VAT UPDATE
JANUARY 2021

Covering material from October – December 2020

Notes prepared by Mike Thexton MA FCA CTA

No responsibility for anyone acting upon or refraining from acting upon these notes can be accepted by the course presenter or author of the notes.

VAT Update January 2021

Contents

1. INTRODUCTION 1
- 1.1 Appeals pending 1
- 1.2 Decisions in this update 2
- 1.3 Other points on appeals 3

2. OUTPUTS 4
- 2.1 Scope of VAT: linking supplies to consideration 4
- 2.2 Disbursements 12
- 2.3 Exemptions 12
- 2.4 Zero-rating 32
- 2.5 Reduced rate 37
- 2.6 Computational matters 38
- 2.7 Discounts, rebates and gifts 38
- 2.8 Compound and multiple 38
- 2.9 Agency 41
- 2.10 Second hand goods 42
- 2.11 Charities and clubs 43
- 2.12 Other supply problems 43

3. LAND AND PROPERTY 45
- 3.1 Exemption 45
- 3.2 Option to tax 51
- 3.3 Developers and builders 51
- 3.4 Input tax claims on land 54
- 3.5 Other land problems 55

4. INTERNATIONAL SUPPLIES 56
- 4.1 E-commerce 56
- 4.2 Where is a supply of services? 57
- 4.3 International supplies of goods 61
- 4.4 European rules 71
- 4.5 Foreign refund reclaims 71

5. INPUTS 75
- 5.1 Economic activity 75
- 5.2 Who receives the supply? 80
- 5.3 Partial exemption 85
- 5.4 Cars 88
- 5.5 Business entertainment 88
- 5.6 Non-business use of supplies 88
- 5.7 Bad debt relief 88
- 5.8 Other input tax problems 92

6. ADMINISTRATION AND PENALTIES 96
- 6.1 Group registration 96
- 6.2 Other registration rules 98
- 6.3 Payments and returns 100
- 6.4 Repayment claims 101
- 6.5 Timing issues 103
- 6.6 Records 104
- 6.7 Assessments 104
- 6.8 Penalties and appeals 105
- 6.9 Other administration issues 115

1. INTRODUCTION

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

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

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

1.1 Appeals pending

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

The HMRC website section which reports the progress of appeals was updated on 18 November 2020.

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

The dates cited for likely hearings must now be treated with caution because of Coronavirus disruption.

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

- *Alan McCord*: HMRC granted leave to appeal against the FTT decision that a car dealer was entitled to input tax on cars purchased for domestic sales, but denied input tax on cars purchased for sale to customers in the Republic of Ireland (listed for April 2021).
- *Ampleaward Ltd*: HMRC have been granted leave to appeal against the UT decision that the company was not caught by the "fallback acquisitions" rule.
- *Anna Cook*: HMRC granted leave to appeal against the FTT decision that classes in Ceroc dancing qualified for exemption as "educational" (hearing in October 2020, decision awaited).
- *Beigebell Ltd*: HMRC succeeded in appeal (covered in July 2020 update) against the FTT decision that a company's directors did not have the means of knowledge of the connection of their company's transactions to a missing trader fraud: case remitted to a differently constituted FTT.

- *Good Law Project*: (not on HMRC's list) HMRC appealing against decision of High Court that it was lawful for them to disclose certain facts in relation to a dispute with a taxpayer, so it was not necessary for them to apply for a court order in order to be granted permission to do so (hearing scheduled for Court of Appeal in December 2020).
- *News Corp UK and Ireland Ltd*: HMRC have been granted leave to appeal against the UT's decision that digital newspapers qualified for zero-rating (hearing listed for 1 December 2020).
- *NHS Lothian Health Board v HMRC*: Court of Session allowed taxpayer's appeal on grounds that "no repayment" had to be the wrong answer; remitted to FTT for reconsideration of the amount; HMRC seeking leave to appeal to the Supreme Court.
- *Pacific Computers Ltd*: MTIC case remitted by the UT to differently constituted FTT for rehearing (not on HMRC's list).
- *Privin Corporation Ltd*: the FTT found in favour of a MTIC appellant. HMRC were granted leave to appeal to the UT, but it was agreed that the case would be remitted to a differently constituted FTT for rehearing (not on HMRC's list).
- *Royal Opera House Covent Garden Foundation*: HMRC succeeded before the UT in their appeal against the FTT decision on the partial exemption recovery percentage; taxpayer has been granted leave to appeal to the CA.
- *Target Group Ltd*: company has been granted leave to appeal against UT decision that its supplies of loan administration services did not fall within art.135(1)(d) – CA hearing scheduled for May 2021 (not on HMRC's list).
- *The Wellcome Trust Ltd*: HMRC granted leave to appeal against the FTT decision that the company was not subject to a reverse charge on investment management fees. The UT has agreed to refer questions to the CJEU (Case C-459/19): the A-G's opinion (favouring HMRC) was covered in the July update.
- *Thorsteinn Gardarsson t/a Action Day A Islandi*: HMRC have succeeded in their appeal against the FTT decision that a trader's products qualified as "books" rather than "stationery", and some issues have been remitted to a differently constituted FTT for further consideration.
- *Tower Resources plc*: HMRC have been granted leave to appeal to the UT on three grounds against the FTT's decision that a holding company was entitled to recovery of input tax on some overhead costs (hearing scheduled for April 2021).

1.2 Decisions in this update

- *The Core (Swindon) Ltd*: HMRC appeal against the FTT decision that certain products were "liquid meal replacements" rather than "beverages".

1.3 Other points on appeals

HMRC's list of appeals refers to the *Newey* case and only says "The FTT allowed Mr Newey's remitted appeal." There is neither confirmation that the case is now final, nor a statement of an intention to appeal the decision. The decision was issued on 14 September 2020, so by 18 November HMRC should have taken a decision on whether to appeal or not, but it is not made clear.

By contrast, the list confirms that the decision of the FTT in *The Ice Rink Company Ltd* and another will not be appealed further; it was "decided on the facts".

HMRC's list refers to Revenue & Customs Briefs issued in relation to the outcome of several recent appeals:

- R&C Brief 5/2020: *Done Brothers* and *Rank* (covered in July 2020 update)
- R&C Brief 16/2020: *Cheshire Centre for Independent Living* (covered in this update)
- R&C Brief 17/2020: *Window to the Womb (Franchise) Ltd* (covered in this update)
- R&C Brief 18/2020: *RSR Sports Ltd* (covered in this update)
- R&C Brief 19/2020: *Northumbria NHS Trust* (covered in this update)

2. OUTPUTS

2.1 Scope of VAT: linking supplies to consideration

2.1.1 Collective management organisation

A Romanian entity was established for the collective management of the economic rights of authors in musical works. It had the sole right and responsibility to collect copyright payments due on the public performance of music at concerts, shows or artistic events. Following a concert organised by a cultural association in 2012, the association disputed the VAT charge added to the royalties levied by the entity. At first instance the Romanian court upheld the demand for VAT, but an appellate court decided that the operation of collecting royalties was not subject to VAT. This was appealed again, and questions were referred to the CJEU. The questions are, in summary:

- whether the owners of copyright supply services for consideration when the entity grants a non-exclusive licence to people putting on shows;
- if that question is answered in the affirmative, whether the entity should charge VAT to the people putting on the shows on the full amount paid, and whether each person in the chain should issue VAT invoices.

In *SAWP* (Case C-2017-22), the CJEU had decided that holders of copyright were not liable to VAT on their shares of a levy that was charged by statute on sales of blank recording tapes. The A-G considered that this was a different situation, because that decision was based on the compensatory nature of the levy; the court should use its analysis of the transactions from *SAWP*, but was not bound to follow the decision.

The A-G considered that the copyright holders did, in the present circumstance, supply services for consideration to the end user (the person putting on the show), notwithstanding that the royalties were collected by a different entity. The nature of the supply was the transfer of an intangible asset.

In relation to the second question, the A-G considered that art.28 PVD applied: the entity was supplying the authors' intangible rights in its own name, and it was therefore deemed to be simultaneously making and receiving the same supply. It followed that VAT invoices should be raised by the author to the entity, and by the entity to the person putting on the show.

CJEU (A-G) (Case C-501/19): *UCMR-ADA v Pro Management Insolv IPURL*

2.1.2 Business or non-business activities

In TC06657, The FTT heard a lead appeal in respect of a number of claims based on the same arguments. The appellant had claimed a repayment of over £1.5m of overpaid VAT. It concerned what the Tribunal decided should be called "the *Lennartz* treatment", and the consequences of the CJEU decision in *VNLTO* (Case C-515/07) that the treatment was not available where a trader had non-business use within

the scope of the entity's objects, rather than "private use or use otherwise than for the purposes of the business" as required by the Directive.

HMRC issued R&C Brief 02/2010 to set out their response to *VNLTO*. In essence, taxpayers who had utilised *Lennartz* treatment in circumstances where (in the light of *VNLTO*) it was not properly available, could choose to unravel that treatment, adjusting both over-deducted input VAT and over-declared output VAT. However, HMRC had decided not to insist on unravelling in all cases, even where the unravelling would have been advantageous to HMRC. Instead, taxpayers were free to retain the benefit of over-claimed input VAT deductions (on the basis of the law as it was understood pre-*VNLTO*), but only on the basis that the taxpayer continued to treat itself as making deemed supplies, and to account for output VAT on those deemed supplies. This was provided for by FA (no.3) 2010 Sch.8 para.4.

The appellant had applied *Lennartz* to the costs of a new building project from November 2009 onwards. It received substantial repayments of VAT on the costs of the project, then accounted for output tax on the supposed "non-business use". In April 2014, its VAT advisor submitted a claim for over-declared output tax, net of overclaimed input tax, from 04/10 to 01/14, totalling £1.522m.

The basis of the claim was that the provision of education to students was a business activity, irrespective of how it was funded. In consequence no part of the buildings within the scope of the project were put to non-business use, and there was no requirement for the college to account for deemed output VAT. Output tax could therefore be reclaimed, subject to the four-year cap; input tax should also be adjusted, but most of that had been claimed over four years before.

HMRC refused the claim on alternative grounds: either the provision of education was properly regarded as non-business and the R&C Brief 2/2010 approach was valid, or else HMRC were entitled to offset the claim against the excessive input tax recovered earlier.

In the FTT, the college's grounds of appeal were as follows:

(1) the provision of education and vocational training by the college is a "business activity" for the purposes of reg.116E, irrespective of whether it is a supply for consideration.

(2) the provision of education and vocational training by the college is a supply for a consideration because the grant income received by the college from government agencies must constitute consideration (within the meaning of art.2(1)(c) PVD and s5(2) VATA) for the provision of that education and vocational training.

(3) it is not possible to split the activities of the college between business and non-business activities. All the activities of the college amount to a single business activity.

(4) a distinction can be drawn between the "provision" of education and vocational training, and the "supply" of education and vocational training – and that the provision of education and vocational training does not require consideration.

(5) HMRC's publicly stated policy is that the provision of vocational training is an exempt supply for VAT purposes – and as it is a "supply", it must by definition be a business activity.

(6) Even if the college is wrong on points (1) to (3) above, the payments made by funding agencies amount to consideration for the provision of education and vocational training, and in consequence the education and vocational training funded by such payments must amount to a business. The college submits that for a payment to amount to consideration, it does not have to be student-specific.

The Tribunal then set out the issues that arose from the designation of the case as a lead appeal, and HMRC's arguments in relation to them. The judge agreed with HMRC that "business" in VATA 1994 Sch.4 para.5(4) (the deemed supply rule) does not have the same meaning as "business" in VATA 1994 s.4 (scope of VAT on taxable supplies). Accordingly, the term "business" as used in:

(1) s.4 must be interpreted consistently with the concept of "economic activity" as used in art.9(1) PVD; and

(2) para.5(4) must be interpreted consistently with art.26(1) (as interpreted in *VNLTO* by the CJEU).

Therefore, "business" in para.5(4) extends beyond economic activities, whereas "business" in s.4 VATA 1994 refers only to economic activities. The judge agreed with HMRC that the provision of education and vocational training by the college amounted to "business activities" for the purposes of art.26(1) PVD and para.5(4).

Next, the judge held that education and vocational training funding provided by government agencies did not amount to consideration for any supplies made by the college. It was a public block grant provided subject to conditions, rather than a payment for particular services. The scale of the college's activities, and the amount of them that were funded by the agencies, meant that the activities were not economic activities and were therefore outside the scope of VAT.

The college's argument that it was engaged in a single activity that was all business was examined and rejected. The judge agreed with HMRC's submission that the key distinction between economic and non-economic activities are whether services are provided for consideration, and that there is nothing in the VAT legislation that prevents someone from engaging in both economic and non-economic activities.

In summary, the Tribunal held that the provision of education and vocational training, to the extent that it is funded by the funding agencies, is not an "economic activity" within art.9 PVD and is outside the scope of VAT for the purposes of the PVD; it is not a "supply of services for consideration" within art.2(1)(c) PVD and is not treated as such by the VATA; it is not a "supply as defined by s.5(2)(a) VATA 1994"; and that in relation to goods for which "*Lennartz* treatment" has been previously adopted by a person, such a person is liable to account for output tax pursuant to Sch.4 para.5(4) and Part 15A of the VAT Regulations.

The appeal against HMRC's preferred decision was dismissed, making it unnecessary to consider HMRC's alternative decision.

Upper Tribunal

The UT judges noted that the issue before them had narrowed to whether the provision of grant-funded education constituted a "supply of services for consideration". HMRC accepted that, if it did, then it was an economic activity; the college accepted that, if it did not, the principles of *Wakefield College* would mean that it was not engaged in economic activity.

The UT went on to consider the formula used to calculate the grants receivable by the college. The college's appeal was based on the argument that the FTT had misunderstood the nature of what was provided in return for the lump sum grants, and had failed to appreciate that the decision in *Le Rayon d'Or SARL* (Case C-151/13) meant that such payments based on a formula could be consideration for VAT. The FTT had been wrong to distinguish that and other precedents relied on by the college.

The judges considered a number of precedents, but in particular *Le Rayon d'Or*, because the college's case "rested heavily" on an analogy with the facts of that case. HMRC had persuaded the FTT that the case was limited to its own particular facts; in their view, the better analogy was with *Apple & Pear Development Council* (Case C-102/86), in which a statutory levy was not consideration for anything done by the body receiving it. HMRC also relied on *South African Tourist Board*, a decision of the Upper Tribunal that came out later in the same year as *Le Rayon d'Or* (2014) but did not refer to it. The judges noted that this gave them the problem of deciding which side of a line between diametrically opposed binding precedents this case should fall.

The UT considered that *Le Rayon d'Or* could not be distinguished. The formula showed that there was a significant link between the grant and the number of students, the type of students and the courses provided. The college was not at liberty to do anything else with the money, and had to provide detailed financial information to show how it had been spent. There were clawback arrangements that applied in certain circumstances. All this established a sufficient link between the service provided and the consideration paid. The FTT's error had been to look for a link that was "so direct that the payments could be matched to individual supplies or the costs of individual supplies, or to individual students taking courses." There was nothing in the case law to require this.

The judges tested the reasonableness of this decision by reference to "the wider canvas". The college provided identical courses to people who paid for them (mainly international students). It made sense to treat both as the same type of activity, i.e. economic.

The appeal against the preferred decision therefore succeeded, so the UT had to consider the alternative decision, on which the FTT had not reached a decision. The parties suggested that it should be remitted to the FTT for a decision; the UT was unwilling to leave the matter still unresolved, so further written submissions were invited in order to consider the matter in detail. The UT effectively heard this part of the case "at first instance", because there had been no analysis in the FTT decision.

HMRC relied on the *Birmingham Hippodrome* decision to support the offset of the repayment claim against excessive input tax that had already been recovered. The college argued that the case could be distinguished

because that case concerned a failure of the UK to give effect to the VAT Directive, and the CA had applied the *Marleasing* principle. That was not relevant in the present case. Alternatively, the college argued that the "input tax mistake" was not the same sort of mistake as the "output tax mistake", and therefore the two should not be offset.

The judges were satisfied that the two mistakes were the same – HMRC had allowed the input tax because they had believed, wrongly, that the *Lennartz* mechanism applied, and that also was the reason that the output tax had been overpaid. In fact, the supplies were exempt educational supplies in the course of business, and no input tax should have been claimed. Although the details of the *Birmingham Hippodrome* case were different, the principles applied exactly, and were binding on the Tribunal. The appeal against the alternative decision was dismissed, and the repayment claim was refused.

Upper Tribunal: *Colchester Institute Corporation v HMRC*

2.1.3 Local authority sports facilities

There has been a raft of decisions in relation to the VAT liability of charges paid by members of the public for access to sports and leisure facilities provided by local authorities. Lead cases were designated for each part of the UK, and a panel of three judges (Peter Kempster, Anne Scott and Alastair Rankin) heard the appeals.

Chelmsford City Council's claim for a repayment of £0.9m was made in December 2010 and rejected by HMRC. The Council contended that the charges in dispute did not attract VAT on three alternative grounds:

(1) Its supplies of sporting and leisure activities to members of the public are not "economic activities", and are therefore outside the scope of VAT;

(2) Its supplies of sporting and leisure activities to members of the public are provided by the Council in its role as a public authority acting under a special legal regime, and therefore it is not a taxable person in respect of those supplies; or

(3) Its supplies of sporting and leisure activities to members of the public are provided by the Council in its role as a public authority, and therefore it is not a taxable person in respect of those supplies, by virtue of Note 3 Group 10 Sch.9 VATA 1994.

In HMRC's view, the supplies were properly chargeable to output tax; the claim to recover output tax accounted for, while retaining the VAT on costs previously claimed because s.33 VATA would apply, was not justified.

The precedent case law cited to the Tribunal was very extensive, and evidence was taken on the wide range of facilities provided by the council to the public. One of the key precedents was *London Borough of Ealing v HMRC* (Case C-633/15), in which the CJEU had held that council sports facilities were within the scope of the exemption at art.132(1)(m) PVD. The appellants argued that the question of whether they were within the scope of VAT at all was a prior question, and relied on arguments based on art.9 and 13 rather than the *Ealing* decision. The application of *Ealing* might result in a repayment of output tax, but might also have negative consequences for some councils which had been able to disregard their

exempt activities as insignificant in making s.33 claims. However, Chelmsford City Council reserved the right to rely on art 132(1)(m) if it lost the current appeal.

The Council accepted that it was making supplies for a consideration within art.2 PVD, but not that it was a "taxable person acting as such". The argument was based on the CJEU decision in *Gemeente Borsele* (Case C-520/14) and the Court of Appeal's judgment in *Wakefield College*. The Council argued that its provision of facilities did not constitute "participation in the market" for a number of different reasons, including the level of net expenditure, the provision of free services, and HMRC's acceptance that provision by outsourcing to a third party (as in *Edinburgh Leisure*) was non-economic, allowing a s.33 claim in respect of the third party's charges.

HMRC responded with detailed arguments on the principles to be derived from *Borsele* and other cases, and also on the application of the rules on whether the Council was acting "under a special legal regime".

The judges considered the precedents in detail, and made the following decision on the "article 2 argument":

113. We consider that the relevant factors in the current appeal for the purposes of arts 2 and 9 are as follows, and we give our findings on each:

(1) The supply to local residents of facilities for leisure, sporting and physical recreation is a core activity of the Council. See the evidence of Mr Lyons ([21(20b)] above) and Mr Reeves ([22(5)] above). That is in contrast to the provision of school transport by the municipality in Geemente Borsele, and the provision of legal aid by the public office in Finland, which in each case was very much ancillary to the respective body's principal activities.

(2) The number of customers and the total revenue raised by the Council for the supply of facilities for leisure, sporting and physical recreation are both significant. See the evidence of Mr Lyons ([21(20a & 20c)]) above) and Mr Reeves ([22(5) & (6)] above). The CJEU in Geemente Borsele said (at [31]) it was relevant to look at "the number of customers and the amount of earnings."

(3) Although concessionary fees are available to qualifying users, (almost) all users pay something for use of the facilities. In contrast, in Geemente Borsele (at [33]) only one-third of transport users paid contributions, and in Finland (AG Opinion para [50]) only 34% of users paid any contributions.

(4) Although the cost of providing the facilities exceeds the fees received from users, the fees do make a significant contribution to the costs of provision. Fees collected accounted for around one third of costs - see the evidence of Mr Lyons ([21(20a)] above) and Mr Reeves ([22(18b)] above). That is in contrast to the position in Geemente Borsele (at [33]) where the charges covered only 3% of costs, and in Finland (at [50]) where the charges covered only around 8% of costs. It is more in line with the situation in Wakefield College where, after noting (at [75]) that in both Geemente Borsele and Finland "the total amount raised by charges was insubstantial, both in absolute terms and relative to the cost of the service", the Court of Appeal (at [82]) stated: "the subsidised fees made

a significant contribution to the cost of providing courses to the students paying those fees, to the extent of some 25–30%."

(5) The fact that the Council does not aim (and has never aimed) to break even (let alone make a profit) on the provision of the facilities does not matter. That is a subjective factor only and must be ignored - see, for example, Wakefield College at [55], Longridge at [84], and Lajvér at [35].

(6) The fact that many users pay concessionary rates does not matter. Per Arden LJ in Longridge (at [93]): "The concessionary charges were also not an indicator against the existence of an economic activity because the economic activity springs from the receipt of income, not profit."

(7) The fact that the costs of providing the facilities for leisure, sporting and physical recreation are subsidised in large measure by grants from UK central government (see the evidence of Mr Lyons ([21(13)] above) and Mr Reeves ([22(11)] above)) does not matter. Per the CJEU in Lajvér (at [38]):

"… the fact that the investments were largely financed by aids granted by the Member State and the European Union cannot have a bearing on whether or not the activity pursued or planned by the applicants in the main proceedings is to be regarded as an economic activity, since the concept of "economic activity" is objective in nature and applies not only without regard to the purpose or results of the transactions concerned but also without regard to the method of financing chosen by the operator concerned, which also holds true in relation to public subsidies."

(8) The fact that the leisure, sporting and physical recreation facilities are provided in fulfilment of statutory duties does not matter. Per the CJEU in Finland (at [40]):

"It must first of all be stated that, in view of the objective character of the term 'economic activities', the fact that the activity of the public offices consists in the performance of duties which are conferred and regulated by law, in the public interest and without any business or commercial objective, is in that regard irrelevant."

114. Taking together all those factors and our findings, we conclude that the provision of the leisure, sporting and physical recreation facilities by the Council constitutes the supply of services for remuneration, and thus that supply constitutes economic activity within art 9 PVD.

The judges therefore agreed with HMRC in respect of the first issue. Turning to the question of whether the Council was acting under a special legal regime, the main precedents were *Fazenda Publica v Camara Municipal do Porto* (Case C-446/98) and *Saudacor* (Case C-174/14). It was clear from those cases, and the other authorities cited to us, that the decision whether art 13 applies in particular circumstances is highly fact-specific. The judges derived the following principles from the precedents:

128. In determining whether an activity is being engaged in under a special legal regime, the following factors are irrelevant:

(1) the subject matter of the activity (Fazenda Pública at [19]);

(2) the purpose of the activity (ibid); and

(3) the fact that private providers carry out similar activities (Isle of Wight at [33]).

The judges considered that the situation of the sporting facilities was similar to that of the waste management services that were held to be outside the scope of VAT in *The Durham Company*; even though the relevant provision gave councils a power to provide sporting facilities rather than a duty, nevertheless that was enough to constitute a special legal regime.

Nevertheless, it was then necessary to analyse all the conditions laid down by national law for the Council's provision of sports and leisure facilities, to determine whether that activity was being engaged in under a special legal regime applicable to bodies governed by public law or under the same legal conditions as those that apply to private economic operators. Based on the witness evidence about the Council's corporate plans and policies, the judges were satisfied that the conditions applicable to the different providers were significantly different. The first paragraph of art.13 was therefore engaged.

It was then necessary to consider whether this would lead to significant distortions of competition, which would require the supplies to be brought back within the scope of VAT. Both parties accepted that this would require further evidence, and the judges granted leave to apply for a continuation hearing.

As the Tribunal had heard full argument on the "Note 3 issue", the decision included consideration of the question, even though it was only relevant to the outcome if the Council was not operating under a special legal regime. VATA 1994 Sch.9 Group 10 Note 3 states that a local authority is not to be treated as an eligible body for the purposes of the exemption. Before the *Ealing* case, this was believed to require local authorities to charge output tax on sporting supplies if they were supplied for consideration; the exclusion from exemption meant that they were entitled to a s.33 claim if there was no consideration. The judges commented that the reference to the CJEU in *Ealing* was based on a mistaken premise, that Note 3 related to the art.133 conditions on distortion of competition. In the Council's view, the effect of Note 3 was to exercise a derogation allowed by art.13(2), confirming that the otherwise exempt activities were to be regarded as being engaged in by the Council as a public authority; and the result was that the Council had no economic activity.

The judges considered the *Ealing* decision in some detail, and rejected the Council's representation of it. The decision had concluded that Note 3 was ineffective, with the result that local authorities were eligible bodies and their supplies (if within the scope of VAT) were exempt. It was not correct to reinterpret Note 3 in a different way to implement a derogation under art.13(2).

Summing up on *Chelmsford*, Judge Kempster concluded that:

- the Council's argument based on art.2 was rejected;
- the Council's argument based on art.13(1) was accepted, subject to further consideration of whether this would lead to a significant distortion of competition.

The decision on Midlothian Council follows the same structure, with different evidence but the same consideration of precedent and principle. The same conclusions are reached.

The decision in relation to Mid Ulster District Council is different. After coming to the same conclusions on art.2 and the first part of art.13, the judges relied on evidence about the special rules requiring fairness between the two communities in Northern Ireland, the promotion of integration and countering all forms of social deprivation. Only local authorities were in a position to meet these obligations; the Tribunal was satisfied that there was no non-negligible alternative provision in Northern Ireland, and therefore no real or potential risk of distortion of competition. The Council's appeal was allowed.

First-Tier Tribunal (TC07909): *Chelmsford City Council*; First-Tier Tribunal (TC07910): *Midlothian Council*; First-Tier Tribunal (TC07911): *Mid Ulster District Council (formerly Agherafelt District Council)*

2.2 Disbursements

Nothing to report.

2.3 Exemptions

2.3.1 Pension fund management

There have been numerous disputes about the application of the exemption to pension funds. The position reached in earlier decisions can be summarised very briefly as:

- "money purchase" or "defined contribution" pension schemes are capable of being "special investment funds", so management of the funds can be exempt;
- "defined benefit" or "final salary" schemes are not sufficiently similar to open ended investment companies and other retail collective investments to qualify for exemption.

The latest case to reach the CJEU raised a different argument, that management services for an occupational pension scheme could qualify for exemption as an "insurance transaction" under art.135(1)(a) PVD.

The Advocate-General's opinion

A-G Pikamae started his opinion by citing from EU Directives relating to life assurance. The First Life Assurance Directive of 1979 mentions "management of group pension funds, i.e. operations consisting, for the undertaking concerned, in managing the investments, and in particular the assets representing the reserves of bodies that effect payments on death or survival or in the event of discontinuance or curtailment of activity" as one of the activities that is subject to the Directive. The 1979 Directive

has been repealed and replaced, but the relevant provisions remain broadly unchanged.

The UK has always regarded the management of occupational pension schemes by insurance companies as exempt under the heading of insurance. Before 1 January 2005, this depended on the law restricting the insurance exemption to authorised insurers. Following the *Card Protection Plan* decision, it was recognised that such a restriction contravened EU law: if a transaction constituted insurance, it had to be exempt, regardless of the authorisation of the supplier. The law was changed, but HMRC continued to regard pension fund management to be exempt as "insurance" only when supplied by insurance companies.

In March 2014, the trustees of the United Biscuits defined benefit pension scheme made a claim to HMRC for recovery of VAT charged on investment management services between 1 January 1978 and 30 September 2013. These services had been supplied by both insurance companies and non-insurers (who were authorised under different legislation to carry on investment management business). The authorities had treated those supplied by insurers as exempt and those by non-insurers as taxable. The claim was dismissed by the High Court in November 2017; the judge held that pension management services supplied by non-insurers were taxable. The trustees appealed to the Court of Appeal, which referred questions to the CJEU. The hearing was in February 2019, but the A-G's opinion was only delivered in May 2020.

The A-G started by defining the scope of the question: in his view, it was not affected by the change from the 6th Directive to the PVD, nor by the wording concerning exemptions being applied "without prejudice to other Community provisions" or "under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse". It was simply whether the management of occupational pension funds by a non-insurer could be regarded as "insurance transactions" within the first part of art.135(1)(a).

The exemptions in art.135 are autonomous concepts of EU law the purpose of which is to avoid divergences in the application of the VAT system from one Member State to another and which must be placed in the general context of the common system of VAT. The terms used to describe the exemptions envisaged by art.135 must be given a strict interpretation, since they constitute derogations from the general principle that VAT is to be levied on all services supplied for consideration by a taxable person; however, the interpretation must be consistent with the objectives pursued by the exemptions and the principle of fiscal neutrality. Operators must be able to choose the form of organisation which, from the strictly commercial point of view, best suits them, without running the risk of having their transactions excluded from the exemption provided for in that provision.

The A-G went on to examine the concept of "insurance transactions" in detail. There is no definition in the PVD. In the case law, the essentials of insurance transactions are 'that the insurer undertakes, in return for prior payment of a premium, to provide the insured, in the event of materialisation of the risk covered, with the service agreed when the contract was concluded'. Thus, it is the *assumption of risk* for

consideration that allows an activity to be classified as an 'insurance transaction'.

It is also necessary to distinguish between art.135(1)(a), which only exemptions "insurance transactions" in the strict sense, and arts.135(1)(d) and (f), which extend the financial exemptions to transactions "concerning" or "relating to" certain banking operations.

As the fund management services did not involve the assumption of any risk by the manager (a fact that the A-G confirmed at the hearing), they did not fall within the scope of the exemption as previously established by the CJEU.

In response, the applicants argued that the term must be given a common interpretation in EU law, and various other Directives brought pension fund asset management within the scope of insurance, even though it did not meet the definition applied in previous VAT decisions. This was based partly on the judgment in *CPP*, which stated that 'there is no reason for the interpretation of the term "insurance" to differ according to whether it appears in the [The First Non-life Directive] or in the Sixth Directive'. The A-G considered that this only meant that the court should refer to relevant other EU rules "insofar as they pursue concordant objectives". It was therefore necessary to consider the reasons for, and the function of, the exemption for VAT of insurance transactions.

