VAT UPDATE
OCTOBER 2024

Covering material from July – September 2024

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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.

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1. INTRODUCTION

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

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

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

1.1 Appeals pending

It is not possible to compile a comprehensive list of cases under appeal, and some of those which are thought to be still "live" may be dropped without a hearing. The HMRC website section which reports the progress of appeals was updated on 30 August 2024, but it has never included all the appeals that are open, even after FTT decisions one way or the other. The following is therefore only an approximate guide to some of the arguments that do not appear yet to have been finally settled:

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

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

- *Bolt Services UK Ltd*: HMRC granted leave to appeal FTT's decision that ride-hailing services were within TOMS (listed for Upper Tribunal 26 to 28 November 2024).
- *Colchester Institute Corporation*: HMRC have been granted leave to appeal to the Upper Tribunal against the most recent decision of the FTT that *Lennartz* assessments were invalid because the college was supplying exempt grant-funded education rather than non-business education.
- *Conservatory Roofing UK Ltd*: Upper Tribunal remitted case to FTT to consider further relevant information not taken into account when dismissing company's appeal (no longer on HMRC's list).
- *Elphysic Ltd and others*: both parties granted permission to appeal to the Upper Tribunal in a case about umbrella companies set up to exploit flat rate scheme and NIC Employment Allowance.
- *Hippodrome Casino Ltd*: taxpayer granted permission to appeal to the Court of Appeal against the Upper Tribunal decision on its application of the Standard Method Override.

- *Hotel La Tour Ltd*: HMRC's list says "current status to be confirmed", but it is understood that HLT has applied for leave to appeal to the Supreme Court.
- *Innovative Bites Ltd*: HMRC's appeal to the Upper Tribunal against the FTT decision in the company's favour was unsuccessful, but they have now been granted permission to appeal to the Court of Appeal.
- *Northumbria Healthcare NHS Foundation Trust*: HMRC have been granted permission to appeal to the Supreme Court against the CA's ruling that the trust supplied parking under a special legal regime, and there was no evidence of a risk of significant distortion of competition.
- *Sintra Global Inc & Parul Malde*: HMRC appealed to the Upper Tribunal against FTT's decision to allow appeals against various assessments and penalties relating to alleged inward diversion fraud (was heard in July 2024, decision awaited).
- *Sonder Europe Ltd*: HMRC have been granted leave to appeal the decision of the FTT that supplies of accommodation were covered by TOMS (hearing listed for December 2024).
- *The Prudential Assurance Company Ltd*: Prudential has been granted leave to appeal the decision of the CA that the time of supply rules required tax to be charged in relation to supplies of services that, "in the real world", had taken place when the parties were members of a VAT group.
- *Yorkshire Agricultural Society*: HMRC granted permission to appeal against the FTT's decision that the Great Yorkshire Show qualified for the charitable fundraising exemption (hearing listed for October 2024).

1.2 Decisions in this update

Even though there are several Upper Tribunal decisions in this update, none of them have previously appeared on HMRC's website list.

2. OUTPUTS

2.1 Scope of VAT: linking supplies to consideration

Nothing to report.

2.2 Disbursements

2.2.1 Caravan sites

David Pedley has written a follow-up article on the recharging of business rates to caravan owners by caravan site operators. In his "layman's view" (*Taxation*, 21 March and 5 September 2024), business rates are not liable to VAT and therefore VAT should not be added when the site owner recharges them to the site renter.

In a further article in *Taxation*, Mike Thexton explains why this is wrong, and HMRC's view on disbursements is in this case correct.

Taxation, 3 October 2024

2.3 Exemptions

2.3.1 Special investment funds (SIFs) – UK

Judge Aleksander has given a ruling in a very long-running dispute about the exemption for management of SIFs. The final paragraphs, relating to the question of costs, start with the startling statement that "This appeal was made to the VAT and Duties Tribunal, and was transferred to the First-tier Tribunal (Tax Chamber) on 1 April 2009".

The appellant is a company that provides management services to funds whose investors are charities, Church of England entities and local authorities. It had traditionally treated its services as fully taxable, but applied for a refund of output tax charged on the basis that the SIF exemption should apply. It undertook to repay any rebate to the funds concerned. The total involved was over £70 million plus interest. The Tribunal was only concerned with the issue of principle: the calculation of input tax adjustments would be left for further consideration if the appeal succeeded.

The repayment claims included *Fleming* claims for the periods from November 1994 to November 1996, and "non-*Fleming*" claims for November 2003 to October 2020. There was no dispute that the claims had been made in the correct way within the appropriate time limits.

There were three categories of investment fund to which the appellant provided services:

- Six "Charities Official Investment Funds" (COIFs), established pursuant to a scheme of the Charity Commission, whose investors are charities.
- Six "Church of England Central Board of Finance" (CBF) funds, whose investors are entities within the Church of England.
- The single "Local Authorities' Property Fund" (LAPF), whose investors are local authorities.

All the funds are constituted as trusts, and the first two categories are all charities in their own right.

The judge noted that all the claims were made before Brexit Implementation Period Completion Day, so the VAT under appeal was governed by EU as well as UK law. He commented "We note that s.22, Retained EU Law (Revocation and Reform) Act 2023 provides that s.3 (abolition of supremacy of EU law) and s.4 (abolition of general principles of EU law) of that Act do not apply in relation to anything occurring before the end of 2023."

It was agreed that none of the supplies under appeal had ever come within the UK exemptions under VATA 1994 s.31 and Sch.9 Group 5, because the UK had never recognised the funds as SIFs. The case was therefore concerned with the European law rather than the UK law, and in particular PVD art.135(1)(g). Although EU VAT Committee statements are not binding, they are persuasive: Working Paper 936 (9 November 2017) contained the following guidelines on the features that a fund should have to be recognised as comparable to a SIF:

(a) the fund must be a collective investment;

(b) the fund must operate on the principle of spreading risk between investors;

(c) the return on the investment must depend on the performance of the investments, and the holders must bear the risk connected with the fund;

(d) the fund must be subject to specific state supervision; and

(e) the fund must be subject to the same conditions of competition and appeal to the same circle of investors who would use UCITS (Undertakings for Collective Investment in Transferable Securities).

There was no dispute that conditions (a), (b) and (c) were met. The differences between the parties related to the nature of the state supervision of the funds and the extent to which the Funds are competitive with UCITS funds.

HMRC considered that (d) required direct supervision of the fund by the Financial Conduct Authority; the appellant submitted that the fact that the manager was subject to FCA supervision was sufficient.

HMRC considered that (e) would only be satisfied if the funds were available or suitable for retail (or at least small) investors, which was not the case for these funds.

The judge went through the regulatory regimes applicable to a wide variety of UK funds in detail. This included a review of the regulatory roles of the FCA and the Charity Commission. He also considered the possibility of competition between these funds and other funds that charities could invest in. For the purposes of investment regulation, most charities would be treated as "retail investors".

He then turned to the CJEU case law on the meaning of SIF and the extent of the exemption, in particular:

- *JP Morgan Fleming Claverhouse* (Case C-363/05), in which it was held that closed fund investment trust companies could fall within the SIF exemption if they competed directly with recognised SIFs;

- *Wheels Common Investment Fund Trustees* (Case C-424/11), in which it was held that a defined benefit pension scheme did not have the features of a SIF;
- *Abbey National* (Case C-169/04), which concerned the definition of "management" (not at issue in the present case), but also discussed the purpose of the SIF exemption;
- *ATP Pension Service A/S* (Case C-464/12), in which it was held that a defined contribution pension scheme did have many of the features of a SIF;
- *Fiscale Eenheid X NV* (Case C-595/13), in which the CJEU held that state supervision was required for the SIF exemption to apply.

He quoted at length not only from the court decisions, but also the reasoning of the Advocate-Generals' opinions.

The principle of fiscal neutrality is key to these decisions: similar products should be subject to VAT in the same way in order not to distort competition. The A-G opinions in particular discussed the extent to which differences in VAT treatment might create distortion, and how to assess whether two products were sufficiently similar to engage the principle of fiscal neutrality. Although it was not about SIFs, the 2020 Court of Appeal decision in *Learning Centre (Romford) Ltd and LIFE Services Ltd v HMRC* addressed the principle of state regulation and fiscal neutrality. The requirement for regulation created a difference between the services supplied: in principle, the distinction between regulated and unregulated services was enough to disapply the principle of fiscal neutrality.

The submissions of the parties were extensive, but they focussed on the question of whether the differences in regulation between these funds and those in the statutory list in Sch.9 Group 5 were enough to disengage the principle of fiscal neutrality.

The judge noted that there was considerable common ground between the parties. The issues to be determined were:

- whether the Funds were subject to specific state supervision, and
- whether they were subject to the same conditions of competition and appeal to the same circle of investors who would use UCITS.

The judge decided that for the SIF exemption to apply, it was not necessary for the fund itself to be regulated by the FCA. That was based on an analysis of the various CJEU decisions, which referred to funds being "sufficiently comparable" rather than meeting such specific criteria.

