never mislaid, it decided that it was extremely unlikely that six separate letters would all be mislaid. The fact that HMRC had no

record of receiving any of them was strongly suggestive that they had not been sent, whether by special delivery or ordinary post.

After September 2009 the director's attention was diverted to other problems, including the likely insolvency of the company and associated companies because of VAT disputes with HMRC. Solicitors were instructed to follow up the claim in June 2011, but it was now refused for being out of time.

Further evidence included notes of meetings with the company's proposed and appointed administrators in July and September 2010 at which the bad debt claim was discussed. However, there was no clear evidence that the claim had been made or that the documentation relating to it was provided to the administrator.

A computer expert carried out a forensic examination of a floppy disk which contained copies of the bad debt claim letters. He reported that they appeared to have been created on the dates that they purported to have been created on; it would be extremely difficult, and would require specialist computer knowledge, to forge the underlying computer information that would make this appear to be the case. However, it would be possible.

The Tribunal commented that there were several unlikely outcomes:

- the letters could have been produced on the computer at a later date, but that was unlikely – it was more likely that they were produced on the dates they bore;
- it was also unlikely that none of the six had been posted, but it was also very unlikely that all six could have been mislaid.

Although it was hard to explain what had happened, the Tribunal decided that the company had not satisfied the balance of probabilities to show that it had actually sent the letters. The Tribunal therefore did not have to consider whether posting or receipt established the claim for the purposes of the time limit – if it had not been posted, it had definitely not been made.

The appeal was dismissed.

First-Tier Tribunal (TC03546): *Infinity Holdings Ltd (in administration)*

A law firm invoiced property developer customers in respect of "contingent receivables" in 2002 and 2005, payable only if the developers realised certain amounts from projects on which legal advice had been given. At the time, the firm was operating the cash basis, so it did not account for any output tax. However, it deregistered for VAT in 2006, and correctly accounted for VAT on its closing return. The contingencies never materialised, so the debtors never paid; the firm made a bad debt claim in 2013 after writing the amounts off in its accounts, and this was refused for being out of time.

The Tribunal described this as an unfortunate case. It concluded that the claim technically failed because the window for bad debt relief had not in fact "opened", not that it was shut – because the contingency had not occurred, the consideration had never become due and payable, and reg.165A could not be satisfied. The judge offered a number of alternative ways of interpreting the legislation to try to come to what he

clearly regarded as the fairer result, but he could only conclude that the law did not operate "coherently". He noted that HMRC's representative agreed, but he could only apply the law as it was written.

The Tribunal noted that cash accounting does not apply to invoices which are not payable for a period in excess of 6 months from their date of issue. They concluded (and HMRC agreed) that this refers to a certain period, not a contingency, so it was correct for the firm to apply the cash basis to the original invoices.

Note that the firm had written off the debt in its books in order to validate a bad debt claim, but still appeared to hold out hope of receiving the money – so it did not intend to issue a credit note. The cancellation of the supply – or a reduction in the consideration agreed to be payable if the contingency should ever come to pass – by credit note might lead to a better result.

First-Tier Tribunal (TC03533): *Hurndalls*

5.8 Other input tax problems

5.8.1 Input tax problem

A trader appealed against an assessment to claw back input tax claimed in the period 10/04 amounting to £47,470. A hearing commenced on 1 April 2008, but was adjourned because the appellant's briefcase, containing all his papers, was stolen on the way to the hearing. This included copies of letters and bank statements that had not previously been provided to HMRC, so it was not possible simply to use their bundles of documents instead.

The appeal was struck out in April 2012 for the appellant's non-compliance with directions, but was reinstated in February 2013 and was finally heard in April 2014.

The dispute concerned input tax paid to a supplier of sub-contract labour. The supplier had been deregistered as a missing trader on 8 March 2004. An HMRC officer had discussed this with the trader at a visit in April 2005; it appeared that a large balance had not been paid to the missing supplier at that time, but VAT had been claimed on it. The assessment sought to recover the VAT claimed, and a warning was sent to the trader that if any of these outstanding invoices were paid to the supplier, the VAT should not be included as it would not be deductible. There was evidence to support this version of events, including the officer's notes of the meeting and an aged creditors report dated 6 April 2005.

The appellant could provide little evidence to back up a changed story – that he had in fact paid the invoices at the time out of a casino win of £280,000 – and the Tribunal did not believe it. It confirmed the assessments, holding that they had been raised to best judgement.

First-Tier Tribunal (TC03497): *C A Dobney*

5.8.2 Invoices

A trader was assessed in two amounts totalling £140,000, together with an inaccuracy penalty under Sch.24 FA 2007 for £17,800. He had started a scrap metal business in September 2009: his turnover increased significantly from £6,570 in the period 11/09 and £4,890 in 02/10 to £615,322 for the period 05/10 and then £2,066,171 in 02/11. The trader had taken deliveries of scrap from a "man called Dave" whose invoices were invalid. There was very little alternative evidence on which HMRC could reasonably exercise their discretion to allow input tax deduction without a valid invoice, so the Tribunal confirmed that their assessment had been raised to best judgement.

The amount of checking carried out on the supplier amounted to "carelessness", so the penalty was also confirmed.

First-Tier Tribunal (TC03506): *Ian Nadin t/a In 2 Trucking & Waste Recycling*

A company appealed against the refusal of a claim to £127,500 of input tax in period 05/11 in relation to the purchase of large quantities of iPhones and iPads. HMRC ruled that the invoices did not meet the required conditions for deduction, and they declined to exercise their discretion to accept alternative evidence to allow a deduction.

The company employed individuals to buy the products from retailers. They could then be sold more profitably abroad, where demand exceeded supply. It argued that it was impractical in the circumstances for it to obtain "proper" VAT invoices from Apple, when it was making individual purchases from retailers. According to its representatives, there was ample alternative evidence to show that the phones had actually been purchased, paid for and supplied on, and HMRC would not be out of pocket if they allowed the input tax.

The Tribunal examined the way in which the trade was carried on. It noted that one of the directors had been involved in another company, Limitmaze, which was the subject of a MTIC appeal. Although that case has been appealed to the Upper Tribunal and is therefore unresolved, the director would at least have been acutely aware of HMRC's requirements for detailed records to be kept of transactions in mobile phones. However, no such records were kept. In view of the various areas of doubt about the transactions, it could not be said that HMRC's decision was unreasonable; that was the extent of the Tribunal's jurisdiction, and the appeal had to be dismissed.

The Tribunal also considered the significance of the rules on undisclosed agency in s.47 VATA 1994, in that the "runners" had purchased phones from retailers on behalf of the company. It concluded that, as undisclosed agents, the runners were acting as principals. Therefore the input tax on the retailers' receipts was not proper to the company.

First-Tier Tribunal (TC03702): *Gold Standard Telecom Ltd*

5.8.3 More input evidence

A trader made a voluntary disclosure claiming input tax of £9,160, which was refused, and received an assessment for the following period to disallow input tax of £8,640. The trader appealed both decisions.

The voluntary disclosure related to two invoices charging for refurbishment work at the trader's central London restaurant. The letter with the voluntary disclosure explained that the VAT would have been claimed on the VAT return but the invoices had been delayed in the post. HMRC asked for further details; after repeated requests for this information went unanswered, HMRC rejected the claim.

Separately, an officer visited the trader's accountants and noted an invoice for "general expenses" of £43,204 plus VAT of £8,640 in the following period. Again, further details were requested.

By the time of the hearing, the trader's representative accepted that only £300 of the £8,640 had been validly claimed. The Tribunal reviewed the evidence and agreed with HMRC that the refurbishment invoices lacked credibility; the lack of any proper corroborating evidence meant that both decisions were confirmed in full.

First-Tier Tribunal (TC03618): *Bukhara Restaurants Ltd*

5.8.4 Missing traders

TC02106 started with a long discussion of the history of the trader's delays, mainly through changes of representation, in proceeding to a hearing. The chairman observed that the Tribunal had been "extremely accommodating towards the appellant." At last, in December 2011, the hearing proceeded without the appellant or a representative. Even so, there was plenty of evidence from HMRC's files, and the Tribunal decision runs to 478 paragraphs. The usual conclusion was drawn: the director ought to have known that the transactions were connected to fraud, and the appeals were dismissed.

The company appealed to the Upper Tribunal, where its representative contended that references to "in the same chain of supply" in the recent *Dixons* decision (Case C-494/12) and "upstream or downstream" in *Maks Pen* (Case C-18/13) supported his contention that the *Kittel* principle could only apply to a VAT loss in a single supply chain, not to a VAT loss in a different chain.

The UT gave a very brief decision: in the judge's view, these references by the CJEU related to the specific facts of those cases, and had no bearing on *Kittel* or on the present dispute. Numerous decisions of the Upper Tribunal supported the conclusion drawn by the FTT. The appeal was dismissed.

Upper Tribunal: *Lifeline Europe Ltd v HMRC*

A slightly different MTIC appeal involved a dispute over the validity of the invoices for purchases of mobile phones. HMRC disallowed £712,000 of input tax on the basis that the invoices were invalid and there was insufficient evidence that the phones existed, or if they did, if they matched the descriptions on the paperwork. There was therefore no need to consider whether the appellant knew or ought to have known of any connection with fraud.

There was evidence that the number of phones of this type shipped by Samsung to Europe was insufficient to meet the much larger quantities shown on these invoices. There were numerous other inconsistencies and anomalies in the supposed trade, and the Tribunal was satisfied that, on the balance of probabilities, it had not purchased any goods of any description.

In that context, it is clear that the Tribunal would have found for HMRC on the normal *Kittel*/*Mobilx* argument; unsurprisingly, it was easy for the Tribunal to conclude that HMRC should not have exercised a discretion to allow the input tax on the basis of invalid purchase invoices.

First-Tier Tribunal (TC03528): *GSM Intertrade Ltd*

A company appealed against the disallowance of £176,000 relating to two exports of mobile phones in 09/06. The company claimed that it had been a victim of fraud rather than a participant. The Tribunal examined all the evidence relating to its trading and concluded that this was not credible. The director was not a reliable witness; it was more probable than not that he knew that the company's transactions were being used to facilitate a fraud. The appeal was dismissed.

First-Tier Tribunal (TC03416): *Intekx Ltd*

A company claimed input tax of £1.036m in relation to its return periods for 05/06 and 06/06. HMRC traced the deal chains, involving mobile phones and satnavs, back to "missing traders", and disallowed the inputs. In an unusually short decision (only 136 paragraphs) the Tribunal concluded that the directors actually knew of the connection to fraud; if they did not, there was in any case no other reasonable explanation for the transactions. The Tribunal listed 7 "probative factors" which showed that the trade was wholly uncommercial and appeared to be orchestrated to generate VAT repayments.

First-Tier Tribunal (TC03506): *EMJ Telecommunications Ltd*

A company was denied total repayments of about £11m for the periods 04/06 and 06/06. When the appeal came for hearing, the director failed to attend to give evidence, giving unspecified and uncertified "ill health" as a reason; the company's other main witness, the company secretary, no longer worked for it. A solicitor appeared for the company, but he was later withdrawn from the case and did not provide written submissions as directed at the hearing. The judge noted that he would have expected the director to support a claim for £11m either by appearing himself or offering more justification for not doing so. After considering the evidence, the Tribunal dismissed the appeal and awarded costs to HMRC, concluding that the director had never intended to appear and had therefore put HMRC and the Tribunal to unnecessary expense.

First-Tier Tribunal (TC03672): *@tomic Ltd*

In a case described as "relatively simple", the Tribunal confirmed a decision to deny £2.7m of input tax in relation to 57 deals in mobile phones between March and July 2006. The usual decision was reached: the appellant's director "must have known" of the connection to fraud, and if he did not, he ought to have done.

An unusual feature of the decision is a specific ruling on the cost of photocopying the 95 lever-arch files of evidence, done by HMRC but

presumably to be shared between them and the appellant. The judge reckoned that 6p per page was reasonable, to cover the paper, the printing and the binders themselves.

First-Tier Tribunal (TC03732): *E-Tel (UK) Ltd*

5.8.5 Combined authorities

The Value Added Tax (Refund of Tax) Order 2014 has added a number of "combined authorities" to the list of bodies which are eligible to claim refunds of VAT under s.33 VATA 1994.

SI 2014/1112

5.8.6 Advisory fuel rates

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

The rates from 1 June 2014 (1 March 2014 in brackets) are:

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

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

Although the rates change quarterly, the actual adjustments are generally very small – in this case, for the first time, there were no adjustments at all from the figures for the previous quarter.

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

6. ADMINISTRATION AND PENALTIES

6.1 Group registration

Nothing to report.

6.2 Other registration rules

6.2.1 Compulsory registration

A takeaway proprietor deregistered for VAT in October 2007 while planning to sell his business. Although the sale fell through, he did not re-register because his accountants told him he was trading below the threshold. HMRC questioned the deregistration in 2010 because the income tax returns showed that the trade had continued; the accountants supplied sales figures, but HMRC investigated and concluded that these were understated.

The evidence suggested that the turnover had fallen below the threshold so that the trader was no longer liable to be registered after January 2010, and HMRC applied the "liable, no longer liable" procedure to reduce the assessment to cover only the period for which it appeared that output tax ought to have been due. However, that produced an assessment of £26,000, plus a penalty under s.67 VATA 1994 for late registration, charged at 15% and mitigated by 25%.

The trader's representative tried a number of criticisms of the calculations used by the HMRC officer, but the Tribunal noted that her methodology was, if anything, "generous". The decision was confirmed, including the penalty.

First-Tier Tribunal (TC03455): *Turgat Karandal*

6.2.2 Exception

A stuntman's historical turnover exceeded the threshold in the year to November 2010. He failed to notice that the limit had been exceeded; curiously, no set of income tax accounts (prepared to 30 April) showed turnover above the limit. However, in 2013 it was noted that the turnover had exceeded the threshold, and HMRC were asked to accept that exception applied.

The Tribunal agreed with HMRC that there would have been no basis at the relevant time to conclude that turnover for the following year would be below the deregistration threshold. Although the limit had been exceeded because of one particularly profitable engagement, the man was trading around the level of the threshold throughout the following year. He was over the limit in May 2012, December 2012 and the following two months.

The Tribunal noted that it was likely that the VAT-registered film companies would agree to pay over the VAT when invoiced, enabling the individual to recover input tax that had previously been irrecoverable. He and his accountant would end up with significant trouble, and HMRC

would end up with less money. However, the Tribunal could only agree with HMRC's decision, based on the information that was available at the time. It was not proper to apply hindsight, but the picture of the business was informed by the performance of the following year.

First-Tier Tribunal (TC03534): *Reginald Wayment*

6.3 Payments and returns

6.3.1 Online filing

HMRC have published a summary of responses to the consultation on alternatives to electronic filing of VAT returns, together with draft regulations for a new system that would meet the criticisms levelled at the rules by Judge Mosedale in the *LH Bishop Electrical Co Ltd* case.

The requirements were held to contravene human rights law in that they failed to make any adjustment in respect of a trader's age, disability, computer illiteracy (linked to age), remoteness of location, or genuinely held religious beliefs. Telephone filing, which HMRC relied on as a way around the unjustifiably strict law, was an unlawful concession that had not been adequately publicised, and its existence could not rectify the basic fault with the law.