The A-G pointed out that the start of the First Life Assurance Directive, relied on by the applicants, referred to "types of insurance" (art.1(1)) and then to "operations" (art.2(2)). A comparison of the various language versions of the Directive showed that only the English and Danish versions described management as a "class of insurance"; the other versions described it as a "class of activity".

In any event, according to settled case-law, where there is a divergence between the various language versions of an EU text, the provision in question must be interpreted by reference to the general scheme and the purpose of the rules of which it forms part. The purpose of the Directive was to bring within the scope of its regulatory regime both the insurance transactions that were the main business of insurance providers (and which would be also covered by VAT exemption) and also ancillary activities (which would not). The ancillary activities only came within the scope of the Directive to the extent that the Member State chose to regulate them; if that were followed through to its logical conclusion, the insurance exemption could then vary from country to country, which would be wrong.

The purpose of the VAT exemption is related to the permission in the PVD for separate taxes on insurance transactions; they are exempt from VAT in order to prevent double taxation of the same thing. The Commission also argued that the exemption was related to the difficulty of establishing the taxable amount for each payment of an insurance premium. The services in the present dispute did not suffer from these disadvantages.

The A-G was satisfied that the main precedents, *CPP* and *Skandia*, supported this conclusion: a supplier of insurance transactions was exempt regardless of whether it was an insurance company, and not all

transactions of an insurance company qualified for exemption, if it did something that was not insurance.

The A-G finished by considering the argument based on fiscal neutrality. He observed that the problem was that the UK had, until 1 April 2019, exempted supplies of this kind by insurance companies because they were supplied by insurance companies. That was incorrect, and the applicants could not benefit from the same incorrect treatment by arguing for fiscal neutrality.

Full court judgment

The full court came to its conclusion much more quickly. It noted that the definition of "insurance transaction" was well established as "the insurer undertakes, in return for prior payment of a premium, to provide the insured, in the event of materialisation of the risk covered, with the service agreed when the contract was concluded". The services in the case consisted entirely of fund management and had nothing to do with the coverage of risk.

The court considered the arguments raised by the appellants based on the wording of directives on insurance, and agreed with the A-G that these did not bring pension fund management within the scope of art.135(1)(a). Ancillary operations might be covered by the insurance directives, but they were not "insurance" and were therefore not within art.135(1)(a). There were ambiguities at first sight, but analysis of the context of the provisions resolved them. "Insurance" and "operations" required authorisation under the insurance directives, but only "insurance" was exempt from VAT.

CJEU (Case C-235/19): *United Biscuits (Pension Trustees) Ltd and another v HMRC*

2.3.2 Insurance and storage

In TC07115, the FTT dismissed an appeal by a self-storage company against a decision to refuse a reclaim of £793,000 of under-claimed input tax and also an assessment for £72,000 of over-claimed input tax relating to the period April 2009 to September 2012. There were four main issues:

- whether the company was making supplies of insurance to UK customers;
- whether it was supplying insurance intermediary services to a Guernsey-resident insurance captive subsidiary of its own parent company;
- what the place of the supplies was – if the supply was to the Guernsey company was it made to the recipient in Guernsey, or to a fixed establishment in the UK;
- whether the assessment was out of time.

The company's position was that it was making "specified supplies" to the Guernsey company, and it was therefore entitled to recover input tax. HMRC's position was that it was making supplies to its UK customers, or that it was making supplies to a FE of the Guernsey company. In either case, the input tax would be attributable to exempt supplies.

Customers of the storage company had to insure the goods they deposited. They were offered insurance through the captive insurer; the UK company collected premiums together with IPT and remitted 70% of the net premium, together with the IPT, to the Guernsey company. The Guernsey company effected reinsurance with Royal & Sun Alliance, which was not connected to any of the parties. The Guernsey company accounted for UK IPT on the necessary returns.

The Tribunal examined the contracts. The company understood them to have the effect that it was the beneficiary of a master insurance contract with its fellow subsidiary, with the customers having rights under that policy in case of loss. That suggested a similar arrangement to that in *Card Protection Plan*, where the supplier had a block policy and extended the benefit of it to its customers. That was held to be a supply of insurance by the company. The company's counsel sought to distinguish the situations, arguing that the UK company was not an insured person and was therefore only acting as an intermediary. It was the Guernsey company that made the supplies of insurance as principal. HMRC disagreed: the situation was very similar to *CPP*.

The Tribunal considered *CPP* and also *Wheels Private Hire Ltd* (UT 2017) and *BGZ Leasing* (Case C-224/11). Each of these considered a situation in which there were three people involved in an insurance arrangement, and examined the question of who was supplying insurance within art.135(1)(a) PVD. In each case the person in the middle was held to be supplying insurance based on the specific facts of the arrangement.

After examining these precedents, the judge concluded that there was no significant difference between the present case and *CPP*. Some of the terms of the policy clearly envisaged that it was the company that was insured under it; for example, the insurance limits were £80m in total and £2.5m in respect of any one premises, which clearly related to the company rather than to a customer. There was a single policy of insurance effected by the company, the benefit of which was extended to new customers as they joined.

The appeals were therefore dismissed in principle, but it was necessary to consider whether the assessment had been raised out of time. It had been issued on 30 October 2015, and related to periods 10/11 to 07/12 and "99/99". It was dependent on the "one year from knowledge of facts" rule.

The history of the provision of information to HMRC was examined. The critical points were that the company provided some information on 4 August 2014 and some more on 2 December 2014. The taxpayer's counsel submitted that HMRC had had sufficient information in December 2013 when an initial decision letter was issued; an initial statement of case for an appeal was dated 15 April 2014. HMRC argued that the document provided on 2 December 2014 was the critical last piece of the jigsaw that enabled them to issue an assessment; counsel's response was that HMRC had not identified any aspect of this document that had caused them to materially change their understanding of the supply chain and therefore to issue the assessment.

The judge agreed with HMRC. Until the company finally provided a copy of the Customer Goods Policy, it was not clear to HMRC whether the

nature of the arrangements was similar to *CPP*. The assessment was therefore not out of time.

Because the question of place of supply had been fully argued, the judge briefly expressed an opinion on it, even though HMRC had won on the issue of who made the supply of insurance to the customers. If the judge was wrong on that, it would be necessary for an appeal Tribunal to consider whether the supplies were "specified supplies".

Here, the argument was about whether what the UK company did in selling insurance to customers made it a FE of the Guernsey company. HMRC argued that only "high level activity" took place in Guernsey, and the day-to-day operation was in the UK company's premises where its staff had full authority to sell insurance to customers. They relied on *DFDS* and other similar precedents.

Curiously, the FTT decision made no reference to *Hastings Insurance*, although the arguments were on the same points of law. The judge agreed with counsel for the taxpayer that the Guernsey company could not be regarded as having a FE in the UK. *DFDS* did not apply because the UK company was not an "auxiliary organ" of the Guernsey insurer. If the judge had found for the company on the nature of its supplies, he would have also found for it on the place of those supplies.

However, the appeal was dismissed in principle.

Upper Tribunal

The company appealed to the Upper Tribunal, where it came before Mrs Justice Bacon and Judge Jonathan Richards. The judges noted in setting out the grounds of appeal that the alternative positions on the nature of the supply were mutually exclusive: either the company was supplying insurance to the domestic customers, or it was supplying insurance intermediary services to the Guernsey company. The nature of the supply was therefore a single issue, referred to as "the insurance issue". The company appealed the FTT decision on both the insurance issue and the time bar issue; as the FTT had not considered it necessary to consider the place of supply of an insurance intermediary service that it did not believe was taking place, that was not part of the appeal at this point.

The judges noted that the FTT had considered the regulatory environment relating to the insurance cover. Up to 2009, the company had been an "authorised person" under the Financial Services and Markets Act 2000, because it was acting as an insurance intermediary in relation to its customers. In 2009, an exemption from FSMA registration was introduced for storage firms; the company had decided to rely on this, and cancelled its FSMA authorisation from 6 April 2009. HMRC argued in the FTT that the company did not meet the conditions of the exemption, which had potentially serious consequences. The FTT concluded that the company's counsel was correct in arguing that the exemption did apply, but the terms of the exemption strengthened the analogy with *CPP* and indicated that the company was making a supply of insurance to its customers rather than intermediary services to the insurer.

The *CPP* decision was central to the dispute. By the end of the hearing, it was common ground that if (i) the company was a holder of a block insurance policy under which its customers were the insured and (ii) the company procured cover for its customers "for payment, in its own name

and on its own account" by having recourse to that insurer, the company would be making a supply of insurance to its customers and would not be making a supply of intermediary services to the insurer. The company's counsel argued that the FTT had not properly described or understood the nature of the arrangements between the company and the insurer, and if it had done so, it would not have found that the company was "the insured" under a block policy. He contended that *CPP* required two transactions in series: the issue of a policy to the company and a subsequent supply of the benefit of that policy to the customers. In this case, in his analysis, there was only one supply, which was directly from the insurer to the customers (arranged by the company as intermediary).

The UT examined the company's arguments and dismissed them in turn. The FTT had made no error of law. In particular, it was entitled to conclude that the regulatory environment was of central importance: the company had intended the arrangements to benefit from the FSMA exemption, and there was nothing unreasonable or perverse in the FTT's conclusion that the successful compliance with that exemption had created a block insurance policy that was similar to that in *CPP*.

The UT also considered in detail the arguments that *CPP* only applied if the company was "the insured", and that it required separate "mother and daughter transactions", and rejected them. There was nothing wrong with the FTT's overall conclusions that the company held a block insurance policy and procured cover for its customers under that policy, in return for payment, in its own name and for its own account.

The UT turned to the time-bar issue. The key question was whether the Customer Goods Policy was "the last piece in the puzzle" in the subjective opinion of the assessing officer; if it was, then the assessment was in time. The UT rejected an argument that HMRC "had everything they needed" to raise the assessment when they refused the repayment claim on 9 December 2013. This approached s.73(6)(b) from the wrong perspective: whether the officer considered he had enough information to justify an assessment was a subjective test, not an objective one. Also, the refusal of the repayment was on a different basis, so the same underlying facts would not have simultaneously and automatically justified the raising of the assessment.

The company's counsel argued that the FTT had not made a finding about the subjective opinion of the assessing officer, and its decision was therefore deficient. However, the UT considered that the FTT had done what the CA judgment in *Pegasus Birds* required: it had inferred the subjective opinion of the officer from the surrounding circumstances. The argument was therefore about whether the FTT had been entitled to infer that the officer had held that opinion about the last piece of the puzzle, rather than that it had substituted its own judgement for his (which would have been improper).

The judges were satisfied from the 30 October 2015 letter accompanying the assessment that the FTT had been justified in inferring the officer's reliance on the Customer Goods Policy. Combined with an earlier letter written by a different officer on 3 November 2014, before the policies were provided, it was clear that the provision of the documents had resolved an uncertainty for HMRC, and had therefore justified the raising of the assessment.

The appeals against both the insurance issue and the time bar issue were dismissed. The UT noted that the skeleton arguments had included discussion of whether the company had in fact been making single compound standard rated supplies of storage services (i.e. without an insurance element at all). HMRC's counsel asked the UT to make a finding to this effect (which would increase the input tax recovery but would increase output tax by a larger amount); however, as this point had not been argued before the FTT, the judges made no findings on the issue.

Upper Tribunal: *Safestore Ltd v HMRC*

2.3.3 Granting of credit

A Croatian company (F) processed tea and coffee. Between 2013 and 2017, it made funds available to a separate retail chain (K) in return for the simultaneous conclusion of three types of contracts:

1. K issued a bill of exchange to F, who undertook to pay the sum stated in cash – K was described in the bills as "lender" and F as "borrower";
2. F transferred the bill of exchange to a factoring company, which paid 95% to 100% of the amount to F, who paid that amount to K, while also guaranteeing payment of the bill of exchange on its due date (a procedure referred to as "reverse factoring");
3. K undertook to reimburse F for the interest and costs charged to F by the factoring company and to pay remuneration amounting to 1% of the principal of the bill of exchange.

The description of these transactions in the judgment is not entirely clear. It appears that, in the end, K paid the principal sum to the factor, subject to F's guarantee; under (3), K covered any costs incurred by F under (2), and also paid the remuneration so K made a profit. The description of K as "lender" and F as "borrower" seems the wrong way round, but it is referred to more than once in the decision.

The remuneration under (3) was invoiced without VAT. Following an audit, the tax authority issued an assessment for the equivalent of some €2m plus interest for late payment. F's appeal against the assessment was dismissed at first instance; on appeal, F argued that the remuneration was consideration for a grant of credit, because the effect of the whole arrangement was to make loans from F to K. The tax authority argued that the fee was for a debt collection service, and was not exempt. Questions were referred to the CJEU, asking whether this arrangement counted as "granting of credit", whether a bill of exchange was an "other negotiable instrument", and whether the remuneration could be exempt under art.135(1)(b) or 135(1)(d).

The court noted that the arrangement included a period (1 January 2013 to 30 June 2013) before Croatia joined the EU. The court had jurisdiction to give answers in relation to the period after 1 July 2013.

The court also noted that this arrangement was not part of F's main activities, and did not relate to supplies of goods or services. Nevertheless it was clearly economic activity within the scope of the PVD. The essential nature of the transactions had to be examined to consider whether they should be regarded as a single supply which it would be

artificial to split, or separate; the principle remained whether one or more elements were ancillary to or a means of better enjoying another, or were ends in themselves for the customers.

It was common ground that the economic purpose of the transaction was to enable K to satisfy its capital requirements, as it was unable to borrow from financial institutions due to its level of indebtedness. The main supply was therefore the making available of credit from F to K, with the other elements having no independent purpose.

The exemption in art.135(1)(b) was not restricted to credit granted by financial institutions; nor was it a requirement that the borrower should repay the lender directly (in this case, the repayment would be to the factoring company). Although exemptions had to be interpreted strictly, they must not be deprived of their intended effect.

The bills of exchange were negotiable instruments issued by K and obliging K to pay the principal sum on maturity (in spite of the contradictory description of K as "lender", which could not affect the economic reality). The Croatian government's argument that F was acting as an intermediary in a debt collection arrangement was rejected. The fact that the arrangement was intended to circumvent Croatian banking regulations was irrelevant: fiscal neutrality required that the exemption should apply to something that was in the nature of a transaction in negotiable instruments, however it was established. The nature of the arrangement was within art.135(1)(d) as well as (b).

CJEU (Case C‑ 801/19): *Franck d.d. Zagreb v Ministarstvo financija Republike Hrvatske Samostalni sektor za drugostupanjski upravni postupak*

2.3.4 Students' union (1)

A students' union claimed back output tax accounted for on sales of hot food and drinks from the students' union shop. The union claimed that the supplies were exempt because it was an eligible body making principal supplies of vocational training, to which these supplies were incidental. The amounts involved totalled £158,000.

The appeals were stood over behind the appeal by *Loughborough Students' Union* (which lost in the UT in 2018 on similar issues). Following that decision, the union submitted revised grounds of appeal, and HMRC filed an amended statement of case in January 2020; in the hearing, the union argued that a subsequent further statement of case represented a change of HMRC's position that required authority from the Tribunal that had not been sought or given.

The union's revised appeal contended that it was an eligible body within Note 1(e) Group 6 Sch.9 VATA 1994, and supplies of catering could qualify as closely related to supplies of education and vocational training. It was not itself the provider of university education, but it claimed that it made its own principal supplies of education or vocational training.

HMRC asked for further and better particulars of these principal supplies, and whether the profits of the catering supplies were fully reinvested into vocational training, rather than into the union's wider activities. After some delays, the union provided these details, mainly related to training those involved in union activities.

Judge Jeanette Zaman agreed with the union that HMRC had changed their position. In the January SOC, they had concentrated on arguments that the profits of catering were not reinvested in training, and that the shop was open to all students at the university, not just the ones who received the union's more restricted training. By July, they had returned to the argument that the union did not make qualifying principal supplies.

Nevertheless, she allowed HMRC to rely on the July SOC and argue the point. The appeals were not listed until October 2020, so the union had had plenty of time to consider the point; it had not explained why it would be difficult to gather evidence to defend the challenge.

The judge considered that the types of training on which the union relied did not meet the conditions to fall within the exemption. They included supplies for no consideration and on-the-job training, neither of which could satisfy the conditions. That was enough to determine the appeal, but the judge went on to consider the other questions as well, and concluded that the supplies of catering were not incidental to any supply of education. The situation was too similar to the *Loughborough* case (which concerned supplies of stationery) on which the decision of the Upper Tribunal was binding.

There was further detailed discussion of the conditions relating to reinvestment of surpluses, touching on the *Kennemer* decision in the CJEU, and whether the UK rules were consistent with the PVD provisions they were intended to implement. The union did not succeed on any point: it was not an eligible body for the purposes of the provision, and its supplies were not incidental to an educational supply. The appeals were dismissed.

First-Tier Tribunal (TC07896): *University of Southampton Students' Union*

2.3.5 Students' union (2)

Another students' union appealed against an assessment for £5,694 covering periods 09/16 and 09/17. This related to VAT not declared on takings for various freshers' week activities, which the union had treated as exempt fund-raising activities within Item 1 Group 12 Sch.9 VATA 1994; it also argued that it could qualify as a youth club providing facilities to its members within Item 6 Group 6 Sch.9.

The FTT decision starts with a long description of the correspondence between HMRC and the appellants' agent, setting out numerous requests for information and arguments from the agent about the validity of HMRC's position. There was also a history of the procedural background to the hearing, which was carried out on the basis of the papers with the agreement of the parties. The hearing bundle comprised 432 pages. There were references in the correspondence to witness statements that were not in fact filed by the appellant, and although both parties requested directions giving them the opportunity to make written submissions to the Tribunal, neither party did so.

There was an initial point that the periods had been subject to an earlier appeal in 2018 that had been concluded. The appellant argued that this invalidated a second attempt to assess the same periods because they were

subject to "res judicata"; HMRC said that the appeals had been withdrawn, and there had been no agreement of the liability.

The Tribunal agreed with HMRC's view. The earlier appeal had been withdrawn on the understanding that HMRC would withdraw the assessments, but only in order to issue revised assessments which set out additional reasons for their belief that the disputed VAT was due. There had been no agreement that discharged or cancelled the liability. There was nothing to stop HMRC issuing the revised assessments. A further argument that the new assessments were an abuse of process was also rejected.

The assessment for period 09/16 was raised on 11 April 2019, more than two years after the end of the period. The judge rejected an argument that it was out of time: it was not until 27 April 2018 that the income figures had been provided to HMRC, and that was information necessary to raise the assessment. The "one year from evidence of facts" time limit was satisfied.

At last, the judge (Jane Bailey) turned to the substantive issues, where it was agreed that the onus lay with the union to show that it fell within the terms of the exemption. The appellant had provided very little evidence and no witness statement; the only document before the judge was a photocopy of something described as a "wall planner" for 2016 which appeared to be a flyer sent to new students. It included a "welcome message" describing the freshers' programme; at the bottom of the document, in small print, there was a statement that "Leeds Beckett Students Union is a charity and Freshers events are organised in order to raise funds for our charitable purposes. All events are free unless otherwise stated."

The judge could only be satisfied that there had been a series of events. Some of these had been described as fund-raising events and others not, without an explanation of the difference between them. The flyer did not establish that the main purpose of the events was fundraising; rather, it appeared to be incidental to the primary purpose of welcoming new students. There was nothing in the internal documentation to explain the fundraising objectives or the difference between the events, and no witness statement from an officer of the union. There was therefore insufficient evidence for the judge to conclude, on the balance of probabilities, that the exemption applied.

Lastly, the judge considered the exemption in Group 6. Once again, there was no evidence to show that the union met the criteria to be regarded as a "youth club" within the definition of the legislation.

All the issues were therefore decided in favour of HMRC, and the appeal was dismissed.

First-Tier Tribunal (TC07907): *Leeds Beckett Students' Union*

2.3.6 Private sonography services

HMRC have published a Brief to clarify their policy on private sonography services (ultrasound) following the FTT decision in *Window to the Womb Ltd* (TC07687). They have accepted that the Tribunal applied the correct tests to the facts that it found, and the decision is therefore final. The Brief also invites anyone who considers that they

have received an incorrect ruling prior to that decision to seek a corrected ruling and a refund of any tax incorrectly overpaid.

The tests are that the services must be provided by an appropriately qualified medical professional, as set out in Notice 701/57, and must constitute "medical care". The primary purpose of the services must also be the protection, maintenance or restoration of the health of the person concerned. This includes the diagnosis of illnesses, the provision of analyses of scans or samples and helping a health professional, hospital or similar institution to make a diagnosis.

In the case, the FTT concluded that the customers' primary purpose in purchasing the scans was also to monitor the pregnancy and, if necessary, receive a diagnosis of any abnormality. Other providers supplying services can similarly exempt their supplies where the facts demonstrate that the conditions are met.

Providers who have received a different ruling in the past can apply for it to be corrected. The Brief sets out the procedure, which includes a requirement for evidence to be provided, and a note that HMRC may ask for further details to make sure that the conditions are fully satisfied.

Revenue & Customs Brief 17/2020

2.3.7 Exemption for medical reports

A qualified nurse drew up reports on behalf of the health insurance authority to assess the dependency levels of certain patients in order to determine the extent of their rights to care services. He treated his supplies of services as VAT exempt. The tax authority carried out an inspection and assessed him, ruling that such a service was not covered either by national or by EU law.

The taxpayer appealed, arguing that his services were "closely linked to social assistance and security" within art.132(1)(g) PVD. The national court considered that he did not qualify for exemption under German law, but decided to refer questions to the CJEU to determine whether this might be overridden by EU law. It was not sure whether exemption would apply under art.132(1)(g):

- where the service is not provided to the dependent person, but rather to an organisation in connection with the provision of exempt benefits to that person – in *Unterpertinger* (Case C-212/01), the provision of medical reports in connection with the award of a disability pension was held to be taxable;
- where the service is not supplied by "a body recognised as having a social character by the member state concerned" (the second condition in art.132(1)(g)). This might possibly arise by virtue of subcontracting of a service by the health insurance body, which clearly was such an entity, but the referring court wanted clarification.

The first proposition was considered in detail. The *Unterpertinger* decision was distinguished because it related to a different question – whether the service constituted medical care. The court concluded that the nature of the recipient of the supply was not a condition for services related to social assistance, and a sub-contractor's supply to another taxable person could in principle qualify for exemption.

In relation to the second question, recognition of bodies as having the required social character was something that was left to member states. A taxpayer could only dispute a ruling that he did not qualify if the member state had exceeded its margin of discretion. It would be for the referring court to determine the question, but the CJEU set out a number of principles to be taken into account:

- the fact that the taxpayer was an independent expert in the assessment of dependency status was not enough, on its own, to establish "social character".
- allowing the "social character" status of the customer (the health insurance body) to apply automatically to its suppliers would transfer the recognition function from the member state to the customer, and that could not be right.
- the fact that the costs would be borne by the social security fund was not a strong factor, because the cost was indirect.
- there did not seem to be a fiscal neutrality argument in favour of recognising the taxpayer as having a social character, because it did not appear that his competitors would have that recognition.

For all these reasons, it did not appear to the court that Germany had exceeded its margin of discretion in refusing to recognise the taxpayer as a body having the necessary social character.

CJEU (Case C-657/19): *Finanzamt D v E*

2.3.8 Updated Notice

HMRC have updated their Notice *Health professionals and pharmaceutical products* to include a new section on 'Deputising Services' and updating the information on 'Supplies of self-employed locum doctors including GPs'.

The new section explains that the health and welfare exemption applies to supplies of deputising services where the provider takes direct responsibility for medical care. The exemption applies where this service is provided by registered doctors or nurses, who provide medical advice or care. The exemption does not apply where non-medical advice is given or when advice is given by a person who is not a medical professional, unless they are supervised by a medical professional.

The information about locums explains that an employment business or similar body which supplies a locum doctor to a third party which it controls and directs, is considered to be making a supply of staff. Supplies of staff do not fall within the exemption and are therefore taxable, with VAT being charged at the standard-rate.

Notice 701/57

2.3.9 Updated Manual

HMRC have updated the *VAT Health Manual* with guidance on the health and welfare exemption and out of hours cover for doctors.

VATHLT2080

2.3.10 VAT liability of payroll services

HMRC have issued a Brief to comment on their policy following the outcome of *Cheshire Centre for Independent Living* (Upper Tribunal, October 2020 update). The FTT had upheld the charity's appeal against an assessment, holding that it qualified for exemption as making supplies that were incidental to a supply of welfare; the charity withdrew its appeal before the Upper Tribunal heard the case, because HMRC had advanced a better argument, and the Upper Tribunal considered HMRC's failure to put the better argument forward earlier was unreasonable behaviour that warranted an award of costs.

The Brief explains that HMRC's main argument had been that the FTT had erred in law because the decision did not take full account of the tests laid down in *Diagnostiko & Therapeftiko Kentro Athinon-Ygeia AE* (Joined Cases C-394/04 and C-395/04). The argument that made the charity withdraw its appeal was that a supply (in this case, payroll administrative services supplied to disabled persons who employed personal carers) can only be incidental to another supply if the same person makes the principal supply. As the welfare service was provided by the employed carer to the disabled person, that could not be satisfied.

HMRC state that anyone relying on the FTT decision in *CCIL* should reconsider their position, as their policy remains that such supplies are taxable. They will write to appellants in other cases that were stood over behind CCIL's Upper Tribunal appeal to find out if they still wish to pursue an appeal. Other suppliers who make similar supplies should ensure that they are accounting for VAT correctly, and should correct past returns if they have treated supplies as exempt.

Revenue & Customs Brief 16/2020

2.3.11 VAT liability of school holiday clubs

HMRC have issued a Brief to clarify their policy following the FTT decision in *RSR Sports Ltd* (TC07453). The Brief sets out the reasoning for the decision, and invites anyone in a similar position to request a correction of past rulings issued by HMRC.

The key conditions are that the supply is made by "the right sort of person" (charity, public body or state-regulated private welfare institution) and is "the right sort of service" (welfare, being directly connected with the care or protection of children and young persons). Notice 701.2 explains that the welfare exemption applies to day care services (such as those provided by a nursery, playgroup or after school club), but activity-based clubs such as dance classes are excluded from exemption.

In the case, the FTT considered whether the predominant element of the holiday camps was childcare or activities, and concluded that it was childcare. Although the answer was finely balanced, the childcare element was not incidental to and subservient to the activities that were being offered to the parents and children.

The important key features were:

- the members of staff were merely supervising activities;
- they did not hold any coaching or teaching qualifications;
- there was no external standard to which the services were being provided;
- the activities were merely an adjunct to the essential service which was childcare.

The Brief sets out the evidence that anyone seeking a corrective ruling should provide, and the procedure for doing so.

Revenue & Customs Brief 18/2020

2.3.12 Sporting body

A German entity was constituted as a private law association whose object was to maintain and promote golf. For this purpose, it operated a golf course and related facilities, which it rented to an operating company. The association's funds were only to be used for purposes in accordance with its statutes, which provided that the assets of the association would be, in the event of voluntary or forced dissolution, transferred to a person or to an institution designated by the general meeting.

In January 2011, the association acquired all the shares in the operating company, using loans from its members. During the following year, it

received income totalling €78,615 from various golf-related supplies; the tax authorities refused to exempt these activities from VAT; they did not regard the association's statutes in relation to dissolution sufficiently clear to make it an eligible body.

Questions were referred by the German court to clarify whether the exemption for sporting supplies by non-profit bodies had direct effect to overrule the German law, and also how the expression "non-profit organisation" should be interpreted, in particular in the present case. If the expression had an independent meaning in EU law, did it require the assets of such a body on dissolution to be transferred to another similar body?

In relation to the "direct effect" question, the court's doubt arose from the judgment in *British Film Institute* (Case C-592/15), where the expression "certain cultural services" was held to be too imprecise to fulfil the conditions for direct effect. The requirement was that the Directive must be mandatory and clearly applicable. The court set out the conditions for art.132(1)(m) to apply: "certain supplies of services" must have "a close link with the practice of sport or physical education", and they must be "provided to persons who practise sport or physical education" by "non-profit organisations". The expression "certain services" indicated that this provision does not lay down an obligation for the Member States to generally exempt all the services which have a close link with the practice of sport or physical education.

The same principle applied as in *BFI*, which concerned the similarly worded exemption in art.132(1)(n): "certain" meant "not all", and it allowed a certain measure of discretion to Member States to choose which services should be exempt. The cases relied on by the taxpayer (*Canterbury Hockey Club* Case C-253/07, *Zamberk* Case C-18/12 and *Bridport and West Dorset Golf Club* Case C-495/12) were not about direct effect: they concerned supplies that were accepted as within the exemption by the Member State concerned, and they concerned the application of the exemption to supplies in particular circumstances. There was, therefore, a "margin of appreciation" allowed to Member States in setting the scope of the exemption.

The court confirmed that "non-profit organisation" is an independent concept of EU law, to be applied consistently across the Member States to avoid a divergence of treatments. The court considered the wording of the provision, the reference in art.133 to allowing Member States to impose the condition on several categories of art.132 supplies, and the precedent case of *Kennemer Golf* (Case C-174/00) which distinguished between a non-profit organisation that made surpluses and reinvested them in the facilities, and an organisation that set out to make profits.

The requirement for an entity to be not-for-profit meant that it should not be allowed to distribute surpluses to its members throughout its existence, including on dissolution. The answer given appears to allow the return of value subscribed for shares, including the market value of contributions in kind, but any surpluses cannot be distributed to the members.

CJEU (Case C‑ 488/18): *Finanzamt Kaufbeuren mit Außenstelle Füssen v Golfclub Schloss Igling eV*

2.3.13 Cost-sharing groups

The full court has now agreed with A-G Kokott's opinion on the rules for cost-sharing groups in art.132(1)(f) PVD. In this case, the group is based in Hong Kong, therefore in a third state, whilst its members are subsidiaries of a group of companies, which are all established in the United Kingdom. Almost all those members, together with other subsidiaries of that group of companies in the United Kingdom, form a VAT group. The situation therefore requires consideration of how the CSG rules apply across borders, in particular in relation to a third country, and how they may interact with VAT grouping under art.11, which also has the effect of not taxing transactions between members of a group.

The fact that Hong Kong does not have VAT made the first issue economically sensitive. If the CSG exemption applied, it would allow the group to buy resources without suffering VAT and bring them into the UK/EU without a charge.