After over 200 paragraphs and extensive quotations from precedent, the judge reached the following conclusions:

- The introduction of regulations in July 2014 meant that, from that date, the COIFs were subject to state supervision, and they would appeal to the same kinds of consumers who would invest in UCITS. From July 2014, therefore, the COIFs were eligible for the SIF exemption. Prior to that date, they were not subject to state supervision, and did not qualify.

- The CBF funds were not subject to state supervision at any point, and were therefore not eligible for the exemption.
- The LAPF was also subject to state supervision from July 2014, but it was not subject to the same conditions of competition that applied to investors in UCITS. It therefore did not qualify for the SIF exemption.

The amount of the refund that the company would be entitled to following this decision was left to the parties to determine. If they could not agree, they would have to return to the Tribunal.

First-Tier Tribunal (TC09241): *CCLA Investment Management Ltd*

Lecture 1

2.3.2 Special investment funds (SIFs) – EU

Six references to the CJEU from the Netherlands were joined together for consideration by the court. They concerned a number of different pension funds: some were funds which had purchased investment management services from outside the country, so they were assessed to a reverse charge, and one of the appellants provided asset management services to a company pension fund within the Netherlands. The appellants argued that the funds were all "special investment funds" for the purposes of the VAT exemption.

The Netherlands retirement pension system is composed of three pillars: the legal basic pension, pension schemes organised by employers and individual voluntary pension schemes. All the pension funds in the cases fell into the second categories – compulsory occupational pension schemes, sector-specific pension schemes and company pension funds. All but one were final salary schemes; the exception paid a fixed pension based on the number of contributions made.

The referring courts did not consider these funds to be sufficiently similar either to *Wheels Common Investment Fund Trustees* (Case C-424/11) or to *ATP Pension Service* (Case C-464/12) for them to apply precedent in deciding the SIF issue. Although at first sight the final salary schemes seem to be more similar to *Wheels* (which was not a SIF), the referring courts considered that the members did bear risk: if the assets did not perform adequately, they would not receive their pensions. The questions referred asked whether the members of the fund had to bear risk individually for it to be a SIF, and whether that risk had to be significant or not.

The CJEU considered that the key question was whether the members bore the "investment risk" in the sense that the amount of their pensions depended on the returns on the fund. That was not the case where the pension was defined by the number of years of service and the final salary, or was a standard predetermined amount. It would be for the referring court to consider whether there was a significant risk of insolvency of the fund, but it seems clear that the court regarded the situation as very similar to *Wheels*.

There was a further question about fiscal neutrality in two of the cases: whether it was necessary to compare a non-UCITS pension fund only with UCITS (which are by definition SIFs), or also with other non-UCITS

funds which the state treated as SIFs. These would be defined contribution schemes, as in the *ATP* case. The court confirmed that fiscal neutrality did require such a comparison, but presumably that would only achieve exemption if the circumstances were similar to *ATP* – the members must have the investment risk in determining the amount of their pensions.

CJEU (Cases C-639/22 – 644/22): *X and others v Inspecteur van de Belastingdienst Utrecht and others*

Lecture 1

2.3.3 Private school fees

The government has published a technical note and draft legislation giving more details of the removal of the VAT exemption for private school fees. For those involved in the sector, the documents should clearly be studied in detail. For the purposes of the update, the main points are:

- From 1 January 2025, all education services and vocational training supplied by a private school, or a "connected person", for a charge will be subject to VAT at the standard rate of 20%. Boarding services closely related to such a supply will also be subject to VAT at 20%.
- Other supplies which are incidental to education (e.g. meals in a canteen) will continue to be exempt.
- Any fees paid from 29 July 2024 pertaining to the term starting in January 2025 onwards will be subject to VAT.
- Where parents have made a prepayment before 29 July, HMRC will check whether the conditions are enough to create a tax point – if it is simply a payment on account, it will not achieve exemption for the fee.
- Where pupils are placed in a private school because their needs cannot be met in the state sector, and they have their places funded by their Local Authority, a devolved government, or a non-departmental public body, their funder will be compensated for the VAT they incur on these pupils' fees.

The government will also legislate to remove the eligibility of private schools in England to business rates charitable rates relief.

The technical note highlights a number of issues that have been taken into account in the policy design:

- Whether the services are being made in exchange for consideration;
- Who is providing the services, and whether they are an "eligible body";
- What is being supplied, and whether the supplies are considered to be education.

"Private schools" are defined in the draft legislation as schools at which full-time education is provided for pupils of compulsory school age or, in Scotland, school age (whether or not such education is also provided for pupils under or over that age), or an institution at which full-time education is provided for persons over compulsory school age but under

19 and which is principally concerned with providing education suitable to the requirements of such persons (for example, a sixth form college), and where fees or other consideration are payable for that provision of full-time education. The various terms carry the meaning given by the Education Act 1996 and equivalent law in Scotland and Northern Ireland. Because VAT is a reserved matter for central government, the changes will affect schools across the UK.

Private schools that are not currently VAT-registered will need to register with HMRC in line with the normal VAT rules from 1 January 2025. Schools who do not currently make any taxable supplies (such as the hiring out of their facilities) will be able to register with HMRC from 30 October, which is when the Budget will be taking place. Schools who do currently make taxable supplies can voluntarily register for VAT ahead of 30 October. (See the detailed guidance below that was issued on 10 October 2024)

The technical note refers to the need to apply partial exemption rules, but does not mention any special rules relating to pre-registration expenditure or the capital goods scheme. This has now been clarified in the guidance issued on 10 October 2024, summarised below.

The draft legislation enacts the withdrawal of the exemption by introducing a new "Part 3" at the end of Sch.9 VATA 1994. Entitled "exceptions", it is proposed at the moment only to deal with the provision of education and boarding by private schools, but presumably it could be extended to other matters in the future. The anti-forestalling rule about fees paid from 29 July 2024 is included in this new Part.

The technical note includes some consultation questions, seeking responses by 15 September 2024.

www.gov.uk/government/publications/vat-on-private-school-fees-removing-the-charitable-rates-relief-for-private-schools

Lecture 2

CIOT and ATT have responded to the consultation. While not objecting to the policy in principle, the responses emphasise the practical difficulties for both schools and HMRC in implementing such a radical change in a very short time and urge the government to delay implementation to September 2025.

www.tax.org.uk/ref1362; *www.att.org.uk/sites/default/files/2024-09/240905%20VAT%20on%20private%20schools%20response.pdf*

Jonathan Main summarises the proposals in a Q&A piece in *Taxation*. His conclusion is:

Careful planning will be needed to ensure that private schools pay the right amount of tax, at the right time, and secure the best possible recovery of VAT on their historical and future costs. It is highly unusual for such a significant sector of the UK economy to cope with such a radical change in its VAT profile and at very short notice.

Taxation 8 August 2024

There is also another article in *Taxation* by Neil Warren covering "practical issues". These include anti-forestalling, fees for supplies other

than education, registration, input tax and what must be done as 1 January 2025 approaches.

Taxation 5 September 2024

The estimate of £1.6 billion for the extra revenue expected from removing the VAT exemption from school fees comes from a 2023 report by the Institute for Fiscal Studies. This includes the interesting comment in relation to the objection "it will not raise that much if parents move their children to the state sector and so pay no VAT":

If demand for private schooling reduces as a result of increases in post-tax fees, the additional tax revenue raised would likely be unaffected. This is because any reduced revenue from VAT on private school fees will likely be made up for by higher VAT revenues on other goods and services, holding overall consumer spending constant. If parents decided to stop paying for private school fees as a result of the extra VAT, this would release spending on fees that would likely be spent on other goods and services, thereby generating extra VAT revenues.

It seems at least possible that some of the money would be spent on things that do not generate VAT revenue, such as mortgage repayments, pension contributions, or foreign holidays.

https://ifs.org.uk/publications/tax-private-school-fees-and-state-school-spending

On 10 October 2024, HMRC issued guidance on registering for VAT, confirming that:

- VAT applies to school fees for school terms starting from 1 January 2025 and will include any fees paid in advance from 29 July 2024. Some parents might have prepaid their 2025 school fees prior to 29 July 2024 and if they were paying a specific 2025 fee note they should have created a tax point and secured exemption. Simply paying a lump sum before that date is unlikely to create a tax point.

- The normal compulsory and voluntary registration rules apply to private schools and connected person supplying education services, vocational training or boarding services. A private school is any school or institution providing full time education for a fee to children of compulsory school age as well as 16- to 19-year-olds, where that institution is primarily concerned with providing education suitable to that age range. A connected person is a body closely bound to a private school by financial, economic, and organisational links. They can also be connected for the purposes of S.1122 CTA 2010.

- Education providers will be able to register for VAT from 30 October 2024 and depending on what level of fees are paid in advance, schools may need register for VAT prior to the new term starting.

Let's have a look at some examples of exactly when a school will need to register for VAT by and start charging VAT.