The proposals involve amendments to the VAT regulations making it clear that telephone filing is an alternative where a business satisfies HMRC that it meets certain criteria. This will be extended in exceptional circumstances to allow paper filing, where the business can show that neither electronic nor telephone filing is reasonably practicable. This will become an appealable decision under s.83 VATA 1994.

More detailed guidance will also be made available, setting out the processes for filing online as currently required, for telephone filing and for filing on paper along with the criteria to be considered by HMRC for allowing businesses to file online by telephone or by paper. HMRC will also make changes to improve the accessibility of the telephone filing service for those who wish to use it and who meet the criteria.

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

6.3.2 FRS categorisation

A company's VAT registration showed that it was an "engineering and design consultancy". It applied to join the FRS, and applied the rate for "any other activity not listed elsewhere". The resulting liability was (during the period in dispute) 9% of gross turnover. HMRC recategorised it as "architect, civil and structural engineer or surveyor" with a rate of 12.5%, and issued an assessment for back tax together with a penalty. This was initially charged at 35% (the "deliberate" rate) but was reduced on review to 15% (careless but not deliberate).

The categorisation had been the subject of discussions between the trader and HMRC when the FRS application was submitted and also at a

meeting three years later. HMRC had suggested "IT consultancy" as well as the category that was the basis of the assessment.

The Tribunal noted that its jurisdiction was limited to considering whether HMRC's decision had been "reasonable". Even with this limited scope, it found for the appellant. The category "architect etc." suggested involvement with land and buildings, which was not the scope of this business. His use of computer animation in plant and machinery design work did not make him an IT consultant. The Tribunal was satisfied that the category chosen by the trader was apt to the work it did.

The appeal was allowed, but the decision does not clearly state that HMRC's decision was unreasonable. It appears rather to substitute the Tribunal's view for HMRC's. It remains to be seen whether HMRC will appeal on that ground.

First-Tier Tribunal (TC03638): *Idess Ltd*

6.3.3 Article

In an article in *Taxation*, Neil Warren points out that a trader leaving the Flat Rate Scheme gets an "extra" return period within the scheme because of the way the rules are written. The trader has to consider the turnover limits on the "anniversary date", which is normally the first day of a return period, and if those limits are exceeded, must leave the scheme at the beginning of the next period – so the quarter in which the anniversary date falls is still validly within the FRS.

A trader on annual accounting, by contrast, is required to leave the scheme two months after the relevant anniversary date – even though that will generally fall within a return period, which will then have to be accounted for partly within the FRS and partly using the normal rules of VAT.

Taxation, 15 May 2014

6.3.4 Updated notices

HMRC have updated their Notice *Filling in your VAT return*, replacing the October 2011 version. The Notice identifies "significant changes" as including:

- completion of the return when using a special VAT accounting scheme;
- using the online VAT return;
- paying electronically and qualifying for extra time;
- using an accountant or agent to send your return online;
- using commercially produced software packages to allow both single and bulk submissions;
- the cleared funds rule for cheque payments by post.

Notice 700/12

HMRC have twice (April 2014 and June 2014) updated their Notice *Payments on account*, replacing the April 2012 version. The only changes identified are to the telephone number for enquiries and the contact addresses.

Notice 700/60

HMRC have updated their Notice *Annual Accounting*, replacing the November 2013 version. The only change identified is a change in the telephone number for enquiries about bank giro books.

Notice 732

HMRC have updated their Notice *Flat rate scheme for small businesses*, replacing the May 2013 version. The only change identified is a change to the e-mail address for applying to join the scheme.

Notice 733

6.4 Repayment claims

6.4.1 Compound interest

Littlewoods were entitled to recovery of output tax wrongly charged on sales to agents from 1973 to October 2004. Where the agent was the final consumer of the goods, and did not sell them on at a mark-up, the discount allowed to the agent should have reduced the VATable consideration on Littlewoods' sale; instead it had been treated as consideration for a supply of services by the agent (i.e. the transaction had been grossed up by the amount of the discount). HMRC paid interest in accordance with s.78 VATA 1994, calculated at the prescribed statutory rates and on a "simple" rather than "compound" basis. Littlewoods appealed, arguing that this was unfair and incompatible with EU law. They should have been compensated for the loss of use of the money, which required compounding and market rates. The High Court referred the following questions to the CJEU:

1. Where a taxable person has overpaid VAT which was collected by the Member State contrary to the requirements of EU VAT legislation, does the remedy provided by a Member State accord with EU law if that remedy provides only for (a) reimbursement of the principal sums overpaid, and (b) simple interest on those sums in accordance with national legislation, such as section 78 of the VATA 1994?

2. If not, does EU law require that the remedy provided by a Member State should provide for (a) reimbursement of the principal sums overpaid, and (b) payment of compound interest as the measure of the use value of the sums overpaid in the hands of the Member State and/or the loss of the use value of the money in the hands of the taxpayer?

3. If the answer to both questions 1 and 2 is in the negative, what must the remedy that EU law requires the Member State to provide include, in addition to reimbursement of the principal sums overpaid, in respect of the use value of the overpayment and/or interest?

4. If the answer to question 1 is in the negative, does the EU law principle of effectiveness require a Member State to disapply national law restrictions (such as sections 78 and 80 of the VATA 1994) on any domestic claims or remedies that would otherwise be available to the taxable person to vindicate the EU law right established in the Court of Justice"s answer to the first 3 questions, or is it sufficient that the national court disapplies such restrictions only in respect of one of these domestic claims or remedies?

What other principles should guide the national court in giving effect to this EU law right so as to accord with the EU law principle of effectiveness?

The Advocate-General (Trstenjak) gave an opinion that s.78 does not contravene EU law. She reviewed the concept of "procedural autonomy" granted to member states (which suggests that this sort of rule is within the discretion of the state), and also the recent line of case law which suggests that taxpayers are entitled to interest to compensate them where tax was collected in breach of EU law (in particular joined cases C-397/98 and C-410/98 *Metallgesellschaft and Others, aka Sempra Metals*). She interpreted s.78 as the UK's fulfilment of its duty to introduce rules for granting interest as compensation; the question is then whether it breaches the principle of effectiveness in that the compensation it offers is inadequate. The Advocate-General considered that the fact that the interest awarded (£268.2m) exceeded the principal sum (£204.8m) meant that it was not a derisory award which deprived the interest claim of substance.

She also considered whether the principle of equivalence might be infringed. This might be the case if other types of claim were more favourably treated in the UK; however, it is not necessary to extend the most favourable treatment to all actions brought in a certain field of law. The first three questions were all answered together by the opinion, which was that:

"*under European Union law a taxable person who has overpaid VAT which was collected by the Member State contrary to the requirements of EU VAT legislation has a right to reimbursement of the VAT collected in breach of EU law and a right to payment of interest on the principal sum to be reimbursed. The question whether the interest on the principal sum to be reimbursed is to be paid on the basis of a system of „simple interest" or a system of „compound interest" concerns the detailed rules governing the interest claim stemming from European Union law, which are to be determined by the Member States in accordance with the principles of effectiveness and equivalence.*"

The opinion went on to consider the fourth question, which it did not dismiss as irrelevant on the basis of the answer to the first three. The overall conclusion was:

"*If the referring court should conclude that the detailed rules governing payment of interest on VAT collected in breach of EU law at issue in the main proceedings are less favourable than the detailed rules governing similar domestic interest claims and that there is therefore a breach of the principle of equivalence, it is obliged to interpret and apply the national rules in such a way that interest is paid on the VAT collected in breach of*

EU law in accordance with the more favourable rules which apply to similar domestic claims."

The full Court's decision (Case C-591/10), handed down in 2012, is one of those which passes responsibility to the national court. It is much briefer than the opinion, giving only a single combined answer as follows:

European Union law must be interpreted as requiring that a taxable person who has overpaid value added tax which was collected by the Member State contrary to the requirements of European Union legislation on value added tax has a right to reimbursement of the tax collected in breach of European Union law and to the payment of interest on the amount of the latter. It is for national law to determine, in compliance with the principles of effectiveness and equivalence, whether the principal sum must bear 'simple interest', 'compound interest' or another type of interest.

This seemed to validate s.78 – the most obvious conclusion is that the CJEU did not hold that s.78 is plainly incompatible with EU law. The detail of the judgment did impose conditions, however: the domestic law can only be valid as long as it is applied in accordance with the principles of effectiveness (member states do not make it excessively difficult or effectively impossible to enjoy legal rights) and equivalence (domestic claims are not treated more favourably than foreign claims). As the UK courts had ruled out the claims on the basis of generally applicable UK legal principles, it seemed that HMRC had won, unless the courts could be persuaded that simple interest was so derisory that it was not "effective" in giving traders their rights.

High Court

The case was referred by Vos J, who has since been promoted to the Court of Appeal, so it returned to be heard by Henderson J in the High Court. Not surprisingly, given that the decision awarded £1.2bn to the appellants, it is long and detailed: 450 paragraphs of close reasoning. The overall conclusions were as follows:

(a) it is not open to HMRC to reopen the underlying tax issues, because it would be an abuse of process to permit them to do so;

(b) EU law entitles the claimants to receive an adequate indemnity for the loss occasioned to them by the overpayments of VAT;

(c) as a matter of EU law, such an indemnity requires the payment to the claimants of an amount of interest which is broadly commensurate with the loss of use value of the overpaid tax, running from the dates of payment of the tax until the dates when the loss of use value is fully restored to them;

(d) sections 78 and 80 of VATA 1994 cannot be construed conformably with EU law, and must therefore be disapplied in such a way as to permit the claimants to pursue both their *Woolwich* claims and their mistake-based *DMG* claims;

(e) as a matter of English law, the correct approach to quantification of the claims is to ascertain the objective use value of the overpaid tax, which is properly reflected in an award of compound interest;

(f) since the claimants are content to receive the use value of the overpaid tax to the Government, which is admittedly less than the loss of use value to themselves, the award of compound interest should be computed in accordance with the unchallenged rates and methodology advanced by the claimants' expert, Professor Kay;

(g) the actual benefit derived by the Government from the overpayments is irrelevant to the objective use value of the money, and even if actual benefit were the correct measure of restitution under English law, it would be precluded by EU law if the actual benefit fell short of the objective use value of the money;

(h) if, however, actual benefit were the correct measure of the restitution to be made by the Government, I would quantify it as equivalent to an award of simple interest only, following the general approach of the Government's expert, Dr Richardson; and

(i) in quantifying the claims, no account should in any event be taken of the additional corporation tax which would have been paid by the claimants if the overpayments of VAT had never been made.

Of these, the conclusions of most widespread application are these:

- first, that HMRC sought to argue that "if we had realised we would not be protected by the cap, we would not have given in on the technical liability issue". They wanted to argue again that the underlying tax should not have been repaid, which would obviously negate the claim for interest. The judge considered that this would amount to an abuse of process – the litigation about the principal amount was settled years ago, and HMRC had to take all the consequences of conceding that case.
- second, that simple interest was not, in the circumstances, an adequate remedy, in spite of the implications of the CJEU judgment that it might be. HMRC (see below) emphasise that the circumstances of the *Littlewoods* claim are exceptional, and they do not apply to current claims – the overpayments arose over 30 years during which interest rates were high, so compounding made a very significant difference. Over three or four years at a time of low interest rates, HMRC will argue that simple interest is not so much less, and s.78 is therefore an adequate remedy.

High Court: *Littlewoods Retail Ltd and others v HMRC*

Not surprisingly, HMRC have applied for and been granted leave to appeal this decision. They state the view that the decision was based on exceptional circumstances that are peculiar to the case, and they will apply for a stay of any other compound interest claims pending the outcome of the litigation.

HMRC's view is that there is no Community law right or domestic law right to compound interest and that s.78 VATA 1994 provides an exhaustive statutory scheme by which only simple interest is payable. In their view, this was supported by the judgment of the CJEU.

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6.4.2 Who claims in a group?

MG Rover Group submitted a *Fleming* claim on 31 March 2009 for £56m. The subject matter was fleet discounts given between 1973 and 4 December 1996 – an *Elida Gibbs* claim. HMRC refused the claim on the grounds that, at the time the overpayments were made, MG Rover had been a member of a VAT group; the overpayments had been made by, and therefore would have to be reclaimed by, the representative member of that group.

The Tribunal considered preliminary issues without finding any facts or hearing any evidence of facts. The point was to determine who was eligible to make a claim for a repayment of VAT in a situation in which there had been changes of the make-up of a group. Two other companies claimed the same VAT. Judge Mosedale noted that the parties all appeared to assume that the VAT could and would only be paid back once; this was not necessarily the case, as it might be repayable to one claimant under UK law, and to another under directly effective EU rights. In theory, both could have an enforceable claim.

The judge analysed the make-up and ownership of what had once been British Leyland and was subsequently owned variously by Austin Rover, British Aerospace, BMW and MG Rover. HMRC's view was that a claim had to be made by the group's "representative member for the time being"; that is, all the VAT overpaid by the group in the past would have to be claimed by whatever company was the representative member of the group now, rather than being claimable by different companies in different proportions based on their past history of having the status of representative member, or based on their share of the group's total VAT payments as members of the group. The judge used the expression "RWS" or "real world supplier" to describe the company that made the original supplies giving rise to the overpayments.

The judge rejected HMRC's view. She understood that HMRC might regard it as simpler, because the same VAT number indicated "the same taxpayer", but "there is little else to recommend it". There is hardly any mention of VAT numbers in the law, and no legislative basis for the proposition that a VAT group is the same group based on a continuing number, irrespective of changes in the companies that it comprises.

After a lengthy analysis of the anomalies that would arise in respect of primary liabilities, assessments, repayments of overpaid VAT, repayment of under-claimed input tax, and reclaiming of VAT on bad debts, the judge concluded that Parliament cannot have intended such a state of affairs to subsist. "*The purpose of VAT grouping is not served by deeming the erstwhile representative member to have made the supplies after the RWS is no longer grouped with it. It seems to me that anomalous results are avoided, while the purpose of s 43 is still given effect, if when the RWS leaves the VAT group it takes with it accrued VAT overpayments or underpayments (although its ex-group members will retain joint and several liability for accrued underpayments). If it joins a new VAT group, then while a member of that group its rights and obligations are enforceable by or against the representative member of that new group.*"

The Tribunal concluded the preliminary matter of principle in favour of the deeming provisions of s.43 lasting only while companies are grouped

together. Once they have ceased to be grouped, any claims for over- or under-paid VAT are proper to the RWS, not to the representative member. That meant that MG Rover were entitled to the claim for the period in the 1990s in which it was RWS; it also was entitled to overpayments from an earlier period, because it had acquired the business of the former RWS under an assignment which (in the view of the judge) transferred all assets to it, including unforeseen rights to overpaid tax.

The decision is intricate and detailed, and includes a number of references to the possibility that questions might need to be submitted to the CJEU. However, the judge was satisfied that the answer was clear enough under UK law, so MG Rover did not need to attempt to enforce EU legal rights.