The appellant (KIC) is the holding company of a group which contains a number of companies that are regarded as exempt educational establishments, being "colleges of a university". These colleges recruit students from outside the UK using a network of 500 recruitment agencies, none of which have an exclusive relationship with Kaplan. KIC also maintained an international network of representative offices. Prior to October 2014, the agents contracted directly with the UK holding company; at that point, the colleges established a limited company (KPS) in Hong Kong, 94% owned by the UK HC and the balance by the University of York, which owned 55% of the only international college that was not a 100% subsidiary of KIC.

From October 2014 onwards, the agents supplied their services to KPS. The place of supply of those services therefore moved from the UK to Hong Kong, and were no longer subject to VAT. KPS supplied the following services to KIC:

- services which KPS procured from the agents;
- services which KPS procured from the representative offices;
- services supplied by KPS dealing with matters such as compliance, together with the other activities discussed above, such as supporting the agents.

KIC gave evidence that its group would not seek recruitment services from anyone other than KPS. KPS charged each international college separately for the money due to accounts for the services provided to the relevant college. KPS charged each college both for its own services (e.g. compliance services) and for those procured from the representative offices on the basis of the number of students recruited for that college. KPS calculated the charges by pooling the costs and then dividing them on the basis of student numbers. Agents' marketing expenses were managed in the same way. However, agent commissions were directly attributable to individual students and were charged to the destination college for the student. Overall, no VAT was charged, relying on the CSG exemption.

It was common ground that there were sound commercial reasons for setting up KPS in Hong Kong; there was no suggestion that it was an

artificial arrangement or that there was an abuse of rights. It was also not in dispute that KPS provides its members, the international colleges, with the services directly necessary for the exercise of their exempt activities and that the method of charging adopted by KPS provides for exact reimbursement of each member's share of the joint expenses.

HMRC ruled in April 2017 that the CSG exemption did not apply, and KIC was therefore liable for a reverse charge of £5.25m for the period October 2014 to July 2016. As the UK group's outputs were largely exempt, this would be not recoverable.

The FTT referred questions to the CJEU. The first question asked whether there was a limitation on the territorial scope of the CSG exemption. If there was not, the further questions asked how the principle of preventing distortion of competition should be applied.

The third and fourth questions asked about the significance of the relationship between the "members" of the CSG: did the provision apply only to unrelated parties pooling resources in a CSG, or could it apply where the members were closely linked (members of KIC's corporate group) or for VAT purposes a single entity (a VAT group)?

There were some preliminary problems with the questions set. Part of the first question referred to the possibility of establishment of a CSG in a different Member State; that clearly was hypothetical in the context of this case and was therefore inadmissible.

The order for reference stated that KPS made its supplies to KIC, which was not itself a member of the group; however, the referring court stated that the colleges were "charged", and were deemed to receive the supplies because KIC was the representative member of a VAT group comprising them all. The A-G considered (contrary to the view taken by the Commission and the United Kingdom) that this meant the exemption was applicable in principle. It would be for the referring court to confirm whether the services were in reality supplied to KIC which sold them on (ruling out the exemption), or were in reality supplied to the colleges but subsumed within the VAT accounting of the VAT group.

The A-G commented that grouping is primarily a simplification that operates between the members of the group and the tax authority. It has no impact on the relationship between the group and third parties, who are unlikely even to know of its existence. The individual colleges still had contractual capacity in their own right, and they would also have the capacity to form and be members of a CSG.

The A-G then turned to the question of whether a CSG could be established in a third country such as Hong Kong. She had already considered this in the context of EU Member States in the *Aviva* and *DNB Banka* cases, and agreed with the UK and the Commission that it was not possible. This was based on the derivation of art.132 from 6th Directive art.13, which was headed "exemptions within the territory of the country". The arrangement of the exemptions in the Directive separates domestic transactions (arts.132 – 137) from international transactions (arts.138 – 165). If it had been intended that CSGs applied across borders, they would have appeared in the later articles.

This interpretation avoided an inconsistency with art.11, which explicitly provides for grouping to be allowed only where the persons concerned

were established in the territory concerned. Given that the conditions for CSGs are looser than art.11 in terms of the required financial and economic links, it would make little sense if a more favourable exemption could be achieved with less stringent conditions. In the present case, KPS is excluded from joining the VAT group by art.11 because it is established in Hong Kong; why then should it be able to achieve the same result by using art.132(1)(f)?

The tax planning opportunities that would be available if cross-border CSGs were allowed were outlined and considered too favourable to have been intended by the legislature. The company's argument that art.132 provided for exemptions in the public interest, and therefore the risk of exploitation of tax rates was negligible, was described as "surprising" by the A-G.

The requirement to prevent distortions of competition also ruled against cross-border CSGs. It would not be practical for Member States to assess whether the condition was satisfied where a CSG was established in a third country. The basic requirement of art.131, to ensure the correct and straightforward application of the exemptions, also militated against the inclusion of such groups.

The A-G went on to consider the other questions in case the court disagreed with her on the question of whether third country CSGs were permitted. She described the purpose of the provision as being intended to offset the competitive disadvantage of smaller undertakings by comparison with a larger competitor. She noted that the competition clause contained in art.132(1)(f) seems somewhat unusual in this regard and makes little sense, because the whole point is to reduce distortions of competition.

She therefore set out some convoluted principles of interpreting exceptions strictly, and exceptions to exceptions broadly, in order to achieve the objectives of the Directive. She made a number of observations about the way in which Member States should approach the question of establishing distortions of competition and apply the rule, including some indications of when the exemption might be applied inappropriately:

- the group supplies the same services to a significant extent for consideration to non-members and is to that extent, by exploiting effects of synergy, operating on the market primarily as a competitor and less as a cooperative group. This could, under certain circumstances, constitute a correspondingly genuine risk of distortion of competition in relation to third-party suppliers.
- the group does not supply any services tailored to the specific needs of its members, but only sells on the purchased services. Those services could just as easily be offered and received by others. Here, too, third-party suppliers would be forced from the market in question.
- the primary purpose of the group's formation is simply to optimise the input VAT burden rather than to establish reciprocal cooperation with a view to avoiding a competitive disadvantage. An optimisation of the input VAT burden can be taken to exist where a competitive advantage is created by shifting any necessary peripheral services

received to a group in a state with a very low VAT rate or even no VAT.

Having effectively found against the appellants on all the issues so far, the A-G turned to the relationship between VAT grouping and CSGs. Here, she disagreed with the Commission and the UK, and opined that there was no reason for members of a VAT group to be precluded from enjoying the exemption for supplies by a CSG to them, as long as the other conditions were met. The law did not require a "group of independent persons" but "independent groups of persons". However, if all the members of a CSG were members of the same VAT group, art.11 would take precedence over art.135(1)(f) – the supplies would be outside the scope rather than exempt.

Full court judgment

The court started its consideration with the question of whether a VAT group could constitute "the members of a CSG" (the third and fourth questions – the first and second were heavily subdivided, but in the end were not answered).

The explicit words of art.132(1)(f) did not refer to the consequences of the members of an independent group forming a VAT group; however, the formation of such a group could not have the effect of extending the application of the exemption to supplies of services to entities which are not members of the independent group of persons.

Considering the context of the exemption, it was necessary for all the members of the independent group to carry on activities in the public interest, in accordance with the heading of art.132. Exemption cannot apply to supplies of services received by members of a VAT group which are not also members of the independent group of persons carrying on such activities in the public interest.

The effect of VAT grouping was to treat all the members of the group as a single taxable person; this meant that supplies by third parties were not to be regarded as made to an individual member of the group, but to the deemed single taxable person as a whole. If the representative member of the VAT group was not a member of the independent group carrying on activities in the public interest, the application of the exemption would benefit a person who should not benefit.

The judgment goes on to say:

"However, that provision expressly refers only to supplies of services by independent groups of persons to their members. It does not refer to supplies of services by an independent group of persons to a VAT group whose members are not also all members of that independent group of persons. Since the conditions for exemption are precisely formulated, any interpretation which broadens the scope of art.132(1)(f) PVD would be incompatible with the objective of that provision."

This could not be overridden by provisions of national law which ascribed to the representative member of a VAT group the characteristics of individual members of the group.

The court referred to *Infohos* (Case C-400/18), in which it was held that it was possible for an independent group of persons to make supplies to the members within the exemption, and to make similar supplies to other persons outside the exemption. The different recipients of the supplies in

that case could readily be distinguished, so the benefit of the exemption could be restricted to the members of the independent group. That was not the case where the supplies were made to a VAT group which contained a person (the holding company) that was not a member of the independent group. There was therefore a significant risk that the scope of the exemption would be extended by its application.

This meant that the structure failed to benefit from the cost-sharing exemption; as a result, it was not necessary to consider the other questions (which related to territorial scope and distortion of competition).

CJEU (Case C-77/19): *Kaplan International Colleges UK Ltd v HMRC*

2.4 Zero-rating

2.4.1 What is food?

Annex III PVD item 1 allows member states to apply a reduced rate to "Foodstuffs (including beverages but excluding alcoholic beverages) for human and animal consumption; live animals, seeds, plants and ingredients normally intended for use in preparation of foodstuffs; products normally intended to be used to supplement foodstuffs or as a substitute for foodstuffs." Item 3 allows member states to apply a reduced rate to "pharmaceutical products of a kind normally used for health care, prevention of illnesses and as treatment for medical and veterinary purposes, including products used for contraception and sanitary protection". Member states can choose whether to apply a reduced rate at all, and can choose to apply such a rate to any of the categories in Annex III without having to apply them to any of the others.

Netherlands law applied a reduced rate to "foodstuffs, in particular food and beverages normally intended for human consumption". The law also extended to ingredients used in preparation of food, and products intended to supplement or substitute for food or beverages (but excluding alcoholic drinks).

A trader ran a sex shop in which he sold capsules, drops, powders and sprays presented as aphrodisiacs that stimulate libido. The products, which were composed essentially of elements of animal or vegetable origin, were intended for human consumption and are to be taken orally. A dispute arose over whether they qualified for the reduced rate as "foodstuffs" or under any part of the extended definition. The tax authorities assessed him for underdeclared output tax on the basis that the standard rate should have been applied, and questions were referred to the CJEU to clarify the meaning of "foodstuffs".

The CJEU noted that the expressions in Annex III concerning foodstuffs and ingredients are not defined in the Directive or the Implementing Regulation, and there was no reference to the domestic law of member states. It was therefore necessary to interpret the expressions in accordance with the usual meaning of their words in everyday language, whilst also taking into account the legislative context in which they occur and the purposes of the rules of which they are part.

The court approved of the definition suggested by the Advocate-General, which was that "all products containing nutrients which serve as building blocks, generate energy and regulate its functions, which are necessary to keep the human body alive and enable it to function and develop, and which are consumed for the purposes of providing it with those nutrients, are in principle 'foodstuffs for human consumption'." The crucial point was the nutritional role: health benefits, pleasure in consumption or use in a certain social context were all irrelevant. The intention (whether realised or otherwise) to increase a person's libido was therefore irrelevant.

The court also noted that definitions of food from Directives relating to food safety were irrelevant, because they served a different purpose in a different context. The scope of those Directives was wider than "foodstuffs for human consumption" or ingredients or supplements. The separate reference in Annex III to "pharmaceutical products" confirmed that "foodstuffs" did not cover everything that was ingested orally by humans.

The purpose of Annex III was to reduce the cost to consumers of certain essential goods and services. This clearly applied to products that provided nutrition to keep the human body alive and to enable it to function and develop; but it clearly did not apply to products that did not contain such nutrients.

It would be for the referring court to determine whether the products in dispute contained the type of nutrients that might bring them within Annex III, but the court expressed the view that this was unlikely, particularly as the reduced rate was an exception to the general rules of VAT and therefore had to be interpreted strictly.

CJEU (Case C-331/19): *Staatssecretaris van Financiën Ltd v X*

2.4.2 Beverages?

In TC06874, the FTT allowed an appeal concerning a "juice bar and health cafe" which supplied "juice cleanse programmes", in which customers replaced meals with juices and smoothies over a number of days. The company accounted for output tax on all its products, whether consumed on or off the premises, therefore effectively treating them as "beverages" rather than as "food" for VAT purposes.

HMRC issued a decision in 2016 that the "programmes" were standard rated as beverages, and the company appealed. There was a preliminary dispute about whether the company or its accountants had accepted in correspondence that individual sales of juices were beverages; the judge (Philip Gillett) considered the argument, but held that it was not relevant to the appeal, because the appeal concerned programme sales rather than individual sales. The judge commented that it would be wrong if HMRC sought to conflate the two issues.

On the other hand, the late inclusion (on the Sunday afternoon before the hearing commenced on the Monday) by HMRC of material published by the NHS and British Heart Foundation on healthy diet would constitute "litigation by ambush", and this material should be excluded.

The Tribunal heard witness statements from the owner of the business, two customers, and an officer of HMRC, as well as examining a "brief

bundle" of documents and tasting the products. These were palatable but thick, not easily drunk through a straw and unlikely to be consumed as a casual drink for general refreshment.

The company's marketing material clearly represented the JCPs as meal replacement programmes rather than as healthy drinks. They were sold at higher prices than the individual juices sold separately, and also for more than similar products could be obtained in a supermarket. They were not pasteurised and therefore had a shorter shelf life than more widely-available products.

HMRC argued that the products were beverages, in line with the appellant's business practice, alleged admissions in correspondence, and precedent cases. HMRC's representative referred to regulations for weight reduction products, which provide specific criteria with which a product must comply before it is regarded as a meal replacement product. Other factors included the simple fact that the product was consumed as a drinkable liquid.

The company's representative pointed out that HMRC had disregarded how the customers perceived the product. The programme was a package that included advice and encouragement as well as a menu plan. The company had been prudent in accounting for VAT on all sales; this did not represent an admission or acceptance that the treatment was correct. The way in which a product was held out for sale and designed to be taken was relevant: these were sold as food, not as beverages.

The question of whether something is a beverage is a "multi-factorial assessment" for the Tribunal, which should not be carried out in an overly elaborate way. The tests set down by Sir Stephen Oliver in *Bioconcepts* remain relevant:

[Beverages are] Liquids that are commonly consumed are those that are characteristically taken:

- *To increase bodily fluid,*
- *To slake the thirst,*
- *To fortify, or*
- *To give pleasure.*

In this case, the judge considered that the multi-factorial assessment should take into account:

(1) How is the product marketed, in accordance with Fluff and Roger Skinner,

(2) Why it is consumed by the customer, considering the Bioconcepts tests, and

(3) What is the use to which it is put, again considering Bioconcepts?

The judge noted that the customers would drink considerable amounts of water or herbal tea with the JCPs. They were not intended to increase bodily fluid or slake the thirst. They were intended for nutrition as meal replacements, not to "fortify" or to give pleasure. It would be surprising if one of these products was offered to an unexpected guest (a test from *Innocent Ltd*).

The judge distinguished a binding precedent, *Kalron Ltd*, on the basis that that decision included a specific finding of fact that the products were not marketed as a meal replacement. The JCPs were marketed as meal replacements in liquid form, not as beverages; they did not satisfy the *Bioconcepts* tests. The appeal was allowed.

Upper Tribunal

HMRC appealed to the Upper Tribunal, where their main ground of appeal was that the FTT erred in law in allowing itself to be influenced by the way in which the taxpayer's products were marketed to conclude that they were not beverages. Mr Justice Zacaroli and Judge Timothy Herrington summarised the decision below and the FTT's interpretation of the precedents that led it to its decision. They further summarised and analysed a number of the precedents, including *Bioconcepts*, *Kalron* and *Innocent*, as well as others.

HMRC argued in particular that marketing is relevant where a product can be used for different purposes, such as the maggots in *Fluff Ltd* or the more recent example of bicarbonate of soda (*Phoenix Foods Ltd*). In their view, marketing was not relevant to the assessment of a "single use product" such as these smoothies.

The judges did not accept that there was such a sharp distinction. In all cases involving classification for VAT purposes a multifactorial assessment is required. The way a product is marketed and sold is a potentially relevant factor in every case; the amount of weight it carries varies, and that weight is part of the assessment.

The UT rejected the submission that the FTT had attributed too much weight to this factor. It had in fact given equal prominence to the marketing and to the way the products were in fact used. HMRC's counsel suggested that the FTT decision would have allowed a retailer to sell a Mars bar as a meal replacement and claim zero-rating, but that was a distortion of what the FTT had concluded.

The FTT's multifactorial assessment had been based on (i) the circumstances of consumption whereby the JCPs were consumed in place of and at the normal time of traditional meals over a period of days; (ii) shelf life; (iii) taste and texture; (iv) ingredients; (v) process of manufacture and (vi) marketing. That was balanced and could not be faulted.

Contrary to HMRC's grounds of appeal, the FTT had explicitly stated that it did not regard the *Bioconcepts* tests as definitive or exhaustive, and its decision was consistent with that statement. The weight to be applied to the factors in the multifactorial assessment was a matter for the FTT, and it should not be interfered with on appeal unless the conclusion reached was plainly wrong or irrational.

HMRC's appeal was dismissed.

Upper Tribunal: *HMRC v The Core (Swindon) Ltd*

2.4.3 Restaurant and catering services

A dispute arose between a McDonald's franchisee and the Polish tax authorities about the application of the reduced rate. In accordance with art.98 and Annex III PVD, Poland has separate reduced rates for "catering

and drinking services" (8%) and "prepared meals" (5%). In effect, this is a similar distinction to the UK's charging of VAT on "eat in" and allowing zero-rating of "cold takeaways" (prior to the current temporary reduced rate on eating in and hot takeaways); however, it comes from a different legislative source, being the distinction between Annex III item 1 ("foodstuffs") and item 12a ("restaurant and catering services"). The fact that the two categories come under different parts of Annex III means that different rates can be applied to them.

The questions ask whether "restaurant service" included the situation in which:

- the seller provides buyers with an infrastructure enabling them to consume their meals on site (separate consumption area, access to toilets);
- there is no specialized service provided by waiters or waitresses;
- there is no service in the strict sense;
- the ordering process is simplified and partially automated;
- the customer has limited possibilities to personalize his order.

Further questions asked about the relevance of the manner in which the meals were prepared, and the relevance of whether the customer actually used the infrastructure provided, or merely had the possibility of using it.

The Advocate-General noted that the fast food operation lay on the border between "supply of goods" and "supply of services" that was considered in the cases of *Faaborg-Gelting Linien* (Case C-231/94) and *Manfred Bog* (Case C-497/09). The A-G proposed that this was the key question that the CJEU should address. He considered the background to the reduced rate, the options available to Member States and the importance of the principle of fiscal neutrality for similar supplies.

The Directive that introduced item 12a to Annex III in 2009 stated as its purpose the promotion of job creation and to combat the underground economy. Art.6 of the Implementing Regulation also defines restaurant and catering services: "Restaurant and catering services mean services consisting of the supply of prepared or unprepared food or beverages or both, for human consumption, accompanied by sufficient support services allowing for the immediate consumption thereof. The provision of food or beverages or both is only one component of the whole in which services shall predominate. Restaurant services are the supply of such services on the premises of the supplier, and catering services are the supply of such services off the premises of the supplier."

The A-G considered that this indicated that it was not the method of preparation of the food that mattered, but the provision of related services that "must be sufficient and predominant to ensure the immediate consumption of the prepared foods". If that did not apply, the supply would be of foodstuffs – goods, rather than services.

The A-G went on to consider the *Faaborg* and *Bog* decisions in some detail, and related them to the article in the Implementing Regulation. In his view, the answer to the question depended on whether the food was to be "eaten in" (services) and "taken out" (goods). Restaurant and catering services would cover the supply of food in a place under the control of the

taxable person in which material and human resources are organized and implemented to guarantee the quality to the consumer sufficient services to ensure their comfort and safety for the immediate consumption of these foods on site.

He noted the practical difficulty of applying this distinction to the various different aspects of the particular appellant's business (walk-through, drive-through, eat-in, sales in a food court), and gave his views on each one in turn. Where no infrastructure was provided, or customers chose not to use it, that would constitute a supply of goods; where infrastructure was provided and the customers used it, even if it was shared with other outlets (as in a food court), that would constitute a supply of restaurant services.

CJEU (A-G) (Case C-703/19): *JK v Dyrektor Izby Administracji Skarbowej w Katowicach*

2.4.4 Change of rate for PPE

HMRC have updated their Notice *Health professionals and pharmaceutical products* to reflect that the zero rate of VAT for the supply of PPE equipment has reverted to the standard rate of VAT from 1 November 2020.

Notice 701/57

A similar update has been made to the *VAT Health Manual*.

VATHLT2021

The Trade Association for Instrumentation, Control, Automation and Laboratory Technology (GAMBICA) has published new specialist guidance on the scope of zero-rating which continues to apply when universities and other charitably funded bodies purchase laboratory equipment. It is hoped this will reduce confusion on VAT for charities as Government re-imposes VAT on PPE.

www.gambica.org.uk/resourceLibrary/press-release-on-ppe-and-zero-rating-for-vat.html

2.5 Reduced rate

HMRC have provided further responses to ATT queries on temporary reduced rate of VAT. In particular, these cover matters such as:

- holiday accommodation deposits (where the business may have the option to apply the reduced rate according to the basic time of supply under s.88 VATA 1994, but there are no plans to introduce anti-forestalling rules when the rate is increased again);
- interaction with the rules on face value vouchers (MPVs will continue to be taxed only on redemption, at the rate ruling at that time; SPVs will continue to be taxed on issue, and the liability of the voucher will not be revisited afterwards);
- interaction with the flat-rate scheme (where "off-premises caterers" can apparently benefit from the reduced flat rate, even though they

cannot benefit from the extension of the lower rate – their supplies remain standard rated in full);

- clarity of guidance issued (e.g. to make it clearer that "admission to attractions" does not include admission to sporting events *or sporting facilities*).

www.att.org.uk/technical/news/hmrc-further-response-att-queries-temporary-reduced-rate-vat

The reduced rate period was formally extended to 31 March 2021 by statutory instrument.

SI 2020/1413

2.6 Computational matters

Nothing to report.

2.7 Discounts, rebates and gifts

Nothing to report.

2.8 Compound and multiple

2.8.1 Fitness and nutrition

The operator of a fitness studio offered, in addition to the fitness service, a nutrition advice service. It treated the nutrition advice as a separate exempt supply of healthcare. The Portuguese authorities considered that there was a single compound supply (in which case the separate question of whether there was a healthcare supply would not arise), and questions were referred to the CJEU. A-G Kokott has given an opinion.

Customers of the fitness studio could opt for a package including nutrition advice, and paid extra for it; however, once they had exercised the option, they paid whether they used the service or not. The studio also provided nutrition advice to external customers who did not use the gym. Fees for the package were apportioned 60% for gym use and 40% for nutritional advice.

The A-G started with the principle that every supply must be regarded as independent, and situations in which that is departed from are "few and exceptional". Economic links between supplies and the particular contractual structure in the Member State could not determine whether supplies were compound or multiple.

This principle is "in tension" with the rule that single supplies should not be artificially split. The two principles that are used to distinguish the situations are:

- single complex supplies, where the supply by the taxable person consists of two or more elements or acts which are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to consider separately.

- dependent ancillary supplies, where one element does not constitute for customers an end in itself but a means of better enjoying the principal service supplied.

In the case of a single complex supply, the critical factor is whether the typical consumer (the typical recipient of the supply) regards the supply received as multiple distinct supplies or as a single supply. The decisive criterion is the generally accepted view, that is to say, the understanding of the general public.

The elements of a single complex supply merge into a different type of supply, and cannot be separated out. Examples include a restaurant meal. If this is the case, the weighting of the individual elements within the complex supply is irrelevant, and it has to be considered as a whole, for example to decide whether it constitutes a supply of goods or a supply of services.

If the different elements can be supplied separately, or are invoiced (realistically) separately, that suggests that the supply does not fall in the "single complex" category. On the other hand, if all the elements of the supply are essential for the overall economic aim of the package, that is suggestive of a single complex supply (e.g. discretionary portfolio management).

Turning to dependent ancillary supplies, the A-G commented that there is nothing artificial about splitting them into their constituent elements. However, they should be given a single VAT liability. Typical examples of ancillary supplies in the supply of goods are packaging or shipment. The latter supplies of services do not have the importance of a distinct principal supply because they serve only to fulfil the actual purpose of the contract. The same holds, for example, where the provider makes available, for consideration, different payment methods.

Indicative factors of dependent ancillary supplies include:

- negligible value in relation to the principal element;
- no distinct economic interest for the recipient.

The A-G suggests that supplies of water, heating and electricity should normally be regarded as ancillary to "letting", even where they are billed on the basis of consumption, because they are for the better enjoyment of the principal supply. Non-typical ancillary letting supplies should generally be regarded as separate, applying the general principle.

There is a third situation in which supplies take on the liability of something else, as provided for by the Directive: "closely related activities" are brought within several of the exemptions in art.132(1). The court has sometimes employed the notion of "principal and ancillary supplies" when considering questions about these rules, but that is not strictly necessary. If the closely related activity was "ancillary", it could not possibly have a separate liability. The A-G suggested that the use of the language was imprecise but was intended to make clear that closely related activities are, in the same way, "auxiliary". She said that they could possibly be made by persons other than the taxable person making the main supply.

After considering all these principles, the A-G turned to the particular supplies in the case. The two elements served the same overall aim, being

to boost physical well-being and athletic performance. However, the fact that they were supplied under a single contract did not necessarily lead to a conclusion that they should be treated as a single supply.

In the view of the A-G, this could not be classified either as a single complex supply or as a dependent ancillary supply. The fitness and nutrition elements were not indivisibly linked to make a single complex supply; it was also the case that neither was ancillary to the other in the sense of being for its better enjoyment. They might both tend towards the same objective, but they did so in different ways, not in relation to each other. The nutrition service was also not a negligible element, if it constituted 40% of the value of the supply.

The A-G was therefore satisfied that the two elements were separate for VAT purposes. She moved on to the second question, which was whether the nutritional supply was paid for but not used. She noted that this implied that the referring court accepted that the exemption was in principle available for the nutritional advice service (which was provided by a qualified professional).

The Commission had argued that general nutritional advice did not have the necessary therapeutic aim to be regarded as "medical care". That should be reserved for the diagnosis, treatment and, in so far as possible, cure of diseases or health disorders. The Court has adopted a broad understanding of therapeutic aim and includes preventive measures which protect and maintain health; however, they must seek to avert, avoid or prevent the occurrence of a health disorder or to detect such a disorder in a latent or incipient state. It would be for the referring court to examine whether the advice service was aimed at the prevention or treatment of certain diseases or was merely intended to improve general well-being or appearance.

The actual question referred had been answered in other cases, where the court ruled that the VAT treatment did not change if a supplier made a supply available but did not actually supply it. The question would only matter in the present case if the referring court determined that the exemption properly applied; however, the A-G could see no reason why the general principle should not apply here, if that was the case.

The A-G recommended that the court should rule that the supplies were separate, but the nutritional element was only exempt if the referring court determined that it had a therapeutic aim.

CJEU (A-G) (Case C‑581/19): *Frenetikexito – Unipessoal Lda v Autoridade Tributária e Aduaneira*

2.8.2 Opticians

The *VAT Valuation Manual* contains updated guidance on opticians and dispensers of hearing-aids, explaining the current approach to "separately disclosed charges" and "apportionment" with examples.

VATVAL12320

2.9 Agency

2.9.1 A last reference?

A company operating a social media platform enabled content providers to sell services to “fans”. According to HMRC, art.28 PVD and art.9a Implementing Regulation meant that the company was to be treated as buying and selling the services, and was therefore fully liable to output tax on all of the income (presumably regardless of whether the content providers were registrable).

Art.9a IR provides:

“Where the broadcasting or electronic services of a service provider are supplied through the telecommunications network, an interface or a portal such as a marketplace for applications belonging to an intermediary or a third party intervening in the supply, the intermediary or the third party shall, for the application of art.28 PVD, be presumed to be acting in their own name but on behalf of the service provider unless, in relation to the final consumer, the service provider is explicitly indicated as the supplier.”

The company applied for a reference to the CJEU. After detailed consideration of the arguments about the validity and application of the EU law in this case, Judge Anne Scott agreed that a reference was necessary to determine the issue. The parties agreed the order for reference, summarising the facts and the issues as follows:

The Appellant (“Fenix”) operates a social media website known as OnlyFans at www.onlyfans.com (“the Platform”) and has sole and exclusive control of the Platform.

The Platform is offered to “Users” from around the world. These Users are divided into “Creators” and “Fans”. Creators have profiles and upload and post content such as photographs and videos to their respective profiles. They can also stream live video webcam and send private messages to Fans who subscribe to them. The Creator determines the monthly subscription fee, although Fenix sets the minimum amount both for subscriptions and for tips.

Fans can access uploaded content by making ad hoc payments or paying a monthly subscription in respect of each Creator whose content they wish to view and/or with whom they wish to interact. Fans can also pay tips or donations known as “Fundraising” for which no content is supplied in return.

Therefore, Creators charge and earn money from content and Fans pay money for content.

Fenix provides not only the Platform but also the facility whereby Fans make payments and Creators receive payment. Fenix is responsible for collecting and distributing the payments, utilising a third-party payment service provider. Fenix charges the Creator 20% for services by way of a deduction (“the Charge”) from the consideration paid by the Fan; if a Creator charges a notional £100 for a subscription, Fenix receives £100 from the Fan, retains £20 and pays the Creator £80.

Both payments from a Fan and payments to a Creator will appear on the relevant User’s bank statement as a payment made to or from Fenix.

At all material times, Fenix charged and accounted for VAT at a rate of 20% on the Charge.

Use of the Platform has at all material times been governed by Fenix's Terms of Service ("T&Cs"). There are various versions of the T&Cs over the period covered by the assessment. There are also various versions of the Privacy Policy.

On 22 April 2020, HMRC sent Fenix assessments for VAT due for the periods from 07/17 to 01/20 in the sum of £8,222,566. On 15 July 2020, HMRC issued a further assessment for VAT due for the period 04/20 in the sum of £3,015,912.

HMRC's view was, and is, that the legal basis for the assessments was that Fenix should be deemed to be acting in its own name by virtue of Article 9a.

On 27 July 2020, Fenix filed an appeal disputing the legal basis for the assessment and also the quantum.

The argument on the legal basis was that Article 9a is invalid and does not apply; further, or alternatively, Fenix falls outside of and/or rebuts the presumption in Article 9a.

HMRC have not made any decision as to, as a matter of English law, the capacity in which Fenix acted in respect of the Platform (i.e. whether as agent or as principal). Their decision to assess Fenix to VAT was taken by reference to Article 9a alone. HMRC have not considered the application of art.28 PVD per se, without reference to Article 9a (including, specifically, the final paragraph of Article 9a(1)).