Example 1 -2025 fee payments between 29 July 2024 and 29 October 2024

The guidance states that these will be subject to VAT from the later of either the first date of the school term that the fees have been paid for or 1 January 2025 so in most cases, 6 January 2025, when the Spring term starts.

So if a school received £100,000 for private school education on 28 October 2024 for the school term starting 6 January 2025 the tax point will be 6 January 2025.

On 8 December 2024 the school will be aware that the £90,000 VAT threshold will be breached in the next 30 days. The school must be compulsory registered from 8 December 2024 unless they decide to voluntarily register from an earlier date. The school has 30 days to notify HMRC of their VAT registration obligation. Any 2025 fees received on or after 8 December 2024 will be subject to VAT.

Example 2 – 2025 fee payments on and after 30 October 2024

The guidance states that any fees received from 30 October 2024 for school terms starting from 1 January 2025 onwards will create a tax point on the date the school receives the payment. This appears to allow the school to receive fees relating to the 2025 year without charging VAT!

The school will only charge VAT once VAT registered so some parents could offer to pay their fees in early November before the school has to compulsory register. If the Spring Term fees were £8,000 (say) the first eleven lucky parents could be paying their fees before the school was VAT registered.

Maybe the school would preserve this advantage for parents that have said they will have to withdraw their child from school because of the VAT?

If the school could avoid the 30 day look forward test it could easily apply to more parents. If most parents are paying in late December following the school sending out the Spring Term Fee notes on 8 December (say) the look forward test creates a VAT registration date of 8 December. Any parents approaching the school in November might well trigger the historic 12 month test at end of November but the registration is effective from 1 January 2025 under the compulsory test. The look forward test is likely to create an earlier date BUT was there any day prior to 8 December (say) when the school knew their taxable income in next 30 days would breach £90k? Ad hoc requests from parents in November might mean the 30 day look forward test is not breached until the 8 December (say)

In the governments rush to bring these rules have they created opportunity!

Example 3 - Payments > £90,000 in a rolling 12-month period

If a school expects to receive pre-payments of < £90,000 in the next 30 days, it will not need to register until their total taxable supplies over a rolling 12 calendar month period go above that limit.

On 31 January 2025, a school realises that since the change in VAT treatment on 30 October 2024, it has received a total of £95,000 in fees for terms starting on or after 1 January 2025.

At this point, the school must register for VAT with HMRC within 30 days of the end of January, the month the threshold was exceeded and their effective date of registration will be 1 March 2025.

https://www.gov.uk/guidance/check-if-you-must-register-for-vat-if-you-receive-private-school-fees

Lecture 3

Also on 10 October 2024, HMRC issued further guidance on goods and services bought and sold, which is summarised overleaf.

What is VAT charged on?

VAT will be due on the total of everything that is received in return for providing education to the student so including the amount paid by the parent, as well as any external bursary that may be paid for the education of that student.

Application and registration fees paid during the application process are standard rated.

Where there is a grant received to cover a specific pupil's educational fees, the whole fee will be subject to VAT, as there is a direct link between the service and payment received.

By contrast, block grant funding that does not relate to individual pupils will usually be outside the scope of VAT. Free places offered by the school ae non-business, which can affect input tax recovery under partial exemption.

When a private school is named in the education health care plan of a student and the local authority funds the place of the student, VAT will be charged to the local authority on the fees but local authorities will be able to reclaim VAT incurred using the existing 'section 33' processes.

Single or mixed supply?

A package of education for a single fee will normally be treated as a single supply for VAT, with a single VAT liability, and will include board and lodging fees. However, in some circumstances, certain fees could be treated as separate supplies, and the invoice should show the rate of VAT that has been applied to each supply. For example, if a school offers separate school meals alongside the education for a separate charge, these will normally be two different supplies and may have different VAT liabilities. HMRC's guidance currently states that such meals would be exempt as 'closely related' to education.

From the guidance, it also appears that transport to and from school should be treated as a separate exempt 'closely related' to education

supply. Should this not be zero-rated transport as the schools are likely to be using their own 10+ seater minibuses?

When schools were not VAT registered, this did not matter but once registered, the school's will be wanting these supplies to be zero rated for partial exemption purposes.

Welfare exemption

Where the welfare is considered to be secondary to the education, this will be seen as a single supply of education for VAT purposes.

However, where the main (larger) element of the supply is welfare, the supply may qualify for the welfare exemption. The guidance gives the example of where supervision and guidance is provided to a vulnerable person to develop a capacity to live independently and complete everyday tasks. This may be listed in an Education Health Care Plan.

Goods or services supplied

To be VAT exempt, the goods or services must be supplied separately from the main education but qualify as being closely related to the supply of education, such as selling stationery.

Nursery classes

Provided a class is made up wholly of children below compulsory school age, the VAT exemption will apply. However, where the class includes any children of compulsory school age for who a fee is received, the whole of the class will be subject to VAT.

Further education colleges

Where a fee is received by a college providing full time 'A' level tuition, this will be liable to VAT as it is education suitable for 16- to 19-year-olds. However, education normally targeted at students over 19 years old will not be affected by these changes. This will include undergraduate and postgraduate education.

Donations and voluntary contributions

A donation of money or a voluntary contribution will not be chargeable to VAT provided the:

- donor gives it of their own free will;
- donor or their beneficiary does not receive anything in return;
- the donation is not subject to any terms or conditions.

This implies that where a donation is made in return for free or discounted fees, the donation is likely to be treated as standard rated consideration.

Reclaiming VAT on supplies

Schools can reclaim VAT relating to its taxable education and boarding but not on purchases used exclusively for non-business purposes which must be disallowed.

Schools are likely to making both taxable and exempt supplies, making them partially exempt businesses subject to the normal partial exemption rules for reclaiming VAT.

Where VAT has been incurred on large capital items, VAT recovery will fall within the capital goods scheme. Where large capital projects have been completed in the last ten years, this should crease cash windfalls for the schools.

Pre-registration expenses

A school may be able to reclaim VAT incurred prior to registration under the normal pre-registration rules relating to goods (4 years) and services (6 months).

The guidance states that the pre-registration input tax relating to goods may need to be apportioned over their economic life (normally 5 years) to reflect the split of taxable and exempt use. This does not sound like HMRC are going to accept full recovery and the first VAT return could well be complicated.

School trips

If a school 'buys in' travel services related to a school trip (for example, transport or accommodation) that are then resold to pupils they may be treated as a tour operator for VAT purposes and TOMS will apply.

https://www.gov.uk/guidance/charging-and-reclaiming-vat-on-goods-and-services-related-to-private-school-fees

Lecture 4

2.4 Zero-rating

2.4.1 Food or not food?

A company sold a collagen drink product called "Skinade". It had originally treated it as standard rated; it submitted an error correction notice for overdeclared output tax of just over £1.25 million in November 2020 on the basis that the product should have been zero-rated as food. HMRC refused the repayment, a decision that was upheld on review, and in April 2022 the company appealed to the Tribunal.

Judge Mark Baldwin reviewed the statutory rules, including a note that the PVD's rules on the lower rating of food are not the vires for the UK's zero-rating rules. He noted the 2018 attempt by the Upper Tribunal to discern the reason for the UK's distinction between what is zero-rated and what is not in *Nestle UK Ltd v HMRC*:

So far as we can discern, the legislation was exempting everyday items from tax, and preserving the tax on items of food which, broadly speaking, had previously been regarded as luxury; rather than promoting a particular drink or things to add to that drink. … Parliament has chosen to zero rate certain foods, generally because they were everyday foods, tax on which would be "particularly sensitive" for much of the population, and has chosen not to zero rate others.

He went on to describe the history of the product, which has won awards since its introduction in 2012. The product is formulated and marketed to improve the quality of the consumer's skin, but it is intended to be pleasant to drink in order to encourage customers to complete a 90-day course. The company complied with food regulations and labelling rules.

HMRC had found a comment by an employee responding to feedback on the company's website in which he said "Skinade is not intended to provide any nutritional benefit". The director responded that the employee was very junior. HMRC argued that the product was a beauty treatment rather than a food.

The director also pointed out that a significant ingredient of the product, marine collagen, is sold in powdered form as a food ingredient and is then zero-rated. In his view, beauty treatments were applied from the outside (such as creams) rather than consumed as a drink.

HMRC's evidence included marketing material that referred extensively to the health benefits, and a map of stockists that showed they were mainly were cosmetic clinics, beauty salons, dentists and private medical service providers, as well as websites focused on skincare and beauty.

The judge examined the case law on whether different products are "food". He started by recalling the 1997 caution from the Court of Appeal judge in *Ferrero UK Ltd*, to avoid over-elaborate investigations: the Tribunal should not "*be misled by authorities which are no more than authorities of fact into elevating issues of fact into questions of principle when it is not appropriate to do so on an inquiry such as this. The tribunal had to answer one question and one question only: was each of these products properly described as biscuits or not? If it had confined itself to that issue which is, and has to be, one of fact and degree, then the problems which subsequently arose would have been avoided*."