There seems little doubt that this case will run for some time; there is also a High Court action stayed behind the Tribunal litigation, in which the parties will further dispute who is entitled to the money.

First-Tier Tribunal (TC03461): *MG Rover Group Ltd*

The same point arose in another case. Two companies had been sold by the Standard Chartered group to Lloyds Bank in September 2000. *Fleming* claims were made by both parties. The Tribunal heard appeals by the two claimants in succession, and each was allowed to make representations in the other hearing; a single decision was given in respect of both.

After analysing the various claims, and the HMRC decisions in respect of them, the Tribunal commented:

"*22. From this description of the claims of Standard Chartered and Lloyds it can be seen that there is considerable overlap in the claims made by each. Essentially, HMRC have determined that, in relation to Chartered Trust, the person entitled to claim in respect of overpayments for the period during which the Chartered Trust VAT group was in existence (1973 to 1990) is Chartered Trust, and not Standard Chartered, even though Chartered Trust, and the members of the Chartered Trust VAT group, became members of the Standard Chartered VAT group in 1990. Accordingly, HMRC have accepted claims L1 and L2, and have rejected claims SC2 and SC3.*

23. But for overpayments in relation to Chartered Trust for the period when that company was a member of the Standard Chartered VAT group (1990 to 1996), HMRC have decided that it is Standard Chartered, as representative member of that group, that is entitled to claim, and not Chartered Trust, even though Chartered Trust left the Standard Chartered VAT group and joined the Lloyds group in September 2000. Thus, in this respect, HMRC have accepted claims SC4 and SC5, and have rejected claims L3 and L4.

24. In relation to ACL, HMRC have determined that any s 80 VATA claim for the period 1973 to 1996 when ACL was separately registered rests with ACL, and not with Standard Chartered, even though ACL subsequently became part of the Standard Chartered VAT group. Claim SC1 has accordingly been rejected."

In effect, Lloyds argued the "RWS" line taken by Judge Mosedale in *MG Rover*; HMRC were consistent with their approach in that case; and Standard Chartered argued that any rights attributable to Chartered Trust

were absorbed by Standard Chartered when Chartered Trust joined its group, but then stayed with Standard Chartered when Chartered Trust left its group.

The Tribunal analysed a similar set of precedents to those examined by Judge Mosedale, and came to a different conclusion:

"*116. In our view, the right to repayment of VAT overpaid in the period when a company was a member of that group is that of the single taxable person, represented and embodied by the representative member. That right does not leave the group with the departing member. It is only if reimbursement to the representative member (or, alternatively, to the person who has borne the tax by virtue of the joint and several liability under s 43(1)) is impossible or excessively difficult would there be any question of the company that has left the group being entitled to be reimbursed.*"

Accordingly, this Tribunal would award the repayment of VAT overpaid during the currency of a VAT group registration to the company that had been the representative member during that period. That was what HMRC had done, and therefore both appeals were dismissed. Judge Mosedale would have found for Lloyds and against Standard Chartered, because Chartered Trust was the RWS for the periods during which overpayments arose while it was a member of Standard Chartered's VAT group.

The Tribunal noted that its decision did not accord with what appeared to be the view of the Commission on the matter, but they did not consider it necessary to make a reference to the CJEU.

First-Tier Tribunal (TC03450): *Standard Chartered plc*

6.4.3 Non-*Fleming* claim

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

In (TC03141), the Tribunal considered the time limits and its jurisdiction as a preliminary issue.

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

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

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

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

The remaining issue was HMRC's argument that, as a matter of EU law, a directly-effective right under the Sixth VAT Directive had to be exercised within a reasonable time after the relevant price reduction leading to an overpayment. As a similar argument had been rejected by the Upper Tribunal in *GMAC UK v HMRC; British Telecommunications plc v HMRC* and was the subject of an appeal to the Court of Appeal, that issue was stood over to be considered after the CA had given its judgment.

Although BT lost in the CA, the FTT judge concluded that the CA agreed with the UT on this point: there is no principle of EU law that requires a claim based on adjustment of consideration to be brought within a particular time-frame.

As this was the only remaining issue, and the CA judgment was binding on the FTT, the judge allowed the taxpayer's appeal.

First-Tier Tribunal (TC03578): *Iveco Ltd*

6.4.4 Offset of claims

A charitable theatre trust supplied tickets which were exempt under the cultural services exemption. It had accounted for output tax on these tickets before a change in the understanding of the law following the *London Zoo* decision of the European Court. In 2007 it made a *Fleming* claim for output tax overpaid between 1990 and 1996.

HMRC argued that the company had reclaimed input tax on theatre renovations in 2000 and 2001. If the supplies had been correctly classified as exempt, this input tax would not have been repaid; the overpaid output tax should be set against the overclaimed input tax. The FTT provided a summary of the effect of the errors as follows:

Item	Period		£m
1	January 1990 to November 1996	Net overpayment – the subject of the appeal	1.1
2	December 1996 to December 1999	Net overpayment – out of time	0.9
3	January 2000 to	Net repayment of input tax – theatre	(5.0)

	November 2001	closed for refurbishment	
4	December 2001 to May 2004	Net overpayment – out of time	1.0
Net			(2.0)

The First-Tier Tribunal accepted HMRC's contention and dismissed the appeal. The taxpayer had argued that s.81(3A) VATA 1994 did not allow HMRC to offset amounts from different periods (in this case a 1990 – 1996 overpayment against an excessive refund from 2000 – 2001); if it did, it was a draconian provision that allowed HMRC to extend time limits for assessment unreasonably. The Tribunal agreed with HMRC's view that the rule was only capable of "defensive" use by HMRC and was reasonable, proportional and as intended by Parliament.

HMRC also argued that the claim was "abusive", but the Tribunal did not agree. It failed on the technical ground rather than on the anti-avoidance ground. Costs were nevertheless awarded on the pre-April 2009 basis to HMRC, who were left to decide whether they would not enforce the award because the Tribunal had decided that the "abuse" argument did not succeed.

The company appealed to the Upper Tribunal, which considered the construction and application of s.81(3A) in detail. It was necessary to balance the general right of taxpayers to make corrections to their declarations, and the general right of the authorities to raise assessments, with the practical need for finality which the CJEU had recognised in judgments which permitted the imposition of time limits. The interpretation of s.81(3A) by HMRC and the FTT in the present case satisfied the objectives of the Directive. There had been a single "mistake" – treating the ticket sales as taxable – and that had led both to the overpayment of the output tax and the overclaim for input tax. Offsetting those two amounts was exactly what was prescribed by s.81(3A). The decision of the FTT was upheld.

The UT summarised its conclusions as follows:

129. The discussion above addresses each of the five issues raised before us: (1) properly construed s. 81 (3A) does not permit HMRC to pick and choose; (2) set-off is limited to the same mistake, not to items linked in any other way; (3) no time limitation is required, although some modification of normal procedural rules may be needed; (4) it is unhelpful to characterise the mistakes by asking the question 'one mistake or two?' but the same mistake was made; and (5) no transitional period was required for the implementation of s. 81 (3A).

130. S. 81 (3A) is to be construed subject to the conditions, (1) that all relevant previous years need to be considered and (2) that in relation to the consideration of years in which the taxpayer is not required to keep records, the onus should be on HMRC to show that any adjustment should be made. However the operation of s. 81 (3A) is not precluded by the principles of legal certainty, equality, equivalence, or the supremacy of Community law.

131. So applied the effect of s. 81 (3A) is not incongruent with Community law. The issues of incongruence raised by HMRC do not arise.

The theatre appealed to the Court of Appeal, arguing that:

i) The Upper Tribunal were wrong on the "pick and choose" point. It was not open to them to interpret s.81(3A) as they did.

ii) On the basis that the Upper Tribunal were wrong, s.81(3A) must be interpreted in some other way so as to avoid a breach of EU law. They should have held that time limits could only be disregarded where the input tax was directly linked to the output tax.

iii) The interpretation of s.81(3A) that the Upper Tribunal adopted contravened the EU principles of effectiveness, equality and legal certainty.

There was no challenge to the UT's conclusion on the question of "one mistake or two", or that no additional transitional period was necessary.

The leading judgment, delivered by Lewison LJ, dismissed the appeal on all counts. The direct effect of the Directive required the taxpayer to be put in the same position that they would have been in had the UK implemented the Directive properly by the time limit. That required the netting off approach adopted by the UT. Anything else would constitute unjust enrichment of the taxpayer. As long as the taxpayer had the right to make the claim or not, and the over and underpayments arose from the same mistake, there was no breach of the Directive.

The principle of effectiveness had no application to the offset of input tax and output tax: it was about the ability to make a claim, which the theatre had been able to do, not about whether that claim ought to succeed. The "equality" principle did not apply because the taxpayer and taxing authority were not in equal positions (as in the Ecotrade case). The principle of legal certainty had been held by the CJEU to justify time limits, but it was not a "trump card" in all situations – it could be overridden by the requirement for effectiveness. The judge concluded that "*In agreement with the Upper Tribunal I do not consider that this interpretation infringes the principle of legal certainty. The key points to my mind are that (a) it is up to the taxpayer whether to make the claim at all (b) it is up to the taxpayer to decide which accounting periods to put into his claim and (c) the outcome of the claim cannot result in the taxpayer having to pay anything more. Thus the taxpayer voluntarily subjects himself to the statutory process. That is quite different from a situation in which HMRC is able to initiate the process. In addition I agree with the Upper Tribunal that the principle of legal certainty is not an overriding one.*"

The only part of the UT's decision with which Lewison LJ took issue was a conclusion that the principles might be different if HMRC wanted to set off an underpayment from a period for which the trader no longer had the records. However, that was not relevant in this case, because the facts were clear. The appeal was unanimously dismissed.

Court of Appeal: *Birmingham Hippodrome Theatre Trust Ltd v HMRC*

6.4.5 *Fleming* clawback

A company made a *Fleming* claim in respect of the sales of demonstrator vehicles up to 1990. This was agreed and paid in 2008 – a total of £665,849, which was approximately one-third VAT and two-thirds

interest. HMRC subsequently decided that some of the sales for which claims were made had not taken place, and issued an assessment to claw back £28,000, which was about equally VAT and interest.

The Tribunal noted that HMRC had had to agree estimation procedures with the motor industry for such claims, because the traders would not have the records going back that far. In this case, there was specific evidence that the company had lost its Ford franchise in 1989 and would not have sold many cars in the period between October 1989 and June 1990. The estimation procedures had been applied to sales of 160 cars in allowing the original claim; the Tribunal was satisfied that, on the balance of probabilities, the company had not sold those cars, and the clawback assessment was therefore justified. The trader's appeal was dismissed.

First-Tier Tribunal (TC03458): *Thomas Motors Ltd*

6.4.6 Direct claim against HMRC

A members' golf club (ET) paid a neighbouring club (GC) for use of its facilities by its members. VAT was charged on these fees. Following the CJEU decision in *Canterbury Hockey Club*, ET asked GC to claim the VAT back from HMRC and return it to ET. ET also claimed directly from HMRC, but this was refused on the grounds that ET was not a person who had overpaid VAT within s.80.

GC made a claim and paid £20,400 to ET, apparently after deducting expenses of making the claim; but ET claimed further that HMRC had reduced the repayment by restricting GC's input tax, and this unfairly deprived ET of some of its proper reimbursement. The total amount of VAT paid by ET to GC and reclaimed was £41,500. ET appealed against HMRC's refusal of its claim.

HMRC applied for the appeal to be struck out on the grounds that ET had no standing under s.80. It could only claim money back from GC, which would then have to claim from HMRC.

The FTT heard the case early in 2013 (TC02602). The judge noted that no evidence had been produced by either side to explain what had been repaid by GC to ET. The chairman agreed with HMRC that the primary route to claim back VAT lay through GC; only if relief was "impossible or excessively difficult" would ET have a direct right against HMRC. However, until the CJEU ruled in the *West Bridport Golf Club* case, it would not be possible to know to what extent GC's repayment claim had been correctly restricted by HMRC.

Accordingly, HMRC's application to strike out the appeal was refused, and the case was stood over pending the outcome of the *West Bridport* case in the CJEU.

HMRC appealed against this decision to the Upper Tribunal, arguing that the FTT had no jurisdiction under s.83 to consider a direct effect claim of this type.

The UT agreed. S.83(t) gave the FTT jurisdiction to consider an appeal about refusal of a claim under s.80, but that could only cover a claim by the person who had directly paid VAT to HMRC. The CJEU judgments in *Reemtsma* and *Danfoss* confirmed that Member States must have a mechanism by which consumers who have overpaid VAT can recover it;

however, the primary route was action against the supplier who had overcharged it. A direct claim against the state was only relevant if recovery by the normal route was impossible or excessively difficult. Even then, there was no requirement in EU law for the mechanism to involve the First-Tier Tribunal. An ordinary action for payment against HMRC would be the correct procedure.

The judge noted that Henderson J's decision that such an action could in principle succeed (*Investment Trust Companies*) has been appealed by HMRC, and a hearing has been set down in the Court of Appeal for October 2014. The appeal apparently does not dispute the general principle that an action may be taken against HMRC in some circumstances, but rather some of the conditions that Henderson J set before such a claim could succeed.

The judge also noted that it was possible for the recipient of a supply to make an appeal to the FTT under s.83(1)(b) on "the VAT chargeable on the supply of any goods and services". However, HMRC's letter refusing the repayment did not contain any decision about the liability of the supply – it simply ruled that any action should be directed to GC, not to HMRC. It therefore was not appealable under s.83(1)(b).

The decision not to strike out the appeal was overturned. A separate attempt to appeal the FTT's decision not to simply allow the substantive appeal was also struck out on the grounds that the UT did not have jurisdiction to hear such an appeal without the leave of the FTT to do so.

Upper Tribunal: *HMRC v Earlsferry Thistle Golf Club*

6.4.7 New claims?

A company made "*Rank* claims" in relation to output tax charged on various gaming supplies on 19 March 2009. The amount claimed was £158,000 and related to the period from 1 November 1980 to 4 December 1996. HMRC refused the claim, and the trader's representatives lodged an appeal to the Tribunal on 16 September 2009.

The representatives then filed another letter on 9 November 2009 purporting to be an "amendment to the claim", covering the same period but adding a further £92,000 in respect of a different category of bingo. HMRC rejected this claim as being made out of time. A further letter dated 12 January 2010 added another "amendment" of £41,000 covering the same supplies as the earlier two claims but over the period from 1 April 1973 to 31 October 1980. Again, HMRC refused the claim.

The FTT relatively briefly came to the conclusion that both the November and January letters were "new claims" and were therefore time-barred. One covered a different category of supply from the original claim, and the second covered a different period. "*On any interpretation, by clearly stating the categories of the supplies and the time period to which it related, [the Original Claim] implicitly excluded any claim in respect of other categories of supplies and other periods of time. To seek to add such supplies and periods of time at a later stage can only sensibly be regarded as making entirely new claims (albeit claims that were, by their subject matter, closely linked to the Original Claim).*"

The appeal was therefore dismissed.

First-Tier Tribunal (TC03735): *Grand Entertainments Company (a firm)*

6.5 Timing issues

Nothing to report.