The question for reference was whether art.9a was invalid because it went beyond the implementing power or duty on the Council established by art.397 PVD.

First-Tier Tribunal: *Fenix International Ltd*

2.9.2 Employment bureaux

In the *VAT Taxable Person Manual* HMRC have published new guidance and amended and archived much of the previous guidance on VAT and employment bureaux. The new guidance refers at some length to the ramifications of the 2018 Court of Appeal judgment in *Adecco UK Ltd*.

VTAXPER67050, VTAXPER67000 and following; Archived VATXPER67500-67800

2.10 Second hand goods

2.10.1 Margin scheme in Northern Ireland

HMRC published a policy paper on "Accounting for VAT on goods moving between Great Britain and Northern Ireland from 1 January 2021" on 26 October 2020. The final section of this policy paper dealt with the operation of the margin scheme:

Margin Scheme

In line with EU rules, margin schemes involving goods, such as the second-hand margin schemes, will not usually apply for sales in Northern Ireland where the stock is purchased in Great Britain. The VAT on these sales will be subject to the normal rules and must be accounted for on the full value of the supply.

Margin schemes will remain available for sales of goods that are purchased in Northern Ireland or the EU, whether sold to customers in Northern Ireland, Great Britain or the EU.

Margin schemes will remain available for sellers in Great Britain selling stock originally purchased in Northern Ireland or Great Britain.

The change was based on the restriction of the margin scheme within the VAT Directive to "goods supplied within the Community", which will include NI but not GB after the end of the transition period. This would substantially increase the VAT on second-hand goods bought in GB and sold in NI. This issue may have been resolved in the final negotiations, but it will be a point to watch out for.

HMRC Policy paper, 26 October 2020

2.11 Charities and clubs

2.11.1 Lobby for new charity relief

The Charity Tax Group has published a report, including research undertaken by London Economics, which shows that VAT continues to represent a significant burden for UK charities. The research highlights the importance of existing VAT reliefs and exemptions for the charity sector. This research has also quantified the value of existing VAT reliefs on purchases (£0.8bn) and the impact of VAT on charity sales and service delivery (output tax of £1.7bn on charity sales, £1.8bn of irrecoverable input tax).

The report concludes that the most effective solution would be to introduce a new charity VAT rate on purchases, to complement existing reduced and zero rates and the social exemptions. The report notes that leaving the EU removes the main obstacle to introducing such a radical review of the rules.

www.charitytaxgroup.org.uk/wp-content/uploads/Charities-and-VAT-an-Evaluation-Charity-Tax-Group.pdf

2.11.2 Charitable Incorporated Organisation

In an article in *Taxation*, James Stevens explains the process of converting a charity to a charitable incorporated organisation and the possible tax implications.

Taxation, 29 October 2020

2.12 Other supply problems

Nothing to report.

3. LAND AND PROPERTY

3.1 Exemption

3.1.1 Pitch hire

A company ran competitive football and netball leagues and supplied pitches for the league matches to be played on. It had accounted for output tax on its income, but then decided it should be exempt as letting of land; HMRC refused a repayment claim for £414,000 covering the periods 04/13 to 10/16, and raised assessment for £218,000 covering the periods 01/17 to 07/18. The company appealed to the Tribunal, which heard the case remotely.

There were further assessments for £185,021 covering the periods 10/18 to 10/19. The company said that it had appealed them, but the Tribunal had no record of this. The judge said that he was not minded to consolidate the appeal with the present case, but fully expected the parties to give effect to the current decision in settling the other dispute.

The question was twofold: first, whether the supplies constituted a letting of land at all; and second, if they did, whether the supplies satisfied Note 16 Group 1 Sch.9 VATA 1994, in that they constituted a grant of facilities for playing sport for a series of 10 or more periods, not less than a day and not more than a fortnight apart, to a "school, a club, an association or an organisation representing affiliated clubs or constituent associations".

The Tribunal noted the main precedents:

- *Sinclair Collis* (Case C-275/01), which sets out the minimum conditions for something to be regarded as a letting of land under EU law;
- *Stade Luc Varenne* (Case C-55/14), which required an assessment of the overall characteristics of the contract to determine whether it was letting or not;
- *Stockholm Lindopark* (Case C-150/99), in which the CJEU held that the operation of a golf course was too active to be considered "letting or leasing of immovable property".

The Tribunal heard from a director of the company, who was considered a "compelling witness who gave his evidence in a clear and straightforward manner". Various findings of fact were derived from his evidence and the bundles. The company provided league management services and pitch hire, and split the income 87.5:12.5 between them. In the absence of any other evidence, the Tribunal accepted this split at face value.

The basis of the business, which was also the basis of HMRC's argument, was that the company did not own its facilities. It entered into agreements with schools and local authorities to hire venues, and then hired them on to its customers. HMRC argued that it could not make a supply of land if it did not own the land.

HMRC further argued that the agreements with customers did not constitute "licences to occupy" because they were, taking into account all the characteristics, a package of services in which the provision of land

was an incidental element. The "core business" was the organisation of leagues and administration of those leagues.

HMRC sought to distinguish the case of *Goals Soccer Centre plc* on the grounds that that company held long leases on its sites and spent considerable sums developing them. Its contracts for pitch hire and league administration had been separate, and its business model was very different from the appellant's.

HMRC also argued that the customers did not satisfy the words of Note 16, in that they were not "a club" but a group of individuals who had formed a team in order to take part in one of the company's leagues.

The company argued that HMRC's case contradicted the statement in Brief 08/14 in which they accepted the Tribunal decision in *Goals*. In that Brief they specifically referred to "traders who hire the pitches from third parties such as local authorities, schools and clubs" as falling within the same principles as the successful appellant.

HMRC's reliance on *Sinclair Collis* was misplaced. The company had a right to occupy the site for the purposes of its business for the duration of the letting, and could sublet to its customers. That was completely different from the situation of the owner of a cigarette vending machine renting space in a pub or club.

The company argued that it fully satisfied the conditions of Note 16; that its supplies were either separate supplies with an exempt element, or else the exempt element was the principal supply to which the taxable supply was incidental; and that the principle of equal treatment required that it should have the same benefit as Goals, in line with the statement in the Brief.

The Tribunal examined the supplies of land made to the appellant, because it was necessary for the company to have a right over land before it could grant such a right to someone else. The judge was satisfied that the company received the right to occupy, and could then sublet it.

The judge went on to examine the supplies made by the company, and decided that its business model was different from that in *Goals*. The great majority of its customers entered leagues; the company made more money by taking block bookings rather than simply letting out facilities. This meant that the supplies it made were single composite supplies rather than mixed ones.

Turning to the characteristics of that compound supply, the judge rejected HMRC's argument that the customers did not enjoy the right to exclude people from what they had hired. HMRC appeared to suggest that "the presence of the other team" negated this, but clearly that was something that would be permitted by the hirer.

HMRC referred to Trustpilot reviews left by customers who enthused about enjoying the leagues; they regarded that as evidence that the principal element for the customers was the organisation and administration. The company referred to other reviews which praised the quality of the pitches. The judge said that the perception of the parties was not relevant: an objective assessment of what was supplied should be carried out.

HMRC pointed to additional services provided, as in *Luc Varenne* – in this case, the provision of referees, bibs, balls and league prizes. However, the extra services in that case represented 80% of the value, as opposed to just 12.5% here.

The judge was satisfied that the fundamental nature of the supply was pitch hire. The administration services were an integral part of it, but were for the better enjoyment of it rather than an aim in themselves for the customers. This was a conclusion based on EU legal principles rather than on any consideration of English property law, as it had to be. The additional services, being of modest value, did not change the fundamental nature of the more valuable supply.

HMRC's argument about Note 16, as set out in their statement of case, was completely misconceived: it stated that the appellant could not qualify because it was not itself a school, a club or an association, but a commercial company. The judge pointed out that the condition applied to the appellant's customers in respect of the supplies that it made, not to the company itself in respect of the supply it received.

At the hearing, HMRC raised the further argument that the customers were individuals who had formed a team to enter a league, and therefore did not satisfy Note 16, was added at a late stage. The company objected, arguing that this was an "ambush": it had not been given the opportunity to consider the point and bring evidence to refute it. The judge said the following:

It is a peculiar feature of this Tribunal that the Rules specifically require the Respondents to provide a statement of case without imposing a similar duty on the Appellant. This is not only because the Appellant has already filed a notice of appeal but is tacit acknowledgement of the unique position the Respondents enjoy. They have the all the might, resource and experience of the state at their disposals and should, on the whole, be in a position to clearly set out their position in relation to the case before this Tribunal. That the Respondents' position might change or become more refined (on for example instructing counsel or upon further disclosure) is to be anticipated. In such an event the proper course for the Respondents to take is to seek to amend their statement of case – as was done in these proceedings. It is not to simply change tack on the eve of the hearing.

The judge refused to consider the argument at all. The company succeeded in its primary argument, and the Tribunal did not need to consider the question of equal treatment or reliance on R&C Brief 08/14.

First-Tier Tribunal (TC07915): *Netbusters (UK) Ltd*

3.1.2 Heat and light

An association of property owners claimed input VAT on the cost of purchasing and operating a power unit which enabled it to supply heat to its members. The German tax authority rejected the claim on the grounds that, pursuant to German law, the supply of heat to property owners is exempt from VAT. Questions were referred to the CJEU.

The association comprised three legal persons (a private company, a public authority and a municipality), and the property ('the estate') consisted of 20 rental apartments, a department of the public authority, and an entity of the municipality. In 2012, the applicant constructed a

combined heat and power unit ('the CHPU') on the estate. It started generating electricity from the CHPU. It then sold the electricity to a power company, and supplied the heat produced thereby to the owners. The tax authority restricted an input tax claim on the costs of the installation to 28%, representing the proportion used in generating electricity. The authority ruled that the supply of heat to property owners is exempt from VAT under German law.

Advocate-General's opinion

A-G Bobek considered first the need to clarify "who delivers what to whom and what is being heated?" He says that it appears that the heat is only provided to "the owners" (i.e. the three members of the association) and not to the residential tenants, who appear to have no part in the transactions. However, the order for reference did not make it clear whether the heating was supplied to the owners collectively (heating the common areas of the building) or individually (heating the areas that they themselves occupied).

It was also not clear if any consideration was provided; without consideration, there could be no taxable transaction. The A-G proceeded on the basis that the owners provided some consideration for the supply of heat, "since it is unlikely that the referring court would even pose such a question if there was no compensation whatsoever." Further, it would make a difference if the consideration was charged specifically for the supply of heat, or was part of a general charge for an array of facilities.

The A-G commented on the normal tests for "consideration" – the need for a "legal relationship between the parties". In his view, this was unhelpful – there was a legal relationship in some cases, such as *Apple & Pear Development Council*, where there was no consideration. The A-G considered that the legal relationship point was only engaged where there was "commensurability of benefit" linked to the payment rendered.

The Commission and the German government had submitted that the fact that the "suppliers" (the association) and the "recipients" (the owners) were identical, there could be no economic activity. The A-G did not accept that reasoning. According to art.9 PVD, "any activity of producers…" is to be regarded as an economic activity. Crucially, in addition, the association was a separate legal person from its owners. There was therefore no identity of persons.

The German government argued that the German law, which specifically exempts the supply of "maintenance, repair and other administrative purposes as well as the supply of heat and similar services" by property associations to property owners and co-owners, was simply the implementation of art.135(1)(l) PVD. Again, the A-G did not agree. Exemptions have to be interpreted and applied strictly: the supply of heat could not possibly fall within "leasing or letting of immoveable property" in its own right; it could only be exempt if it was held to be an ancillary supply for the better enjoyment of a principal exempt supply. In addition, the generation and supply of heat appeared to be an "active" transaction rather than sharing the "passive" nature of most rental activity according to the case law.

The A-G turned to the alternative scenarios that he had proposed:

- if the heat was supplied to the common areas of the property, i.e. to the owners collectively, in his view the situation was similar to that in *Apple & Pear Development Council* and there would be no taxable transaction;

- if the heat was supplied to the owners individually, the national court should consider whether there was “commensurability of benefit”; if there was, then the German law would incorrectly exempt something that ought to be taxable.

The opinion proposed to send the case back to the referring court for important clarification.

Full court

The full court judgment considers the question of economic activity at some length, and concludes that (subject to some points of verification for the referring court) the supplies of heat should be regarded as within the scope of VAT. It appeared that the property owners paid for their consumption of heat in accordance with meter readings; this was, according to art.15 PVD, a supply of goods, and it was made for consideration on a permanent basis. The association was sufficiently separate from its members to be regarded as carrying on an economic activity “independently”.

Turning to the exemption, the court noted that the German government relied on a report produced during the development of the 6th Directive, which included the text “the Council and the [European] Commission declare that Member States may exempt making the common property available for use, maintenance, repair and other management purposes, as well as the supply of heat and similar goods by associations of residential property owners to the property owners themselves”. The court commented that such a preliminary report could only be relevant in the interpretation of a Directive if there was some reference to it in the Directive itself. As neither the 6th Directive nor the PVD contained any similar text, it had to be disregarded.

A further argument of the German government based on fiscal neutrality also failed. The government contended that owners of single family homes could not benefit from VAT deduction in the same way as the members of an association of co-owners; but the court commented that there were two clearly distinct groups of consumers whose circumstances were not comparable, and the principle of fiscal neutrality was therefore not engaged.

The supply of heat was a supply of goods within art.15 PVD, and was not the supply of immovable property within art.135. The court’s answer was that the PVD precluded the exemption of the supply of heat by an association of residential property owners to the property owners belonging to that association.

CJEU (Case C‑449/19): *WEG Tevesstraße v Finanzamt Villingen-Schwenningen*

3.1.3 Article

In an article in *Taxation*, Elizabeth Small examines the policies set out in R&C Briefs 11/2020 and 12/2020 in relation, respectively, to lease variations and cancellation fees. She notes that 11/2020 was clearly produced by HMRC’s property team, but 12/2020 appears not to have been discussed with them, leaving a number of questions unanswered in relation to such issues as the treatment of dilapidations payments. In her view, the policies proposed are sensible and justified, but this does not

extend to the suggestion in 12/2020 that retrospective adjustments are required in relation to what is clearly a change in HMRC policy.

Taxation, 15 October 2020

3.2 Option to tax

3.2.1 Notification

To ease the compliance requirements for businesses during the pandemic, HMRC have further extended the timeline to notify the decision to opt to tax land and buildings to 90 days from the date the decision to opt was made. This applies to decisions made between 15 February 2020 and 31 March 2021 (having previously only applied until 31 October 2020).

www.gov.uk/guidance/changes-to-notifying-an-option-to-tax-land-and-buildings-during-coronavirus-covid-19

3.3 Developers and builders

3.3.1 More ZR certificate penalties

HMRC issued a penalty under s.62 to a charity that had issued a certificate to secure zero-rating for the construction of a new boathouse. The charity appealed, and the Tribunal had to consider three questions:

- whether the building was intended for use solely otherwise than in the course or furtherance of a business;
- whether the building was intended for use solely as a "village hall or similar" in providing social or recreational facilities for a local community;
- whether, if neither of these conditions was satisfied, the charity had a reasonable excuse for issuing the certificate.

The Tribunal examined the history of the project to construct the boathouse, including the fundraising efforts and various communications with HMRC over the VAT status of the work, before examining a number of precedent cases, including *Longridge on the Thames*. The decision contains a detailed discussion of a number of the issues, and will be a useful point of reference for people having an argument in this area.

The charity appeared to have concluded that it would not be regarded as using the building for business purposes if it did not make a direct charge to people for using it or its facilities. However, the club's membership subscriptions satisfied that function; counsel's argument that they were not directly linked to the use of the facilities was not accepted by the Tribunal. The building was used in the course or furtherance of a business that had the necessary degree of permanence.

Although the building was intended to be made available to other community users, in line with the conditions of some of its funding grants, it was too far away from the "paradigm village hall" to qualify under that heading. For most of the time, it was used to store the club's boats, and therefore was not unoccupied and available for a range of other uses.

Turning to the question of reasonable excuse, the judge (Kevin Poole) adopted the approach in *Perrin*:

- determine the facts that are put forward as a reasonable excuse;
- consider whether the evidence establishes that those facts existed;
- consider whether the established facts, objectively viewed, constitute a reasonable excuse for the conduct;
- consider whether the taxpayer remedied any failure as soon as it became apparent.

The judge summarised the reasonable excuse offered as follows:

Ms Bramwell and Ms Jennings read Notice 708, agreed that they thought SSRC should qualify for zero rating but realised the law was quite complex and technical. They agreed it was appropriate to seek reassurance as to the availability of zero rating by contacting HMRC's helpline specifically established and advertised for the purpose of providing assistance in such matters. Ms Bramwell did so. In summary, she informed the helpline officer that SSRC were a charity run by volunteers giving of their free time and they relied upon donations and membership subscriptions, including some small charges for rowing, to maintain the gigs and various equipment and generally cover their costs. They were planning to build a new boathouse, which would be used for SSRC's purposes but also be offered for use more widely to the local community. She told him that SSRC had no intention of using the boathouse to generate income – the most they might do would be to ask for potential third party users to make a voluntary donation for using it. She asked for confirmation that the construction of the building could be zero rated. The officer confirmed to her that as long as SSRC did not make any charges for the use of the new boathouse by third parties, zero rating was appropriate in the circumstances she outlined and he referred her to the form of certificate set out at the end of Notice 708. In doing so, he did not indicate that:

(1) any further information was required from her before he could give the reassurance being sought,

(2) a detailed written application was required from SSRC,

(3) the advice being given could only be relied on if it was confirmed in writing by HMRC, or

(4) she should make a specific request if she wanted a written record of the oral advice being given to be kept by HMRC.

The judge was satisfied that these facts were proven to the required standard, having heard Ms Bramwell's evidence in person and seen it tested in cross-examination.

The judge considered that the charity's acceptance of the advice given was reasonable in all the circumstances. There was nothing in the knowledge or personal attributes of any of the members of the charity's executive committee which affected this conclusion.

The appeal was therefore rejected in relation to the technical correctness of the zero-rating certificate, but allowed on the basis of reasonable excuse.

First-Tier Tribunal (TC07904): *Swanage Sea Rowing Club*

3.3.2 Building materials

A company appealed against assessments totalling £42,000 covering periods from 08/14 to 02/17. HMRC disallowed the recovery of input tax on window blinds installed in newly constructed houses. Judge James Austen noted that the trader wanted a decision that could be applied to future supplies, but commented that his decision would only be binding on HMRC in respect of the periods that had been assessed.

Previous cases on the builders' block include the UT decision in *Taylor Wimpey plc* and, in respect of the specific issue of roller blinds, in the FTT in 2010 in *John Price*. The case concerned a DIY claim and had other procedural differences, and did not set a binding precedent; the Upper Tribunal case, while not dealing directly with roller blinds, established principles that were binding on the FTT. Following Price's success in the FTT, HMRC issued R&C Brief 02/11 to confirm that they would not appeal the decision because of the small amount involved, but they would not change their policy and would continue to regard roller blinds as not "building materials ordinarily installed".

The Tribunal took evidence from a number of witnesses who explained the building and marketing strategy of the company. This was to sell completed houses that were to a standard specification with no input from the customer; blinds had been fitted as standard, and were integral to the building in that removing them would damage the wall to which they were fixed. They contributed to the insulation of the building as well as providing privacy.

The judge agreed with the reasoning in *Price*: "roller blinds are as much 'goods of any description ordinarily incorporated by builders in a [dwelling house]' as finished or prefabricated furniture, furniture designed to be fitted in kitchens or carpets or carpeting material. In short, this seems to me to be nothing 'extraordinary' about their incorporation into a dwelling house by builders." He did not agree that HMRC's Brief was correct in law.

The judge analysed the law in order to apply it. The provision required that building materials should be:

(1) "Goods of a description";

(2) "incorporated";

(3) "ordinarily";

(4) "by builders"; and

(5) "in a building of that description".

He considered each term in turn, and concluded that the roller blinds satisfied the definition. The parties disagreed on several points, and the judge examined in detail the meaning of "ordinarily" and the categories against which "such a description" and "of that description" should be measured. He considered the first to be "window dressings" and the second to be "single family dwellings". "Ordinarily" meant that something was not invariable, and it would not be exceptional for it not to occur; but it was also something that would not be remarkable if it did

occur – "greater than that it is not exceptionally installed, and greater than merely sometimes installed. However, we do not consider that ordinariness can be equated with likelihood" (as set out in the *Taylor Wimpey* decision).

The judge noted that HMRC's argument on whether the exclusions for "finished or prefabricated furniture, other than furniture designed to be fitted in a kitchen"; "materials for the construction of fitted furniture, other than kitchen furniture"; "electrical or gas appliances…"; and "carpets or carpeting material" had been confused and confusing; their counsel "advanced several competing arguments in the hearing and did not seek to conform one with another". The judge concluded that "the submissions that blinds could be considered to be within any of the excluded categories in Note 22 are obviously incorrect and patently untenable".

Lastly, the judge distinguished the present situation from *Frank Haslam Milan & Co Ltd* (VTD 3857) and *Perry* (VTD 19428) which concerned electrically operated blinds with sophisticated temperature controls. Those were held to be subject to the builders' block not because they were blinds, but because they were not ordinarily installed.

The appeal was allowed in full.

First-Tier Tribunal (TC07864): *Wickford Development Co Ltd*

3.3.3 Brexit and construction

The government has collected Brexit guidance for different trade sectors on dedicated webpages, including one directed at the construction industry. The guidance was aimed at the end of the transition period before the deal was struck on Christmas Eve, so users should proceed with caution.

www.gov.uk/government/collections/construction-sector-end-of-transition-period-guidance

3.4 Input tax claims on land

3.4.1 DIY claim refused

An individual appealed against the refusal of a DIY claim for £18,239. HMRC ruled that the works did not involve "the construction of a building" because the building previously on the site had not been demolished.

The property had been very substantially demolished. This was not in accordance with the original planning permission, but had been retrospectively approved by the council. Only the front and side walls were retained. However, HMRC argued that it was not a "corner site", so this did not amount to demolition.

It is interesting that HMRC did not take issue with the timing of the planning permission. They accepted that the condition in s.35(1)(b) VATA 1994 was satisfied because planning permission had been obtained

by the time the claim was submitted, even if some of the works were carried out before it was granted. The judge (Jeannette Zaman) noted that there was precedent from the Upper Tribunal on this point – suggesting that she was not convinced that HMRC were correct to concede this point.

The appeal turned on whether the building was a "corner site" and the facades were retained as a condition of planning consent. Although the building was on a bend in the road, and the facades formed a corner of the building, the judge did not accept the claimant's argument that this satisfied the legislation. That was enough to decide the case for HMRC, but the judge also noted that she did not agree that the claimant had established that retaining the facades was a requirement of the planning consent.

Lastly, she noted that HMRC had expressly reserved their position in relation to whether the claimant's invoices satisfied the requirements for a claim – that is, if they lost the appeal on the principle of whether anything should be repaid, they would examine the invoices with a view to arguing about them. The judge said nothing turned on this, because they had won on principle, but she was not sure that HMRC could reserve a position in this way.

First-Tier Tribunal (TC07858): *Joe Smithers*

3.5 Other land problems

Nothing to report.

4. INTERNATIONAL SUPPLIES

4.1 E-commerce

4.1.1 MOSS registration

A company provided web-hosting services to consumers across the EU. It registered for the MOSS in July 2017, but did not submit its first three MOSS returns on time. HMRC therefore cancelled its MOSS registration in May 2018. The rules prevent a company that has left MOSS rejoining within 2 years; by the time of the hearing of its appeal, the company had been allowed to rejoin MOSS, but it still wanted to settle its VAT liabilities (about £25,000) through the scheme for the intervening period. The company estimated that complying with its obligations separately in all the other EU countries in which it would be liable would cost about £50,000.

The company's ground of appeal at the hearing was that the notices issued by HMRC prior to cancellation of registration were inadequate and therefore did not entitle HMRC to proceed with the cancellation. The Implementing Regulation has specific rules about "persistent failure to comply with obligations" at art.58b; this includes failing to submit a late MOSS return within 10 days of a reminder for three successive periods.

The decision notes the systems for sending HMRC messages to taxpayers. Where a message has been read, HMRC delete it from their system after 30 days; where it has not been read, they delete it after 360 days. Although the reminders sent to the appellant for its 09/17 and 12/17 periods no longer appeared on HMRC's system, the judge found as a fact that they would have been sent by the system.

The three returns to 03/18 were submitted on 15 June 2018 and 25 June 2018, apparently in response to a reminder sent on 11 May 2018 in respect of the 03/18 period. It appeared that the taxpayer's agent had changed computer systems in early 2018, and this had led to problems with MOSS accounting. It was also argued that a taxpayer's agent had no access to messages sent by HMRC to the taxpayer.

HMRC argued that the Implementing Regulation gave them no discretion: once a taxpayer had failed to respond in time to three reminders, the MOSS registration had to be cancelled. The taxpayer's representative argued that the taxpayer must have been given a reasonable opportunity to read the reminders and remedy any default. He emphasised that the taxpayer's agent had no means of knowing that reminders (or any other messages) had been sent to the taxpayer. As the taxpayer had entrusted compliance to its agent, it could not be expected to log in to HMRC's system regularly to see if there were any messages. There could, and therefore should, also be a hard copy in the post, if the message was of such significance. If everything was to be online, a clearer warning should have been given to the taxpayer at the outset. HMRC responded that this was all within the responsibilities of the taxpayer.

The representative also took issue with the wording of the messages: "Failure to meet the requirements for using the MOSS service may result in your removal from the scheme." If it was the case that HMRC had no discretion in the matter, the warning should be clearer.

Judge Robin Vos essentially agreed with HMRC on all points. The company had failed to respond to the messages that were required to be sent by HMRC, and HMRC were then required to remove the company from MOSS. The wording of the warning message was irrelevant. He noted in passing that the company should in any case have realised that there was a problem with its compliance: even if it had sub-contracted its compliance obligations, it must have expected to pay VAT on a quarterly basis, and it was not being asked to do so.

The Tribunal found that HMRC had been correct to remove the company from MOSS from 1 July 2018, and dismissed the appeal.

First-Tier Tribunal (TC07923): *Krystal Hosting Ltd*

4.1.2 Guidance on Brexit changes

HMRC have updated the online guidance on MOSS to reflect the changes resulting from the end of the transition period. These include:

- the requirement to submit the last UK MOSS return for the quarter to December 2020 by 20 January 2021;
- the requirement to register by 10 January 2021 to use the UK MOSS for digital sales to EU consumers made before 1 January 2021;
- the requirement to register for the non-Union MOSS in another Member State for supplies made after 31 December 2020.

Businesses will be able to amend their MOSS return up to 31 December 2021 and amend their registration information up to 31 December 2024.

www.gov.uk/guidance/changes-to-the-vat-moss-rate-for-other-countries

4.2 Where is a supply of services?

4.2.1 Roaming services

Advocate-General Saugmandsgaard Oe has given an opinion on a case referred from Austria on art.59a PVD which provides for optional place of supply measures to avoid double taxation and non-taxation. The taxpayer was a telecoms company established in South Korea which provided mobile telephone roaming services to South Korean residents who were staying temporarily in Austria. The Austrian tax authorities considered that they could transfer the place of supply to Austria, making the supplies chargeable to Austrian output tax.

The relevant law in art.59 PVD places supplies of telecommunications services to persons residing outside the EU as “outside the scope”; however, art.59(a) allowed member states to consider services within art.59 to be supplied within their territory if the effective use and enjoyment of the services took place there. Art.59b required member states to apply a use and enjoyment provision to B2C telecommunications services supplied by a person established outside the EU, where the consumer customer had a permanent address or ordinarily resided in the EU. Austria had enacted a use and enjoyment provision in accordance with the Directive; the disputed transactions took place in 2011, which

was only just after the mandatory introduction date of the relevant provisions.

The Korean company paid a fee to an Austian network operator to enable its consumer customers to have access during stays in the country. The operator charged Austrian VAT, which the Korean company reclaimed from the Austrian authorities. This was refused, on the basis that the company was liable to account for output tax on the revenue charged to the customers.

An Austrian court allowed the company's appeal, interpreting art.59a and 59b as only allowing the use and enjoyment provision to shift the place of supply to Austria where the customers were non-taxable persons established within the EU. If the Korean company's supplies were outside the scope, it would be entitled to a refund. This decision was overturned on appeal, and questions were referred to the CJEU. These covered two points:

- first, whether the use of roaming services, by a non-taxable end customer who does not ordinarily reside in the EU, could be subject to the use and enjoyment provision in art.59a where the supplier was also established outside the EU;
- second, whether this transfer of liability was possible simply because the telecommunications services in the third country were not subject to a tax comparable to VAT under EU law (in effect, asking whether the "avoidance of non-taxation and double taxation" in the heading of the article was a guiding principle).

The A-G started with an analysis of the transactions involved in a mobile telephone roaming service, which involved:

- a B2B supply from the network operator (in Austria) to the Korean mobile operator;
- a B2C supply from the Korean operator to its customers, "subletting" the access to the network that was obtained by the B2B transaction.

The questions referred related to the second of these supplies, but they were only relevant because of the VAT charged by the supplier on the first supply, which the Korean company was attempting to recover. The Commission expressed some reservations on whether the first transaction should have been charged, given that it was a B2B supply that would normally be treated as outside the scope; however, the A-G declined to discuss it, as the order for reference did not contain any information about that part of the transaction. It did not undermine the validity of the questions referred, so the court could provide answers.

The company argued that it would be artificial to split supplies made on the same SIM card. It regarded its supplies to customers as a single continuous supply of services that was situated in South Korea. The A-G noted that the "normal rule" is that every supply is distinct and independent and should be given its own natural liability. Roaming services which consist in offering access to a mobile telephone network in a country other than the country of origin are objectively separable from mobile telephone services provided in the country of origin. Bills sent to users usually identify roaming services as a distinct supply, and itemise individual calls and the amount of data use. The A-G agreed with the

Spanish government's submission that this was a separate and non-incidental service.

The A-G noted that art.59b, which was a mandatory provision, had no application in the present case because it only applied to consumer customers who were established in the EU. The optional provision in art.59a had been implemented by Austria; the scope of that optional provision was wider than that of the mandatory provision in art.59b. The question was whether the conditions set out in art.59a had been correctly implemented and were applicable in this case:

- First, the 'effective use or enjoyment' of the services must take place within the territory of the Member State concerned. That condition was the subject of the first question asked by the referring court.
- Secondly, Member States may make use of that option 'to avoid double taxation, non-taxation or distortion of competition'. That condition was the subject of the second question.