The judge carried out a comprehensive review, listing over a dozen cases in which the definition of "food" has been considered, starting with the VAT Tribunal in 1974 and finishing with the Court of Justice in 2020. The judge derived the following principles:

First and most importantly, that the test to be applied is "what is the reasonable view on all the facts?" This has been articulated as asking whether a broad-minded VAT payer, who has heard the evidence and tasted the product, would regard Skinade as food. The appeal to the "broad-minded VAT payer" tells us that the question should not be over-analysed or be allowed to get bogged down in technical legal points. Factors our broad-minded VAT payer might consider could include form (tablets are generally not seen as constituting food), palatability, nutritional value, directions for use, cost, whether it is consumed as part of or an adjunct to a meal, its purpose (Is it consumed for the purposes of providing the body with the nutrients it needs to stay alive and function or

develop or does it have another specific purpose?) and linked to that how it is marketed. As with all multi-factorial tests, factors will have different weight or value in particular cases, some may be irrelevant in a particular case and there may be factors not on this list which are relevant or helpful in a particular case.

Applying this to the facts, the judge agreed with the appellant that it was not helpful to discuss whether Skinade was "a beauty product". The statutory question was whether it was "food". There was insufficient evidence to compare the nutritional value of the product with foodstuffs generally, so that factor was considered "neutral": the judge accepted that it had some nutritional value, without which it could not be food. Palatability was also neutral: the judge found it not unpleasant, but would not "rush to drink Skinade for its own sake … or serve it to an unexpected guest".

The food regulations were not relevant because they apply to all products that are sold to be ingested, rather than just to products that are normally understood to be food. They would apply to food supplements and medicines, which are not regarded as food: the definition is broader in the interest of public safety.

The judge considered that the presentation and route to market were not what would be expected of a foodstuff. It was much more reminiscent of something that would be found in a chemist's shop than a grocer's. The website showed an image of someone having an injection in their face, advertised training and education at the Skinade University, referred to Skinade's presence at aesthetic trade shows and showed the covers of peer reviewed magazines in the dermatology and anaesthetic medicine fields. None of this was how the judge would expect to see food marketed.

The directions for use suggested that the product should be consumed every day "ideally after breakfast". This indicated that it was not "part of a meal", but something that was to be consumed as a supplement. It was intended to be "part of your daily skincare regime". This was not redolent of food.

The judge concluded by saying that this had not been an easy issue to resolve, but in the round he considered that a well-informed, broad-minded VAT payer's answer to the question would be "no, Skinade is not a food". For that reason, the appeal was dismissed.

First-Tier Tribunal (TC09231): *Bottled Science Ltd*

Lecture 5

2.4.2 Wigs – or not wigs

A company appealed against an assessment for underdeclared output tax of £165,821 for the periods from 01/2018 to 04/2021, and amendments to returns for periods from 07/2021 to 04/2023 amounting to £76,814, as well as amendments not yet issued for the periods from 07/2023 to 01/2024 for £34,448. The total in dispute was agreed between the parties to be £277,083.

The company had traded and been registered for VAT since 2001. It had relied on VAT advice received in that year that it could make supplies of its products zero-rated under the heading of medical supplies for disabled

people. The product was a hair replacement system; the advice noted that "medical appliances" included wigs.

Judge Kelvan Swinnerton recorded the progress of the enquiry into the company's returns, which started in April 2020 and concluded with the September 2021 issue of a decision that the product did not qualify for zero-rating under VATA 1994 Sch.8 Group 12. This was confirmed on review in January 2022 and appealed; further periods had been added to the appeal by the time the case reached the FTT.

The relevant legislation includes the following as zero-rated:

2. The supply to a disabled person for domestic or his personal use…

(a) medical or surgical appliances designed solely for the relief of a severe abnormality or severe injury;

(g) equipment and appliances not included in paragraphs (a) to (f) above designed solely for use by a disabled person;

(h) parts and accessories designed solely for use in or with goods described in paragraphs (a) to (g) above.

3. The supply to a disabled person of services of adapting goods to suit his condition.

5. The supply to a disabled person or to a charity of a service of repair or maintenance of any goods specified in item 2, 2A, 6, 18 or 19 and supplied as described in that item.

The Notes included the following:

(3) Any person who is chronically sick or disabled is "disabled" for the purposes of this Group.

(4) Item 2 shall not include aids (except hearing aids designed for auditory training of deaf children), dentures, spectacles and contact lenses but shall be deemed to include –

(a) clothing, footwear and wigs;

VAT Notice 701/7 *Reliefs from VAT for disabled and older people* states:

3.2.1 What 'chronically sick or disabled' means

A person is 'chronically sick or disabled' if they are a person with a:

- *physical or mental impairment which has a long-term and substantial adverse effect on their ability to carry out everyday activities*
- *condition which the medical profession treats as a chronic sickness, such as diabetes.*

It does not include an elderly person who is not disabled or chronically sick or any person who's only temporarily disabled or incapacitated, such as with a broken limb.

The sole issue before the Tribunal was whether the company's product, known as "the Kinsey System", fell within these provisions. The system

involved fitting a silk mesh to fit a customer's scalp, together with regular maintenance by "hair angels" to weave hair into the mesh. The company argued that this was a supply of a service falling within (3) or (5) above. HMRC argued that there was no supply of goods to the customer, because the mesh was not sold separately from the regularly maintenance visits, and the service did not fall within the statutory words. The parties agreed at the hearing that there was a supply of services rather than a supply of goods.

The judge described the way in which a client is fitted with a wig, and how the regular maintenance is required to make sure the wig remains in good condition. The cost of a wig was nearly £2,400, and the maintenance costs about the same each year.

The parties agreed that zero-rating provisions have to be interpreted strictly, because they are an exception to the general rules of VAT. The appellant's representative submitted that a "strict" interpretation did not mean a "restrictive" interpretation.

The judge discussed what is meant by "a disabled person". The wording of Notice 701/7, which is similar to s.6 Equalities Act 2010, refers to "physical or mental impairment which has a long-term and substantial adverse effect on their ability to carry out everyday activities" or "a condition which the medical profession treats as a chronic sickness, such as diabetes". The company argued that baldness in women is in itself a disability; the judge, after considering the question in some detail, concluded that it was not. Some of the customers might suffer a disability such as cancer that was recognised as such by the Equalities Act, but hair loss or baldness on its own would not be a chronic sickness or disability.

The judge agreed with HMRC that the Kinsey System was not designed solely for use by disabled people and that those who are not disabled can and do use it.

The judge also rejected the company's submission that the System involved "services of adapting goods to suit [a disabled person's] condition". The System involved the creation of the product and then regular maintenance of it; it was not the adaptation of anything, and to characterise the maintenance as "adaptation" would involve artificially dissecting parts of a single supply. This had been rejected in cases such as the House of Lords decision in *Dr Beynon and Partners*.

The company's representative argued that the inclusion of "wigs" as medical appliances within Notice 701/7 required the Kinsey System to enjoy the same treatment under the principles of fiscal neutrality. This was rejected by the judge, who said that such wigs were distinct from the Kinsey System, and the System was not a wig. As it was not solely designed for the relief of a severe impairment or severe injury, it was not zero-rated.

The appeal was dismissed.

First-Tier Tribunal (TC09255): *Mark Glenn Ltd*

Lecture 6

2.4.3 Caravans

he *Value Added Tax (Caravans) Order 2024* makes changes to the zero-rating provisions in VATA 1994 to ensure that residential caravans which are subject to new manufacturing standards continue to benefit from VAT relief. Currently, the legislation mentions the manufacturing standards BS 3632:2005 and BS 3632:2015. However, the manufacturing standard was updated in 2023 so there is a need to update the legislation to provide continuity of VAT treatment for these caravans. The legislation is being updated in such a way that VAT relief will also apply to any updated version of BS3632 published by the BSI in the future.

The amendments to VATA 1994 Sch.8 Group 9 item 1 come into force on 30 September 2024. The changes are discussed in a policy paper.

SI 2024/910; *www.gov.uk/government/publications/the-value-added-tax-caravans-order-2024*

2.5 Lower rate

Nothing to report.

2.6 Computational matters

Nothing to report.

2.7 Discounts, rebates and gifts

2.7.1 Prompt payment discounts

The 2014 March Budget included a surprise announcement changing the rules on the calculation of output tax where a prompt payment discount was offered. Up to that point, VAT was always calculated on the discounted amount, whether or not the discount was eventually taken up; this was considered not to be significant, because most PPDs arose on transactions between traders. The change, which was introduced from 1 May 2014 for telecommunications and broadcasting supplies and from 1 April 2015 for other supplies, arose because HMRC suspected traders were trying to exploit the rule by offering PPDs to consumers. The rule change provided that output tax could only be reduced if the discount was actually taken up.