6.6 Records

6.6.1 Updated Notice

HMRC have updated their Notice *Electronic invoicing*, replacing the June 2007 version. It has been updated to reflect the changes to invoicing regulations which took effect in January 2013. It also contains revised content to reflect the technological advances since the previous version.

Notice 700/63

6.7 Assessments

6.7.1 VAT but no penalty

A trader ran a fast food delivery service. HMRC decided that turnover was understated and raised an assessment for £40,334, together with a s.60 penalty mitigated by 10%. The officer's calculations were based on pizza boxes used; the Tribunal examined the way in which the figures had been calculated, and confirmed that it appeared to have been raised to best judgement.

On the other hand, the penalty assessment was raised because when the first investigating officers arrived, unannounced at 20 past midnight one night, the appellant told his manager to refuse them access to the records. The Tribunal decided that this was not enough to show, on the high level of probability required for a s.60 penalty, that the appellant was dishonest. He might just as well have panicked when he heard the officers were at the premises or he may well have simply wanted to do what he said he wanted to do which was to speak to his accountant first before allowing them to see the records. The penalty was therefore discharged.

First-Tier Tribunal (TC03749): *Hamid Reza Rowshanzamir t/a Yummies Pizzeria*

6.7.2 Compulsory registration

In July 2012, HMRC issued a notice of compulsory registration to a hair salon to take effect from 1 June 2006. This followed from a check of the trader's self-assessment income tax returns and records in 2011, which indicated that the purchases did not correlate with the declared takings. A

"business economics exercise" was extended back to previous years and suggested that turnover had been above the limit since 2006 (it started on 1 July 2005). The total of undeclared output tax, before offsetting input tax, was estimated at £64,267.

The trader argued that her books reflected all her income, and her accountants contended that HMRC's calculations were based on over-optimistic mark-ups and usage figures for shampoo and colours. HMRC reworked the calculations using the accountants' figures and still came to the conclusion that turnover was understated, and registration should have been undertaken in 2006.

The Tribunal reviewed the method of calculation and the logic underlying it, and confirmed that the assessments were made to best judgement. The taxpayer and the accountants had provided no evidence that would displace the conclusion that sales were understated. The appeal against registration was dismissed. The resulting assessment was not part of the appeal, and no penalties were discussed, but presumably both will follow.

First-Tier Tribunal (TC03544): *Dawn Owens t/a Bizar Hair Salon*

6.7.3 Deliberate understatement

A convenience store trader was assessed to understated output tax of £14,103 in respect of its very first return period, the 6 months to November 2011. A penalty of 92.5% of the VAT was added for a deliberate error with concealment.

After considering the trader's explanations and dismissing them as untruthful, the Tribunal confirmed both the assessment and the penalty.

First-Tier Tribunal (TC03551): *Apex Stores Ltd*

Another supermarket owner was assessed to £266,000 covering a 6 year period, together with a penalty under s.60 VATA 1994 mitigated to 80% of the VAT. The Tribunal considered evidence about the operation of the till, which appeared to have a programmable key which was used (according to the taxpayer) for training or (according to HMRC) to record sales that did not then appear in the reports of takings.

The trader's main defence was that the figures contended for by HMRC were so large that the assessment was unreasonable – a 64% suppression rate, leading to turnover for the period of £1.5m. The Tribunal noted that the burden was on the trader to displace the assessment, and he had been reticent in providing evidence. The Tribunal therefore could only find that the assessment was to best judgement, and confirmed it along with the penalty.

First-Tier Tribunal (TC03560): *Kenan Guzel t/a Can Supermarket*

Another appeal concerned a combination of income tax and VAT assessments and penalties on an Indian restaurant totalling about £850,000 to cover the years from 2002 to 2008. The Tribunal found that HMRC were justified in concluding that the director had dishonestly suppressed takings and had raised assessments to best judgement, but had overstated the amounts. The assessments were confirmed in principle but reduced in amount.

The trader argued that there was no evidence of an expensive lifestyle. The Tribunal commented that a lack of any indication about where the money had gone could not invalidate the conclusion that the turnover had been understated.

First-Tier Tribunal (TC03671): *Raj Cuisine (Kells) Ltd*

In another case involving a programmable till and a supermarket alleged by HMRC to have deliberately understated takings, the Tribunal once again confirmed the assessment and the penalty.

First-Tier Tribunal (TC03756): *Serla Ltd*

6.7.4 Taxis

A taxi firm was assessed to output tax of £39,600 covering three years to 11/06. In answer to a questionnaire at the commencement of the enquiry, a director had stated that a "circuit fee" was charged to the drivers. HMRC asked further questions but received no answers, so a best judgement assessment was raised on what was considered to be a further taxable supply made to the drivers in addition to the other supplies already charged by the company.

It appeared to an investigating officer that the VAT returns only covered receipts from account customers, whereas the company also made bookings for cash customers. The questionnaire disclosed that the drivers paid a weekly fee of £85 for full time drivers and £60 for part time drivers. More money was banked than appeared on the VAT returns.

The company argued that the radios and bookings were provided for no consideration, and there was no separate supply. No evidence to support this version was provided to the Tribunal, which therefore held on the balance of probabilities that HMRC's assessment was both justified in principle and correct in amount.

First-Tier Tribunal (TC03610): *London Cars Holdings Ltd*

6.7.5 Deregistration dispute

A trader, probably of Ethiopian origin, sold refreshments and khat from a kiosk near the Edgware Road. He was registered for VAT from 1999 to 2004, but then deregistered when his business was affected by rerouting of some footpaths, which meant fewer pedestrians passed his kiosk. Later HMRC decided that he should have remained registered for VAT throughout, and assessed about £91,000 of undeclared tax.

The Tribunal obviously had considerable sympathy for an immigrant who was trying to make a living in difficult circumstances, and did not want to bankrupt him. The judges were impressed by his apparent honesty and integrity, and decided that his figures for turnover were sufficiently reliable for the purposes of determining the case. However, they still showed that he should not have deregistered when he did; and, if the notice of compulsory registration was valid, the fact that the Tribunal had found that his turnover was later below the deregistration threshold would not help him. He would remain registered for the whole period – no mention is made of the HMRC policy of "liable/not liable", which allows them to assess VAT only for periods in which they believe the trader should have been registered.

The assessment was significantly reduced and HMRC agreed to allow 100% mitigation of the penalties; the Tribunal expressed the hope that HMRC would allow the trader time to meet the much lower liability, as it was still more than he would be able to pay.

First-Tier Tribunal (TC03625): *Girma Mesfin*

6.8 Penalties and appeals

It is interesting to note that many current appeals on default surcharge still include an argument about disproportionality, even though that was effectively ruled out by the Upper Tribunal's decision in *Total Technology*. It may be revived by the current decision in favour of the taxpayer in *Trinity Mirror*, but the level of penalty at which the principle is suggested to apply - £50,000 at 2% – still means that most of those who raise it in their grounds of appeal are doomed to fail.

Several of the other decisions consider the relationship between Total Technology's penalty (£4,260) and its profits (approximately £12,500 per quarter). Given that this high proportion (around 34%) was not held to be excessive, it is unlikely that smaller proportional penalties will be found to be so.

Overall, of the 70 appeals decided in this quarter, only 4 succeeded at all. It seems that HMRC's review teams are sufficiently generous in cancelling defaults before they proceed to appeal, that where HMRC decide to dig their heels in, they are likely to be justified in doing so.

6.8.1 Default surcharge – successful appeals (in whole or part)

A company was between 1 and 3 days late in paying its VAT for a succession of periods from 4/10 to 7/11, incurring surcharges totalling about £7,100 on the 3rd to the 6th defaults. It was then on time for 2 periods, and HMRC accepted a reasonable excuse for 1 day's delay in 4/12; but the company was 3 days late in respect of 7/12, incurring a 15% surcharge of £6,066. A related company also incurred surcharges for several periods.

The first company appealed the surcharges for 4/11, 7/11 and 7/12 on the grounds of proportionality and on the grounds of reasonable excuse. The recollections of the director who gave evidence were not clear or precise about the circumstances of each late payment, but it seemed that there had been misunderstandings about the amounts due and mistakes because the company's limit for Faster Payments had been exceeded and the bank made BACS transfers instead.

The company's book-keeper had personal difficulties in that her husband was dying of a brain tumour. The director had realised that she was not coping with her job and had tried to provide her with assistance, but this had not worked out. The Tribunal decided that reliance on an employee could not be a reasonable excuse in the long term, but in the short term and in the circumstances, it was an excuse sufficient to remove the surcharges for the main company for 7/12 and the smaller company for 2/11.

The director mounted a detailed argument on proportionality, citing precedent case law rather than simply claiming the penalty was unfair. However, the Tribunal was bound by the decision in *Total Technology* to dismiss this ground of appeal.

First-Tier Tribunal (TC03462): *Prested Hall Ltd*

A second surcharge (after *Enersys*) has been held by the FTT to be "disproportionate". This Tribunal (Dr Khan) applied the Upper Tribunal's judgment in *Total Technology* and concluded that a penalty of £70,909 levied at 2% (for being one day late with the balancing payment for its 01/08 VAT quarter) was comparable to the £131,000 at 5% for Enersys Ltd's similar delay. The surcharge liability notice had been issued for a similar 1 day delay in making the balancing payment for the quarter to 06/07. These were the first such failures in Trinity Mirror's registration history, which dated back to 1986. The surcharge was originally higher, but reduced following a voluntary disclosure of an overpayment; and it was initially paid, but appealed following the *Enersys* decision.

The judge disagreed with HMRC's assertion that a finding in favour of the taxpayer would "make the surcharge system itself disproportionate". The judge also rejected an assertion by HMRC that they consider proportionality before imposing surcharges (and therefore make a decision which is in their power and cannot be overturned by the Tribunal); this appeared to be based on the waiver of £400 penalties at the 2% and 5% rates, which the judge considered was more to do with administrative convenience than any consideration of proportionality. There was no evidence that proportionality had been considered in relation to this particular penalty.

First-Tier Tribunal (TC03490): *Trinity Mirror plc*

A company appealed against a surcharge of £16,640 levied at 15% for its period to 03/13. It had defaulted in periods 06/11, 09/11, 12/11, 06/12 and 12/12 before the period under appeal. The appellant was a charity which had grown very considerably in the year, and had taken on new staff and new projects. The 03/13 period coincided with its year end, and the issue of a considerable number of invoices meant that the liability (and therefore the penalty) were much higher than they would normally be. The charity had now restructured its accounting department and engaged a consultant to make sure that future VAT returns were on time.

The Tribunal quoted from *Total Technology* without explicitly rejecting the "unusually high liability therefore disproportionate penalty" argument. However, it did not need to find the penalty disproportionate, because it decided that there was a reasonable excuse. It decided that the particular circumstances of the charity at the time of this return were "beyond its control". Its failure to ask for TTP was because it hoped to meet the deadline; indeed, it had the money available to pay the VAT, but had not managed to calculate it by the due date. The appeal was allowed.

First-Tier Tribunal (TC03594): *The Groundwork South Trust Ltd*

A trader appealed against a 10% surcharge of £13,378. The Appellant had previously defaulted on VAT payments in periods 07/11, 07/12, 10/12, 04/13 and 07/13 prior to the default under appeal (for 10/13), those of 04/13 and 07/13 having subsequently been removed by HMRC.

The taxpayer claimed that an employee had telephoned HMRC before the due date to explain that a large receipt was due, and payment would be made on 13 December. The request for TTP was refused, but the employee said he phoned again on the instructions of the directors and received agreement to pay late and a promise that the surcharge would not be levied. He noted the name of the officer concerned. Payment was made as agreed on 13 December, but HMRC denied that there had been such an agreement. There was an officer of that name, but she could not recall the conversation. She said she would not have been able to agree TTP for such a large amount.

The Tribunal was persuaded that TTP had been agreed, and this constituted a reasonable excuse for the late payment. The appeal was allowed.

First-Tier Tribunal (TC03722): *Princi London Ltd*

6.8.2 Default surcharge – unsuccessful appeals

A trader appealed for "clemency" in a case involving "human error" – two signatories were required to authorise a bank transfer; one was abroad on the due date and realised that HMRC needed to be paid; in spite of phoning the office, it was not possible to arrange for payment that day; he thought that, as the due date was a Saturday, payment on the Monday would suffice. Not surprisingly, this was dismissed. The surcharge was £5,000.

First-Tier Tribunal (TC03446): *Miller Ltd*

A trader was 3 days late and suffered a surcharge at 15% of £4,250, being the 8th default in the surcharge liability period. Surcharges 4 to 7 totalled £13,000; some had been appealed – all had been refused by HMRC, and each refusal had contained a reiteration of the length of time taken by a bank transfer to arrive. The trader claimed to have made a Faster Payments transfer on Friday 6 December, but offered no evidence to support this. HMRC produced evidence to show that the payment arrived on 10 December; a payment made on Friday 6 before 4pm would have arrived on the same day, and made after 4pm would have arrived on Monday 9 December. The Tribunal found that the trader had not satisfied the balance of probabilities that the payment was made at a time when it was reasonable to expect it to arrive on time.

First-Tier Tribunal (TC03447): *Omnific Designs Ltd*

A trader appealed against surcharges for 06/11 of £5,250 and 03/12 of £15,970. It provided considerable amounts of evidence, including evidence under cross-examination from a director, about the cash flow difficulties the company had resulting from the recession, and about attempts to agree TTP with HMRC. The Tribunal expressed sympathy for the company, but found that there was nothing particular about the alleged late payments from customers that contributed to an inability to pay the VAT, and that there was no clear agreement from HMRC for TTP in respect of the periods under appeal. The penalty could not be disproportionate, following *Total Technology*. The appeal was dismissed.

First-Tier Tribunal (TC03457): *O'Brien Contractors Ltd*

A trader registered with effect from 3 December 2010. There was confusion between HMRC and the trader about the correct stagger group, with the result that the trader was continually late filing for successive periods up to 10/11. The trader argued (without appearing in person) that the clerical error was a reasonable excuse; the Tribunal agreed with HMRC that even if it was, the trader was late on the basis of his own understanding of the due dates. In any case, the proper due dates were clearly shown on the online returns, and the trader would have received surcharge liability notices which should have alerted him to something going wrong. The appeal was dismissed.

First-Tier Tribunal (TC03463): *Rocket Leisure Ltd*

A company appealed against 3 surcharges totalling nearly £5,000. The only defences were "trading difficulties" and "unfairness", neither of which could succeed.

First-Tier Tribunal (TC03467): *Eurolet LLP*

A "paper" case concerned a 15% surcharge of £222 for the 8th default by a business. The Tribunal accepted that the trader had genuinely believed that a BACS transfer made on the due date would arrive in time, but did not accept that the bank had told him this, because he produced no evidence to back up that assertion. It did not therefore constitute a reasonable excuse; he had been warned in default surcharge letters that BACS transfers took three days.