The company pointed out, and the A-G regretfully agreed, that there were inconsistencies between the different language versions of the Directive: in some, art.59a referred to "use or enjoyment", and others have the expression "use and enjoyment". In the proposal to recast the 6th Directive, which led to the 2006 PVD, the Commission appears to have recommended harmonisation of a longstanding discrepancy by advocating the use of "or"; however, the English, Dutch and Swedish versions of the PVD still use "and". Implementation of the VAT Package Directive (2008/8), which changed the place of supply rules, appears to have changed the Italian and Portuguese versions to "and" as well. The A-G recommended that this disparity should be resolved, because the provisions of EU law should be interpreted and applied in a uniform manner across the EU.

In his view, there were four reasons for preferring the application of the rule in accordance with "use or enjoyment":

- the Commission had expressly stated this intention in proposing the recast of the 6th Directive;
- it was consistent with the general principle of taxation at the point of actual consumption;
- it was necessary from a semantic point of view, because something could not be "enjoyed" without being "used" – if the inclusion of the second word added anything, it had to extend the meaning of the expression, which suggested that "or" made more sense;
- the A-G considered that "use *and* enjoyment" would tend to exclude B2C services from the scope of art.59a, on the grounds that they do not "enjoy" the services (this point is not immediately obvious to me, but it appears that the A-G considers "enjoyment" to have an economic sense that would not apply to a non-economic recipient) – the context of the legislation suggests that this is not what is intended.

If the wording "use or enjoyment" is preferred, the A-G considered that the answer readily followed: the roaming services were clearly "used" by the customers in Austria. "First, the mobile telephone network used is

located in that Member State. Second, the users who are granted access to this network are temporarily staying in that Member State. Third, and as the Spanish Government has pointed out, such roaming services can only be used in the territory of that Member State. Indeed, in the context of the main proceedings, their presence in Austria is the only reason why users from South Korea request access to an Austrian mobile telephone network." The customers accessed the Austrian network in exactly the same way as an Austrian customer, which clearly indicated "use in Austria".

The A-G therefore recommended that the court should answer the first question in the affirmative: the services were within the scope of art.59a as "used or enjoyed" in the territory, and were properly chargeable to Austrian output tax.

Turning to the second question, the A-G considered that the tax treatment in the third country was irrelevant to the treatment under the Directive. The expression 'double-taxation, non-taxation or distortion of competition' refers to tax treatment *at EU level*. In other words, use by a member state of the options offered by art.59a is subject to the existence of a case of double-taxation, non-taxation or distortion of competition *at EU level*. As it was clear that the disputed transactions were not taxable in any other member state, the Austrian rule was within the purpose of the provision – to prevent non-taxation of a supply that involved consumption within the EU, and double taxation was not an issue.

CJEU (A-G) (Case C-593/19): *SK Telecom Co. Ltd v Finanzamt Graz-Stadt*

4.2.2 Guidance on services and Brexit

The Department for International Trade published updated guidance on providing services and travelling for business to European countries after 1 January 2021. There are separate pages for each EU Member State, as well as Switzerland, Norway and Iceland. One example address is given, and the rest can be found by searching GOV.UK.

www.gov.uk/guidance/germany-providing-services-after-eu-exit

4.2.3 Financial services

In a speech to TheCityUK's annual conference, the economic secretary to the Treasury, John Glen, confirmed the intention that UK financial services businesses will be able to recover input tax relating to exempt supplies to customers in the EU after the end of the transitional period. All supplies to non-UK customers become "specified supplies" from 1 January 2021.

www.gov.uk/government/speeches/the-economic-secretarys-keynote-speech-to-thecityuk-2020-conference

4.3 International supplies of goods

4.3.1 Brexit

A huge amount of information was published in the three months from October to December 2020, much of it tending towards the increasing likelihood of "no deal". When the agreement was finally reached on 24 December, a week before the end of the transitional period, it left very little time for traders and advisers (and legislators and customs authorities across the EU) to consider what the final version meant – and what of the material from the previous three months was now obsolete. It will take some time to sift through the new requirements, and the summary here is intended to provide no more than a brief outline.

4.3.2 The agreement

The draft EU-UK Trade and Cooperation Agreement (TCA) was published on 24 December, along with other agreements on nuclear cooperation and security of information.

https://ec.europa.eu/info/sites/info/files/draft_eu-uk_trade_and_cooperation_agreement.pdf

The Commission published a number of high level guides to explain the deal, and the UK government published its own summary of the deal. There is also a Parliamentary briefing on the deal prepared by the House of Commons Library to help MPs understand what they were voting on.

https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_2532;
https://www.gov.uk/government/publications/agreements-reached-between-the-united-kingdom-of-great-britain-and-northern-ireland-and-the-european-union/summary-explainer;
https://commonslibrary.parliament.uk/research-briefings/cbp-9101/

The EU Council adopted a Decision on the signing and provisional application of the TCA on 29 December, paving the way for the signing of the agreements on behalf of the UK and the EU on 30 December and the application of the agreements on a provisional basis from 1 January 2021 (pending ratification in the European Parliament).

www.consilium.europa.eu/en/press/press-releases/2020/12/30/press-release-signature-of-the-eu-uk-agreement-30-december-2020/

4.3.3 Legislation

The *Taxation (Post-transition Period) Act 2020* received Royal Assent on 17 December. It makes various provisions in relation to the implementation of the Northern Ireland Protocol, and makes some amendments to VAT rules as well as excise duty and IPT.

The draft *European Union (Future Relationship) Bill* was published just before the recall of the UK Parliament on 30 December 2020. Parliament was recalled to debate the agreement and implementing legislation, which the government needed to fast-track so that it could be brought into force before the end of the Brexit transition period at 11 pm on 31 December 2020 (IP completion day).

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/948181/20201229_Draft_Gov.uk_EU__Future_Relationship__Bill_.pdf

There are also explanatory notes to help MPs and others understand what they were voting for.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/948208/20201229_Draft_gov.uk_EU__Future_Relationship__Bill_Explanatory_Notes_.pdf

4.3.4 Regulations

A great many Statutory Instruments have been laid in the months leading up to the end of the transitional period. They include:

SI 2020/1495 *The Value Added Tax (Miscellaneous and Transitional Provisions, Amendment and Revocation) (EU Exit) Regulations 2020*

SI 2020/1544 *Value Added Tax (Miscellaneous Amendments to the Value Added Tax Act 1994 and Revocation) (EU Exit) Regulations 2020*

SI 2020/1545 *Value Added Tax (Miscellaneous Amendments, Northern Ireland Protocol and Savings and Transitional Provisions) (EU Exit) Regulations 2020*

SI 2020/1546 *Value Added Tax (Northern Ireland) (EU Exit) Regulations 2020*

SI 2020/1619 *The Travellers' Allowances and Miscellaneous Provisions (Northern Ireland) (EU Exit) Regulations 2020*

SI 2020/1629 *The Customs (Modification and Amendment) (EU Exit) Regulations 2020*

Note that *The Intrastat General Guide* has been updated to reflect the requirement to submit arrivals Intrastat declarations for movements from the EU to GB during 2021, but not despatches. Intrastats will still be required for movements between Northern Ireland and the EU in both directions.

Notice 60

4.3.5 Guidance

HMRC has continued to update its guidance in relation to the rules that were to apply immediately after the end of the transitional period, including temporary relaxations for movements between GB and Northern Ireland.

www.gov.uk/guidance/ongoing-customs-movements-and-procedures-at-the-end-of-the-transition-period

HMRC has published new and updated guidance on:

- postponed accounting for VAT on imports from 1 January 2021.

https://www.gov.uk/guidance/complete-your-vat-return-to-account-for-import-vat

- accounting for VAT on cross-border purchases and sales of services and goods.

https://www.gov.uk/government/publications/accounting-for-vat-on-goods-moving-between-great-britain-and-northern-ireland-from-1-january-2021

- making import and export declarations.

https://www.gov.uk/check-customs-declaration

- claiming preferential rates of duty for UK or EU originating goods under the agreement.

www.gov.uk/guidance/claiming-preferential-rates-of-duty-between-the-uk-and-eu

- proving the origin of goods.

www.gov.uk/guidance/get-proof-of-origin-for-your-goods

- applying for a Binding Tariff Information decision.

https://www.gov.uk/guidance/check-what-youll-need-to-get-a-legally-binding-decision-on-a-commodity-code

- preparing to use the Customs Declaration Service.

https://www.gov.uk/guidance/how-hmrc-will-introduce-the-customs-declaration-service

- clearing goods entering, leaving or transiting the UK or EU.

https://www.gov.uk/guidance/national-clearance-hub-for-goods-entering-leaving-or-transiting-the-eu

- moving goods to common or EU transit countries.

www.gov.uk/guidance/how-to-move-goods-between-or-through-common-transit-countries-including-the-eu

- using special procedures to pay less import VAT and duty.

https://www.gov.uk/guidance/pay-less-import-duty-and-vat-when-re-importing-goods-to-the-uk-and-eu

- using returned goods relief to pay less import VAT and duty.

https://www.gov.uk/guidance/pay-less-import-duty-and-vat-when-re-importing-goods-to-the-uk-and-eu

- using temporary admission to pay less import VAT and duty.

https://www.gov.uk/guidance/apply-to-import-goods-temporarily-to-the-uk-or-eu

- accounting for VAT when the importer is not aware of the full customs value of goods and when using a third party to import goods.

https://www.gov.uk/guidance/check-when-you-can-account-for-import-vat-on-your-vat-return

- dealing with transactions spanning the end of the transitional period.

https://www.gov.uk/guidance/value-added-tax-eu-exit-transitional-provisions

- applying for, amending or cancelling an application for a duty deferment account (not required any more for import VAT under postponed accounting).

https://www.gov.uk/guidance/cancel-or-amend-your-duty-deferment-account-in-great-britain

- sailing a pleasure craft to and from the UK.

Notice 8

4.3.6 Goods sold directly into UK

HMRC have published guidance about the treatment of goods sold directly from outside the UK to customers in the UK after 1 January 2021. The overview of the guidance is as follows:

Consignments of goods with a value of £135 or less that are outside:

- the UK and sold directly to customers (not through an online marketplace) in Great Britain (England, Scotland and Wales) will have UK supply VAT charged at the point of sale;
- the UK and EU and sold directly to customers (not through an online marketplace) in Northern Ireland will have import VAT charged.

The £135 limit applies to the value of a total consignment that is imported, not the separate value of individual items that are in a consignment.

On B2B sales to UK VAT-registered customers, the seller will not need to charge and account for VAT if the customer gives them their VAT registration number. The seller can confirm it is correct using the online service.

The seller can add a note to the invoice (for example, by writing 'reverse charge: customer to account for VAT to HMRC') then send it to the UK business customer.

The business customer will then be responsible for accounting for any VAT due on their VAT Return, if the goods are supplied in:

- Great Britain using a 'reverse charge' procedure
- Northern Ireland, using Postponed VAT Accounting

In both cases, the seller will be able to recover the VAT as input tax on the same VAT Return under normal VAT recovery rules.

Sellers do not have to register for VAT if they only sell goods that are outside the UK at the point of sale to UK VAT-registered businesses.

Where consignments are valued at more than £135, normal VAT and customs rules will apply on importation of goods into Great Britain from outside the UK or into Northern Ireland from outside the UK and EU.

Overseas sellers who own goods of any value that are located in the UK at the point of sale must register for VAT and account for output tax on any sales made directly to customers in GB and NI.

https://www.gov.uk/guidance/vat-and-overseas-goods-sold-directly-to-customers-in-the-uk

4.3.7 Goods sold through online marketplaces

Where goods are sold through online marketplaces from outside the UK to a GB customer in a consignment of £135 or less, the online marketplace becomes liable for the output tax. Sales from outside the UK and EU to a NI customer will have import VAT charged. Online marketplaces will also be liable for the VAT on goods of any value that are located in the UK at the point of sale and sold by an overseas business through an online marketplace. However, the seller remains liable for VAT on the sale of goods in Northern Ireland sold to customers in Northern Ireland.

HMRC's definition of an online marketplace is a business using a website or mobile phone app (such as a marketplace, platform or portal) to handle the sale of goods to customers which meets all of the following conditions:

- in any way sets the terms and conditions on how goods are supplied to the customer;
- is involved in any way in authorising or facilitating customers' payments;
- is involved in the ordering or delivery of the goods.

A business will not be classed as an online marketplace if it only provides one of the following services:

- processing of payments for the supply of the goods to the customer;
- listing or advertisement of goods;
- redirection or transferring of customers to other websites or mobile phone apps where goods are offered for sale, without any further involvement in any sale that might take place on that website or app.

The online marketplace will not need to charge and account for VAT on a B2B supply if the customer gives them their VAT registration number. The online marketplace can confirm that it is correct using the online service.

Normal VAT and customs rules will apply on importation of goods in consignments over £135 into Great Britain from outside the UK or into Northern Ireland from outside the UK and EU.

www.gov.uk/guidance/vat-and-overseas-goods-sold-to-customers-in-the-uk-using-online-marketplaces

4.3.8 Retail export scheme

HMRC have issued a Brief to confirm the end of 'airside' tax-free shopping in the UK and the withdrawal of the VAT Retail Export Scheme from Great Britain when the transition period comes to an end on 31 December 2020. The tax-free shopping extra statutory concession (ESC 9.1) that allows retailers of goods sold in ports and airports to zero-rate sales to passengers departing for non-EU destinations has also been withdrawn with effect from 1 January 2021 throughout the UK.

Purchasers who bought goods up to 31 December will still be able to make a claim in accordance with the rules existing at the time they made the purchase. The Retail Export Scheme will still be available in

Northern Ireland, with some special rules for goods purchased in Northern Ireland that are taken to Great Britain and some additional records that will need to be kept.

Revenue & Customs Brief 21/2020

4.3.9 Northern Ireland

Moving goods between GB and Northern Ireland is one of the more complicated parts of the agreement, and it appears that there have been some difficulties at least to begin with. There is new guidance available from HMRC on:

- how VAT will apply to goods moving between Great Britain and Northern Ireland.

  https://www.gov.uk/guidance/how-vat-will-apply-to-goods-moving-between-great-britain-and-northern-ireland

- the Northern Ireland Protocol Customs Declaration Service (CDS) Tariff Guide for imports and exports.

  https://www.gov.uk/government/publications/customs-declaration-completion-requirements-for-the-northern-ireland-protocol

- accounting for VAT on movements between GB and NI.

  https://www.gov.uk/government/publications/accounting-for-vat-on-goods-moving-between-great-britain-and-northern-ireland-from-1-january-2021

- reporting sales of goods from NI to the EU.

  https://www.gov.uk/guidance/how-to-report-sales-of-goods-from-northern-ireland-to-the-eu-for-vat-from-1-january-2021

- transit movements and other aspects of trading with and through Northern Ireland.

https://www.gov.uk/guidance/starting-and-ending-transit-movements-in-northern-ireland-using-common-and-union-transit

4.3.10 Replacement for VIES

A statutory instrument has been passed requiring HMRC to respond to enquiries concerning the validity of UK VAT registration numbers. HMRC have stated an intention to provide an online service for checking UK VRNs to replace the existing VIES on the Web (which is the system provided by the EU). This contributes to the Government's commitment to minimise disruption to UK businesses after the UK leaves the EU and removes the need to contact HMRC directly to check a UK VRN.

SI 2020/1333

4.3.11 Industry webpages

The government published a number of "industry-specific" guides to life after Brexit in early November; some of these were updated in early January, although it seems unlikely that they are yet comprehensively revised for the actual deal. They include:

- Creative industries: *www.gov.uk/government/collections/the-creative-industries-sector-from-january-2021*
- Automotive sector: *www.gov.uk/government/collections/automotive-sector-end-of-transition-period-guidance*
- Aerospace sector: *www.gov.uk/government/collections/aerospace-sector-end-of-transition-period-guidance*
- Consumer goods sector: *www.gov.uk/government/collections/consumer-goods-sector-end-of-transition-period-guidance*
- Electronics and machinery sector: *www.gov.uk/government/collections/electronics-and-machinery-sector-end-of-transition-period-guidance*

4.3.12 Articles

In an article in *Taxation*, Neil Warren reviewed the guidance available at the beginning of the last quarter of 2020 and reviewed steps to be taken to prepare for the end of transition. Some of it will have been superseded but some will not.

Taxation, 8 October 2020

In another article, Neil considered the effect of the end of transition on a UK business selling services cross-border. The impact is much less than on sales or purchases of goods, but he highlighted some exceptions.

Taxation, 19 November 2020

In an article in *Taxation*, Kevin Hall considers whether GB businesses may benefit from a connection with Northern Ireland after Brexit. The unique VAT status of NI may create opportunities as well as complexities.

Taxation, 1 October 2020

4.3.13 Travellers' luggage

Art.147 PVD provides a VAT exemption for "goods to be carried in the personal luggage of travellers", subject to a number of conditions. These include the transportation out of the EU within 3 months of the supply taking place, and the traveller not being established in the EU. Member States may impose a minimum value for the relief of €175, but there is no upper limit.

This relief is given effect in the UK as the "retail export scheme". People who are eligible to claim the exemption generally have to pay the VAT to a retailer on purchase of goods, but they are given paperwork to present to Customs at the point of exit. Customs then authorise the retailer to treat the sale as a zero-rated export ("exempt", in EU terms) and reclaim the output tax charged. It is then supposed to be refunded to the traveller. Agencies at airports may give travellers the cash upfront and will take over pursuing the retailer.

A Hungarian business carried on a wholesale trade in ornamental plants. Subsequently, it was involved in non-store retail trade. From 2015 onwards, its annual turnover increased from approximately €140,000 to €2.8 million. It entered into transactions with 20 Serbian individuals

belonging to 3 families. The goods were transported to a warehouse rented by the customers in Hungary close to the Serbian border. The goods were then presented as “retail exports” on exit from the EU. The business operated the retail export scheme as described above.

It was clear that the goods were being purchased to be sold in Serbia, and the Hungarian trader knew this. The value of each supply was kept below a set level to avoid problems with Hungarian customs procedures.

The tax authority carried out an inspection and concluded that the goods were not “travellers’ luggage”, because they were for commercial purposes. It also ruled that no other exemption applied, so output tax was due, plus a late payment surcharge and a fine.

The national court dismissed an appeal, agreeing with the tax authority that the quantity of goods and the frequency of purchases were relevant in determine what was “travellers’ luggage”. As there was nothing in the PVD to define it, the concept was open to reasonable interpretation by the Member State; according to national practice, traveller’s luggage was to be regarded as the goods which a traveller purchases for his own personal needs or as a gift, and must under no circumstances be for commercial purposes.

The company did not qualify for exemption of commercial exports (art.146) because it had not followed export procedures and had not cleared the goods as exports; the customers had expressly asked to use the exemption for travellers’ luggage.

The company appealed, and questions were referred to the CJEU to clarify the concept of “travellers’ luggage”, and also to determine whether exemption under art.146 necessarily followed from disallowing exemption under art.147 on the grounds that the goods were commercial, in spite of the customer’s preference for the art.147 procedure. The final question asked whether the alleged “bad faith” of the Hungarian business, in applying the art.147 procedure to goods it knew were commercial, justified the withholding of tax refunds that were incorrectly claimed.

Advocate-General Sanchez-Bordona gave an opinion that was restricted to the interpretation of “travellers’ luggage”. It appears that the CJEU directed him to consider only those questions, although it is not clear why.

The principle of interpreting exemptions requires that the meaning and scope of terms for which EU law provides no definition must be determined by reference to their usual meaning in everyday language. However, account must also be taken of the context in which the terms occur, and the purposes of the rules in question. The Hungarian rule appeared to consider only the everyday meaning, and was therefore not in accordance with the case law.

The A-G went on to examine the context and purposes of the exemption, to decide whether it could be extended to commercial items that were transported by a traveller (i.e. the expression related to the way in which the goods were exported, rather than implying “personal effects”). He considered the history of the exemptions for personal imports and exports going back to the 1960s, and concluded that they had consistently been intended only to apply to non-commercial items. This would mean that the exports should be occasional and for personal or family use or

intended as presents. The nature or quantity of the goods must not be such as to indicate they were being exported for commercial reasons.

The A-G recommended that the CJEU answers the first two questions referred by stating that the context and purpose of the provisions had to be considered as well as the everyday meaning of the terms; that the 1954 New York Convention concerning Customs Facilities for Touring and various other EU regulations did not provide that context, because they did not apply; but that nevertheless the exemption should only apply to items of a non-commercial character.

The other questions (whether art.146 could apply instead, and whether "bad faith" was relevant) were not considered by the Advocate-General.

Full court

The judgment noted that the company disputed the facts as presented by the referring court, and sought to introduce two more questions for consideration by the CJEU, to cover legal certainty and the protection of legitimate expectations. The court rejected this request on the basis that it was required to consider only those matters referred by the national court; also, there was nothing in the case file to suggest that the usefulness of its answers would be undermined if it did not deal with the additional questions.

The court considered the meaning of "personal baggage" and agreed with the A-G that, in accordance with the normal meaning of the words and the history of the provision, it should not cover commercial consignments.

The full court did go on to consider the questions about the alternative application of art.146. As so often, the court ruled that the objective nature of the transactions was what determined whether they would be exempt, not the formal requirements for compliance with the customs procedure; the answer to the question is hard to follow, as it contains at least a double negative, but it appears that the court envisaged that the authorities should at least consider whether the conditions for exemption under art.146 were met on the basis that art.147 did not apply to commercial goods.

The full court also answered the question about the relevance of an allegation of "bad faith". Member States were entitled to impose conditions on exemptions under art.131 "for the purposes of ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse". Measures that went beyond what was necessary to achieve those objectives would not comply with the Directive.

According to the Court's case-law, there are only two situations in which the failure to meet a formal requirement may result in the loss of entitlement to an exemption from VAT. In the first place, a breach of a formal requirement may lead to the refusal of an exemption from VAT if the effect of that breach is to prevent the production of conclusive evidence that the substantive requirements have been satisfied. The requirement to prove that the goods had been exported was effectively part of the substantive conditions, not merely a formal condition; however, it was not permissible to require only one specific probative procedure to the exclusion of any other possibility. In this case, it was common ground that the goods had been exported to Serbia.

In the second place, the principle of fiscal neutrality cannot be relied on for the purposes of an exemption from VAT by a taxable person who has intentionally participated in tax evasion jeopardising the operation of the common system of VAT. According to the Court's case-law, it is not contrary to EU law to require an operator to act in good faith and to take every step which could reasonably be asked of him to satisfy himself that the transaction which he is carrying out does not result in his participation in tax evasion. However, an operator cannot be held responsible for evasion that takes place in a third country outside the operator's control; and the CJEU appears to regard evasion of third country tax to be "not the EU's problem".

The infringement of the formal conditions on export could justifiably be subject to administrative penalties such as fines, but it cannot be penalised by the refusal to grant the VAT exemption for exports that have actually taken place.

CJEU (Case C‑ 656/19): *Bakati Plus Kereskedelmi és Szolgáltató Kft v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága*

4.4 European rules

4.4.1 B2C online sales

The Commission has published explanatory notes on the new VAT rules for cross-border B2C online sales. They contain extensive explanations and clarifications on the new rules including practical examples on how to apply the rules for suppliers and operators of online marketplaces and platforms.

Due to the coronavirus pandemic, the application of the new VAT e-commerce rules has been postponed by six months and the rules will apply from 1 July 2021 instead of 1 January 2021, giving Member States and businesses additional time to prepare.

https://ec.europa.eu/taxation_customs/business/vat/modernising-vat-cross-border-ecommerce_en

4.4.2 Coronavirus response

The EU adopted a Directive on enabling Member States to relieve EU hospitals, medical practitioners and individuals from VAT when acquiring coronavirus vaccines and testing kits. The measure will apply at least until 31 December 2022.

Prior to the change, Member States could apply reduced VAT rates on sales of vaccines but could not apply a zero rate, while testing kits could not benefit from reduced rates. The revision (inserting a new art.129a PVD) permits Member States to apply either reduced or zero rates to both vaccines and testing kits if they so choose.

www.europarl.europa.eu/doceo/document/TA-9-2020-0335_EN.html

The Commission welcomed the move in a press release.

https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2299

4.5 Foreign refund reclaims

4.5.1 Failure to apply the Refund Directive (1)

The Commission received a complaint concerning the arrangements for reimbursement of VAT by the German tax authorities to taxable persons established in another Member State, from which it appeared that a large number of requests for reimbursement were rejected on the grounds that

the description of the goods or services acquired, declared under code 10 "other" in art.9(1) Directive 2008/9, was considered insufficient or inappropriate, without the authorities having first attempted to clarify the facts, in accordance with art.20(1) of the Directive.

The Commission wrote a formal notice to Germany stating that the systematic rejection of claims, without asking for further details, was a breach of art.170 and 171 PVD. The German authorities responded that art.20(1) Directive 2008/9 did not require them to ask for further information; the responsibility lay on the claimant to provide it. Nevertheless, they said that they no longer routinely rejected such claims, but since November 2014 had asked for further details to be provided before the 30 September deadline. This would not happen where a similar request had been made in relation to an earlier claim, or the deadline had already passed when the claim was being processed.

The Commission was not satisfied, and issued a reasoned opinion in July 2018. This argued that a claim for VAT, even with the vague description in code 10, conferred a legitimate expectation that it would be processed, and if further information was required it would be asked for.

The Germans stated that they changed their practice after the reasoned opinion, and asked for the case to be dismissed for inadmissibility because the Commission no longer had a cause for complaint. The Commission replied that Germany had not cooperated in demonstrating that it had properly responded to the opinion, and should therefore be subject to judicial review by the court. The court agreed that Germany should be put to proof of the adequacy of its response.

Summarising a detailed examination of the arguments, the court agreed with the Commission on the fundamental issues: Germany was wrong to have routinely rejected claims without asking for further information in the two circumstances in which they did not ask for it. However, the Commission's argument about legitimate expectations was rejected: the mere acknowledgement of receipt of a claim did not create a legitimate expectation that it would be paid.

The court ordered Germany to pay two-thirds of the Commission's costs in addition to its own costs.

CJEU (Case C‑371/19): *Commission v Federal Republic of Germany*

4.5.2 Failure to apply the Refund Directive (2)

An Austrian company made an interim electronic refund claim to Germany for the period July to September 2012. The claim was made on 29 October 2012, and was therefore in very good time. In the form, the company did not include the actual number of the various invoices, but an alternative reference number. The tax authority rejected the claim on 25 January 2013; the company appealed on 8 February; and the tax authority issued a final decision on 7 January 2014, stating that the claimant had failed to provide the details required by law by the deadline of 30 September 2013. The tax authority stated that it had asked for the compliant invoice numbers three times before the deadline.

A court of first instance upheld the company's appeal, holding that the absence of the numbers did not invalidate a refund application. The tax authority appealed, and questions were referred to the CJEU. These

covered the issues of whether the invoice number was a formal or substantive requirement, and whether an applicant, faced with the design of the electronic portal, was entitled to assume that the identifying number it had used was a valid way of specifying what it was claiming.

The court noted that art.8(2)(d) Directive 2008/9, in using the expression “the number of the invoice”, was referring to one specific number, to the exclusion of all others. The interrelation between that Directive and the PVD meant that they had to be interpreted in the same way. The number was therefore the “sequential number… which uniquely identifies the invoice” referred to in art.226 PVD.

However, the absence of a reference to such an invoice number in the refund application cannot lead to the refusal of that application in the event that such a refusal would infringe the principle of fiscal neutrality or the principle of proportionality. Despite the importance of the use of a sequential number of the invoice for the functioning of the VAT system, that requirement remains a formal condition which, in certain circumstances, must surrender its priority to the application of the substantive conditions of the right to a refund, in accordance with the principles of neutrality and of proportionality.

The automatic refusal of a claim on the grounds that it did not include the sequential number would be disproportionate. The claim had been “submitted” and the Member State should determine whether to pay it. It was appropriate, if the tax authority did not already have a copy of the invoice concerned, to ask for the sequential identification number as part of the procedure described in art.20, to be provided within the deadline of one month laid down in art.20(2). If it was not provided within that period, the authority would be entitled to reject the claim.

It therefore appears that the failure of the company to supply the relevant numbers, after being asked three times, justifies the refusal of its claim.

CJEU (Case C‑346/19): *Bundeszentralamt für Steuern v Y-GmbH*

4.5.3 New guidance

HMRC have published new guidance to replace Notice 723A, covering claims for UK VAT by EU businesses and EU VAT by UK businesses. It has separate sections setting out the rules for VAT incurred up to 31 December 2020 and after the end of the transitional period.

UK businesses may continue to claim 2020 EU VAT through the UK portal up to 31 March 2021 (the normal deadline would be 30 September). Similarly, EU businesses can claim UK VAT incurred in 2020 through their own national portals by the same deadline.

After that point, claims by UK businesses fall under the 13th Directive procedure, which normally requires a separate paper claim for each country, with full supporting information, submitted in the language of the country in which the claim is made. Such claims are made for the year to 30 June, and the deadline is 31 December.

Non-UK businesses will effectively also use the 13th Directive procedure to make claims for UK VAT, with no distinction in future between EU and non-EU businesses. The UK rules in SI 1995/2518 reg.191 and

following will continue to apply, but will now apply in the same way to all non-UK established claimants.

www.gov.uk/guidance/refunds-of-uk-vat-for-non-uk-businesses-or-eu-vat-for-uk-businesses

HMRC have also issued a Brief to acknowledge the Covid-related difficulties that some non-EU claimants and their agents have had in obtaining certificates of eligibility to support 13th Directive claims for the year to 30 June 2020. In this specific circumstance, HMRC will allow the certificate of eligibility to be submitted by 30 June 2021. The claim itself, with all the other required supporting information, must have been submitted by 31 December 2020.

Revenue & Customs Brief 20/2020

5. INPUTS

5.1 Economic activity

5.1.1 Mixed holding companies

In 2005 a Portuguese company planned to acquire a subsidiary to which it would have made taxable supplies of management services, and incurred input tax on consultancy and on services related to the issue of corporate bonds. In the event, the acquisition did not take place, and the proceeds of the bond issue were instead made available to the holding company of the group as an exempt loan. The company considered that it was entitled to a deduction on the basis of the intention underlying the incurring of the inputs, or their categorisation as overheads of the general activity of an active holding company; the tax authority took the opposite view on the basis of the outcome. Questions were referred to the CJEU, and Advocate-General Kokott gave her opinion.