In 2018 the FTT decided in *Virgin Media Ltd* (TC06730) that the old PPD rule did not apply to a situation in which a trader offered a choice between higher monthly payments and a lower sum if the customer paid for a year in advance. One was not a discounted version of the other: they were alternative offers with different consequences. In TC08674, the FTT rejected what appeared to be the scheme that the rule change in 2014 was aimed at. The period in dispute was from 1 January 2014 to 30 April 2014, so it appears that the Budget was a speedy response to HMRC becoming aware of the plan; the amount in dispute was £10.6 million. The company has now lost a further appeal to the Upper Tribunal.

FTT decision

During the period in dispute, the company offered most of its retail customers the option of receiving a 15% discount if their monthly bills

were paid within 24 hours, and calculated the output tax on the basis that this was a PPD. Around 3% of customers actually took up the offer. In February 2015, HMRC decided that this was not within the original PPD rules, and raised an assessment. The company appealed, disputing both HMRC's interpretation of the law and its application to the circumstances.

VATA 1994 Sch 6 para 4(1) originally stated: "Where goods or services are supplied for a consideration in money and on terms allowing a discount for prompt payment, the consideration shall be taken for the purposes of section 19 as reduced by the discount, whether or not payment is made in accordance with those terms." The company argued that the meaning was clear; HMRC's counsel contended that this was inconsistent with the 6th Directive, and the Tribunal would have to apply a conforming construction. The company's counsel agreed that it was inconsistent, but the Tribunal agreed with him that no conforming construction was possible.

The judge analysed the contracts, and agreed with HMRC that para 4(1) did not apply. The reasoning was slightly different for amounts billed in advance (such as line rental) and those billed in arrears (such as call charges). The contract was in general governed by terms and conditions on the TalkTalk website; the discount offer was not within the main T&C, but was found on a different page on the website.

For services billed in advance, the discount was offered on a month by month basis, and had to be accepted by the customer within the narrow 24 hour window. The judge found that, where the customer took up the offer, the contractual variation happened at exactly the same moment as the supply and the payment, and thus there were no terms "allowing a discount for prompt payment" on a future date. Para 4(1) did not apply.

For services billed in arrears, the discount offer was made and accepted after the services had been delivered. That meant that the supplies had been made on the basis of the T&C on the website, and the offer was to make a post-supply rebate of consideration already due. It was not a prompt payment discount; output tax would only be reduced where the offer was actually taken up, in accordance with art.90 PVD.

TalkTalk had also appealed against decisions on schemes that were similar to those in the *Virgin Media* case, and its appeals were stood over behind that appeal. After the UT confirmed the FTT decision in that case (April 2020), TalkTalk abandoned those parts of its appeal.

As this is of mainly historical interest, the detailed reasoning of Judge Redston is not covered in detail here. There are some interesting points about the interpretation of statute, where an earlier Tribunal (*Saga Holidays*) had concluded that the law only applied where the discount was taken up; the judge in *Virgin Media* had held that this was clearly wrong, and Judge Redston agreed with her.

There is a further interesting detail in a dispute about the history of the legislation: Judge Redston considers whether the principles of the *Pepper v Hart* case apply so that a ministerial statement in Hansard could be used as an aid to interpretation of the legislation. She concluded that it could not.

The taxpayer accepted that the PVD only allowed consideration to be reduced for discounts actually taken up. The traditional interpretation of

para 4(1) was therefore incompatible with the PVD. HMRC argued that the interpretation used by the Tribunal in *Saga Holidays* was "tenable" and therefore required by the *Marleasing* principle of conforming construction. Judge Redston agreed with the judge in *Virgin Media* that this was not the case: the meaning of the legislation, and the intention of Parliament, was quite clear, and no other construction was possible. To do so would go entirely against the grain of the provision, and would "cross the boundary between interpretation and amendment".

The rest of the decision relates to the operation of the old PPD rules and analysis of the contractual terms and their variation.

The judge concluded that none of the supplies fell within para 4(1) for the reasons given above; if she was wrong on that, she rejected a separate argument from HMRC that the PPD rules were excluded by para 4(2) because the consideration was "paid by instalments".

The appeal was dismissed.

Upper Tribunal

The company appealed to the Upper Tribunal, where it came before Judge Greg Sinfield. Three grounds were put forward for disputing the FTT's conclusion on the second issue (whether para.4(1) applied on the facts of the case):

(1) The FTT erred in concluding that in order for para.4(1) to be engaged, the option to pay a discounted sum had to exist in the context of a pre-existing contractual relationship.

(2) Further and alternatively, even if the FTT was correct about the need for a preexisting contractual relationship, the FTT erred in law by holding that the option to pay a discounted sum under the SPD payment offer did not exist in the context of a preexisting contractual relationship.

(3) Further, the FTT erred in law by holding that the time of supply was set by the basic time of supply rules in s.6(3) and s.6(4) VATA 1994 and therefore that the time of supply for services billed in arrears was when the services were performed.

HMRC served a Respondents' Notice seeking to uphold the FTT's decision for the reasons it gave, but also putting forward additional grounds, relying on the need for a conforming construction of the UK law and the submission that the customers' payments were "instalments" which therefore disapplied para.4(1).

The judge reviewed the law and the conditions for a PPD as identified by the FTT. In his view, the key questions were whether the agreement between the company and its customers included terms that allowed a discount for prompt payment. The judge said:

'I consider that terms that allow a discount for prompt payment must provide for, at least, two payment dates: a standard due date for payment and an earlier optional payment date. The terms must then allow a discount if payment is made on the earlier date. I take this view because paragraph 4(1) implements (if only imperfectly) Article 79(a) of the PVD

which provides that the taxable amount shall not include price reductions by way of discount for early payment. Accordingly, I interpret "discount for prompt payment" in paragraph 4(1) as referring to a discount for early payment.'

The T&Cs did not contain any provision for a PPD until and unless they were varied by the customer's acceptance of the SPD offer, which meant that there was no PPD in the T&Cs for the supplies to those customers who did not take up the offer. For those who did take it up, it was not a PPD but a variation accepting a lower figure than that provided for in the T&Cs. There was no dispute that VAT was due on that lower figure actually received, but it did not then also apply to those who did not take up the offer and paid the originally agreed higher amount.

The judge commented that he had heard argument on the Respondents' Notice, but given that he was dismissing the appeal on the basis of the original FTT decision, it would not be appropriate to make any comment on those issues.

The appeal was dismissed again.

Upper Tribunal: *TalkTalk Telecom Ltd v HMRC*

Lecture 7

2.8 Compound and multiple

2.8.1 Article

In an article in *Taxation*, Scott Harwood examines the Upper Tribunal decision in *Spectrum Community Health CIC*, including a review of the development of the concepts of compound and multiple supplies as they have been applied to the medical exemption since the 1980s. His closing throughs are:

Spectrum is also unusual by including many different activities with these all shoe-horned into a single exemption category. Over the years the medical services exemption has been closely guarded by HMRC to encompass only those services provided, or supervised, by registered medical professionals.

The decision could undermine this control as their package included a wide array of non-medical services delivered by workers who are not necessarily supervised by registered medical professionals. For example, were IT services packaged with medical services, with the medical being predominant, the Spectrum case leads us to conclude this whole package will be exempt. Whether HMRC will be happy with this unintended consequence could well be drawn out in future disputes.

Taxation 11 July 2024

2.9 Agency

2.9.1 Article

In an article in *Taxation*, Geraint Lewis and Karl Leesi review the Court of Appeal decision in *DELTA Merseyside Ltd and another v Uber Britannia Ltd* [2024] EWCA Civ 802.

This was not a VAT case, but in common with the earlier cases of *Aslam* and *Sefton MBC*, it has implications for the VAT treatment of private hire vehicle supplies.

The case considered whether the *Local Government (Miscellaneous Provisions) Act 1976* required taxi firms outside London to contract with passengers as principal at the time of booking. This was effectively the decision in *Sefton MBC*; that called into question the agency model that many taxi firms have traditionally used.

Following *Aslam* and *R (United Trade Action Group Ltd) v Transport for London*, it is settled that the *Private Hire Vehicles (London) Act 1998* requires private-hire vehicle operators in London to contract as principal. The High Court judge in *Sefton MBC* decided that the same principle applied outside London under different legislation dealing with similar businesses, and issued a declaration to that effect on the application of Uber. The applicants in the present case had made representations in the *Sefton* case, and asked the Court of Appeal to discharge the declaration.

The leading judgment of Lewison LJ (with which Lord Justice Lewis and Lady Justice Elisabeth Laing agreed) concluded that the High Court judge's declaration was flawed because it was made in general terms that demonstrably would not apply in all situations. The HC judge had assumed that the booking would be made by "the passenger", with whom the taxi firm would have a contract to "provide the journey". The CA judge gave a number of examples of situations in which that would not apply. The HC judge had also said that the contract was required for the taxi firm to be acting "lawfully", implying that acting otherwise would involve committing a criminal offence; however, there was no statutory provision that creates such an offence.

The effect appears to be that taxi firms outside London can still structure their contracts so that they act as agents for the drivers and account for output tax only on their commission, rather than having to account for output tax on all fares paid by passengers. They will still have to make sure that the contracts reflect that arrangement and also are followed in practice.