First-Tier Tribunal (TC03470): *Peter Montique & Lisa Morton t/a Spar Convenience*

A company appealed against a 15% surcharge of £2,700 for 07/13. It paid its VAT in instalments, most of it 2 days late. The directors claimed that "the due date for payment was unclear" – they said they believed the VAT was due by 12 September, because they had been paying by direct debit in previous periods. Cash flow problems had led them to cancel the DD in order to avoid the possibility that a call would be refused by the bank. However, the change of due date had been explained when a previous surcharge had been cancelled on review, and there was no reasonable excuse.

First-Tier Tribunal (TC03478): *Estates and Law Ltd*

A trader appealed against surcharges for 03/10, 06/10 and 09/10. The business had been sold, the trader did not have the records and he argued that half the surcharge should be collected from his business partner, from whom he was now divorced.

The judge found the appellant to be "an honest and responsible gentleman" who had seen to it that all the outstanding debts to HMRC had been settled. Although there was nothing that could be found to be a reasonable excuse, and each of the partners was jointly and severally liable for the whole of the debt, the judge expressed the wish that HMRC would consider whether to collect some of the debt from his wife.

First-Tier Tribunal (TC03479): *Sandford Promenade Hotel*

A barrister appealed against a 10% surcharge of £360 for 08/13. Once again, the 2% and 5% surcharges had been below £400. The barrister claimed that the move to online returns meant that he no longer received

the reminder of a return form in the post to prompt him to file; pressure of work meant that he had missed the due dates. HMRC pointed out that it is possible to sign up for free e-mail reminders, but the barrister had not done so. His appeal was dismissed.

First-Tier Tribunal (TC03480): *Phillip Neil Petchey*

A company appealed against a 10% surcharge of £1,040 for 08/13. The 2% and 5% surcharges had been below £400. The defence was essentially "insufficiency of funds" and "unfairness", and the appeal was dismissed.

First-Tier Tribunal (TC03496): *Liberty Scaffolding Ltd*

A company appealed against a surcharge of £420 for 7/11. This was levied at 5%, reduced from 10% after a successful appeal against a default for the period 4/13. That had been in relation to a BACS transfer taking 3 days to clear; it appears that on that occasion HMRC decided to be merciful, but this was held against the trader in relation to the following period. The Tribunal accepted that he had had difficulty navigating the HMRC website, but he should have rung to ask for help. His appeal was dismissed.

First-Tier Tribunal (TC03510): *Atlantic Interiors Ltd*

An individual appealed against a 10% surcharge of £844 for 01/08. The appeal was made very late, and HMRC objected to it being heard out of time. It appeared that the trader had asked for a review at the time, and had stated an intention to appeal, but had never actually done so until HMRC sought to enforce the debt several years later.

The trader's original objection to the surcharge had been that he was "entitled to be a day late once every 12 months". Of course, that is exactly what he is not entitled to be – that will keep him within the surcharge regime. No reason for the late payment was ever offered. Although the Tribunal eventually concluded that there was no good reason for the late appeal either, it considered the substantive issues and dismissed the appeal in any case.

First-Tier Tribunal (TC03517): *Addisons Solicitors*

An individual appealed against a 15% surcharge of £1,364 for 05/11. He claimed that he had made the transfer by internet banking in good time, but for some reason the funds had not left his account. When he realised this, he made the payment immediately, but was now late. The excuse was phrased by his advisors as "effectively, therefore, our client has made payment in advance of the due date, it was only the transfer of funds from our account to yourselves that was delayed."

This was not held to be a reasonable excuse, and a separate assertion of disproportionality was rejected.

First-Tier Tribunal (TC03519): *Peter Sargeant t/a Panther Crane Services*

A trader appealed against surcharges for the periods from 7/11 to 4/12 totalling £2,017. The trader had been in the surcharge regime since 4/09; her accountants had notified an underpayment of £6,890 in June 2011, and she had settled this by TTP up to the end of October 2011. She then, of her own volition, started to pay £400 each week to HMRC on account of

her VAT. HMRC allocated this to the older liabilities, with the result that her current liabilities ended up unsettled by the due dates.

The Tribunal found no evidence that there had been any other agreement about the allocation of the weekly payments, with the result that the surcharges had to be confirmed. The only excuse offered amounted to "insufficiency of funds".

First-Tier Tribunal (TC03522): *Nadine Cherry*

A company appealed against surcharges totalling £63,400 for the periods 12/03, 03/04, 09/04, 12/04, 06/06, 03/07, 09/07 and 06/08. The Tribunal agreed to hear the appeal out of time, and HMRC raised no objections. The basis of the appeal was that the company had agreed to defer payment of the VAT for 09/03, and this would have a knock-on effect on subsequent defaults. However, this agreement had been entered into after the due date, and the company had explicitly been advised that it would not affect surcharges.

Further deferrals were made, but they were subject to the same problem: they did not remove liability to surcharges.

The return for 12/05 was recorded as being received by HMRC one day late, even though the payment was made on time. This was critical to the extension of the surcharge liability payment. The return had been dated by the signatory on 31 January; she claimed that the company would have sent it out by first class post the same day. However, there was evidence from other returns and HMRC's records that this was not the company's consistent practice. The Tribunal found, on the balance of probabilities, that the return was submitted late.

This meant that the surcharges for the later periods were due (and at 15%) – if that 12/05 return had been on time, the company would have gone back to square one, and the later surcharges would have been at 0%, 2%, 5% and 10%.

A further discussion of disproportionality was of no assistance to the trader.

First-Tier Tribunal (TC03527): *Crescent of Cambridge Ltd*

A company appealed against a surcharge of £750 for 5/13. This was the fifth default, charged at 15%; the 2% and 5% charges had both been less than £400 and not collected. The company claimed that it had entered into an NHS contract in July 2013 for which the payment was unexpectedly delayed to November; however, the Tribunal was satisfied that this happened after the due date, and should not in any case have been taken into account in relation to paying the VAT for 5/13. If there were difficulties meeting the payment the trader should have applied for TTP, and the appeal was dismissed.

First-Tier Tribunal (TC03535): *Wrekin Landscapes Ltd*

A trader appealed against a surcharge of £189 for 8/13. This was the fourth default, running from 11/11, 2/12 and 11/12; the previous surcharges had been below £400, so this was the first to be collected. The trader claimed to be confused about due dates, but HMRC's records showed that he had discussed these by telephone in relation to an earlier

default; his cash flow difficulties were not such as to constitute a reasonable excuse. The appeal was dismissed.

First-Tier Tribunal (TC03538): *Hassan Lal t/a Park Licensed Groceries*

A company appealed against a surcharge of £560 for 7/13. The trader had a history of six previous defaults. The Tribunal accepted that the trader thought that he would not incur a surcharge because his return was submitted on time; however, this could not constitute a reasonable excuse because he should have been well aware of the requirement also to pay on time. The fact that he did not have the login details for his bank account on the due date was also not sufficient to avoid a surcharge. The appeal was dismissed.

First-Tier Tribunal (TC03539): *Yellow on Black Ltd*

A company appealed against a surcharge of £1,560 for 7/13. The director had realised the company could not meet the whole liability on the due date, which was a Saturday; she rang to explain on the Monday, and she claimed that she had been told no penalty would be levied if the company met an agreed schedule of instalments. HMRC disputed this – they argued that TTP had been applied for only after the due date, and no promise was given to waive the penalty. HMRC had a contemporaneous record of the phone call, making no reference to the penalty, and the trader had no evidence.

Sadly, she seems to have been unaware that the BPSS is open on Saturdays; if she had rung on the due date, she could have avoided the penalty.

First-Tier Tribunal (TC03540): *Hugh Harris Ltd*

A company had a history of defaults, but had managed to submit payments and returns for 10/12, 1/13 and 4/13 on time. Unfortunately, it was one day late submitting the payment for 7/13, and suffered a surcharge of £9,600. The Tribunal had great sympathy for the company's position, given that it had apparently tried very hard to organise the payment so that it would be made on time in spite of the absence on holiday of the office manager who handled such matters; however, they had arranged for a BACS transfer to be made on a Thursday, rather than a Faster Payment on the Friday or a BACS transfer on the Wednesday. As the due date was the Saturday, they were late, and there was nothing which could constitute a reasonable excuse.

The Tribunal commented that they could submit accounts to HMRC and to the Tribunal if they wished to support an argument that, in relation to the company's profits, the penalty was disproportionate in the *Enersys* sense. In the absence of such an argument, the penalty was dismissed.

First-Tier Tribunal (TC03542): *Paragon Precision Engineering Ltd*

A company appealed against a 2% surcharge of £3,650 for 05/13. The payment of £182,500 was received by HMRC 9 days late. The return was filed on time, with the result that HMRC were able to issue a surcharge demand in the correct amount before the liability was paid. The company's appeal appears to have amounted to the fact that it paid the liability before the surcharge demand was received. However, this clearly did not assist it: the consequences of late payment were clearly stated on

the surcharge liability notice and elsewhere, and the appeal was dismissed.

First-Tier Tribunal (TC03564): *Contract Services (Millenium) Ltd*

A company appealed against a penalty of £1,000 for its 3rd default. The trader had made a "genuine mistake" about the due date, but this could not be a reasonable excuse. He argued also that the penalty was disproportionate because the income of the quarter was unusually large, but the Tribunal did not accept that it was disproportionate to the extent required by the Upper Tribunal. The appeal was dismissed.

First-Tier Tribunal (TC03571): *Total House Solutions Ltd*

A trader had signed up for VAT to be paid by direct debit. However, it did not submit the returns for 4/13 and 7/13 until 24 September, so the DDs were not activated. It made payments by BACS on 11 June and 9 September, both late. A surcharge was issued in respect of the second period; when the returns were submitted, the DD collected a second payment for both periods, totalling £117,000, which was then returned after deducting the surcharge of £862.

The company's defence appeared to be based on confusion about the due dates and the amounts due, but no explanation was offered for the late submission of the return. It also felt aggrieved that it was charged a penalty after HMRC had collected the tax twice, but the Tribunal found that the two matters could not be regarded as connected. The appeal was dismissed.

First-Tier Tribunal (TC03573): *JP Glasby Ltd*

A company appealed against four dsurcharges for 12/11, 3/12, 6/12 and 3/13. The total amount was about £4,700. The company had a problem with reconciling its VAT account following a VAT inspection in October 2010; its accounts for the year to December 2011 showed a VAT overpayment of £6,000, and the company tried to persuade HMRC to repay it. The Tribunal agreed that HMRC's administration had not been helpful; however, any complaint about that could only be made to the Adjudicator. It might be that the amounts actually found to be paid late would change when the accounting problems were finally resolved; subject only to that possibly changing the amounts of the surcharges, the appeal was dismissed in principle, because the payments for the periods in question were undoubtedly made late.

First-Tier Tribunal (TC03576): *Igmusic Ltd*

A company was recorded as being in default for 10 periods from 05/09 to 05/13, incurring a total of £1,857 in surcharges. It appealed against all those where a surcharge was levied (5 out of 10 – the first return was reduced to "nil" following a voluntary disclosure; it was not then charged on the 2nd, 3rd or 4th defaults, and was not late paying in one other period).

The trader claimed that his company had been taken off the annual accounting scheme without his knowledge, and he therefore incurred surcharges without realising that quarterly returns were due. However, HMRC's records suggested that he had been telephoned about the removal from the annual accounting scheme and therefore knew that the returns should have been submitted. A separate claim that the trader had been told that the surcharges would be removed if he submitted his

outstanding returns and payments was also not supported by the evidence from HMRC's records.

The appeal was dismissed.

First-Tier Tribunal (TC03582): *Residential Equities Ltd*

A publican appealed against surcharges of £311 and £309 for successive periods, charged at 15%. He had paid earlier surcharges after accepting that he had settled the VAT liability late. In respect of these two periods, he claimed that he had paid on time, or had paid at a time when it was reasonable to expect the money to arrive on time. However, he had misunderstood the length of time that a bank transfer would take, and this could not be a reasonable excuse. This was unfortunate: he had initiated the payments on the 4th of each month, but as they were a Thursday and a Friday, the intervention of the weekend meant that the payments only arrived on the 8th. The appeals were dismissed.

First-Tier Tribunal (TC03587): *Aaron Gubb*

A company had a long history of late payments and returns going back to 09/06. The total of surcharges levied was over £41,000. The director claimed that the company had been in dispute with HMRC over whether its payments were up to date, and adopted a policy of late submission of VAT returns in order to "provoke a reaction". The Tribunal accepted that the directors may have had a genuine belief that they were in the right, but their actions put them in the wrong. There was little evidence available in the form of correspondence or formal minutes to explain the course of the dispute. It was not possible to find that it constituted a reasonable excuse, and the appeal was dismissed.

First-Tier Tribunal (TC03588): *Penrith Building Supplies Ltd*

A trader defaulted in 06/11, 03/12, 09/12, 03/13 and 06/13. The penalty of £1,250 for this last period was appealed on the grounds that the penalty was excessively harsh for a delay of a single day. The director was camping "at 6000 feet" on the due date without access to the internet, and only managed to send an instruction after returning to a valley the following day.

The Tribunal considered that the penalty was, in the context of the earlier defaults, not within a range which would sensibly be regarded as entirely disproportionate. The appeal was dismissed.

First-Tier Tribunal (TC03591): *Trade Finance Solutions & Outsourcing Ltd*

An individual appealed against a 15% surcharge of £800 for 03/13. He was a truck driver whose main customer supplied him with diesel, and which collected the money for that fuel by direct debit. When it advanced the date on which the DD was called for, it meant that funds were not available to pay the VAT for two days.

The Tribunal could not find anything that would constitute a reasonable excuse. The appeal was dismissed.

First-Tier Tribunal (TC03593): *Trevor Starkes*

A firm of accountants and tax consultants appealed against five default surcharges totalling £5,174.95 for its VAT periods ended 11/11, 02/12,

05/12, 08/12, and 11/12. The appeal was based on the illness of the proprietor, debtors taking 9 months to pay, and the bank reducing the overdraft. The Tribunal did not consider the cash flow problems to be within *Steptoe*; the senior partner had been ill since 2008, so a prudent taxpayer would have done something about it; and an argument based on disproportionality was necessarily rejected.

First-Tier Tribunal (TC03595): *Philip Thomas Jones & Partners*

A company appealed against a 15% surcharge of £30,165 for 12/11. The Tribunal concluded that there was no evidence that it had agreed a formal TTP arrangement; it could have done so, and could also have eased its VAT problems by using cash accounting. It appeared to have sufficient bank facilities to pay the VAT due. In these circumstances, it did not have a reasonable excuse.

First-Tier Tribunal (TC03596): *Westoak Construction Ltd*

A company appealed against a 2% penalty of £915 for a six month period to 09/13. The director claimed not to have been aware of an earlier late payment, although he did not say whether he had received the surcharge liability notice that HMRC claimed to have sent on 15 February 2013. The company changed address, and following some confusion about where it was, HMRC agreed to extend the 06/13 period to 09/13. All the VAT was therefore due on 7 November 2013, but it was paid on 19 November.

The Tribunal found no evidence that the trader had taken any of the steps available to a diligent person to avoid a default. Although the long period artificially inflated the liability and therefore the penalty, the trader could have made a payment on account. The company provided no evidence to support a *Steptoe* defence on insufficiency of funds. The appeal had to be dismissed.