The referring court formulated its first question badly, because it failed to take into account existing case law that showed the mere acquisition of shares to be a non-economic activity. The A-G reformulated the question to ask whether a mixed holding company (one that supplies taxable services to some subsidiaries but also has non-economic holdings where no taxable services are supplied) is entitled to deduct input tax in respect of consultancy services connected with the market survey with a view to the acquisition of shares; in particular, where there was an intention to make taxable supplies to the acquired company, but that acquisition did not take place.

The A-G observed that the answer was found in precedents such as *Ryanair*. A mixed holding company can be a taxable person; input tax may be deducted in respect of preparation for activities not subsequently carried out; and a disproportion between the amount of the deduction and the amount of a holding company's tax liability on the basis of its planned management services, which regularly occurs in these cases, is immaterial.

The appellant company was a mixed holding company rather than a "mere *Polysar*" investment holding company, so it was in principle a taxable person. The failure to carry through the transaction did not restrict the initial right to deduct, in accordance with *Ryanair*, as there was an intention to become involved in management and to make taxable supplies.

The only question was whether there was a direct and immediate link between the expenditure and the services which the appellant intended to supply to the target company. The A-G sets out the two bases for such a link – cost components of particular outputs, and general overheads that are linked to the whole activity – and concludes that the appellant is entitled to deduct these consultancy costs. However, it is not completely clear which principle the A-G is applying: what she says is that the "expenditure has a direct and immediate link with the planned taxable services", which suggests that she regards the inputs as cost components of future services supplied to the subsidiary, rather than the general overheads of a holding company.

The A-G noted that the deduction claimed was nearly €1 million, which would be much more than the output tax chargeable on future services. However, VAT law did not require there to be a proportionate relationship between input tax and output tax; the services would be taxable over a number of years, and the principle of neutrality of legal form suggested that expenditure for the management of the undertaking should be relieved in full.

The second question concerned the deductibility of the costs relating to the bond issue. The A-G also reformulated that to consider whether it was the planned use of the funds or the actual use that counted, and whether it was possible for the appellant to justify deduction on the basis of later use by the rest of the group for taxable activities.

In this case, the A-G was clear that these inputs were not "general costs". The principle of general use/general overheads can only be used if there is no link to particular outputs; *Sveda* and *Iberdrola* (described by the A-G as "generous" decisions) concerned use for disregarded activities rather than exempt ones. The actual use of the inputs was more precise than the intended use, and it precluded a deduction.

The later use for taxable purposes, even if it could be made out as a fact, would be unlikely to lead to an adjustment of the non-deductibility of the inputs. The expenditure was not a "capital item", and the conditions of art.184 and 185 PVD did not appear to apply. The services were consumed immediately when the capital was raised, and subsequent events did not change the entitlement.

In conclusion, the A-G recommended that the court finds that the inputs on consultancy services were deductible, as long as the referring court confirmed an intention to make taxable supplies, regardless of the fact that the acquisition did not take place; but that the inputs relating to the bond issue were not deductible, based on the actual use to make an exempt onward loan.

Full court

The full court started by repeating the distinction between a non-economic holding company and a taxable one, and recognised the existence of a "mixed" holding company that had activities of both types. In this case, the documents confirmed the referring court's view that the appellant had planned to make taxable supplies to the target company, so it was acting as a taxable person.

The court agreed with the A-G that the right to deduct arose at the time the costs associated with the share acquisition were incurred, based on the intention to make taxable supplies, and the fact that those supplies never took place was irrelevant. The costs would form part of the general overheads of the holding company, and the court pointed out that this might require an apportionment into business and non-business elements if the holding company was "mixed".

Turning to the costs of the bond issue, the court agreed with the A-G that the provisions of the Directive supported the view that "actual use" took precedence over "intended use" in determining the right to recovery. As with the A-G's opinion, the court appears to regard the disallowance of the input tax as something that should have happened when it was

incurred, rather than operating by way of clawback on the change of intention.

The court notes a discrepancy between the order for reference and the information provided by the company at the hearing: the order stated that the loan had always been intended "to provide the subsidiaries with the resources they needed to make direct investments in new technology" (i.e. was intended to be loaned intra-group); at the hearing, the company stated that it had intended to use the money to buy the shares in the new subsidiary, that would have invested in new technology. This discrepancy is not fully resolved, but it may underlie the conclusion that the company was not entitled to the input tax at all, rather than being entitled to it initially and having it clawed back.

CJEU (Case C-42/19): *Sonaecom SGPS SA v Autoridade Tributária e Aduaneira*

5.1.2 Another mining holding company

HMRC denied input tax deductions totalling £255,000 for periods 04/12 to 09/15, £296,000 for 12/15 to 12/17, and £274,000 for periods 03/18 to 09/19. Appeals against the third set of periods were stood over behind the appeals against the first two, which were heard in a virtual hearing in November 2020. The reason for the decisions was familiar from other cases about mining holding companies: in HMRC's view, the company did not make taxable supplies to its subsidiaries, and was not engaged in economic activities.

The company was AIM-listed, being re-admitted to the market in November 2012 and December 2013 following acquisitions of significant assets in Austria and Finland. Further acquisitions in Greenland followed in 2015 and 2017, when the Austrian activities were discontinued.

Judge Philip Gillett examined the structure of the company's operations. Its mining licences were held by local subsidiaries. The company raised funds in the UK market and loaned them to the local subsidiary. The company held contracts to supply advisory, consulting, marketing, accounting, financial services and technological support and development services to the subsidiaries; the contracts stated that the services were to be charged at 115% of the costs incurred by the holding company, and were payable within 30 days of quarterly invoices being raised. Some of the loans bore interest, but others did not.

HMRC focused on a description in the company's accounts that the loans would be repaid "when sufficient cash resources are available in the subsidiaries". They argued that this constituted an additional, unwritten term in the loan agreements; the company disputed this, but HMRC argued the point strongly. The judge did not agree with HMRC's representative. In his view, this was merely a description of the commercial reality, not a variation of the legal – but purely theoretical and impractical – position that the loans were repayable on demand.

Until 2017, amounts invoiced for services were simply added to the loan accounts. Following the commencement of HMRC's enquiries, the company started to loan additional funds to the subsidiaries so they could pay the invoices. Both parties agreed that this did not make a fundamental difference to the transactions.

The judge was referred to a large number of precedent cases, which include several on mining holding companies – *African Consolidated Resources*, *Norseman Gold*, *Tower Resources* and *W Resources*. Other cases included those in which the CJEU has considered the position of holding companies, as well as *Wakefield College* as the most recent UK authority on economic activity.

HMRC argued that the supplies of services were not supplied for a consideration, because they would only be paid for if and when the investment was successful. They were not supplied to generate remuneration on a continuing basis, because the company's central activity was to make equity investments in the hope of making gains. The judge stated that "these arguments involve a significant recharacterization of the contracts between Bluejay and its subsidiaries." They involved treating the contract for services and the loan agreement as a single agreement, and the purpose of the services as enhancement of the value of the investment.

The judge started his analysis by stating that it was necessary to ascertain the true economic and commercial nature of the transactions in question. According to the *Newey* decision, the contracts should be the starting point, and should then be examined to find out if they did not correspond to the economic and commercial reality. There was no suggestion from HMRC that the contracts were in any way artificial, but nevertheless they sought to recharacterize them.

The judge saw nothing in the contracts that contradicted the evident economic and commercial reality of the transactions. There was nothing contingent about the consideration: it was payable within 30 days of the invoice being submitted, and adding the amount to the loan account constituted "payment" for this purpose. There was no difference between lending the money and receiving a payment back, and simply debiting the loan account. HMRC were reading far too much into the description of the loans in the accounts.

The judge was therefore satisfied that the services were provided for consideration that was not contingent on the success of the operation; however, he went on to consider the effect of contingency, if an appellate court should decide that he was wrong on that point. He examined the Upper Tribunal decision in *Norseman Gold* and the other decisions that had followed from it. In his view, the Upper Tribunal's decision was based on the particular facts found by the FTT in that case, and did not express a general principle that uncertainty of receipt undermined the link between consideration and supply. The judge noted that a witness had repeatedly said that it would have been a dereliction of his duty as a director if he had continued to supply services without expecting the consideration to be paid in accordance with the contracts. The fact that some of the loans had become irrecoverable was not relevant. Therefore even if the payment of the consideration for services was contingent on the success of the projects, nevertheless the consideration was real.

HMRC's argument on economic activity was characterised by the judge as advancing several points:

- supplying services to the subsidiaries was ancillary to the investment objective (although no authority was cited to support the case that this meant there was no economic activity);

- the main purpose of the company was to make a profit from the onward sale of its exploitation licences, so the supply of services was not "to obtain income therefrom on a continuing basis".

The judge pointed out that art.9 PVD does not make "obtaining income on a continuing basis" a necessary condition for economic activity to exist in general; it is part of a separate sentence after the first provision, which is "Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as 'economic activity'." The qualification about "income on a continuing basis" only therefore appears to apply to the exploitation of tangible or intangible property.

In any case, the judge was satisfied that this company obtained an income stream from these activities, which continued for many years, and was therefore carrying on an economic activity even following HMRC's analysis.

The judge found that the company had engaged in economic activities throughout the period: the invoices it raised represented supplies for consideration, and before it raised its first invoices in December 2013, it was at all times intending to make supplies to its subsidiaries. The appeals were allowed.

First-Tier Tribunal (TC07947): *Bluejay Mining plc*

5.1.3 Abandoned activities

A Romanian company acquired real estate during 2006 and 2007 and carried out preliminary activities for a redevelopment project, deducting VAT on costs. The project was suspended during the financial crisis of 2008 and finally abandoned in 2015. Tax inspections in 2009 and 2013 found nothing wrong, but a further inspection in 2016 resulted in an assessment for nearly €50,000. The inspectors considered that the company should have been aware, from the outset, that the project was contrary to the local town plan, and the company was therefore incurring a significant risk that the project would not be completed. The authority also held that some of the expenditure was incurred on behalf of the prospective customer for the developed property, and should therefore have been reinvoiced with output tax charged.

The Romanian court referred questions to the CJEU, asking for clarification on the right to deduct and retain input tax where a project is abandoned and therefore inherent risks are realised; and also whether the authorities had to prove abuse or fraud with objective evidence, or could be presumed to justify refusal of deduction. The nine questions on deduction also referred specifically to *Ghent Coal Terminal* and *INZO*, and asked about the significance of the earlier tax inspections for the principles of legal certainty protection of legitimate expectations. There were a further six questions about art.28 PVD and incurring costs as agent for another.

The answers to the questions about deduction were detailed but entirely predictable: the right to deduct was based on the intention to use the costs for taxable outputs at the time the costs were incurred, and was not lost if that intention was frustrated by factors beyond the taxpayer's control. The tax authorities could not make assumptions about abuse without

evidence, and there was no such evidence in the present case in the documents before the court.

As regards art.28, the court commented that it only applies where two conditions are fulfilled: there must be a mandate in execution of which the commission agent acts, on behalf of the principal, in the delivery of goods and/or the provision of services; and there must be an identity between the deliveries of goods and/or the provision of services acquired by the broker and the deliveries of goods and/or provision of services sold or transferred to the principal. The referring court would have to determine the facts, but the CJEU did not find anything to indicate that these conditions were present in this case. It appeared that the costs had been incurred by the construction company acting in its own name and on its own behalf, and art.28 was not engaged.

CJEU (Case C‑734/19): *ITH Comercial Timişoara v Agenția Națională de Administrare Fiscală*

5.1.4 Article

In an article in *Taxation*, Alex Millar analyses the VAT rules on corporate transactions, including share issues, acquisitions, and the input tax of holding companies.

Taxation, 26 November 2020

5.2 Who receives the supply?

5.2.1 Import VAT on goods not owned

A Slovakian company provided repackaging services. It acted as importer of record and paid import VAT on goods belonging to a Swiss customer when they arrived in Slovakia; it billed the customer for repackaging services, and then delivered the goods to other member states or exported them to third countries. The company claimed to deduct the import VAT.

The tax authority refused the claim on the grounds that the company was not the owner of the goods, it did not supply them to anyone else, and did not use them for the purposes of its taxed transactions. On appeal, a Slovak court held that the import VAT could be deducted, because without importing the goods, the company could not make any supplies. There was therefore a sufficient link to its economic activities. Refusing the claim infringed the principle of fiscal neutrality. Questions were then referred to the CJEU, asking whether the right to deduct import VAT could be made conditional on the claimant having the right to dispose of the goods as owner.

The company argued that the importation of the goods was essential for its economic activity; requiring it to own and supply the goods, in order to deduct the import VAT, was a condition that was impossible to satisfy. Refusal of its claim infringed the principle of fiscal neutrality.

The court noted that the VAT Advisory Committee (established by PVD art.398) had commented in its meeting of 19 October 2011 that a taxable

person designated as liable for payment of import VAT is not entitled to deduct VAT when two conditions are met: when the taxable person does not obtain the right to dispose of the goods as an owner and when the cost of the goods does not have a direct and immediate link with his economic activity. Although the Committee's guidance is not binding, it is persuasive.

The court accepted the referring court's view that there was no link between the "cost of the upstream transaction" (the importation of the goods to Slovakia) and "the downstream transaction" (the supply of services to the Swiss customer). The VAT did not arise on a "cost component" of the company's supplies. In essence, it made no difference what was being imported and repackaged; the VAT had to be paid, but it did not relate to an "input" as understood for VAT.

CJEU (Case C-621/19): *Finančné riaditeľstvo Slovenskej republiky v Weindel Logistik Service SR spol. s ro*

5.2.2 Import VAT deducted as input tax

HMRC published R&C Brief 2/2019 in April 2019, confirming their long-held policy on deduction of import VAT: only the owner of the imported goods is entitled to the deduction. HMRC and HM Treasury received a number of representations about the application of the rules in specific circumstances, and carried out a review, the result of which has been announced in a new Brief. HMRC have confirmed that they maintain their position as set out in Brief 2/2019.

HMRC considered a number of specific examples raised by various businesses and representatives, including:

- agents;
- warehousing;
- goods temporarily imported for repair;
- goods imported for onward lease;
- special procedures.

Agents

An agent may be given power to act on their client's behalf. They can then enter into contracts with third parties, receiving and issuing invoices in their own name.

Where an agent acts in line with s.47 VATA 1994, the agent is treated as importing and supplying the goods as principal.

In these circumstances the agent can reclaim the import VAT as input tax, subject to the normal rules, but must treat the transactions as a supply by them and charge and account for VAT on the onward sale in the normal way.

Customs Warehousing

Businesses such as retailers that source goods from abroad, may on import enter the goods into warehousing. Duty and VAT are then suspended.

The retailer raises a purchase order at a later date and goods are dispatched from the warehouse and VAT deferred to the retailer's deferment account. The retailer takes ownership of the goods at the time of delivery to either a distribution centre or their retail premises.

Ordinarily, import VAT and customs duty become due when the goods are imported and enter free circulation. Where goods are entered into warehousing, import VAT becomes due at the point the goods are removed from the warehouse and enter free circulation.

In the above example, when the goods are released from the warehouse into free circulation, the import VAT becomes due. Where a retailer uses their own deferment account and reclaims the import VAT, this is incorrect.

Retailers have expressed a concern that following the correct procedures will result in a large number of overseas suppliers becoming liable to register for UK VAT and that this would threaten the supply chain.

A solution to this would be for the retailers to take ownership of the goods prior to the goods being removed from the warehouse and prior to entry into free circulation. This would allow the retailer to both act as importer of record and recover the import VAT. There is no legal issue preventing a sale of the imported goods whilst within the warehouse regime and this would remove the need for overseas entities to register for UK VAT.

Goods temporarily imported for repairs

There are a number of examples related to goods imported into the UK for maintenance or repair (without a change of ownership) and then subsequently re-exported.

Under special procedures the inward processing procedure may be available if certain conditions are met. This allows non-UK goods to be imported for repair or processing whilst import duty and VAT is suspended.

If the goods are released from inward processing to free circulation, customs duties and VAT become payable. The provider of the repairs simply provides their services of repair.

Goods imported for onward leasing

Goods will be moved from outside the EU to the UK site of the person leasing the goods for the duration of the lease term. It is expected that the goods will be returned to the lessor at the end of the lease term.

The importation of the leased goods and the onward lease are two separate taxable events for VAT purposes. When the goods are imported into the UK the overseas supplier incurs the import VAT in respect of its separate onward supply of a leased good.

The person leasing does not take ownership of the leased goods and does not have entitlement to recover the import VAT. They take on the leased good and any input tax incurred in respect of the lease itself would be recoverable. It would be subject to the normal rules, as it relates to the separate onward supply that they receive.

Customs special procedures

Businesses can use customs special procedures to suspend, reduce or claim relief on the payment of customs duties and VAT under specified conditions.

Special procedures include:

- customs warehousing – allows for goods not in free circulation to be stored without payment of customs duty, and where appropriate excise duty or import VAT, in a customs warehouse.
- inward processing – allows for the payment of customs duties and import VAT to be suspended on imported goods whilst processing is taking place.
- outward processing – allows for the temporary export of goods for processing or repair, and to re-import the processed products whilst retaining domestic status or with partial relief from import duties.
- temporary admission – allows for businesses and individuals who are established outside of the UK to be authorised to import goods with total or partial relief from customs duties and other charges because of the specific use to which the goods will be put.
- authorised use – allows for reduced or nil rates of customs duty on certain imported goods, provided they are put to a prescribed end use.

However, some businesses, for administrative purposes, choose not to apply the relevant special procedure but choose to pay the import taxes applicable at import.

If a business chooses not to use a special procedure, then the standard import procedure must be followed, and any import VAT must be accounted for and deducted by the correct entity.

Postponed VAT accounting

From 1 January 2021, UK VAT registered businesses will be able to use postponed VAT accounting to account for import VAT on their VAT Return for goods imported for use in their business from anywhere in the world.

Where a business initially declares goods to customs warehousing or into some other customs special procedure, they can use postponed VAT accounting when they submit the declaration that releases those goods into free circulation.

Businesses do not need to be authorised to use postponed VAT accounting; they simply make the appropriate entry on their customs declaration.

Ordinarily, postponed VAT accounting is not mandatory and businesses can start to use it at any time after 1 January 2021.

However, businesses must use postponed VAT accounting if they import non-controlled goods from the EU to Great Britain from 1 January 2021 to 30 June 2021, and either defer their supplementary customs declaration, or use simplified customs declaration process where authorised and make an entry in declarants records.

As with existing processes, it is the owner of the goods who is using the goods in the course of their business who can use postponed VAT

accounting. It means they can declare and recover import VAT on the same VAT return, subject to the normal rules on input tax deduction.

For businesses who currently import goods from non-EU countries, this relieves them from having to pay for the import VAT upfront through their deferment account. Non-owners cannot use postponed VAT accounting.

Revenue & Customs Brief 15/2020

5.2.3 More third party benefits

A Belgian company constructs apartments on land belonging to third parties; the undivided shares in the land corresponding to the constructed apartments are then sold by the landowners themselves. The company covered advertising and administrative costs as well as estate agents' commission, and deducted the associated VAT in full.

The tax authority ruled (in relation to sales made between 1999 and 2001) that the deduction of input tax should be restricted by a fraction based on the respective values of the building and the land. The company was assessed to just over €92,000 together with interest and penalties. The company paid the assessment but then appealed and applied for repayment.

Questions were referred to the CJEU after differing decisions in the national courts. At first instance, a Belgian court considered that, in view of the fact that the sale of the building and of the land constitutes a single supply, the advertising costs, the administrative costs and the estate agents' commission paid by the company could be regarded in their entirety as relating to the general overheads of its sole economic activity, namely the construction and sale of apartments. Furthermore, that court considered that the fact that the landowners concerned were apt to benefit from the advertising services and the services supplied by estate agents receiving commission had to be regarded as ancillary to the company's purposes.

However, the appeal court decided that the sale of the land and the buildings could be separated, and it was possible for the company to invoice the landowners for their shares of the various costs. Insofar as the costs related to the sale of the land, they were proper to the landowners, not to the company. Nor were those costs general overheads of the company.

The CJEU noted the two routes to the right to deduct: a direct and immediate link to specific taxed output transactions, and a link to the business as a whole ("general overheads"). The referring court started from the premise that the costs in dispute were general overheads, and focused on the question of whether the benefit to the third party (the landowner) would lead to a restriction in VAT deduction.

The court referred to *Iberdrola Inmobiliaria* (Case C-132/16) as authority for the proposition that a benefit to a third party could not justify a restriction in the right to deduct, provided that there was a direct and immediate link to the taxpayer's taxable activity, and the third party benefit was incidental or ancillary to the taxable person's purposes. In order to qualify as ancillary, the benefit to the third party must flow from a supply of services made in the taxable person's own interest (*AES-3C*

Maritza East 1 (Case C-124/12)). That appeared to apply in the present case, so the right to deduct could not be restricted.

The second question asked whether there could be a partial disallowance if the costs were not general overheads, but were rather directly and immediately linked to output transactions, some of which were made not by the taxable person but by third parties. The court considered that this would lead to a partial disallowance, but it was for the referring court to consider whether this was the case. It would be necessary to determine the extent to which the services concerned were actually supplied in order to allow the taxable person to carry out his taxable transactions; in the circumstances of the case, it would be necessary to consider the contracts for the provision of services as well as the economic and commercial realities. The benefit to third parties would not lead to a disallowance, even if the costs were not general overheads, as long as the direct and immediate link to the taxpayer's own taxable outputs was maintained.

The third question asked about the "possibility" of the taxpayer passing on the cost of the inputs to the third party. It appears that the tax authority considered that the transactions should have been invoiced differently, with separate recharges being made for the landowners' share of the costs. The court ruled that this would be one of the elements that should be considered in deciding whether there was a direct and immediate link with the taxpayer's own outputs, but it was not sufficient on its own to restrict the right to deduct.

CJEU (Case C- Case C-405/19): *Vos Aannemingen BVBA v Belgium*

5.3 Partial exemption

5.3.1 "Special" method

A company operating a leisure park appealed against a number of assessments and penalties totalling about £120,000, covering some matters specific to its operation and one of general interest on special methods of partial exemption.

There was a dispute about the amount attributed by the company to standard rated removable contents on sale of a caravan. The company bought caravans with removable goods and then sold them; it charged less for the standard rated element on sale than the manufacturers charged it on purchase, with the result that the VAT element accounted for was less than the input tax claimed. Various arguments were put forward in support of this approach, but the Tribunal considered it would have been fair to apply the same mark-up to the caravan and the contents – it would certainly not be fair to use a second-hand value for the contents, when they were sold as new. HMRC's assessment did no more than recoup the input tax claimed and was therefore "neutral", which the judge considered to be "rather more generous to the appellant than the method considered to be fair and reasonable by the Tribunal in *Colaingrove*."

A second point specific to caravan sites was the liability of disconnection fees. The company claimed they were zero-rated; the judge pointed out that this must be at best exempt, in accordance with the principle that

connection fees followed the liability of the supply of the site itself. Rental of a caravan site for year-round occupation is exempt. The company argued that disconnection was part of the overall supply of the site and was simply the reverse of the connection fee; HMRC argued that this could not be the case as they were charged when the occupation had ceased, and was therefore not "for its better enjoyment". Judge Anne Fairpo preferred the company's argument. In accordance with the treatment of connection fees under Notice 701/20, the disconnection fees should be regarded as part of a single supply and exempt.

Turning to partial exemption, the company had treated various outputs as zero-rated, when they should have been exempt. The company argued that there had been no breach of the partial exemption de minimis limits on the grounds that:

(1) residual non-attributable input VAT should only include items which are genuinely non-attributable to any particular supply;

(2) directly attributable exempt supply VAT should include only small amounts of petrol and diesel together with plant repairs and plant parts.

The company contended that 75% of the construction and building materials were used in developing new areas of the site and were therefore attributable to zero-rated caravan sales; 25% of the materials were used for other activities across the site, such as decking around the swimming pool, parts of a ski slope and climbing tower and other facilities. These were all related to taxable supplies, with fees charged separately to the sale of the caravans and plot fees. The fees charged where the same regardless of whether the user was a site resident or not.

The company had sent a spreadsheet to HMRC showing this 75:25 split, and argued that this should have been treated as a request to use a special method along those lines. HMRC disagreed: in the absence of a formal application for a special method, none had been agreed, and the turnover-based standard method was therefore appropriate for expenditure that was not exclusively used to make either taxable or exempt supplies.

The judge held that the argument that developing the site was only attributable to sales of new caravans was "not a sustainable position". Arguments about the relative levels of income and profitability in the two parts of the business did not help. Further, the VAT regulations clearly required special methods to be applied for and approved by HMRC. The correspondence in the Tribunal bundle showed that the appellant had been advised of the required steps, but had not followed them. The appeal on the partial exemption assessment was dismissed.

There were also two items of expenditure where HMRC refused a deduction because there was no proper VAT invoice. One involved a purchase of equipment by an employee using his credit card; the other was a supply by a firm of solicitors who, in spite of repeated requests, had not issued a VAT invoice. The company argued that, in the context of its business and the reliability of the rest of its records, it should be given the reasonable benefit of the doubt in respect of what were relatively small amounts (£1,740 and £1,666).

The judge said that she had no discretion, as the company admitted it did not have the evidence required by law. She did not consider the

possibility that HMRC might have exercised discretion to accept other evidence under reg.29; the appeal was dismissed.

The company also appealed against a fixed penalty of £300 and daily penalties of £2,450 for failure to comply with a Sch.36 FA 2008 information notice issued in the course of the enquiry. It argued that HMRC had caused numerous delays themselves, and were victimising the company by inventing issues that were disproportionate or non-existent.

The judge set out the chronology of correspondence about the request for information and the notice that was issued to enforce it, and noted that the notice was not complied with in full until almost two months after the original deadline. No explanation was given for the delay. The Tribunal had no jurisdiction to consider whether HMRC's actions were reasonable; the company had failed to establish a reasonable excuse for its failure, and the appeal against the penalty was dismissed.

First-Tier Tribunal (TC07927): *Tallington Lakes Ltd*

5.3.2 Tax deducted by another person

A Swedish business bought a property in 2012 and let it out subject to an option to tax. The previous owner had also opted to tax and had recovered VAT on redevelopment of the building. This was subject to the capital goods scheme, which in Sweden has special provisions relating to the transfer of obligations to adjust input tax if a building is sold during the adjustment period. As the 2012 purchaser had also opted to tax, no adjustment was due on that transaction, as the Swedish law treated it as continuing the taxable use of the building. This is an application of art.188(2) PVD: "where the supply of capital goods is exempt, Member States may waive the requirement for adjustment in so far as the purchaser is a taxable person using the capital goods in question solely for transactions in respect of which VAT is deductible."

In 2013 the business sold the property to two private individuals who were not intending to use it for taxable transactions. This was treated as an adjusting event under the CGS (because art.188(2) did not apply), and the tax authority requested an adjustment that included the VAT deducted by the previous owner. The company appealed, arguing that the judgment in *Pactor Vastgoed* (Case C-622/11) meant that it did not have to account for tax deducted by another person.

The Swedish Supreme Court referred questions to the CJEU, asking for clarification of the capital goods scheme and the interaction of that scheme with the rules on transfers of a totality of assets (transfer of going concern) in art.19 PVD.

The CJEU rejected various arguments that the decision in *Vastgoed* could be distinguished. It would contravene the principles of the Directive to require a trader to pay back input tax that he had not deducted, while allowing the person who deducted it to keep the benefit. If the Member State exercised the option in art.188(2) not to require an adjustment on a transfer to someone who would use an investment property for wholly taxable purposes, effectively that gave up the right to claw back the VAT that had originally been claimed by the transferor. Arguments that this could give rise to a VAT-free benefit did not sway the court.

The second question about the possible effect of treating the transfer as a TOGC was rejected as hypothetical and therefore inadmissible. The referring court had asked for guidance on what the correct treatment would be in that situation, but had not yet decided whether the transaction was a TOGC. The CJ set out the rules for referring questions and ruled that this was not the correct order of events.

CJEU (Case C-787/18): *Skatteverket v Sögård Fastigheter AB*

5.4 Cars

5.4.1 Supply of cars to staff

HMRC have announced an intention to repeal the *VAT (Treatment of Transactions) Order 1992 (SI 1992/630)*, which provides that supplies of cars to employees for a salary sacrifice are treated as neither a supply of goods nor a supply of services. This was intended originally to prevent double taxation, in that employers might have had to account for output tax on the salary sacrifice even though they were not entitled to deduct input tax on the purchase of the car; however, it had the unforeseen result that *Northumbria Healthcare NHS Foundation Trust* demonstrated in the Court of Appeal – the leasing of cars by a s.41 body had to be regarded as a non-business activity, with the result that the Trust was entitled to full recovery of the VAT incurred.

The Court of Appeal agreed with HMRC that the Order was incompatible with the CJEU judgment in *AstraZeneca* (Case C-371/07); however, the judges refused to follow their suggestion and therefore disapply the Order. They commented that the correct approach would have been to change the law, which had not yet been done some ten years after the CJEU decision showed it was wrong. This will now be done before Autumn 2021.

Revenue & Customs Brief 19/2020

5.5 Business entertainment

Nothing to report.

5.6 Non-business use of supplies

Nothing to report.

5.7 Bad debt relief

5.7.1 Withdrawal of relief

In TC07010, a factoring company appealed against assessments withdrawing bad debt relief it had claimed in its returns for periods between July 2007 and January 2010. The chief executive explained the way in which the business operated, giving an example in which a customer (also called a "supplier" – the source of the debts) factored an

invoice worth £1,000. The appellant would advance £764, being 80% of the debt, less its charge of £30 plus VAT; when the debt was collected, the remaining £200 would be paid over to the customer (or would be credited to its account, as the funding of customers was an ongoing process).

The factoring was "with recourse", which meant that the customer/supplier was required to "buy back" the debt if the appellant was unable to collect it. It was therefore possible that a customer/supplier would have received advances that were not covered by receipts; if it could not repay these, the company appeared to have a bad debt. The question for the Tribunal was whether all debit balances written off were bad debts qualifying for VAT relief.

HMRC argued that the fee for the factoring service was deducted when the appellant made its initial advance of funds to the customer/supplier (the £36 held back out of £800 in the above example). There was therefore never a debt that was unpaid in respect of the supply. If there was in the end an irrecoverable balance, it arose because the factored debt was irrecoverable and the customer/supplier was unable to refund the advance. That was a bad debt on lending, rather than a bad debt in respect of the consideration for the company's supplies.