Taxation 1 August 2024; Court of Appeal: *Delta Merseyside Ltd and Veezu Holdings Ltd v Uber Britannia Ltd*

Lecture 8

2.9.2 Consultation response

ATT has responded to HMRC's consultation on the implications of the *Sefton* decision, which will possibly now not lead to any changes following the above case. The ATT did not regard the proposed introduction of a legal fiction (allowing operators to be treated as agents for VAT while acting as principals for regulatory purposes) as representing value for taxpayers' money, and recommended instead targeted interventions such as broadening bus pass and grant schemes to enable vulnerable people to access transport services rather than changing the VAT rules.

www.att.org.uk/technical/submissions/att-responds-consultation-vat-treatment-private-hire-vehicles

2.10 Second hand goods

Nothing to report.

2.11 Charities and clubs

Nothing to report.

2.12 Other supply problems

2.12.1 Vouchers

The London Pass (LP) and London Explorer Pass (LEP) were the subject of previous VAT Tribunal decisions in 2007 and 2009. The LP and the LEP entitle the purchaser to enter various attractions and use certain forms of transport in London without further payment. The passes are priced at a discount compared to the gate prices of the attractions. After losing the first of those cases, the company changed the terms of its product, and in the second case persuaded the Tribunal that the passes were vouchers and outside the scope of VAT. Since then, the company has changed its name (from The Leisure Pass Group) and has now won another appeal in the FTT before Judge Anne Redston.

When the Vouchers Directive was about to be implemented in the UK, HMRC wrote to the company to say that the passes would no longer be treated as vouchers because they "functioned as a ticket" (excluded from the definition of a voucher by the new rules). The company wanted to avoid the disruption of further litigation, and restructured its arrangements from 3 January 2019; it understood that the changes would mean that the Pass remained out of scope for VAT purposes. HMRC asked for further information about the Appellant's VAT returns and subsequently issued assessments:

- On 17 March 2021, for £1,570,122 in relation to VAT period 03/19 ("the First Assessment").
- On 22 June 2021, for £2,068,328 in relation to VAT period 06/19 ("the Second Assessment").
- On 27 September 2021, for £1,835,607 in relation to VAT period 09/19 ("the Third Assessment"); and
- On the same day, for £3,835,897 in relation to VAT periods 01/20 to 12/20 ("the Fourth Assessment").

The assessments issued on 27 September 2021 were accompanied by a "liability decision" setting out the basis for HMRC's view. The company appealed, and the judge set out the four issues that had to be determined:

- Whether the first and second assessments were out of time for the unusual reason that, at the time they were issued, HMRC had not formed the view that the VAT returns were incorrect;
- Whether the passes were multi-purpose vouchers (MPVs) and therefore outside the scope of VAT on issue;
- Whether the passes were outside the scope of VAT because of the changes the company had made to its contractual arrangements;

- Whether unused balances on expired passes should be subject to VAT by being allocated as consideration to supplies.

The judge helpfully set out her conclusions at the beginning of a long decision: she found for the appellant on all the issues, and therefore set aside the assessments and the liability decision.

The judge was critical of the two HMRC witnesses, who in her view had been inconsistent and had given their evidence "with one eye on the case HMRC were seeking to make". The company's Group Chief Financial Officer was, by contrast, "an entirely honest and straightforward witness".

During cross-examination, one of the officers referred to several documents which had not been disclosed to the appellant. The appellant's counsel applied for their disclosure; HMRC resisted this, but the Tribunal ordered their production. Some redacted text in printouts of e-mails was also disclosed by agreement shortly before the hearing.

The passes

The judge described the way in which the passes worked. The contractual arrangements had changed over time, but the essential idea was that a pass allowed entry to a wide range of attractions over a given period. Passes are available for a set number of days, starting with the first use of the pass, and they expire after a year (extended to two years during Covid). The LEP required the purchaser to determine how many attractions would be visited and gave a longer period in which to visit them (e.g. five attractions in the 60 days from first use). In each case, the company would not know in advance which attractions (if any) the customer would visit. No attraction could be visited more than once.

The judge noted the basis for the 2009 decision that the passes were vouchers at that time. The arrangements were changed from 3 January 2019, to deal with HMRC's view that the passes "functioned as tickets". Instead of the attractions granting admission to the passholder on presentation of the pass, as happened previously, the new arrangements were designed to work as follows:

- When the passholder presents the pass at the attraction, the relevant computer terminal contacts the appellant, which purchases the right to admission from the attraction.
- The appellant on-supplies that right to the passholder.

The other change to the arrangements in January 2019 was to recharacterise the passes as "credits packages": the LP comprised a package of credits where each credit was worth £1, and the LEP treated one credit as one right of entry into an attraction.

The contracts between the attractions and the company provided that the company bought and sold the right of admission, and would pay the attraction less than the gate price that would normally be charged to a customer not holding a pass. However, the face value of the pass would cover the normal gate price. By way of example, a one day adult LP currently has 165 credits, and so can be used to enter attractions with a total gate price of up to £165. Each time the LP is used to enter an attraction, the amount of available credits reduces. If, on presentation of the LP, there are insufficient credits remaining, entry is declined. At the end of the LP's validity period, any remaining credits expire. The LP's

retail price is determined taking into account the entry price negotiated between each attraction and the appellant. The judge found that the way in which credits operated was well publicised and understood by customers, and this was the case throughout the relevant period.

Various examples were given of how a pass might be used. It was possible for a customer to use up the full face value of the pass, but difficult: it would be necessary to find an attraction with a gate price exactly equal to the remaining credits. It was much more likely that some credits would expire. A passholder who wants to know how many credits remain on the pass can call the appellant's customer service desk; the appellant had not as yet managed to develop and implement the technology necessary for passholders to see the declining credits value on their mobile phones or computer apps.

In the hearing, HMRC's counsel submitted that the maximum value "had no practical impact", because so few people managed to exhaust the pass. However, in closing, he accepted that the limit was real: it protected the appellant from "heavy users".

The way in which the passes operated was discussed between the HMRC officers, the appellant and its advisers through 2019 and 2020. However, the officers had not reached a reasoned conclusion about how the passes should be treated as the two-year time limit approached for the 03/2019 period.

The time limit issue

Normally arguments about time limits turn on whether HMRC have issued the assessment within 12 months after receiving the last piece of information that was required to make the assessment. In this case, the first and second assessments were issued just before the two-year time limit relevant to the 03/2019 and 06/2019 return periods. The company argued that, at those dates, HMRC had not formed a view that the returns were "incomplete or incorrect", so it was not open to them to raise an assessment under VATA 1994 s.73.

The officer who issued the assessment said that she had formed the view by January 2021 that the company was paying too little VAT. In January 2021, she sent a Technical Advice Request to a specialist team; this had not been disclosed, but was produced to the appellant's counsel at the end of the second hearing day.

The TAR set out a number of factors the officers had considered, and discussed various precedent cases, and put forward three possible VAT treatments:

- The pass was outside the scope of VAT, with the appellant making supplies of admission to the attractions (the appellant's position).
- The pass was outside the scope of VAT, with the attractions making supplies of admission (described as creating many practical difficulties).

- The sale of the pass was a taxable supply. This was the officers' preferred answer, but they expressed doubts as to whether it could be justified.

The officer submitting the TAR noted the reference to the CJEU in *DSAB Destination Stockholm AB v Skatteverket* (Case C-637/20), which was pending at that time. She said "we could consider taking a position which aligns with that of the Swedish tax authority, pending the outcome". She also noted that the Findmypast decision "provides a seemingly solid basis for the tax treatment applied by [the company]". Her colleague countersigned the TAR, adding "The tax outcome argued for by the taxpayer is clearly unpalatable to HMRC, but it may not be easy to challenge under existing law". The officers recommended that advice should be sought from the HMRC Solicitors' Office.

The judge reviewed in detail the correspondence following the submission of the TAR up to the issue of the second assessment. She then made findings of fact about whether anyone in HMRC, including but not limited to the two officers directly involved in the case, had formed the opinion, by the time the assessments were issued, that insufficient tax had been paid. The opening words of the assessment said this, but those words were contradicted by the text in the main body of the letters, by the TAR and the submission to the Dispute Resolution Board; by the assessing officer's decision not to follow normal administrative processes to enter the assessments on the system, and by her evidence when she entered the witness box for the second time, that it was only in September that a decision was made.

The judge went on to consider a number of different arguments, including the possibility that the assessments were valid "protective assessments". Such assessments are issued when a time limit is about to expire, but usually relate to a situation in which HMRC have formed the view that tax has been underpaid, but are appealing a contrary decision in another case. That was not the situation here. The judge concluded that the first and second assessments were invalid because, at the time that they were made, it did not "appear to the Commissioners" that the Appellant's VAT returns for 03/19 and/or 06/19 were "incorrect".