First-Tier Tribunal (TC03599): *Peachy Productions (London) Ltd*

A company's grounds of appeal were that the delay had been caused by a change of staff and location, a new process in the SAGE accounting package, and staff holidays. HMRC responded that these were all predictable events that should have led the company to take extra care. The penalty of £970 was not considered disproportionate in relation to a business with a turnover of £3m, and the appeal was dismissed.

First-Tier Tribunal (TC03602): *Prestige Developments (Park Homes) Ltd*

A company appealed against a 10% surcharge, mainly on the basis that it was a small company under serious time pressure. The amount is not stated, but the implication is that the 2% and 5% surcharges were not collected, as the company stated that "if we had known that it was on its last chance then it would not have defaulted again". The Tribunal ruled that it should have known, and dismissed the appeal.

First-Tier Tribunal (TC03603): *Magno Ltd*

A trader appealed against a surcharge of £86. This was one of those where previous defaults had not led to a penalty. The trader did not appear at the hearing; the BACS instruction provided in evidence clearly stated that the VAT was to be paid later than the due date. There was no reasonable excuse.

First-Tier Tribunal (TC03612): *CSDL Ltd t/a SAKS Hair & Beauty*

A trader appealed against six surcharges. Two were withdrawn before or during the hearing; the remaining four totalled £3,172. The Tribunal examined the facts in detail and expressed sympathy for the director; however, the cash flow difficulties were not sufficiently unusual to be a reasonable excuse. The judge noted that the trader was using the flat rate scheme and cash accounting, which meant that the funds should have been available to pay the VAT if it had been given appropriate priority.

The judge also commented: "*For 12/11, 03/12 and 06/12 both the Returns and payments were late. Either eventuality would trigger a surcharge. Whatever cashflow difficulties the Appellant had, that would not excuse the late submission of the Return.*" Although the overall comment may be valid, only late payment would trigger a surcharge.

First-Tier Tribunal (TC03613): *Lynx Comms Ltd*

A company appealed out of time against surcharges for the periods 04/13 and 07/13, both levied at 15%, totalling £2,600. The company had been late first in 04/12, and then in each period since. The basis of the appeal was a late repayment of income tax deducted under the Construction Industry Scheme: the company argued that it would have paid its VAT on time if HMRC had met its own deadline, which the company claimed was 19 May 2013. The VAT due on 7 June and 7 September 2013 was all paid on 9 September, after the CIS refund was received on 28 August.

HMRC argued that the company should have made a written request for set-off, or discussed the VAT problem caused by the outstanding CIS claim, before the due dates. The judge agreed that a reasonable taxpayer would have done this; the second default, in particular, was entirely avoidable, as the funds had arrived. The surcharges were confirmed.

First-Tier Tribunal (TC03631): *C G Steel Structures Ltd*

A trader appealed against a surcharge of £1,859 levied at 10%. He had paid two days late. He also appealed out of time against an earlier surcharge of £2,026 levied at 5%; the VAT had been paid in two instalments, a day and 28 days late.

The Tribunal dismissed an argument based on unfairness, and considered that there was nothing unusual about the reasons for the cash flow shortage claimed by the trader. He could have applied for TTP, but failed to do so. The surcharges were confirmed.

First-Tier Tribunal (TC03632): *Henry Mark Righton*

A trader appealed against a 15% surcharge of £702 on the grounds that he had failed to notice the deadline because of working commitments. The Tribunal expressed some sympathy for the trader's hard work, but could not accept that this was a reasonable excuse at law.

First-Tier Tribunal (TC03649): *Stephen Lee Allen*

A partnership appealed against a 5% surcharge of £730. The trader had had two eye operations – but the return immediately after those operations had been filed on time, together with the payment, so it did not appear to be an excuse; his care of his elderly mother, which was stated to take up considerable time, was not unexpected or unpredictable, and in a partnership the other partner should take responsibility as well; and preparation for a legal dispute fell into the same category. The only remaining argument against the surcharge was its unfairness, which had to be dismissed.

The Tribunal noted that the trader's business (a pub) would always receive the cash from customers at the point of sale, so it ought to have the VAT available to pay HMRC by the due date.

First-Tier Tribunal (TC03650): *Robert Conley and another*

A trader appealed against a 15% surcharge of £1,041. Its main defence – that the directors had been told by an accounts clerk that the VAT had been paid – fell foul of "reliance on another" in s.71 VATA 1994, and could not constitute a reasonable excuse. A claim that the system had now been improved so that future VAT payments would be on time would avoid future surcharges, but not this one.

First-Tier Tribunal (TC03652): *Ical Fire Safety Ltd*

A company appealed against a surcharge of £1,004 levied at 2%. The trader had submitted late returns for 02/12 and 05/12, resulting in a help letter and a SLN. The return for 09/12 was also submitted late, but payment was on time; a surcharge at 2% was issued but then withdrawn, and a SLN was issued which covered the return period in dispute, 06/13.

The director claimed that he had not received any of the liability notices or the help letter. However, he only stated that the letters had not come to his attention, and he produced no evidence about the procedures for opening the post in his company. HMRC's records showed the correct address for the company; the Tribunal concluded that it was more probable than not that the notices had been sent to the company.

What remained were arguments based on reliance on accountants, a mistaken belief about the due date, and unfairness. None of these could succeed.

First-Tier Tribunal (TC03655): *GPF Trading Ltd*

A company appealed against a 15% surcharge of £1,089. It had been in the surcharge regime for two years and six SLNs had been issued. The company had recently been taken over by another business that intended to sort out its financial difficulties; the directors believed that a direct debit had been set up to pay the VAT, and payment was actually made on the day that a DD would have been paid. However, the arguments boiled down to "unfairness", which could not succeed as a defence.

First-Tier Tribunal (TC03661): *Options Mail Order Software Ltd*

A company appealed against a 10% surcharge of £1,058. At a first hearing, the director relied on a letter from his accountants explaining that the default of a major customer owing £25,000 had caused the shortage of funds. The Tribunal gave the director more time to produce evidence to support a "*Steptoe* argument" based on this; however, at a second hearing,

the director did not do so, but rather confusion between himself and HMRC over a request for a change of VAT return periods.

The request for the change of date was submitted after the end of the period for which the default occurred. The Tribunal accepted that the director had been confused, but he should have taken advice from his accountants about the procedure for changing periods, and should have realised that he still had to meet the old deadline until HMRC had confirmed a change. This was not an excuse. As he had himself withdrawn the "shortage of funds" argument at the second hearing, the Tribunal did not consider it further.

First-Tier Tribunal (TC03662): *Norman Perkins Ltd*

A firm of architects appealed against a surcharge of £8,893. It pleaded cash flow difficulties arising from reductions in overdraft facilities and late payment by clients, and a late repayment of corporation tax, as well as confusion arising from the intermittent presence of the office manager who had health problems.

HMRC argued that the firm could have asked for time to pay; as it was on cash accounting, late payment by clients did not affect its ability to pay the VAT due; and the corporation tax refund was offset against other tax liabilities, so it could not be used to pay VAT anyway. The illness of the office manager did not appear to be the cause of the late payment – it was too long beforehand, and the error appeared to be due to a miscalculation rather than her absence. As the firm had not contacted HMRC to discuss its problems, it could not be held to have acted in a reasonable and diligent manner. Its appeal was dismissed.

First-Tier Tribunal (TC03664): *Alan Camp Architects LLP*

A company appealed against a penalty of £1,697 charged at 10%. The director had misunderstood his accountant's advice about the due date – he thought he had 7 days beyond 7 January to pay, rather than having to pay by 7 January. It appeared that he also misunderstood what was to go on the return: he thought it should reflect the position on the date of filing, rather than at the end of the quarter to which it related, so he spent the due date updating the calculations. As he had been a registered trader for some time, this was surprising. The director had some health problems, but there was insufficient evidence that this was the cause of the late payment. The essence of the appeal was that the penalty was unfair, and this could not succeed.

First-Tier Tribunal (TC03667): *End-1 Trans Industries Ltd*

Another company appealed against a 10% surcharge of £377. The company had been in default for four periods out of six, but the fourth default was the first to result in a penalty. The appeal letter stated:

"*I think it is absolutely outrageous that a person who is in no way trying to avoid payments is presented with such a fine when more and more people are avoiding both tax and VAT by dealing in cash. Not to mention the big corporations who seem to get away with murder.*

I am a one person operation, a busy working mum, who tries her best to be organised and efficient. The idea that you can fine me in this way is beyond infuriating."

The judge considered that this amounted to a disproportionality defence, and it could not succeed.

First-Tier Tribunal (TC03668): *K B Editorial Ltd*

An appeal against a £927 penalty had a very similar background: the fourth default (this time in 8 periods) led to the first penalty to be collected, charged at 10%. The payment was one day late; the due date was on a Sunday; the company did not have sufficient funds to pay on the previous Friday, but made payment on Monday by Faster Payments after contacting the bank to make sure it would be met. There was no defence.

First-Tier Tribunal (TC03669): *Bruce & Co Building Contractors (Sussex) Ltd*

A trader appealed against three surcharges on the grounds that the returns were sent by first class post at least 3 days before the due dates. The periods concerned were 03/09 and 12/09, before online filing and payment were mandatory.

Unfortunately for the appellant, the dates shown by the signature on both returns was after the date on which the company said they were posted; the evidence suggested that the returns and payments were sent at the same time, and they were not sent at a time at which it was reasonable to expect that they would arrive before the due date.

The company also claimed not to have received surcharge liability notices. However, these were sent to the same address as the VAT paper returns, and these had been completed and returned. Once again, the Tribunal concluded that the balance of probabilities suggested that the notices had been served.

First-Tier Tribunal (TC03680): *Second 2 None Vehicle Repairs*

A trader appealed against a surcharge of £731 on the grounds that it had not been paid for work done during the period, so it had to "guess the VAT due" – it submitted the return late, and set up a direct debit at that time. The trader had not contacted the National Advice Service or the Debt Management Service, and nothing in the grounds of appeal constituted a reasonable excuse.

First-Tier Tribunal (TC03681): *S Samuddin Ltd*

A company appealed against a surcharge of £1,143 for a period in which it filed its return two weeks late, leading to the late collection of a direct debit by HMRC. The company claimed that it was in discussion with a client at the due date so it was not sure exactly what to put on the return: it delayed submission in order to make a correct filing. This was not a reason to file late. HMRC had confirmed the surcharge on review for the wrong reason (claiming incorrectly that the excuse was based on insufficiency of funds), but that did not affect the fact that the taxpayer had no reasonable excuse.

First-Tier Tribunal (TC03685): *Lateral Advertising Ltd*

A trader paid for the period 08/13 in two instalments, one a day late and the other fourteen days late. It appealed against a surcharge of £1,255 at 5%, later reduced to £502 at 2% after a surcharge for an earlier period was cancelled. The trader tried to argue that its problem was not an "insufficiency of funds" as referred to in s.71 VATA 1994, but a

"shortage of funds". The Tribunal could not see any distinction between the two. The trader had made no contact with HMRC, and an argument based on "unfairness" was rejected.

First-Tier Tribunal (TC03687): *CM & SJ Borders and others t/a Eagle & Child Inn & Central Beach Club*

A trader appealed against a 5% surcharge of £2,675. A director stated that the employee responsible for the VAT return had suffered a miscarriage and was absent from work; he had taken responsibility for her duties himself, keeping her place open for her to return if she wished, but had failed to notice the due date. This might have constituted a reasonable excuse, but he only stated that the connection between her absence and the default was "loose", and he based his main argument on the unfairness and disproportionality of the penalty. This could not succeed.

First-Tier Tribunal (TC03688): *Essex Electrical Wholesalers (Braintree) Ltd*

A trader appealed against 2% and 5% penalties of £435 and £1,320 for successive periods. The trader claimed that he had applied for TTP on both occasions; on the first it was refused, and on the second the trader said he had been told that TTP would be granted, only to have this withdrawn the next day. HMRC had no record of this. The Tribunal commented that anything to do with TTP could not be appealed to the Tribunal – if the trader had any complaint about how he had been treated, it would have to be directed to the Adjudicator. What remained was "insufficiency of funds", which could not be an excuse.

First-Tier Tribunal (TC03747): *JCR Security Ltd*

A trader appealed against a 10% surcharge of £1,917. Its bank had refused a direct debit on the due date; the trader contacted HMRC and was told to pay by cheque. He thought this meant that no default surcharge would be collected, but no promise was given; there was no evidence to show that they had taken reasonable steps to ensure the payment would be made, and they had not contacted HMRC for TTP until after the due date. An argument based on proportionality was dismissed.

First-Tier Tribunal (TC03745): *Barry Turner Ltd*

A company within the payments on account regime was a day late paying £1,672,658 – in fact, 4 hours and 46 minutes late, because a CHAPS instruction given at 18.11 on the due date, after the deadline of 15.30, was processed by the bank at 04.46 the next day. A penalty of £33,453 was levied at 2%, because the company had similarly missed a CHAPS deadline 6 months earlier.

The company argued that this was a disproportionate penalty as judged against the criteria set out by the UT in *Total Technology*, and as applied by the FTT in *Trinity Mirror*. The FTT considered the facts and disagreed: "*a penalty of £33,453 for a company with profits in its financial year ended 2012 in excess of £6 million for late payments of £1.62 million for a second default, of which its senior management were unaware (as they were also unaware of being in a Surcharge Default*

Period at all), albeit less than one day late was (a) suitable, (b) adequate, (c) was not excessive and (d) was at a level that was necessary and no more than strictly necessary."

First-Tier Tribunal (TC03739): *Edgen Murray Europe Ltd*

A company appealed against a 5% surcharge of £1,150. Although it referred in its appeal letter to late payments by customers including local authorities and government bodies, it did not satisfy the Tribunal that this was anything more than the normal hazard of trade. The appeal was dismissed.

First-Tier Tribunal (TC03709): *Safety Solutions (NI) Ltd*

A trader's appeal appeared to be based on misunderstanding of the due dates, shortage of funds and harshness of the penalty. The Tribunal noted that SLNs clearly explain the importance of paying on time, and dismissed the appeal.

First-Tier Tribunal (TC03715): *The White Horse Edwardstone LLP*

A company appealed against a 15% surcharge of £5,600. It was the 6th default in 10 periods. The director responsible for paying the VAT was out of the country at the time; he had asked a fellow director to make sure that sufficient funds were in the bank account to meet the VAT payment on the due date, if necessary transferring funds into it from a personal account. Unfortunately, by mistake she transferred £6,000 out of the account rather than into it, which caused the direct debit to bounce. The first director explained that she was dyslexic and hoped that this might constitute a reasonable excuse.

The Tribunal did not accept that it would be a reasonable excuse, even if medical evidence was provided. In the context of its poor compliance history, the company should have taken more care.

First-Tier Tribunal (TC03721): *L M Communications Ltd*

A company appealed against a 15% surcharge of £9,594. In the previous three quarters it had managed to pay and file on time. The director had set up a BACS transfer in advance, but had failed to appreciate that commencing the transfer on the Thursday when the due date was the Saturday would result in a default. The company's argument was mainly based on disproportionality. The Tribunal concluded that it was not disproportionate, but invited further submissions about the profitability of the company. This information was provided, showing profits for the year to 30 April 2014 at £20,022, and for the quarter to 31 July 2013 (the quarter in which the default happened) of £32,310. Even with these figures, the Tribunal concluded that the penalty was not so disproportionate that it could substitute its own view of what is fair for the penalty provided by Parliament.