There was a further argument that the contract provided that charges became due and payable "forthwith" on entering into a factoring agreement. In many cases, the claim to bad debt relief was made a long time after the initial advance, and HMRC therefore argued that it would be made outside the time limit (up to 31 March 2009, this was three years and six months from the date the debt was due).

The company argued that, at the time of making the advance, the only movement of funds was from it to the customer/supplier. There was no consideration moving the other way at that time. Although the contract referred to the charges being due and payable on entering an agreement, according to the conduct of the parties the charges were only due once collection of the debt had proved impossible and recourse was taken to the customer/supplier.

There was a further dispute about whether the company's records satisfied the requirements for a "bad debts written off" account in SI 1995/2518 reg.168.

The FTT judge based his decision on interpretation of a 2002 contract that had been in force at the relevant times, even though much of the enquiry and dispute had focussed on a 2011 version. The terms of that contract appeared clear and consistent: "an Initial Advance will made against such debt less any … fee whatever payable to the factor by the Supplier according to the terms of this agreement". The contract provided that it could not be varied without formal agreement, so the "conduct of the parties" argument failed.

The judge also held that the company's bad debt accounting, which failed to establish a clear audit trail identifying which invoices had been claimed for, did not meet the requirements of the regulations. Even if the company had succeeded on the issue of consideration received, it would have failed on its record-keeping.

The appeal was dismissed, and the company appealed to the Upper Tribunal, coming before Mrs Justice Bacon and Judge Jonathan Cannan. The decision starts by emphasising that the issues to be determined were the identification of the taxable amount of the company's supplies, the time when that taxable amount was paid and the circumstances in which it could be reduced after a supply has been taken place, in accordance with art.73 and art.90 PVD, s.36 VATA 1994 and the regulations made under it regs 165A to 172 SI 1995/2518.

The grounds of appeal were that:

(1) The FTT erred in its interpretation of the contractual arrangements.

(2) The FTT erroneously disregarded the economic reality.

(3) The FTT's reasoning does not apply to all of the disputed claims, including in particular charges or disbursements which arise after the Initial Advance and any charge payable by a client to whom no advances have been made.

(4) The FTT misinterpreted the requirements of the Regulations.

In response to grounds (1) and (2), the judges decided that the FTT had been wrong to hold that the company had received its consideration at the time it made the initial advance. The reasoning is complicated, but it appears that the offset at that point did not constitute "payment"; the company could only collect the fees due when it had received more money from the customer than it had advanced. The judge illustrated the point by supposing a single advance where nothing was subsequently received: clearly the company would not have been paid the consideration for its service, and would be entitled to a bad debt claim.

The fact that a running account was maintained for continuing customers made it difficult to identify particular supplies for this purpose, although the company conceded that it was possible; the accounting system was relevant to determining the entitlement to a claim in accordance with the regulations, but as a matter of contract, the fee was not "paid" at the outset.

The judges were not satisfied that the FTT had made an error of law in approaching the issue of charges and disbursements (ground (3)). However, in line with the decision on ground (1), the company did not recoup these amounts until it had made a recovery of the underlying debt.

Turning to ground (4), the judge noted that the company's representative pointed out that HMRC had failed to utilise the procedure in reg.171(3) to recover relief that had been claimed and paid in breach of reg.168. However, this had not been argued by the company before the FTT, and was not among the permitted grounds of appeal. Nor had the company argued that HMRC should have exercised its discretion to allow the relief even with a breach of reg.168. Instead, it argued that its accounting records satisfied all the requirements of reg.168(2); they were not prepared or designed for that purpose, which meant that reg.168(3) did not apply – it only required records to be kept in a single account if they were "created in pursuance of this regulation".

The company's representative argued that *Tratave* (Case C-672/17) was authority for the proposition that formalities should not prevent a taxpayer exercising the fundamental right to adjust the taxable amount where

consideration was not received. He submitted that HMRC's requirement in reg.168 for a "single account" was a matter of their administrative convenience which was not a permissible purpose.

The UT did not agree. The purpose of reg.168 was plainly to establish an audit trail whereby HMRC could check a bad debt relief claim. The company had clearly not done that, and the FTT had been entitled to conclude that it had not done so. The *Tratave* decision related to national laws that made the claiming of a relief practically impossible or excessively difficult. Requiring an audit trail did not clear that hurdle: it was plainly within the margin of discretion allowable to Member States.

The UT concluded that "the fact that Regency did not keep a single refunds for bad debts account was simply a matter of administrative convenience for Regency. Regency is not being penalised for its business model, as suggested by Mr Ripley. It has been denied relief because of deficiencies in its record keeping."

The appeal was dismissed on ground (4) alone.

Upper Tribunal: *Regency Factors plc v HMRC*

5.7.2 Bad debt relief conditions

Polish law imposed particular conditions on a claim to bad debt relief. It provided that a debt is regarded as likely to be irrecoverable if it has not been settled or assigned in any form within 150 days of the expiry of the period for payment indicated in the contract or invoice. Further conditions included a requirement that the customer was registered for VAT and was not subject to insolvency or winding-up proceedings, and the claim should be made within two years of the issue of the relevant invoice.

A Polish company provided tax consultancy to a customer which was VAT-registered and not subject to insolvency proceedings at the time the invoice was issued, but which was would up within 150 days of the expiry of the payment period. The company applied for a tax ruling to clarify whether it was entitled to bad debt relief. The tax authorities ruled that the conditions of the Polish law were not met; the company objected that these did not comply with PVD art.90, and questions were referred to the CJEU.

The referring court explained the Polish law as intended to ensure the symmetry of the adjustments: the supplier could recover the output tax charged if the customer was in a position to reduce the input tax claimed. It was also necessary to preserve the coherence of Polish insolvency law, which determined the order in which debts of an insolvent company were settled.

The court noted that art.90 and art.273 together give member states a margin of discretion in setting the formalities to be complied with by taxable persons before reducing the taxable amount. However, measures to prevent tax evasion or avoidance may not, in principle, derogate from the rules relating to the taxable amount except within the limits strictly necessary for achieving that specific aim. That meant that the formalities to be complied with by taxable persons in order to exercise the right to reduce the taxable amount for VAT must be limited to those which make

it possible to provide proof that, after the transaction has been concluded, part or all of the consideration will definitely not be received.

Art.90(2) permits member states to derogate from the rule in art.90(1) of that directive in situations of total or partial non-payment of the transaction price. However, this is intended to reflect the possibility that in certain circumstances and because of the legal situation prevailing in the Member State concerned, non-payment of consideration may be difficult to establish or may only be provisional. The exercise of the power has to be justified in order to conform to the principle of fiscal neutrality, and member states are not allowed to exclude altogether the right of reduction of output tax in the event of non-payment. Conditions can therefore only relate to the establishment of the bad debt with certainty; if there is no doubt that a debt will not be paid, the right under art.90 cannot be restricted.

The specific conditions imposed by Polish law could not be justified: the customer did not have to be VAT registered either at the time of the supply or at the time of the bad debt claim; entering insolvency proceedings was likely to confirm that non-payment would follow.

The Polish government based its argument on the apparent requirement for symmetry in art.90 (adjustment of output tax by the supplier) and art.185 (adjustment of deduction by the recipient). However, the two provisions did not require symmetry. Art.90 operated for the supplier whether or not the customer ever had a right to deduct, so it could not depend on the operation of art.185 by the other party to the transaction.

The requirements could also not be justified as necessary and proportionate to prevent irregularities or abuses. Any need to preserve the coherence of domestic insolvency law could not override the primacy of an EU VAT provision which had direct effect.

CJEU (Case C-335/19): *E sp zoo sp k v Minister Finansow*

5.8 Other input tax problems

5.8.1 Missing traders

In TC07315, HMRC denied an input tax claim for just over £1m for periods between 03/15 and 01/16. The VAT related to 20 purchases from one supplier, alleged to be a defaulting trader. The company accepted that there was a VAT loss, and on most of the deals accepted that its transactions were connected with that loss. On five deals it did not accept the connection, and on all of them it disputed that it knew or ought to have known of the connection.

The Tribunal examined the history of the trade and the enquiry. It was satisfied that the counterparty in the five deals was a fraudulent missing trader. It did not accept the statements of the company's witnesses that they were naive or unaware of the risks of MTIC fraud in their industry. The company appeared not to have understood the difference between normal commercial due diligence and the "red flag due diligence" that was required when HMRC had issued Notice 726 and given specific

warnings of the risk of MTIC fraud. The Tribunal was satisfied that the company should have known that the challenged deals were connected with MTIC fraud.

On the other hand, it appeared that the director had been "beguiled" by the counterparty into believing that he was of good standing in the industry and his supply chains were of no concern to HMRC. The Tribunal concluded that he did not actually know of the connection to fraud.

The appeal was dismissed by the FTT, and the company appealed to the Upper Tribunal, coming before Judge Jonathan Richards and Judge Guy Brannan. HMRC did not seek to challenge the decision that the company had no actual knowledge of fraud; the only point in dispute was whether the FTT should have concluded that it ought to have known of the connection. In particular, the company did not accept that the FTT had given sufficiently full reasons for drawing the conclusions that a reasonable businessman would have concluded that there was a fraud, or it had failed to apply the law on "means of knowledge" to the facts it had found.

The judges commented that the FTT's decision gave rise to "difficulties" by setting out the parties' evidence and cases at length, and giving only a short section of "consideration and conclusions". It was not straightforward to tell which evidence was contentious and which was not; it was not absolutely clear to what extent particular evidence had been accepted.

There was a greater difficulty in relation to potentially controversial evidence, such as the director's explanation of his reliance on the counterparty. The FTT had made no primary finding of fact as to whether the director genuinely believed the counterparty's explanation, and no secondary findings about whether the explanation was objectively reasonable or consistent with other facts.

The judges noted two principles of law in relation to "means of knowledge":

(1) The "should have known" condition is not satisfied if there is a reasonable explanation for the transactions other than those transactions being connected with fraudulent evasion of VAT.

(2) A finding that the Company should have known that there was a risk that its transactions were connected with the fraudulent evasion of VAT, or even that it was "more likely than not" that those transactions were so connected, is not sufficient to invoke the principle in *Kittel*. Rather, it has to be shown that the Company should have known that its transactions were connected with fraudulent evasion of VAT.

The FTT had failed to give express reasons for rejecting the reasonableness of the company's alternative explanation. HMRC argued that it had identified the "red flags" that should have been obvious from a reading of Notice 726; however, the company had given an "innocent explanation" for at least one of these, and the FTT had given no explanation for disregarding that explanation.

HMRC argued that "even if there was a technical failure to give reasons" the Upper Tribunal should not interfere with a decision that would inevitably have been the same. The UT did not accept that a failure to

give reasons was a mere technicality. The parties must understand why they have won or lost, and an appeal court must understand whether the correct legal approach has been followed.

The UT considered that the decision below did not contain enough findings of fact for it to determine whether or not the alternative explanation was unreasonable. The judges made several detailed criticisms of the decision, which in effect made it clear that the directors should have been aware of the risk of fraud, but that fell short of the required standard.

To ensure a re-hearing that would be free of any suspicion of bias either in favour of the original decision or over-compensating in favour of the taxpayer, the case would be remitted to a differently constituted FTT for reconsideration of the limited question of whether the directors "should have known" of the connection to fraud.

Upper Tribunal: *Revive Corporation Ltd v HMRC*

A company appealed against decisions denying input tax on 403 purchases of scrap metal between 12/13 and 06/15. The total amount in dispute was £640,000, and the HMRC decisions were based on the allegation that the company knew or should have known that the transactions were connected with fraudulent evasion of VAT. The company did not accept that there was a tax loss, or that it was fraudulent if there was one, or that its transactions were connected to a tax loss, or that it should have known of such a connection.

The company was incorporated in 2004, carrying on a family business that had been established in 1943. The Tribunal set out the involvement of various family members in its management, and the involvement of an employee (who left the company in 2016) in the disputed deals. The judge understood the company's position as a requirement for HMRC to prove that there was a fraudulent tax loss in the case of each supplier, so he examined the evidence on each one in turn. In most cases, the judge (Richard Chapman QC) was satisfied that HMRC had made out this part of their case to the required standard.

The taxpayer's representative (the late Tarlochan Lall) submitted that an absence of sufficient evidence of the suppliers having an intention fraudulently to evade VAT when the company purchased the goods meant that there could not be any connection to fraud. The judge analysed precedent cases and did not accept the need for any such intention or plan at the time of the purchases.

The company was certainly well aware of the prevalence of fraud in its industry, but that was not enough on its own. The Tribunal considered that it did have due diligence mechanisms in place, but often operated them in a casual manner, and were not operated in full in respect of any of the traders who carried out the disputed transactions. However, the company frequently withheld the VAT due to suppliers until it had carried out documentary checks, and the Tribunal accepted that this was considered by the directors to be a cautious approach, even though any payment would in fact contain a proportion of VAT – it is not possible to withhold the VAT on its own.

The judge considered each of the suppliers in turn, and in each case concluded that HMRC had not shown, to the requisite standard, that the

only possible explanation for the transactions was a connection with fraud. It was therefore not proven that the company "should have known" of such a connection. The appeal was allowed.

First-Tier Tribunal (TC07900): *Crow Metals Ltd*

5.8.2 S.33 bodies

The *Value Added Tax (Refund of Tax to the Charter Trustees for Bournemouth and the Charter Trustees for Poole) Order 2020* has added two bodies to those entitled to claim under s.33 VATA 1994 in respect of VAT incurred on their non-business activities.

SI 2020/1113

The *Value Added Tax (Refund of Tax to Museums and Galleries) (Amendment) Order 2020* has added a number of further bodies to those entitled to claim under s.33A VATA 1994.

SI 2020/1167

6. ADMINISTRATION AND PENALTIES

6.1 Group registration

6.1.1 Consultation responses

CIOT has responded to HMRC's consultation on *VAT Grouping: Establishment, Eligibility and Registration*. The executive summary of the response states:

The CIOT supports the 'whole establishment' provisions ('WEP') as opposed to 'establishment' provisions ('EP').

Although in principle the EP could bring some simplification by having a single reverse charge rule for all businesses, this would be majorly outweighed by the additional costs, increased bureaucracy and uncertainty for businesses.

The CIOT does not currently support the change to compulsory grouping and would prefer that identified avoidance is targeted by changes to legislation to capture the small number of businesses that are deliberately using the VAT group rules to engage in VAT avoidance. The UK's mature VAT grouping rules provide certainty for the majority of compliant businesses.

The CIOT suggests that HMT and HMRC representatives also consult another tax authority's perspective.

The CIOT would be cautious about the introduction of beneficial ownership tests.

The CIOT would like to see the admission to a VAT group position considered for other types of legal entities e.g. trusts, joint ventures, s.33 bodies, though the joint and several liability position would have to be considered concurrently.

www.tax.org.uk/policy-technical/submissions/vat-grouping-establishment-eligibility-and-registration

The Law Society has also responded, summarising their approach as follows:

"Our response provides information and views about how the current VAT grouping rules operate and how potential changes might affect UK businesses that utilise VAT grouping.

The response covers each of the three distinct areas of VAT grouping examined in the call for evidence:

- the VAT establishment provisions
- compulsory VAT grouping
- grouping eligibility criteria for businesses currently not in legislation, including limited partnerships

Our response explores some of the potential consequences of change for businesses, including financial services businesses, investment funds, as well as certain financing arrangements and outsourcing arrangements.

In conclusion, we do not favour a move to compulsory VAT grouping, as this would significantly reduce business flexibility; nor do we favour elective VAT grouping but on an "all or nothing" basis involving all members within the relevant control group.

We also question whether it is necessary or appropriate to revisit the VAT grouping treatment of limited partnerships and their general partners as part of a package of measures covered in the call for evidence. We ask whether it would not make more sense to consider such issues as part of the wider review of the indirect tax regime for fund management in the UK."

www.lawsociety.org.uk/campaigns/consultation-responses/vat-grouping-establishment-eligibility-and-registration-call-for-evidence-law-society-response

6.1.2 Degrouping order

A number of companies appealed against decisions of HMRC to remove them from a VAT group registration with effect from 1 October 2013, or alternatively with effect from 1 January 2018. HMRC's basis for the decision was a view that the companies had not been established or had a fixed establishment in the UK since at least the earlier of those dates and were therefore not eligible to be members of a VAT group; alternatively, they were exercising their revenue protection powers to remove the companies from the later of the two dates.

Judge Greg Sinfield heard an application by the companies for a preliminary hearing to decide certain issues on an urgent basis. This might be considered appropriate, according to the precedent of *Wrottesley*, if:

- the issue is a succinct "knockout" point that would determine the appeal on its own;
- the point could be dealt with quickly;
- separate determination of the issue would not adversely affect the determination of other issues;
- it would not increase the risk of a greater overall delay;
- it might mean that no further hearing would be required;
- a preliminary hearing would reduce the time required for preparation for a substantive hearing;
- a preliminary hearing was consistent with the overall objective of dealing with cases fairly and justly.

The judge decided that the criteria were met, but also that the case should be heard directly by the Upper Tribunal, because an appeal from the FTT would be inevitable whichever side won. The issues for consideration in the preliminary hearing are:

1) How is the concept of two or more bodies corporate being "established" or having a "fixed establishment" in s.43A VATA 1994, which it is common ground purports to implement the words "any persons established in the territory of that Member State" in art.11 PVD, to be interpreted?

2) Is the question of whether the UK discharged its obligation to consult the VAT Committee relevant? If it is relevant what would be the consequences of any breach of the obligation to consult?

3) Are the measures which a Member State may adopt under the second subparagraph of art.11 PVD to prevent tax evasion or avoidance through the use of art.11 limited to those needed to prevent tax evasion and avoidance caused by an abusive practice under *Halifax* principles, or any concept of avoidance arising from *Direct Cosmetics Ltd and Laughtons Photographs Ltd v Customs and Excise* (Cases C-138 and C-139/86)?

4) Is s.84(4D) VATA 1994 engaged in relation to these appeals and, if so, what are the factors that the Tribunal must take into account in considering whether or not HMRC decided on an appropriate date?

First-Tier Tribunal (TC07879): *HSBC Electronic Data Processing (Guangdong) Ltd and others*

6.2 Other registration rules

6.2.1 Article

In an article in *Taxation*, Neil Warren examined practical situations in which VAT might be saved if a deal or trading arrangement could be split in two. These include:

- splitting the tax point for a supply exceeding £85,000 in two to avoid the "forward look" registration test;
- splitting the tax point for purchases between two partial exemption "longer periods" in order to remain within the de minimis limits in both years;
- the standard splitting of a business that deals with the public into two entities in order to keep some or all of the turnover below the registration threshold, subject to the possibility of a business splitting direction.

Taxation, 17 December 2020

6.2.2 Change of EDR

HMRC have updated guidance in their internal manuals to state that in order to change an effective date of registration, the VAT Registration Service should be contacted. This is an area in which the Tribunal almost never finds in favour of a trader who regrets the chosen EDR, so it is important to understand the policy that HMRC should apply:

"The VAT Act 1994, Schedule 1, paragraphs 5 & 6 and paragraphs 9 & 10 do not allow an EDR to be varied after a trader is registered. When the trader applied for registration, he had the opportunity to negotiate his EDR: the registration legislation does not allow this date to be changed retrospectively. Also, the trader should have charged VAT from his EDR and any change to the EDR will present difficulties with accounting procedures and may lead to the possibility of unjust enrichment.

However, our collection and management of the tax powers at Schedule 11(1) give us some leeway to agree to an EDR change request where it would be unreasonable for us not to do so.

The eligibility criteria which we would usually apply when we are considering a request to change an EDR are

- the EDR given must, at the time of registration, have been a backdated EDR. In other words, at the time of application, the trader voluntarily applied for an earlier EDR.
- the trader must demonstrate that there was a genuine misunderstanding or error in completing the application form. That does not include an error of judgement, for example, he thought he would be in repayment but found in fact he was a payment trader.
- the request must be made before the due date of the first VAT return (that is, one month after the end of the first period), which must not have been rendered.
- the trader must return the original VAT 4 certificate.

You are not expected to work on the mechanistic basis that every business which does not meet all four of the change eligibility criteria must automatically have its change request refused. You should consider each trader’s circumstances separately and think about how a First Tier Tribunal judge might regard those circumstances should the trader appeal against your decision to refuse the request.

The test of any decision is that it is reasonable and proportionate in all the circumstances of the case.

It is important that you:

- look at each case on its own merits
- take account of all the relevant factors
- don’t allow irrelevant factors to prejudice your judgement
- weigh the impact (if any) granting the request would have on overall tax yield against the impact refusing the request would have on the trader’s business.

You should keep a written record of every decision – this is particularly important where you have refused the request. This should include the factors you considered and any other relevant information that you took into account. Save the record to EF so that, if the trader appeals against your decision, your appeals team colleagues will be able to see how you reached it.”

VATREG25350, VATREG25400

6.3 Payments and returns

6.3.1 Change of system

HMRC are migrating the remainder of VAT-registered businesses from the current VAT mainframe to the Enterprise Tax Management Platform (ETMP) from March 2021. This does not affect businesses already signed up for Making Tax Digital, but those who have continued to use "the old system" will face extra administration as a result. Direct debit businesses and those using XML-based software products will be affected, and agents will no longer be able to use the agent online service for their VAT clients.

www.tax.org.uk/policy-technical/technical-news/transformation-hmrc's-vat-services-—-important-information

HMRC have written to VAT registered businesses who submit VAT returns using XML software. From 8 April 2021, HMRC will no longer accept VAT returns using this software as it will be moving all VAT customer accounts to a new IT system that does not accept XML submissions. The letter outlines the steps that businesses, or their agents, need to take in order to remain compliant and be able to submit their VAT returns after this date.

www.tax.org.uk/policy-technical/technical-news/hmrc-letter-those-who-file-vat-returns-using-xml-software

6.3.2 Deferred VAT

HMRC have updated their guidance on the payment of VAT that has been deferred due to the pandemic. The update provides information on the new payment scheme that will be available in 2021 and on how to opt into the scheme.

Businesses that deferred VAT between 20 March and 30 June 2020 can still make payments for any outstanding amounts by:

- paying the deferred VAT in full on or before 31 March 2021;
- opting into the new VAT deferral payment scheme when it launches in 2021;
- contacting HMRC for any further help to pay deferred VAT.

Businesses must opt themselves for the new payment scheme, as agents cannot do this on behalf of their clients. Under the new VAT deferral scheme, instead of making a full payment by the end of March 2021, businesses can make up to 11 smaller monthly instalments, interest free. All instalments must be paid by the end of March 2022.

HMRC have added a new section "Get ready to opt into the new payment scheme" that provides guidelines to businesses before opting for the new payment scheme.

www.gov.uk/guidance/deferral-of-vat-payments-due-to-coronavirus-covid-19

6.3.3 Article

In an article in *Taxation*, Richard Curtis reviews the package of Covid support measures announced in the autumn, including the extended payment period for deferred VAT. These will now be superseded by further measures announced in the winter and spring.

Taxation, 1 October 2020

6.4 Repayment claims

6.4.1 Second bite at the cherry

A group of claimants had made claims for repayment of output tax on sales of demonstrator vehicles made before November 1992. These had been settled on an estimated basis in about 2007 using what were known as "the Italian Tables" (after the *Italian Republic* case that established that the sales should have been treated as exempt). The claimants sought to make amended claims in about 2016 on the basis that the Italian Tables had contained an error arising from incorrect assumptions in relation to car tax, which had been abolished on 12 November 1992, which meant that the claims relating to sales before that date had been understated when they were first agreed.

The argument was based on a "legitimate expectation" that the claims would not be treated as closed on a materially incorrect basis. The group claimed that HMRC had agreed to pay similar claims made by another trader in July 2018, and this invoked the principle of equal treatment. HMRC argued that the FTT had no jurisdiction to consider claims based on legitimate expectation.

The judge considered the arguments about jurisdiction in detail, and commented that the taxpayers' contentions had some force. They had not been presented to the Upper Tribunal in the *Noor* case, but that did set a binding precedent that the FTT had no jurisdiction to hear an appeal based only on the EU principle of legitimate expectation; that could only be pursued by way of judicial review.

In case he was wrong on that issue, he went on to consider whether the appellants did have a legitimate expectation. In his view, the Italian Tables had clearly been prepared by HMRC to offer traders an alternative to adducing their own detailed evidence. They necessarily contained estimates and could have been inaccurate for any number of reasons. In accepting their use, the traders could not have an expectation that HMRC were giving an unconditional assurance that the result would be accurate.

Nevertheless, the judge was satisfied that the Tables were materially incorrect. There was evidence, including in guidance on the use of the parallel Elida Tables, that supported the argument that the figures produced by the Italian Tables up to November 1992 were wrong. The next question was whether the time for correcting that error had expired. The judge was satisfied that it had. Whether or not the claims were amendments of an existing claim or a new claim, the closure of the *Fleming* window on 31 March 2009 must have extinguished any

legitimate expectation that further repayments could be due from periods before 1992.

On the question of equal treatment, the judge was not convinced that it was invoked by a single instance of a decision by HMRC in favour of another taxpayer. However, he did not need to decide that: the burden was on the taxpayer to show that the claim and the circumstances of the other taxpayer were materially identical to their situation, and they had adduced no evidence to show this. They had only shown that another trader had made an *Italian Republic* claim in 2003 and had later sought to claim more, and HMRC had agreed to compromise rather than conclude a Tribunal hearing in July 2018. It was not for HMRC to justify their actions in relation to the other trader, but for the claimants to show that it was unfair to treat them differently.

The appeals were dismissed.

First-Tier Tribunal (TC07869): *R T Rate Ltd and Others*

6.4.2 Dispute about liability

An unusual court hearing on 7 October 2020 involved a dispute over a VAT liability on construction work. A construction company had charged standard rated VAT on £2.286m in relation to the construction of student accommodation. The customer then received advice that the work should have been zero-rated, and the parties agreed the form of a s.80 claim to be submitted to HMRC to recover £449,454, which would be paid to the customer.

The parties then fell out, and the supplier refused to submit the s.80 claim unless further conditions were met, including engaging it to complete the project. When the customer refused, the supplier further refused to assign the benefit of the s.80 claim to it, and stopped engaging with the customer. The customer applied to the court for a declaration that the other company held on trust for it any money that had been received from HMRC, and would hold any further money that was received in future.

The company joined HMRC in the action, only to make sure that they were bound by any order that was granted. HMRC had not been able to confirm whether any repayments had been made; the supplier's adviser had told HMRC that the s.80 claim would be withdrawn and dealt with instead through the VAT returns. The customer was concerned that the supplier might be in financial difficulties and the money would become irrecoverable.

The judge accepted that damages might not be a sufficient remedy for the customer if the supplier became insolvent, and granted the application. An interim injunction was awarded, with instructions on how to proceed from that point.

High Court: *Deluxe Property Holdings Ltd (A Company Registered Under the Laws of the British Virgin Islands) v SCL Construction Ltd and another*

At a further hearing in December before a different judge, the court considered whether the overpaid VAT was held in trust by the builder for the customer (in which case it would have to be returned), or whether it was simply a debt (in which case the builder could offset it against

amounts it claimed it was owed, and have an argument about what was due). The building company had been duly notified of the hearing, but did not attend.

It was now established that the builder had obtained effective reimbursement of the VAT by setting it against its liability for the quarter to 31 May 2020. The company had submitted a s.80 claim with a reimbursement undertaking, but had subsequently withdrawn it; the company's VAT adviser had explained that he wished to use "an alternative more practical approach" to circumvent the delay in processing a s.80 claim that would be likely in the midst of the pandemic disruption. This had been agreed by HMRC, who accepted a negative figure for output tax on the May return, and repaid the money on 16 July. On 18 September, the officer dealing with the company asked whether a credit note had been issued to the customer.

After the injunction was granted, the building company responded to the court that it had no effect, because it referred to money received as a result of a s.80 claim and that claim had been withdrawn. It claimed that the money received had been offset against debts owed by the customer, leaving a balance of over £500,000 still due.

The judge was persuaded that the way in which the refund was given resulted in a "*Quistclose* trust" (named after a 1970 case). HMRC had clearly intended to make the repayment subject to the repayment undertakings in the original s.80 claim; the fact that a different mechanism had been used by the company, with HMRC's agreement, did not change the nature of the repayment.

Such a trust initially arises in favour of the person who has paid over the money subject to an undertaking, i.e. HMRC. However, the fact that HMRC had communicated the reimbursement undertaking to the customer's agent meant that they had effectively transferred the beneficial interest, and it could be enforced by the claimant.

There was one quarter that was not subject to the repayment undertakings, but that was covered by the alternative doctrine of constructive trust.

This meant that the builder was not entitled to offset money held on trust against other debts, and was required to repay it immediately and in full to the claimant. As the company's own statements in letters to the court showed that it had used the money to fund its general business expenses, the judge declared that it was in breach of trust.

High Court: *Deluxe Property Holdings Ltd (A Company Registered Under the Laws of the British Virgin Islands) v SCL Construction Ltd and another*

6.5 Timing issues

Nothing to report.

6.6 Records

6.6.1 Making Tax Digital rollout

The CIOT has welcomed a call by the Public Accounts Committee for HMRC to assess whether the administrative burden that Making Tax Digital is imposing on businesspeople is reasonable and affordable before proceeding with further rollout.

John Cullinane, the CIOT Tax Policy Director, commented on the risks that HMRC were overestimating the effectiveness of MTD in reducing the "tax gap", and the suggested that imposition of MTD by compulsion would be premature without reliable evidence to demonstrate that it was achieving its purpose.

www.tax.org.uk/media-centre/press-releases/mps-back-tax-profession's-call-rethink-making-tax-digital-roll-out

6.7 Assessments

6.7.1 Overpaid VAT on flats

A company had traded since 1993 as a supplier in the fish and chip industry. In September 2017, it ceased that activity and became an investment company. In August 2016 it had purchased a property from a developer, paying £315,000 plus £63,000 in VAT. The building was a former public house that the seller had converted into residential flats. The VAT was claimed as input tax on the company's return for 09/16; following an enquiry, HMRC assessed to recover it, stating that the company did not have the proper evidence to support the claim, and the property was used to make exempt supplies. The assessment also covered VAT on legal fees claimed on the same return.

The Tribunal noted that the bundle contained a completion statement showing VAT, but no copy VAT invoice; there was no evidence of an option to tax exercised by the seller, which would not in any case have been accepted by HMRC on a residential property. It was clear that the VAT had been incorrectly charged by the sellers.