There was a further attack on the validity of the assessments which, according to the appellant's counsel, would require a countersignature from another officer. He submitted that they were not "issued" until that second signature was added, in which case the issue dates were in November 2021 – outside the two years from the return period. After considering the arguments and HMRC's procedures on issuing of assessments, the judge dismissed this alternative ground of appeal.

The vouchers issue

The judge referred to the CJEU decision in *DSAB*. The Advocate-General's opinion was given on 24 February 2022 and the full court judgment followed on 28 April 2022. As this is a post-Brexit CJEU decision, it was not binding on the Tribunal, but the judge said the reasoning was clearly relevant as it related to the meaning of EU legislation that had been implemented in the UK, and the facts of the cases were very similar. She summed up her conclusions as follows:

- *The Voucher Directive was issued long before IP Completion Day, and was implemented by Sch 10B for periods after 1 January 2019. The assessments under appeal are for periods after that date which end before IP Completion Day.*
- *Although we are not bound by DSAB, because it was issued after IP Completion Day, it provides helpful and relevant guidance as to the meaning of the Voucher Directive, and thus of Sch 10B. To borrow the words of the UT in Gloucestershire Hospitals in relation to Frenetikexito, the judgment in DSAB "attempts to summarise principles from existing law by which we are bound".*

HMRC's main argument was that the passes "functioned as tickets", so they could not be vouchers and therefore could not be MPVs. The company's counsel put forward a number of arguments against this, including the uncertainty at the time of issue about the attractions that the pass would be used for. It was not like a ticket in the normal sense. The A-G and full court in *DSAB* had explicitly confirmed that the Stockholm City Pass was a voucher, not a ticket (and was a MPV).

The judge agreed with the appellant's arguments, and added three further points:

- Neither party had referred to the dictionary definition of a ticket, but that supported the appellant's view that the passes were unlike tickets.
- The Vouchers Directive had the express purpose of clarifying the treatment of vouchers, but not changing it – in particular, not extending the meaning of "ticket".
- The explanatory notes to Sch.10B when it was introduced gave no indication that Parliament intended to do anything more than implement the Voucher Directive.

The judge had no hesitation in agreeing with the appellant that the passes were "not tickets nor instruments functioning as tickets".

HMRC argued further that the company was making a "single supply of services" when selling a pass. The new arrangements differed from those in *DSAB*, because the company was now buying and selling entry rights as principal. The judge found this "unattractive", because the company had only changed its arrangements in response to HMRC's incorrect view that the passes were "tickets"; however, she also rejected it on the grounds that the CJEU had given in *DSAB*. Treating the sale of a pass as a single taxable supply would impose standard rated VAT on underlying supplies that might be exempt or subject to a different rate, and it could lead to double taxation.

For all these reasons, the judge found that the passes were MPVs, and their sale was therefore outside the scope of VAT.

The credits package

The judge next considered arguments about the operation of the credits package as implemented by the company. HMRC's counsel submitted that the economic and commercial reality was that a customer had purchased a single sightseeing package, and could "exercise the rights of admission" contained within that package immediately on purchase".

The company countered by submitting that it had no control over, or foreknowledge of, the attractions that its customers would visit, or how much it would have to pay to honour its commitment. The prices of entry to attractions might change between the sale of a pass and its use by the holder. Those uncertainties meant that the commercial and economic reality was to treat the supply as the credit package it purported to be: a supply would only arise when credits were used to buy a service.

The judge cited extensive extracts from *MacDonald Resorts Ltd* and *Findmypast Ltd*, which she considered to be very similar. In both cases, the supplies were held to be made when credits were used, not when they were purchased.

The consideration

HMRC's last submission was that the company underpaid VAT because it had not accounted for output tax on all the money it had received for the supplies it made. It should have apportioned the value of expired credits to other supplies and accounted for output tax on that; treating expired credits as "VAT-free income" offended against the basic principle that VAT should be charged on what the consumer paid.

The judge reviewed the precedents, and also considered the practical difficulty of HMRC's approach. She commented:

VATA s 4 provides that services are supplied when they are performed. If HMRC were to be correct, it would be impossible:

1. *to know at the time of supply what consideration had been received for the services;*
2. *to work out the related output tax; or*
3. *to include the transaction in the VAT return.*

In contrast, under the appellant's approach, the value of the consideration is known at the time the service is supplied, because it is calculated based on the gate prices of the attractions.

The assessing officer had described this approach as trying to find a solution to "an unacceptable rate of tax leakage".

However, HMRC had not provided any related evidence or calculations, nor had they suggested at any point that this was an abusive arrangement within the *Halifax* principle.

The judge set out her findings as follows:

1) *where a Passholder uses all the credits, the whole of the amount paid for the Pass is allocated to the particular supplies made;*

2) *where a Passholder does not use all the credits, part of the payment made for the Pass is not consideration for a supply; and*

3) *HMRC's proposed method of allocating 100% of the purchase price over the supplies made is inconsistent with the legislation and the case law.*

The Tribunal upheld the taxpayer's appeal on all the issues.

First-Tier Tribunal (TC09263): *Go City Ltd*

Lecture 9

2.12.2 Plan bundles

A mobile phone operator sold "plan bundles", which entitled the customer to a fixed amount of phone calls, text messages and data within a set period.

In HMRC's view, this was a supply of telecommunication services at the point of payment, fully subject to VAT.

The taxpayer argued that it should be treated either as a multi-purpose voucher or as a supply of "credits" – in either case, a tax point would only arise when the voucher or credit was used, and unused credits would not be subject to tax at all.

The taxpayer accounted for VAT according to its view of the law. HMRC raised assessments for the periods from 07/2012 to 08/2019 totalling over £51 million. The company appealed; the hearing before Judge Tony Beare was to determine issues of principle, leaving the questions of best judgement and quantum to be determined by the parties by mutual agreement or, if necessary, by a further hearing at a later date.

The company's four grounds of appeal were as follows:

(1) the Plan Bundles were face-value vouchers that were retailer vouchers and not single-purpose vouchers;

(2) the Plan Bundles should be treated as such in order to comply with general principles of European Union ("EU") law which bound the Respondents;

(3) activating a Plan Bundle was not chargeable to VAT because, at that time, it was not possible to identify the nature and extent of the services which were to be supplied under the Plan Bundle with sufficient particularity; and

(4) from the perspective of the consumer, there was functionally no difference between a Plan Bundle and the top-up credit which customers of the Appellant were able to use to receive telecommunication services, as described further below. The Respondents accepted that such top-up credits were treated for VAT purposes as face-value vouchers and the general EU principles of fiscal neutrality and non-discrimination required that Plan Bundles were treated in the same way.

The judge commented that some of the witness evidence from the company's employees was contradictory and implausible. He did not think that this arose from a desire to mislead the Tribunal: he noted the delay between the facts and the hearing, the great variety of products at issue, and the roles of the employees which meant they could only speak with authority about part of the business.

The judge explained the way in which the business operates. It is a "mobile virtual network operator", which means that it supplies its services using the infrastructure of mobile network operators such as Vodafone, O2 or EE. Customers could buy "pay as you go credits" (PAYG), which could be used to acquire telecommunications services, or they could buy plan bundles (either using PAYG credits or a debit or credit card).

Some of the bundles sold during the period only allowed basic telecommunications services. Some had what were described as "value

added services" (VAS) such as sports updates and international roaming. The judge described the terms and conditions on which these services were supplied as "slightly opaque", but not relevant to the decision on how the bundles should be treated.

One of the areas of dispute was the importance of VAS to customers. The company contended that they were significant, but the judge found little evidence to support this. He noted that correspondence from the company's advisers in 2016 said that "around 25 to 30 customers per month made use of the VAS", which in the context of the business was a derisory amount (a million plan bundles a year were being sold).

There was also a dispute about the way in which a feature called "Roam Like Home" operated. Some of the plan bundles allowed customers to use their allowances within specified non-EU countries as if the customer was located in the UK.

After considering detailed argument from HMRC that this was only available by using PAYG credits, the judge accepted the company's position that at least some of the bundles allowed this non-EU roaming.

The issues to be decided were:

- What service was supplied when a plan bundle was sold, and when it was supplied;
- If the Tribunal agreed with HMRC that there was a supply at the time the bundle was sold, whether that was the supply of a face value voucher, and if so whether it was a single purpose or multi-purpose voucher. The legislation relating to vouchers changed during the period at issue (on 1 January 2019), so this issue would have be considered under both sets of rules.

The judge noted that, as all the periods at issue were before 31 December 2020, the UK law should be interpreted in line with CJEU decisions made up to that date; the Tribunal was not bound by later decisions of the CJEU, but could "have regard" to them. The following cases were considered:

- *Lebara* (Case C-520/10): the sale of phonecards was held to be a supply of telecommunications services at each stage of the chain (the origin of the concept of "single purpose vouchers");
- *Kennemer Golf & Country Club* (Case C-174/00): golf club subscriptions were held to be directly and immediately linked to the supply of the club's facilities, even if some members did not use the facilities regularly or at all. The supply was the making available of the facilities, whether used or not. A similar conclusion was drawn in the UK case *Esporta Ltd*.
- *MEO* (Case C-295/17) and *Vodafone Portugal* (Case C-43/19) both held that charges for cancelling a contract were subject to VAT because they were part of what the customer paid for the availability of the contracted service.
- *BUPA Hospitals* (Case C-419/02) established that a prepayment for services will only create a tax point if all the information concerning the future delivery and future performance of the contract is known at

the time of payment. If the goods or services have not been precisely identified at the time of payment, there is no tax point.