First-Tier Tribunal (TC03724): *Paragon Precision Engineering Ltd*

A company appealed against a surcharge of £1,426. It claimed that it had made payment on time, but some problem might have arisen because it was due around a bank holiday weekend. The Tribunal noted that no evidence of any problem had been provided, and so no reasonable excuse could be shown to exist.

First-Tier Tribunal (TC03710): *Globalgraphics Associates Ltd*

A company appealed against a surcharge of £414. It had on previous occasions successfully agreed TTP, but not for this quarter. It seemed that a deliberate decision had been taken not to make a payment that would have taken the company very close to, but not over, its overdraft limit. The Tribunal could find no reason to allow the appeal.

First-Tier Tribunal (TC03730): *Thameside Electrical Ltd*

A company appealed against a 15% surcharge of £911. HMRC's DD request had been refused by the bank because it would have taken the company £35 over its overdraft limit. Although this was unfortunate, it could not be a reasonable excuse.

First-Tier Tribunal (TC03727): *The Leisure Marketing Company Ltd*

A company filed its return online a day late, with the result that HMRC asked for the DD late. The only excuse seemed to be pressure of work and an appeal not to make the company's recovery from the recession more difficult. This could not succeed.

First-Tier Tribunal (TC03728): *Mediaeval Baebes Ltd*

A company appealed against a 10% surcharge of £544. It had been in default for the previous two periods, but the 2% and 5% surcharges had been less than £400 and had not been collected. The director's defence was mainly based on fairness, which could not succeed.

First-Tier Tribunal (TC03752): *Move Up Lofts Ltd*

6.8.3 Civil evasion

A trader imported Khat from Ethopia. HMRC assessed him to import duty and VAT, and also charged a penalty for dishonesty under s.61 VATA 1994, which if proved would entitle them to go back a further three years to assess underdeclared output tax. The Tribunal considered the principles underlying a finding of dishonesty, and also the validity of an estimated "best judgement" assessment. The judge summarised the issues as follows:

(1) Did the appellant understate his sales for VAT purposes in the period assessed or any part of that period?

(2) If so, was he evading VAT dishonestly?

(3) Are the assessments to VAT and a penalty excessive?

(4) Was an appropriate level of mitigation allowed by the respondents in calculating the penalty?

The Tribunal examined the evidence, as presented by the investigating officer and the 78-year old appellant, both of whom were cross-examined. The Tribunal was satisfied that the records were false, and the only explanation for this was dishonesty; this was proven on a balance of probabilities back as far as April 2005. Before that, HMRC had no evidence beyond their presumption of "continuity" – that a state of affairs would subsist consistently over time. The judge did not accept that this was sufficient to discharge their burden of proof in a dishonesty case.

Accordingly, the assessments were discharged in relation to the period before April 2005; the judge also changed the calculations after that date, reducing assessments of some £230,000 to about £37,000. The penalty

assessment should be reduced in the same proportion, but the mitigation allowed of 25% was appropriate.

An appendix to the decision sets out a letter from the investigating officer to the trader's representative in which he explains the arithmetical basis of his best judgement assessment – a useful guide to how an officer will go about this task.

First-Tier Tribunal (TC03444): *Salah Mohamed Hussein t/a Eastern Orbit*

HMRC assessed a kebab seller to a penalty of £39,900 for dishonestly failing to register for VAT from 1 September 2005 and 31 March 2010. The Tribunal examined the history of the business in detail, and went through the trader's answers given at the start of the investigation – a surprise visit to the premises in 2009. He had claimed to the officers that he was VAT-registered but did not have his number to hand; that, along with a number of other factors, confirmed to the judge that he had acted dishonestly. The penalty was confirmed; the mitigation already allowed was considered, if anything, to be generous.

First-Tier Tribunal (TC03500): *Memduh Ermis*

HMRC assessed a penalty of £1,137,603 on a company, and then attributed it to the dishonesty of a director under s.61 VATA 1994. He appealed against the imposition of the penalty on him, claiming that he had not been dishonest. The company had claimed a VAT credit to which HMRC said it was not entitled.

The Tribunal reviewed an unusual tale which included the kidnapping of the appellant, allegedly at the instruction of a creditor, who afterwards informed HMRC that he was involved in a circular set of transactions in irrigation hose that generated excessive VAT repayments. The creditor was later prosecuted for kidnapping, convicted and imprisoned, but acquitted on appeal.

The Tribunal considered the actions taken by the director, and concluded that they were consistent with what might be expected of an honest man trying to resolve what he thought were difficulties with genuine transactions. They were not consistent with the actions of a man who knew that the business was a sham. The way in which he conducted himself under cross-examination also supported the Tribunal's view that he had a genuine sense of grievance of how he had been treated not only by HMRC but also by the other parties to the transactions. On the balance of probabilities, HMRC had not proved him to be dishonest, and the appeal was allowed.

First-Tier Tribunal (TC03659): *John Wood*

A second man was involved in the same business, directing another company that bought hose from the same supplier and sold it to the same customer. The Tribunal also concluded that he had believed the business was genuine, and allowed his appeal against a s.61 assessment of £519,437.

First-Tier Tribunal (TC03660): *David Langhorne*

A company was assessed to a s.60 penalty in relation to a missing trader fraud in which it was alleged to have acted as a knowing contra-trader, claiming over £6m of VAT which HMRC said it was not entitled to. In

March 2010, HMRC assessed a director of the company under s.61. As a preliminary issue in an appeal against that penalty, the director's representative presented a detailed legal argument asserting that the case should be struck out because HMRC had no legal basis for such an assessment. This included such points as:

- the events which were the subject of the case predated the *Kittel* decision in the CJEU – at the time, there was no reason to suppose that the company was not entitled to deduct input tax on genuine supplies to it;
- the loss of VAT was elsewhere in the supply chain, and s.60 should only apply to VAT that is evaded by the particular taxpayer.

The Tribunal had to consider whether HMRC's case "had no prospect of success". The judge considered the various arguments in detail and disagreed with the appellant's representative. Without prejudging the issues or considering the accuracy of HMRC's allegations about the facts, he concluded that the substantive hearing should go ahead, and there was no need to make any reference to the CJEU.

First-Tier Tribunal (TC03616): *Umaad Butt*

6.8.4 Late registration penalty

A trader was more than 18 months late registering for VAT, and HMRC imposed a 15% penalty of £7,204 under s.67 VATA 1994. On review this was mitigated to £3,602, but the trader appealed further to the Tribunal. The Tribunal noted that the trader appeared to be an honest man who had not known about his VAT responsibilities, but when he was informed of them, he took steps straight away to make sure he complied. Ignorance of the law cannot be a defence against the VAT, but the Tribunal decided it could use a wide discretion to set the appropriate level of penalty. Rather than using any particular percentage, it considered that £400 was appropriate for a "first mistake".

First-Tier Tribunal (TC03758): *Jonathan Lee*

6.8.5 Penalty after withdrawn appeal

A company appealed against a MTIC decision to refuse recovery of input tax, and against misdeclaration penalties related to the overclaims. It subsequently withdrew its appeal on the input tax, but tried to pursue the appeal against the penalties (£102,955 and £85,519). The Tribunal agreed with HMRC that this had no reasonable prospect of success and struck out the appeal. Under s.85 VATA 1994, withdrawing an appeal had the effect that the decision was "upheld without variation". No reasonable excuse or other defence had been offered, and the substantive issues relating to the input tax could not now be argued because the matter was closed.

Costs of £2,232 were awarded to HMRC. The company's director applied for an adjournment on the day of the hearing, after requesting adjournments on previous occasions. The present hearing went ahead without him, and HMRC presented a schedule of "wasted costs" for an earlier hearing which they had prepared for before a late application to postpone was accepted.

First-Tier Tribunal (TC03437): *Meridian Defence & Security Ltd*

6.8.6 More penalties

A company failed to respond to requests from HMRC for explanations of several transactions which HMRC considered had been incorrectly accounted for. These included a sale of goods which were never in the UK, and a purchase of wooden flooring which appeared to bear no relation to the declared nature of the business at registration ("postcard wholesale"). The Tribunal report makes it even harder to understand these transactions: first, the company is criticised for including a transaction that should have been outside the scope of VAT – but as it was a sale it would appear to increase the tax; and the Tribunal refers to amounts being "received" into the company's bank account in relation to the purchase of the flooring, which makes no sense. The company was not represented at the hearing.

The Tribunal decided that including the outside the scope transactions could be careless; however, the input tax claim could not. It was either correct, or it was dishonest. As a single penalty had been raised in relation to both matters, the Tribunal decided that it could not stand: it would be necessary for HMRC to cancel it and issue a new one. They would require further evidence if they wished to levy a penalty in respect of the flooring.

First-Tier Tribunal (TC03577): *SWJJ Ltd*

A trader appealed against penalties of £39,500 raised on the "deliberate" scale. He claimed that he had been suffering from depression and overwork, and had not intended to file wrong returns. The Tribunal accepted that the carelessness scale was appropriate, but there was no reasonable excuse. Nor could HMRC's refusal to suspend the penalty be criticised. The penalty was reduced to 24% of the PLR, £22,570.

First-Tier Tribunal (TC03559): *Jaswant Singh Bhatt*

6.8.7 Time limits

The FTT decision in *Scanwell Freight Services Ltd* (TC03246), covered in the last update, identified an anomaly in the rules for appealing decisions. While a time limit of 30 days from the date of the decision applied to appealing or applying for a review, it appeared that a separate right to appeal arose where HMRC refused permission for a review to be carried out "out of time". The FTT commented that this was anomalous but appeared to be what the law said. Although the context was a Post Clearance Demand, the rules could have applied across a range of indirect taxes.

The government has moved quickly to correct the anomaly: a draft of The Revenue and Customs (Amendment of Appeal Provisions for Out of Time Reviews) Order 2014 has been issued, amending the rules so that an appeal against a refusal to grant a review out of time will only consider whether that refusal itself was reasonable – it will no longer enable the appellant to reopen the underlying substantive issue in the Tribunal.

SI 2014/Draft

A company appealed against the imposition of a series of misdeclaration penalties and assessments totalling over £200,000. The assessments covered periods from 03/06 to 03/11, but an appeal was only lodged in

February 2012. At an earlier hearing (TC02675), the Tribunal considered the time limits and issued a number of directions that the company had to comply with. However, in July 2013, the whole of that decision was set aside by the Tribunal on the Appellant's application, on the ground that the Appellant had not received notice of the hearing on that occasion and had not been represented.

The company argued on a further appeal that some of the decisions had not been properly addressed, so that time had not begun to run in respect of appealing against them. It applied for leave to appeal out of time against others.

The Tribunal reconsidered the long and complex history of the disputed assessments, some of which appeared to bear the wrong address, and considered whether they had been properly served or notified. It decided that, on the balance of probabilities, they had; there was no good reason for the delay in making a formal appeal; only one decision, which the 2013 hearing had held could be appealed out of time, should be allowed to proceed to a substantive hearing.

First-Tier Tribunal (TC03675): *Romasave (Property Services) Ltd*

6.8.8 HMRC run out of time

A company (which had a notable success in a different case which went to the Court of Appeal in 2006) lodged an appeal in December 2010 against a November 2010 HMRC decision. In the appeal notice, a director claimed that HMRC had agreed a hardship application. In fact, no such application had been made, although there appeared to be some tacit agreement between HMRC and the company that the tax would not be pursued while negotiations for a settlement continued. The tax was in fact deposited just before the current hearing.

The current hearing reviewed the history of the appeal, which involved repeated applications for deferral of the time limits by HMRC. On 22 July 2013 the Tribunal issued an "unless" direction giving HMRC 14 days to lodge a statement of case. HMRC responded asking for another 30 days, but the Tribunal issued a barring order on 16 August 2013 which effectively disbarred HMRC from taking any further part in the proceedings. HMRC applied for that order to be set aside.

The Tribunal considered rules 2 and 8 of the Tribunals Rules and the precedent cases of *Mitchell v Newsgroup Newspapers Ltd* and *McCarthy & Stone (Developments) Ltd v HMRC*. The principles that should be applied by a Tribunal in deciding whether to extend a time limit are:

(1) what is the purpose of the time limit?

(2) how long was the delay?

(3) is there a good explanation for the delay?

(4) what will be the consequences for the parties of an extension of time? and

(5) what will be the consequences for the parties of a refusal to extend time?

HMRC's representative argued these points, but also raised the question of whether the Tribunal had had jurisdiction to issue an "unless" direction

if the tax had not been deposited and hardship had not been agreed. The Tribunal viewed this as a simple way of avoiding the vexed question of whether to grant HMRC relief – however, treating all hearings as invalid if the VAT had not been paid went beyond a sensible interpretation of the law. It was for the Tribunal to decide what to do if it transpired that the VAT had not been paid; non-payment would not render all proceedings and decisions void.

The Tribunal considered a number of other arguments put forward by HMRC's representative, and rejected them all. In particular, there was no special rule that would give more latitude to public authorities in missing deadlines because they were acting on behalf of the public purse. The decision in *McCarthy & Stone* showed that this was not correct; if HMRC used unqualified and inadequately trained or supervised staff, that was a choice that would have consequences. HMRC's application was dismissed.

First-Tier Tribunal (TC03532): *Compass Contract Services UK Ltd*

6.8.9 Costs

An appellant in a case running from 2002 to 2013 objected to HMRC's application for costs. Judge Mosedale considered that the case was complex, so even under the Sheldon statement on the "old basis" HMRC would have applied for costs. The company had been warned at the outset that HMRC would do so; the fact that no further specific warning was given nearer to the hearing was not relevant. As HMRC were substantially successful in the case, they should be awarded their costs on the standard basis.

First-Tier Tribunal (TC03460): *Trapps Cellars Ltd*

6.8.10 Procedure

A company transferred some property interests to a subsidiary. HMRC decided that this was done at a substantial undervalue and raised assessments for £2.94m, which the company could not pay. It was put into liquidation; the liquidators commenced High Court proceedings against the directors and their accountants for breach of duty and negligent advice.

The company brought an appeal against the assessments, pending which the High Court action was stayed. HMRC applied to have the appeal struck out as having no prospect of success. The liquidators had agreed with the directors that it was in the company's interests for the directors to conduct the hearing, and they executed a deed which purported to transfer that conduct to them; HMRC argued that this was invalid.

The judge considered the best way to ensure that the two related cases were conducted fairly in the interests of justice for all parties, and made the following directions (using the word "conduct" to mean organising, arranging, and paying for the appeal whether or not having ultimate control over the appeal):

(1) that each Director be permitted to make submissions and to provide information and documents to the tribunal;

(2) that the Directors exercise the permission granted in (1) only to the extent that such submissions, information or documents are not provided to the tribunal by or on behalf of the company;

(3) that the Directors shall give notice to the other parties and the tribunal if they are not, or cease to be, the persons conducting the appeal on behalf of the company; and

(4) that, if the Directors are not at any time the persons conducting the appeal on behalf of the company, documents required to be sent by any party or the tribunal to the company should at the same time also be sent to the Directors;

(5) that the Directors shall send a copy of any documents they send to the tribunal to HMRC and the company; and

(6) that the consideration of separate representation for any Director be considered by the tribunal if the Directors cease to have conduct of the appeal, and that until then they should not be separately represented at a hearing.