The company appealed, arguing that HMRC would otherwise receive an unjustified windfall by collecting the output tax from the seller. At the initial hearing in February 2020, the director accepted that this was misconceived, and an adjournment was granted so that the company could request a repayment of the incorrectly charged VAT. An extension was granted to 16 June 2020 for the appellant to confirm that the matter had been resolved; nothing was heard from them, so the Tribunal determined the matter on the papers in accordance with directions given earlier, formally dismissing the appeal.

First-Tier Tribunal (TC07945): *Kang & Mand Ltd*

6.7.2 Best judgement assessment

A Subway franchisee appealed against assessments for underdeclared output tax of £37,568 and an inaccuracy penalty of £6,198 for periods from 05/15 to 02/17. An enquiry was opened by an officer who carried out test purchases and subsequently left HMRC; by the time a new officer followed the matter up, the franchisee had sold the business. Nevertheless, further invigilation was carried out, and the assessments followed.

The Tribunal examined the basis of the assessment and the taxpayer's objections to it in detail. The judge was satisfied that the officer had raised it to best judgement, and the taxpayer had not then satisfied the burden of proof to displace it. The main argument for the taxpayer was that a single day's invigilation was not representative as a basis for extrapolation, but on the basis of long-standing precedent, that could not succeed. The appeals against both the assessment and the penalty were dismissed.

First-Tier Tribunal (TC07943): *Subway (Staines Central) Ltd*

6.8 Penalties and appeals

6.8.1 Default surcharge

A company appealed against a 15% surcharge of £21,932 for its 05/15 period. HMRC did not object to the appeal being made out of time. The appellant was not represented at the hearing, and it was not clear whether it had intended to withdraw its appeal; however, the Tribunal considered its reasonable excuse claim. The company appeared to believe that its Construction Industry Scheme tax paid could be offset against its VAT liability, and chose to assume that this would be done, even though it had enough money in the bank to pay it on the due date; a director wrote in support of the appeal saying that he had gone on holiday "unsure of the amount of VAT that should be paid". Not surprisingly, none of this amounted to a reasonable excuse. The appeal was dismissed.

First-Tier Tribunal (TC07901): *Telec Utilities Ltd*

A sole trader appealed against a surcharge of £3,701 issued for the 02/19 period. He had been in the surcharge regime from 08/10 onwards. Returns for the periods from 11/13 to 08/16 had all been submitted on paper on 24 October 2016; the trader had received centrally issued assessments in the absence of returns, but no VAT had been paid since 02/12. The trader's accountants appealed against the surcharge, claiming that HMRC had seized over £550,000 from the trader and he was therefore "in credit". He had also made claims to repayment of input tax that HMRC had refused; he claimed that these too generated a credit.

The judge ruled that it was not possible to offset a liability to pay VAT against disputed repayment claims; until and unless a Tribunal ruled that the VAT was due to the trader, it was not available to him for any purpose. As correspondence relating to the seized funds made clear, HMRC had raised assessments for various taxes considerably in excess of

the amount seized, and it could also not therefore be offset against a new liability.

A claimed belief that he was in credit was not a reasonable excuse. The appeal was dismissed.

First-Tier Tribunal (TC07931): *Mohammad Ameen Mirza*

A company appealed against a 2% surcharge of £1,597 for its 10/19 period. The company had tried to pay its VAT liability a day before it was due and thought it had made the payment by "Faster Payments", which would have arrived the same day (a Friday). However, while it was within the company's daily limit for online transfers (£99,999) the amount was greater than the company's daily limit for Faster Payments (£25,000), and the payment was only processed on the Monday. The company argued that it had a reasonable excuse.

The company claimed that it "always filed and paid on time". However, it had defaulted in 07/19, and it should have been warned of the consequences by the Surcharge Liability Notice. The judge accepted that the penalty was harsh for a short delay, but that could not be accepted as a defence. Applying the tests in Perrin, there was no evidence for the view that "expecting a FPS to go through the same day without checking" was a reasonable belief. The appeal was dismissed.

First-Tier Tribunal (TC07941): *Dougs Maintenance Services Ltd*

6.8.2 Penalties

A company sold a property in March 2018, correctly charging £370,000 in output tax as the building was opted. However, the output tax was not included in the returns for April or July 2018. HMRC raised an unrelated query into the April return; follow-up questions in that enquiry in November 2018 appeared to lead to the company submitting the October return showing the output tax on the sale, with an explanation that it had been omitted in error. HMRC raised a penalty on the deliberate scale with a 90% reduction for "telling, helping and giving". The company appealed.

The judge noted that the director had given inconsistent explanations, at one point saying that the invoice for the sale had been posted as if it was not VATable, and then saying that it had not been posted to the system at all. The sale was fundamental to the nature of the business; it seemed to the judge inconceivable that £370,000 of excess cash in the bank account could have gone unnoticed. On the balance of probabilities, the judge was satisfied that this was a deliberate error, and dismissed the appeal.

First-Tier Tribunal (TC07877): *P D Properties and Investments Ltd*

An individual appealed against a number of income tax, VAT and penalty assessments dating from 2013 onwards. As a preliminary issue in the appeal, Judge Anne Scott had to consider an application to make a late appeal against additional assessments for 2016/17; the trader's representative was unfamiliar with the precedent cases of *Martland* (and, in Scotland, the binding precedent of *Advocate General for Scotland v General Commissioners for Aberdeen City*), so the judge explained the rules in great detail, and held that the application should be refused. She

also commented that it would have failed in any event, in line with her decision on the rest of the appeal.

The representative also submitted a “witness statement” that purported to be expert evidence. HMRC objected that much of it was opinion, and after comments from the judge, the representative agreed to withdraw it and use it instead as the basis for submissions.

The judge carried out a meticulous examination of the history of the business and the dispute, and found that the assessments had been raised to best judgement and could not be displaced. The trader’s representative, in spite of claiming considerable experience in Tribunal hearings, raised numerous arguments that could not succeed. The only success for the taxpayer was that the judge considered the conduct for VAT to be careless rather than deliberate, which not only reduced the rate of penalty but also required HMRC to consider whether it would be appropriate to suspend the penalties. Apart from that, the appeals were dismissed.

First-Tier Tribunal (TC07930): *Mohammed Adam Nasir*

A company appealed against a VAT assessment of £17,533 and a related penalty assessment of £7,363. According to HMRC, the company’s VAT return for 12/15 had included credit for input tax on two invoices from a related company representing supplies that the director knew would never take place.

Judge Anne Redston examined the history of the claim and correspondence with the company’s accountants and with HMRC. She was satisfied that the director must have known that the connected company was incapable of making the supplies, and funding would not be obtained to pay for them; a number of his responses to HMRC had been potentially misleading. A defence based on a schedule of other VAT that might have been claimed, offsetting this overclaim, was rejected as simply wrong in law. The correct procedure to make a claim had not been followed, and that failure could not be cancelled by proposing an alternative claim that had not been made at all.

The judge was satisfied that the director had acted “deliberately” within the meaning given to that word in case law: he had submitted an inaccurate return, knowing it to be inaccurate and intending HMRC to rely on it. The mitigation allowed by HMRC was appropriate, and both the appeals were dismissed.

First-Tier Tribunal (TC07849): *Marsh and Riddell Ltd*

HMRC issued a personal liability notice to an individual for £31,933 for periods 11/15 to 08/17. A dispute had arisen about the operation of the cash accounting scheme by two connected companies; HMRC had directed that one of them should cease to use cash accounting because of the disparity between its output tax accounting and the other company’s input tax claims.

The penalty was calculated on the basis that the inaccuracy was a result of “deliberate inaccuracy”. The director argued that he had kept HMRC fully informed of his attempts to refinance the business throughout, and he believed that he had tacit approval to continue using the cash accounting scheme while he resolved his cash flow difficulties.

The judge considered that the burden lay on HMRC to show, on the balance of probabilities, that the director did not have a genuine belief that they had tacitly approved what he was doing. HMRC pointed to seven letters they had sent to the company stating that the cash accounting scheme was to be withdrawn; however, the first two letters themselves had to be withdrawn because they had attempted to cancel the scheme retrospectively, which is not possible.

Judge Philip Gillett said that it was not necessary for the director's belief to be a reasonable one; it was only necessary for the Tribunal to decide that he genuinely held it. He maintained that contention throughout his evidence at the hearing; he claimed that it was supported by the fact that the officer had authorised repayments of input tax to the companies that were claiming on an invoice basis, and he believed that he was being given a transitional period. The judge commented that the various letters and penalty notices from HMRC were confusing, and a non-tax specialist might well have come to that conclusion.

Given that the test of "deliberate behaviour" was subjective, and the director was a credible witness, the judge found that HMRC had failed to demonstrate that the behaviour was a deliberate inaccuracy. The appeal against the penalty was allowed.

First-Tier Tribunal (TC07951): *Michael Robinson*

6.8.3 Late appeals

A company submitted an appeal dated 28 August 2019 against a VAT assessment dated 27 November 2018 for £9,996 and a penalty raised in January 2019 for £1,999. The assessment was based on a decision that the company should have been registered for VAT from 1 May 2016 to 31 October 2017.

The company had paid the assessed amount and had submitted an appeal on time in January 2019. The company claimed that HMRC had acknowledged this but stated that some of the attachments were illegible; the company had resubmitted them, but had heard nothing further. It transpired that the correspondence had been with the Tribunal, rather than with HMRC.

The Tribunal found that the Tribunal service had failed to notify HMRC that an appeal had been made. Although the company's employee had been confused about the procedure and who she was dealing with, it was not her mistake. HMRC objected that the company had taken a further six months before asking about progress on the appeal, but the judge considered that it had in fact lodged a timely appeal. Any prejudice to HMRC in allowing the appeal to proceed would be substantially less than the prejudice to the company if was not allowed to appeal because of an error in the administration of the Tribunal.

Permission was granted for the substantive hearing to be listed.

First-Tier Tribunal (TC07895): *Lincoln Yurts Ltd*

An individual applied for permission to appeal out of time against personal liability notices in respect of a VAT penalty (£30,087) and underpaid PAYE and NIC (£83,813). The PLNs were issued in June and May 2017, but were not appealed until January and February 2019. The

appellant accepted that the delay was both serious and significant. He claimed that he had put his tax affairs entirely in the hands of first one firm of advisers and then another, and both had let him down badly. He had been unaware of the PAYE PLN until a debt management statement was issued in October 2018. HMRC responded that the precedent of *Katib* showed that the failures of advisers were not a good enough reason to allow appeals to proceed out of time. According to HMRC's interpretation of the correspondence, the appellant was aware of the issues at latest in August 2018, and was therefore seriously late in appealing even if he had not been aware before that time.

Judge Nigel Popplewell noted that the *Katib* decision was binding on him, and the incompetence of the advisers was not dissimilar to that shown in the precedent case (even if the behaviour of Katib's adviser had a number of extraordinary features that might have alerted his client to the problem). However, he still considered it necessary to consider all the circumstances of the case, including taking an overview of the strength of the appellant's case. He noted from the documents that there was a potential defect in the issuing of the VAT PLN, in that it referred in different places to FA 2007 Sch.24 para.19(1) (errors in returns) and FA 2008 Sch.41 (failure to notify). There was at least an argument that the notice was invalid for procedural reasons, and even though the appellant had not raised this point, it could and should be considered by a Tribunal in a full hearing.

The late appeal against the VAT notice was allowed partly because in any case the judge had decided to allow the late appeal against the PAYE notice to proceed, and so there would be a hearing in any case. Although it appeared that the notice had been sent by HMRC, the appellant claimed not to have received it. The judge noted that it had been mailed to the company's address rather than his own; therefore, there might be justifiable confusion about who owed the money. In effect, the statutory assumption that mail is delivered meant that it had to be assumed that the company had received the notice, but HMRC had not presented evidence to show that either the appellant or his representative had received it.

The application was allowed.

First-Tier Tribunal (TC07856): *Mohammed Abdur Rashid*

A sole trader ran a second-hand car business. He appealed against a decision to register him for the period from 1 December 2011 to 28 August 2017 (when the business was incorporated), together with assessments for VAT (£84,267) and "failure to notify" penalties (£53,088). The VAT investigation commenced in 2017 at the conclusion of an income tax enquiry that was settled in 2014.

The assessments were issued in April and June 2018, following which there was some correspondence, but an appeal to the Tribunal was only made on 12 February 2019. HMRC applied to have the appeal struck out on the grounds that it was late, included matters that were not appealable, and was made in the wrong form. The appeal had been filed with numerous attachments, some of which related to the earlier income tax enquiry, and it was therefore not clear what was being appealed against. It was also not possible to appeal against the assessment (as opposed to the registration decision) without filing VAT returns for the period.

The judge (Ian Hyde) did not accept that the irrelevant attachments invalidated the appeal. It was clear enough on the face of the appeal form which decisions were being appealed. He agreed with HMRC that the assessments could not be appealed without filing returns, but would have allowed the appeal against the registration decision and the penalty to proceed, but for the lateness of the application.

The appellant explained that his mother and father lived in his house; his father suffered from dementia, even though he was caring for his wife, and he hoarded all the post that arrived under his bed. The appellant was therefore unaware of the decision letters until a recorded delivery arrived in late October 2018. He then asked for copies of all correspondence from HMRC.

The lateness was 8 months for the assessment and 6.5 months for the penalty. It is worth noting that HMRC's representative accepted that the registration decision (a month before the assessment) could not be regarded as starting time running because it did not refer to rights of appeal; it was therefore not a proper "decision letter".

Applying the *Denton* tests, the judge considered first the reason put forward for the late appeal. He did not accept that the trader could have been completely unaware of the problem of his father hiding post. In any case, the trader's representative received copies of correspondence and was clearly aware of the issues as early as April 2018. This meant that the trader had failed to show a good reason for the delay in appealing.

The judge rejected HMRC's argument that it was then unnecessary to consider the level of prejudice to the appellant in refusing leave to appeal; however, he considered that the length of the delay without a good reason, and prejudice no more than the normal, led him to refuse the application.

First-Tier Tribunal (TC07850): *Syed Hussain*

6.8.4 Costs

In June 2019, HMRC made a very late application to be allowed to amend their Statement of Case in an appeal. As a result, a hearing listed for seven days had to be abandoned. The appellant claimed that an immediate award of costs should be made to it; the FTT declined to do this, reserving a decision on costs until the substantive appeal should have been determined. The company appealed to the Upper Tribunal against that decision.

The Upper Tribunal briefly summarised the substantive dispute, which relates to merchant acquirer services supplied to a foreign group business. The company's position is that it should be entitled to full input tax recovery while making supplies that are outside the scope of VAT but would be taxable if made in the UK; HMRC's view is that the company makes exempt supplies.

The amendment to HMRC's case was to allow them to plead "*Halifax* abuse". The Upper Tribunal describes and differentiates between arguments concerning "economic reality" and "Halifax abuse"; the two concepts are related, but the judge noted an important difference: "The parties agree that the burden of proof relating to questions of economic reality lies with Worldpay in the sense that, in order to displace HMRC's decisions, Worldpay must show that the IGSA [Intra-Group Services

Agreement] provides for Worldpay to make taxable supplies to WPBV and that the provisions of the IGSA properly reflect economic reality. However, the parties also agree for the purposes of this hearing that the burden of pleading and proving Halifax abuse lies with HMRC."

HMRC's case had originally been exclusively based on their view of the economic reality of the situation, but they sought in correspondence to access the tax advice received by the company to see whether the arrangements were tax-driven. The company explained the commercial justification for its arrangements; in July 2018, HMRC issued a request for information and disclosure arising from the company's witness statements, including "all documents relating to the decision to make WPUK the purported remittance agent of the Merchants… and tax advice relating to that change." The judge commented that, with the benefit of hindsight, this request could be seen as changing the focus of HMRC's enquiries. The company objected that the request was not justified, claiming that the VAT treatment of the remittance services was not in issue.

The FTT ruled in April 2019 that the company would have to make the additional disclosures, which it did on 10 May; on 14 May, HMRC applied to amend their Statement of Case to plead *Halifax* abuse for the first time. The FTT gave permission for the amendment, while recognising that this "very, very late" application meant that the substantive hearing would have to be postponed, probably for at least 12 months. The FTT noted that "costs may not be an entirely adequate remedy"; nevertheless, the FTT concluded that HMRC had acted reasonably in all the circumstances, acting promptly on the receipt of relevant information from the appellant.

The Upper Tribunal noted that the present appeal was only against the FTT's decision on costs, not the decision to allow the amendment of the case; that was a case management matter that an appellate court should be slow to interfere with. After considering the arguments at length, the judges decided that neither of the two grounds on which the company appealed had been made out.

This left the question of costs open for argument before the FTT when the FTT came to decide the matter; it was not impossible that the company would overcome "the FTT's initial impression, that even though HMRC met the high hurdle necessary to make a very late amendment to their pleadings, nevertheless the prejudice to Worldpay in the loss of the hearing should be compensated by an award of costs."

Upper Tribunal: *Worldpay UK Ltd v HMRC*

HMRC applied for costs of £18,193 in relation to an appeal by a company over refusal of £5.8m of input tax in periods from 10/13 to 07/14 on *Kittel* grounds. The company had appealed to the Tribunal on 12 February 2016, claiming that HMRC did not have sufficient evidence or grounds to show that the transactions were connected with fraud; however, on 4 February 2019, the sole director pleaded guilty to cheating the public revenue and conspiracy to commit money laundering in relation to transactions undertaken by the company during the period. He was sentenced to five years and two months in prison.

In September 2019, HMRC applied to the Tribunal to have the appeal struck out; following the issue of an unless order, the appeal was struck out on 4 March 2020, and in July 2020 HMRC applied for costs.

As the appeal had been characterised as "complex", the general rule was that costs would follow HMRC's success (i.e. the award did not depend on the unreasonableness of the company's conduct). However, HMRC also sought for an order making the director liable for the costs. Judge John Brooks considered a number of precedents about the award of costs and the Tribunals Rules in this area, and upheld HMRC's application. There were exceptional circumstances, in particular the fact that the company, through its director, had pursued an appeal on a false basis. He therefore ordered that the company and the director should be jointly and severally liable for the costs applied for.

First-Tier Tribunal (TC07925): *Eurochoice Ltd*

6.8.5 Information Notice

A company appealed against a penalty of £1,500 under Sch.36 FA 2008 for failure to comply with an information notice. This had been issued on 17 July 2019; HMRC had agreed on 20 September to extend the deadline to 30 November 2019. A £300 penalty was issued on 11 December, and a further £1,200 penalty (£40 per day for 30 days) was issued on 10 January 2020.

The information requested comprised statements from JustEat and FoodHub. An agent was appointed to deal with the matter, but he was absent from work from mid-October 2019 to January 2020, due to the illness and death of his mother in November 2019. The trader was also visiting his sick mother almost daily, which involved travelling between Birmingham and Manchester.

The defence of reasonable excuse to this penalty does not apply unless the person served with the notice took reasonable care to avoid the failure. The judge (Zachary Citron) considered the precedents of *Clean Car Co* and *Perrin* and concluded that the mitigating circumstances of the two mothers was not sufficient. The extension of the deadline had been agreed to allow for the appellant director's own circumstances; he had not taken any steps to follow up progress, which was the action required of a conscientious taxpayer trying to comply with requirements. He could not wholly delegate responsibility for complying with the notice and pay it no further attention, as he appeared to have done.

The appeal against the penalty was therefore refused.

First-Tier Tribunal (TC07857): *New York Krispy Fried Chicked Ltd*

6.8.6 Updated Manual

HMRC have updated the guidance in the *Compliance Handbook Manual* on reasonable excuse in relation to penalties for failure to notify, as well as what is regarded as a "deliberate but not concealed inaccuracy". This is described as follows:

A deliberate but not concealed inaccuracy occurs when a person gives HMRC a document that they know contains an inaccuracy. It is not necessary to demonstrate that the person knew what the accurate figure

was, only that they knew that the figure they put on the document was not accurate.

Giving a document is explained at CH81050.

Examples of actions that when taken into consideration along with all the other facts of the individual case, may lead an officer to conclude there was a deliberate inaccuracy in a document include:

- *systematically paying wages without accounting for operating PAYE or Class 1 NICs*
- *knowingly failing to record all sales, especially where there is a pattern to the under-recording, such as omitting all transactions with a particular customer or at a particular time of the week, month or year*
- *deliberately describing transactions inaccurately or in a way likely to mislead*
- *giving a VAT return to HMRC that includes a figure of net VAT due that is too low because the person does not have the cash at that time to pay the full amount, and later telling HMRC the true figure when they have the funds to pay*
- *claiming a deduction for personal expenses of such a size or frequency that the inaccuracy must have been known*
- *deliberately not making any attempt to ensure that money withdrawn for personal use from an incorporated business is treated correctly for tax purposes*
- *deliberately omitting a known asset from an IHT account (rather than making enquiries about its value) on the basis that the asset can be included in a corrective account later*
- *omitting income and gains from offshore assets or investments that have a material effect on the tax liability, where the taxpayer is aware that they needed advice from an appropriately qualified tax professional to ensure the income or gains have been treated correctly for tax purposes, but did not obtain that advice*
- *deliberately failing to take action that they know is necessary to ensure a return is accurate.*

These examples are indicators and should be taken in to consideration along with all the relevant other facts of the individual case in coming to a conclusion on whether there is a deliberate inaccuracy in a document.

Although the penalties for deliberate inaccuracies are civil monetary penalties, we also have a criminal investigation policy and will refer the most serious cases for consideration of criminal proceedings where appropriate.

CH61520, CH71520, CH81150

HMRC have also updated the guidance on “the Human Rights Act and penalties” to add a consideration of penalties for transactions connected with VAT fraud charged under s.69C VATA 1994 to the list of penalties that must be treated as if they are “criminal” for Article 6 purposes, and to state that where there is a reason to suspect deliberate evasion HMRC

should follow the guidance at CH301100, before discussing penalties or the person's rights under Article 6 ECHR.

CH300200, CH300400

6.8.7 Hardship

HMRC have updated guidance in *the Appeals Reviews and Tribunals Manual* on assessing hardship applications in relation to the payment of the disputed tax. This includes the following introduction:

It is for the customer to demonstrate that payment of the disputed tax would cause them to suffer financial hardship.

Each case should be considered on the basis of the facts. The review officer who assesses the application should not make any decision until they have all the evidence and information, such as bank statements, audited accounts etc they need to form a complete picture of the customer's financial position.

There is no statutory requirement for the taxpayer to provide any particular type of documents to support their case. However the burden of proof is on them and it may help prevent a rejection of the application (on the basis of insufficient information) if they provide the relevant documents detailed below.

We should obtain as clear a picture as possible of the customer's financial position. In complex cases the review officer assessing the application may wish to consult an HMRC accountant.

ARTG3340

6.8.8 Interest on overdeclarations

HMRC have updated the *VAT Default Interest Manual* in relation to the consequences of a taxpayer making an overdeclaration of VAT. This explains as follows:

Although interest is charged on under declarations the law does not allow for it to be paid on over declarations.

HMRC allow for over declarations which arise in the same accounting period to be taken into account when calculating the net liability to interest. However the computer is programmed to calculate interest for each document, and so it will only do this automatically if the over declarations are included on the same input document as the interest bearing tax VAT641 or VAT642. Failure to take VAT credits into account can lead to an excessive interest charge.

It goes on to consider in some detail circumstances in which the separate calculation of an underpayment, carrying interest, and an overpayment, with no interest, should lead to a netting-off adjustment.

VDIM4030

6.8.9 Reinstatement refused

A peculiar case involved an adviser who was arguing a case for a taxi firm; it appears that he advised the client to withdraw a Tribunal appeal on the basis that he would be able to recover some VAT by a different

claim, then discovered that HMRC would not allow that either, and applied to have the original appeal reinstated. HMRC objected; the Tribunal considered the history of the arguments between the parties, and agreed with HMRC that the reasons given by the appellant for withdrawal and reinstatement did not make a strong case for the matter to be heard, because the adviser appeared to be taking contradictory positions on acting as principal or agent; the prejudice to HMRC would be considerable; and the second claim should be considered by HMRC without reinstating the first appeal. The application was dismissed.

First-Tier Tribunal (TC07955): *Footprint Associates*

6.9 Other administration issues

6.9.1 Privilege

Communications between a lawyer and a client are "privileged" and cannot in general be required to be disclosed to the authorities in the course of an investigation. The Financial Reporting Council was engaged in an investigation into the accounts and audit of Sports Direct, and applied for an order requiring the company to produce certain documents. These included some reports which recorded the advice provided by VAT advisers in relation to the VAT implications of the company's distance and/or internet selling operations. The question arose whether these documents were privileged, or would have to be disclosed to the investigators.

The key question was whether the material had been prepared for the sole or dominant purpose of litigation. Even though the company could be assumed to have been expecting litigation in respect of these arrangements in one or more EU Member States, the reports were not prepared for use in litigation. Therefore none of the reports attracted litigation privilege.

High Court: *Financial Reporting Council Ltd v Frasers Group plc (formerly Sports Direct International plc)*

6.9.2 Search warrant

In a case not involving VAT, the High Court has considered the circumstances in which HMRC can obtain a search warrant to look for evidence of tax evasion. Two people were involved in sub-promotion of a tax avoidance scheme involving employee remuneration trusts. When legislation was introduced to counteract this, HMRC suspected that fraudulent misrepresentations were made by users of the scheme, on the instructions of the main promoter of the scheme. They sought, and obtained, search warrants to seize documents from the personal addresses of two individuals who both used and promoted the schemes themselves. Those individuals challenged the legality of the warrants, arguing that they were involved in legal tax avoidance rather than illegal tax evasion.

The decision of the judge who approved the warrants was reviewed by the High Court. The question was whether there were reasonable grounds for believing that an indictable offence had been committed, and whether it was not reasonable for HMRC to seek to obtain the same information by other means (e.g. the issue of an information notice). The question of whether an offence actually had been committed was not before the court.

The judges reviewed the record of the decision made by the judge, including the questions he asked the HMRC officer and the responses given. They were satisfied that he had correctly considered the difference between the original "loan scheme" (which was considered legal tax avoidance) and the representations that were subsequently made in order to circumvent the "loan scheme charge" that was introduced to counteract it. There were reasonable grounds for believing that these representations might have included fraudulent misrepresentations, and also reasonable grounds for believing that alerting promoters of the scheme (as opposed to "ordinary" users of the scheme) to a criminal investigation might have prejudiced the enquiry.

The reasons for rejecting other approaches are twofold: Police and Criminal Evidence Act Sch.1 para.2(b) refers to other methods of obtaining the material either having been tried without success, or not being tried because it appeared that they were bound to fail; and para.14(d) refers to service of an information notice running the risk of seriously prejudicing the investigation. The claimants argued that these were separate tests, both of which had to be met, and the judge had conflated the two. The High Court judges accepted that his judgment was not as clear as it might have been in this respect, but were satisfied that he had in fact considered the questions separately and come to the required conclusion on both.

The application for judicial review of the issue of the warrants was refused. The judges did comment: "We are concerned, however, that the judge was not given all the assistance he should have received. He should have been directed to the issues he was being asked to determine, in the context of the legislation. He should have been taken to the case law on that legislation. Specifically, he should have been invited to address paragraph 2(b) separately from paragraph 14(d). This should have been done, ideally, by means of a short skeleton argument filed in advance of the hearing. We hope that HMRC and other public bodies will regard that as standard practice when making similar applications in future. These are invariably *ex parte* applications, where the possibility of appeal is of little comfort to a respondent who may only know of the existence of a warrant after it has been executed. Scrupulous care is required."

High Court: *Anthony Ashbolt and Simon Arundell v HMRC and another*

6.9.3 VAT and the Sharing Economy

HMRC have published a Call for Evidence on the challenges to the VAT tax base posed by the "sharing economy". Responders are invited to consider in scope "any digital platform which facilitates the supply of services between two or more unconnected parties, where those services do not involve any transfers in the ownership of tangible or intangible property. In practice, these services will generally take the form of individuals hiring out either their labour or renting out their assets, or a combination of both, in return for consideration (as well as monetary, this consideration can be in the form of a non-monetary, barter-like nature)."

The document has chapters on "Accounting for VAT at final consumption (B2C and C2C) – Agent and principal rules" and "Accounting for VAT on cross-border B2B transactions – Place of supply rules", as well as a

number of detailed questions about how the rules operate and how respondents believe the government should respond to the challenges.

www.gov.uk/government/publications/vat-and-the-sharing-economy-call-for-evidence

6.9.4 HMRC as a preferential creditor

HMRC have published a new policy paper to explain how taxes paid by employees and customers are protected in insolvency procedures commencing after 1 December 2020. From 1 December 2020, HMRC are a secondary preferential creditor in insolvency proceedings in relation to VAT, PAYE income tax, employee NICs, student loan deductions, and construction industry scheme (CIS) deductions. This means that these debts are paid to HMRC before amounts owed to secured creditors with a floating charge and other non-preferential creditors.

www.gov.uk/government/publications/hmrc-as-a-preferential-creditor/hmrc-as-a-preferential-creditor

6.9.5 Article

In an article in *Taxation*, Allison Plager reviews the latest report from the Revenue Adjudicator, summarising complaints made against HMRC, their investigation and the conclusions drawn. There is nothing directed specifically at VAT in the report, but it is a useful reminder of how to make complaints; the Adjudicator will generally only take on a case once HMRC have given their final decision on a matter (and the taxpayer is still unsatisfied with their response).

Taxation, 29 October 2020; www.gov.uk/government/publications/the-adjudicators-office-annual-report-2020

6.9.6 Prosecutions

An individual involved in MTIC fraud skipped his trial and fled to Dubai. He was convicted in his absence of conspiracy to cheat the revenue and conspiracy to launder money, and issued a confiscation order of £37.6 million. Failure to satisfy the order carries a ten-year prison term.

www.cps.gov.uk/crime-type/proceeds-crime

HMRC announced that they secured a 6-year jail term for an individual who illegally imported cigarettes and made fraudulent VAT repayment claims before fleeing to Pakistan two days before a court hearing. He returned to the UK eight months later and was intercepted at the airport by HMRC officers.

www.mynewsdesk.com/uk/hm-revenue-customs-hmrc/pressreleases/runaway-tobacco-and-vat-fraudster-jailed-3049416

The individual who bought British Home Stores for £1 has been jailed for 6 years for dishonestly failing to pay £584,000 in VAT, income and corporation tax.

www.cps.gov.uk/news/buyer-bhs-jailed-evading-ps584000-tax