First-Tier Tribunal (TC03433): *Space Maker Storage 2 Ltd (in liquidation)*

HMRC applied for parts of a MTIC appellant's case to be struck out on the grounds that it had no reasonable prospect of success. The appellants resisted this application, arguing that the onus of proof in a MTIC case was on HMRC, and they intended to put HMRC to proof in respect of all their assertions. The Tribunal considered the relevant statute and case law in relation to such an application, and also the relevant rules of procedure for the Tribunal and the courts, and concluded that it was not appropriate to grant HMRC's application. The full case should proceed to a substantive hearing. However, as this was a novel application, the judge recognised that he might be wrong; he gave HMRC leave to appeal to the UT if they wished to try to establish a different principle before the listed date for the FTT hearing in January 2015.

First-Tier Tribunal (TC03453): *Fairford Group Ltd PLC (in liquidation)*

Two companies made *Fleming* claims on the basis that the supply of certain medical/surgical appliances was zero-rated, and separate from the exempt healthcare services necessarily involved in the fitting of those appliances. This would entitle the company to a repayment of input tax incurred between 1974 and 1986. HMRC refused, and the Tribunal directed that one should be designated as a lead case (*Nuffield Health* [TC02697]). The Tribunal decided against the taxpayer, ruling that from the patient's point of view, there was a single supply of exempt healthcare.

The company whose appeal was directed to follow on behind *Nuffield Health* applied to be allowed to argue its own case separately, disputing the correctness of the FTT decision (which the other appellant had not chosen to take further).

The FTT judge held that it was not appropriate for him to allow a follower to a lead case to be "unbound" by the decision. It was possible for the appellant to appeal to the UT even if the lead case appellant had decided not to; that was the proper procedure. If the appellant wished to argue that the facts were different from those in the lead case, it would be open to

the UT to remit the case to the FTT for further findings of fact and a decision on the law as set out by the UT.

First-Tier Tribunal (TC03488): *General Healthcare Group Ltd*

In two 2013 hearings relating to a MTIC dispute (TC02508 and TC02745), Judge Mosedale decided that appeals against HMRC decisions in relation to the same company for different periods should be consolidated; and a delay by HMRC of four months in complying with a direction should not disbar the case from proceeding, given that it had already taken four years to reach the point of a hearing. In the meantime, one of the directors had been convicted of fraud and sentenced to 17 years' imprisonment, and this had been confirmed by the Court of Appeal.

The company appealed these decisions to the UT, which reviewed the basis of the FTT decisions and a list of criticisms of them. The UT was satisfied that there was no error of law: it could not be substantiated that the judge had taken into account irrelevant information or failed to take into account relevant information, or had come to conclusions that no reasonable Tribunal could have reached.

Upper Tribunal: *First Class Communications Ltd v HMRC*

6.8.11 Non-existent appellant

A cardiac surgeon incorporated a company to carry out a refurbishment of premises from which he carried on his profession. The company charged him £30,000 + VAT in respect of the works, and claimed £126,683 of input tax in relation to the cost of carrying them out. HMRC assessed the company on the market value of its outputs to a connected person under Sch.6 para.1 VATA 1994. The company appealed, arguing that it had been given misleading advice by an HMRC officer and the different officer raising the assessment had been "arrogant" and "unreasonable". The appeal was made more than 30 days after HMRC had confirmed the assessment decision on review, but HMRC did not object to this, nor did they insist on the VAT being paid before the hearing. However, they applied for the appeal to be struck out on the grounds that the Tribunal had no jurisdiction: it appeared to be founded only on "legitimate expectation", and the decisions in *Hok* and *Noor* confirmed that the FTT could not hear such a dispute.

At the strike-out hearing, HMRC's representative stated that the company had been liquidated. The surgeon and the owner of the company, appearing for it, confirmed this, and asked the Tribunal to declare that the company's creditors (i.e. HMRC) would now be unable to collect any outstanding sums.

Judge Redston struck out the appeal on the grounds that the Tribunal could not hear a case in which one of the parties no longer existed. She declined to make any comment about the ability of creditors to collect outstanding sums, and recommended that they should take legal advice if any creditor were to commence legal action.

First-Tier Tribunal (TC03553): *Wimpole Interiors Ltd*

6.8.12 Strike-out

Suffolk Constabulary made a claim for recovery of £430,000 of VAT incurred on the purchase of police vehicles between 1995 and 2003. HMRC refused and the force appealed to the Tribunal. The Tribunal examined the provisions of s.83 and decided it had no jurisdiction to hear an appeal about VAT recoverable under s.33 VATA 1994: it was not "input tax" and so was not within s.83(1)(c). The appeal had to be struck out.

First-Tier Tribunal (TC03644): *Suffolk Constabulary*

An appellant argued the same point that had been considered by the FTT in *Le Bistingo Ltd* (TC02912): that mandatory online filing was an unlawful requirement. Judge Mosedale found that the failure to make allowance for people with special difficulties and religious objections was a breach of human rights legislation in the case of *L H Bishop*; however, this appellant, as in *Le Bistingo*, was notified by HMRC of the requirement for all traders to file online after April 2012. Although there was still a breach of human rights law, there was no appealable decision – HMRC were simply notifying an obligation that had been provided for by Parliament.

First-Tier Tribunal (TC03472): *K W Hadleigh Ltd*

A proprietary sports club claimed to be entitled to the sporting services exemption under the PVD and the principle of fiscal neutrality. HMRC pointed out that, as it was a commercial organisation, it could not possibly qualify for exemption. The Tribunal agreed that its appeal had no reasonable prospect of success, and ordered that it be struck out.

First-Tier Tribunal (TC03701): *The Club Company (UK) Ltd*

6.8.13 Information notices

HMRC started an investigation in 1999 into the reorganisation of a hotel business which had a golf course so that golfing activities would be carried out by two limited companies – one not-for-profit company for members of the golf club, and a separate one for non-members. This separation of the sporting activities was intended to be able to benefit from the exemptions for sporting services, which would not be available while the whole single operation was carried on by a commercial company.

Some documents were provided to HMRC between 2003 and 2004, but a major fire at the hotel caused it to cease trading for a year and destroyed many records. The investigation appeared to have been dropped by HMRC when they asked in 2011 for further information, including copies of the documents that had already been supplied – which HMRC had lost or destroyed in the meantime. The companies did not supply the documents, and HMRC issued formal notices requiring their production under Sch.36 FA 2008. The companies appealed to the FTT, arguing that these were not reasonably required for the enquiry.

The Tribunal noted that para.18 allows the recipient of a notice to escape its effect if it can be shown that the documents are not in its possession or power, but the appellants had not used this defence at the hearing.

There is no right of appeal against a notice requiring production of "statutory records". However, the information required by HMRC was broader, including minutes of meetings, leases, and agreements for management services. HMRC did not dispute that a right of appeal existed.

The companies argued that "*The purpose for which the documents are required is not that of checking the Appellants' tax position, it is in order to correct HMRC's administrative error in losing or destroying the copies originally provided and/or failing to follow up their original enquiries.*" The issue of the notices was not reasonable in all the circumstances.

The Tribunal considered the arguments, and decided that (with one small exception) it could not allow the appeals. The criticism of HMRC's poor handling of the case was not enough to show that the documents were not reasonably required for the purpose of checking the tax position. The function of the FTT in such a case was not to consider the reasonableness of HMRC's actions as a whole, but only whether the notice complied with the law.

The exception was a requirement to produce "*the identity of the person or persons who instigated the separation of the golf activities from the hotel; what their authority was to instigate this separation and the reasons why the separation was made*." This was not a document but an explanation; so long after the event, it was not reasonable to require such a recollection to be "produced" in the same way as something that would be on a file. It would be a matter for any further Tribunal hearing of a substantive appeal to consider in evidence and to draw inferences accordingly.

The Tribunal also noted that it was not appropriate for it to consider any of the substantive issues, although they were set out in some detail in the companies' submissions. The appeal against the information notices was dismissed; although there was no further right of appeal against such a decision (para.32 Sch.36 FA 2008), the companies asked for it to be set out in full in a published Tribunal report.

First-Tier Tribunal (TC03585): *Whitefields Golf Club Ltd and related appeals*

The appellants subsequently applied for an order suspending the effect of the above decision pending an application for judicial review of HMRC's conduct. The judge considered whether the regulations allowed him to issue such a direction and decided that they did; he agreed to suspend the earlier decision until 4 July, provided that the appellants had made an application for judicial review to the Upper Tribunal or to the High Court by that time. As the matter was urgent, the judge decided that it was more appropriate to issue a short suspension without hearing representations from HMRC, rather than to consider arguments that they might put against this course of action.

First-Tier Tribunal (TC03621): *Whitefields Golf Club Ltd and related appeals*

6.9 Other administration issues

6.9.1 Direct recovery of tax debts

HMRC have commenced a consultation on new powers to recover debts directly from the bank accounts of tax debtors. These proposals were announced at Budget 2014, with a view to legislating in Finance Bill 2015. HMRC estimate that they will apply these new powers, if passed, in up to 17,000 cases a year. They believe that there will be sufficient safeguards to make sure that they only collect tax that is indisputably due, and that they will not cause unfair or unwarranted problems for businesses from which they take the money. They say they will only directly access bank accounts once all other avenues for collecting money have been exhausted, and the taxpayer is simply failing to meet an undoubted obligation.

https://www.gov.uk/government/consultations/direct-recovery-of-debts

6.9.2 High-risk promoters

The Finance Bill 2014 introduces a new regime to govern "high-risk promoters of tax avoidance schemes. The objectives of the regime are to:

- deter the development and use of high risk avoidance schemes
- change the behaviour of the small number of such promoters
- force monitored promoters (see below) to disclose details of their products and clients to HMRC
- force monitored promoters to tell clients, potential clients and intermediaries that they are a monitored promoter
- minimise the risk of tax loss via avoidance schemes developed by promoters of tax avoidance schemes
- make sure that clients and intermediaries are fully aware of the risks of engaging in avoidance schemes.

Draft guidance on the new regime was issued for comment in May. The rules are related to the existing Disclosure of Tax Avoidance Schemes regime, and as with the main DOTAS provisions, they do not apply to VAT. VAT avoidance schemes have a separate disclosure regime and are not yet covered by any rules relating to promoters.

www.gov.uk/government/uploads/system/uploads/attachment_data/file/313987/Promoters_of_Tax_Avoidance_Schemes_Guidance_v1_0.pdf

6.9.3 Office of Tax Simplification

The City of London Law Society has responded to the OTS review of the effect that the UK tax system has on competitiveness. Two particular points were raised in relation to VAT:

- VAT registration delays have been reduced, but there is still room for improvement – it should be possible to receive a VAT number within a week of applying, and this should be HMRC's target;

- uncertainties over whether an option to tax has been exercised cause significant problems in real estate transactions – the existence of an option could be made a matter of public record via the Land Registry.

http://www.citysolicitors.org.uk/

6.9.4 Winding-up order

HMRC issued without notice applications for the appointment of provisional liquidators for two companies which they alleged had carried on a trade on a basis that was clearly uncommercial but was intended to obtain and retain VAT charged in the course of business by issuing fictitious invoices. The High Court noted that appointing liquidators on such an application was a serious step, but it was necessary in this case to protect HMRC's position. It was essential to ensure that records were preserved and funds were not moved out of the jurisdiction.

High Court: *HMRC v Winnington Networks Ltd and another company*

6.9.5 Criminal proceedings

HMRC have announced the successful prosecution of four men for their involvement in a missing trader mobile phone fraud which claimed £28m in VAT repayments. They were sentenced to a total of 27 and a half years in jail. Confiscation proceedings are in progress to recover losses from any assets that can be traced.

www.gov.uk/government/news/28m-mobile-phone-vat-fraudsters-jailed

A barrister was prosecuted for failing to pay over VAT he had charged to clients from 1999 to 2011. He was sentenced to three and a half years' imprisonment for cheating the public revenue. He appealed, arguing that the prosecution and the judge's summing up had been unfair. The Court of Appeal accepted that there had been shortcomings in the way the case had been handled both by the prosecution and the judge, but this did not mean that the conviction was unsafe. The appeal was dismissed.

Court of Appeal: *R v Pershad*

The Supreme Court has considered appeals about confiscation orders, one of them arising from a missing trader prosecution. The lower courts had ordered that each of the defendants should be made liable for the whole of the proceeds of the crime they had jointly committed (£16.1m). The Supreme Court ruled that it would be oppressive and contrary to human rights law for the state to collect the same amount twice over; although it was open to the judges to find that each of the defendants had "obtained" the whole of the criminal property, the orders should be amended to make it clear that they would only be enforced to the extent that the money had not already been collected from someone else.

Supreme Court: *R v Ahmad and another; R v Fields and others*

6.9.6 Data sharing

The Government is seeking powers through the Small Business, Enterprise and Employment Bill which would permit HMRC to release non-financial VAT registration data and permit the release of exporter data as open data. HMRC consulted in July 2013 on proposals to share

VAT registration data and is currently consulting until 19 September 2014 on the proposal to release a specific export data set.

HMRC's commissioned research indicates that the use of VAT registration data for credit scoring by credit reference agencies would increase availability of trade credit to VAT registered businesses by up to £1.8 billion, with an estimated uptake of trade credit of between £0.7 billion – £1.4 billion. Smaller businesses, recently incorporated businesses and unincorporated businesses (e.g. sole traders) would be the main beneficiaries.

Comments are invited by 19 September.

R&C Brief 26/2014

6.9.7 Security

A company running a pub was served with a notice to deposit security. This was initially set at just over £7,000 based on declared likely turnover in the VAT 1 form, and that was paid; however, it was set against outstanding VAT debt which continued to grow. The company moved to making monthly returns, and appealed against a further notice based on the first 9 months' turnover of £31,550. By the time of the hearing, HMRC had reduced this on the basis of monthly returns to £24,150, but the Tribunal could not find that the company had any grounds to show that such a decision was unreasonable. Its appeal was turned down.

First-Tier Tribunal (TC03442): *Whyte Harte Hotel Bletchingley Ltd*

A notice of security was issued to a company which had the same trading name and address as a former partnership which had failed owing HMRC at least £157,000 (the debt in bankruptcy of one of the four partners). A different partner owned the new company.

When officers arrived to serve a notice to require deposit of security, they discovered that the bankrupted partner was the manager running the business. This only confirmed their concerns. The Tribunal considered that the reviewing officer was entitled to take this into account in forming his separate decision about the requirement.

The Tribunal could not find that the decision had been made unreasonably. The officer did not take into account any irrelevant matter or disregard something which should have been given weight. The appeal was dismissed.

First-Tier Tribunal (TC03647): *Moat Ventures Ltd*