- *Air France* (Case C-250/14): consideration for "no shows" was still VATable, because the ticket was the supply, whether it was used or not.
- *MacDonald Resorts Ltd* (Case C-270/09): the acquisition of "points" was not an aim in itself for a customer, but a preliminary transaction with the purpose of exercising the points rights in due course to acquire a supply of accommodation. The nature of the eventual supply was not known when the points were acquired, so in line with *BUPA* there was no tax point.
- *Orfey Bulgaria EOOD* (Case C-549/11): a taxpayer was granted a right to construct a building on land owned by four individuals, and agreed to design and construct buildings for those individuals for no further consideration. It was held that the design and construction services could be charged to VAT at the time the right was granted, if at that time all the relevant information concerning the future supply of services was already known and precisely identified and the value of the right could be expressed in monetary terms.
- *Marcandi* (Case C-544/16): credits bought in order to be able to bid in a "penny auction" were an aim in themselves for the purchaser and therefore constituted a supply separate from the eventual supply of goods (if the bid was successful).
- *Findmypast Ltd* (Court of Session 2017): a website selling "credits" for downloading documents was held not to make a supply at the time the credits were sold – they were not vouchers, and there was uncertainty about the nature of the supply that might take place later. This case was considered in more detail than any other, probably because it led to the conclusion that the taxpayer in the present case argued for – that unused credits were not subject to VAT.

Cases on compound and multiple supplies were also referred to, including *Card Protection Plan* (Case C-349/96), *Purple Parking* (Case C-117/11) and *Mesto Zamberk* (Case C-18/12). It was necessary to consider the supply from the point of view of a typical consumer, and to decide whether there was a single complex supply with a predominant element.

The judge also discussed the 2018 FTT decision (TC06519) in *Hutchinson 3G Ltd*. Although this was not binding on the Tribunal, the facts were very similar, so the reasoning leading to the earlier decision was potentially relevant to the proceedings. The Tribunal had concluded that a monthly subscription for telecommunications services was taxable at the point of payment, because there was no uncertainty about what was to be supplied; however, there should be a refund of the output tax to the extent that the services actually supplied were outside the scope of VAT under the use and enjoyment provisions. Although there was no express authority in the PVD for such an adjustment, it was implicit in art.59a PVD because use and enjoyment could follow payment.

The judge summarised the submissions by the appellant's counsel, but did not do the same for HMRC's counsel, because he essentially agreed with

them. Rather than setting them out twice, he incorporated her submissions in his decision.

The judge concluded from the case law that it was necessary first to determine what the supply was, before it was possible to consider whether its nature was too uncertain at the time of payment to trigger a tax point. This was the difference between the decisions in *MacDonald Resorts* and *Marcandi* – in the first, the points did not constitute a supply, but in the second, the credits did. This was also the approach of the Court of Session in *Findmypast Ltd*. Applying that principle to the facts, the judge concluded that the supply of the bundles was a supply of the availability of the various allowances (calls, texts and data), and it was therefore taxable at that point. There was no uncertainty about what the supply consisted of.

After detailed consideration of the different types of bundle, the judge agreed with HMRC that they were all taxable at the time the customer paid for them, but ruled that they were subject to the adjustment for use and enjoyment outside the scope of UK VAT based on actual use.

The judge then turned to the question of whether the bundles were vouchers, and if so how the legislation applied to them. The legislation was in VATA 1994 Sch.10A for vouchers issued before 1 January 2019, and Sch.10B for vouchers issued on or after that date. Sch.10B was introduced to give effect to PVD articles 30a and 30b. The judge set out the legislation at length, and then turned to the relevant case law, which included *Leisure Pass Group* (High Court 2008), *Leisure Pass Group (No.2)* (VAT Tribunal 2009), *Skyview Ballooning* (FTT 2014), *DSAB Destination Stockholm AB* (Case C – 637/20), and *Findmypast*. The issues have already been considered in relation to the case discussed at 2.12.2.

Once again, the judge set out the appellant's submissions, but only incorporated HMRC's submissions in the decision, because he agreed with them. He started by noting that it was unclear whether the appellant was claiming:

(1) each Plan Bundle amounted to a single voucher; or

(2) each category of Allowances to which each Plan Bundle entitled the relevant customer amounted to a single voucher; or

(3) each unit of entitlement to which each Plan Bundle entitled the relevant customer amounted to a single voucher.

There were several problems in fitting the bundles into the definition of vouchers in either Sch.10A or Sch.10B. The simple fact was that the entitlements under the bundles were not monetary amounts which could be used to acquire future services. Instead, they reflected the fact that services had already been supplied. For that reason, the entitlements did not represent the right to receive future services, as required by the law, but instead represented the provision of services which had already been supplied.

In his closing remarks, the judge commented that if he was wrong on this and the bundles were vouchers, he would have concluded that they were single purpose vouchers. That is an interesting decision, given that a SPV has to have a known place of supply; the judge's preference for a

retrospective adjustment to output tax to reflect use outside the scope does not appear to follow the voucher legislation.

The decision in principle was given in favour of HMRC's view of the law, and the parties were invited to agree the effect of that decision between themselves.

First-Tier Tribunal (TC09243): *Lycamobile UK Ltd*

Lecture 10

2.12.3 Article

In an article in *Taxation*, Steve Price points out that HMRC are paying close attention to online trading, and describes case studies of investigations into people misdeclaring (carelessly or deliberately) or not declaring their income from online sources. The article is mainly about income tax, but the same issues apply for VAT:

- where person is already registered for VAT in respect of another activity;
- where the online trading on its own is above the registration threshold.

Taxation 11 July 2024

3. LAND AND PROPERTY

3.1 Exemption

3.1.1 Compulsory purchase

A Polish dairy farmer had traded since 2001 and had been registered for VAT since 2013. He had expanded his farm with purchases of land in 2003 and 2015, without paying or deducting VAT on the acquisitions. In 2017, a public authority ordered that some of his land should be transferred to the state for the purpose of road construction. A process was started to determine the amount of compensation he would receive.

The farmer applied for a ruling on whether this should be treated as a transaction within the scope of VAT, and if so, whether the compensation would be subject to VAT. The ruling was that it would be treated as a supply of goods for consideration and therefore VATable; the farmer appealed, and in due course questions were referred to the CJEU.

The referring court noted that the farmer appears to have used the expropriated land for the purpose of his business, which suggested that the disposal would be within the scope of VAT; but he had taken no steps to market it, and he had not deducted any input tax on the purchase of it, so it was not within the ordinary course of his taxable activity. The question referred asked whether the fact of earlier agricultural use was enough on its own to make the expropriation disposal taxable.

The CJEU started by reformulating the question, which was framed in relation to art.9 (taxable person). It was not in dispute that the appellant was a taxable person; the question should be whether the circumstances fell within art.2 (taxable transaction), and in particular whether they constituted a supply by "a taxable person acting as such".

The court noted that PVD art.14(2)(a) treated as a supply of goods "the transfer, by order made by or in the name of a public authority or in pursuance of the law, of the ownership of property against payment of compensation". As it was clear from the order for reference that the compensation in this case was directly linked to the transfer of the land, there was no doubt that this was a supply of goods for consideration.

The court also noted that it is possible for a taxable person to enter into transactions in a private capacity, quite separately from the taxable activity. However, in the present case, the disposal of land which had been used for the taxable activity was not separate. Imposing a condition requiring "active marketing of the land" would render art.14(2)(a) ineffective, as it clearly included situations where the decision to expropriate was unilateral and not sought by the trader.

If the referring court had found as a fact that the land transferred had not been used for the farming activity, it could be treated as a transaction not carried out by the taxable person acting as such. In the absence of such a finding, it fell within art.14(2)(a) and art.2 PVD.

CJEU (Case C-182/23): *DyrektorKrajowej Informacji Skarbowej v J.S.*

Lecture 11

3.2 Option to tax

Nothing to report.

3.3 Developers and builders

3.3.1 Transfer to company

An individual (AG) purchased a pub (with residential accommodation upstairs) in his own name on 18 February 2014. He paid £645,000 plus VAT of £116,120. He was registered for VAT and appears to have recovered the input tax on the basis of an intention to develop the property and grant major interests in dwellings. AG obtained planning permission to develop the property by creating six one-bedroom flats on the first and second floors. He incorporated a company, KPL, in December 2015, and transferred the property to it on 19 March 2016. The consideration was given as £915,000. The company applied for VAT registration on 8 December 2016 to take effect from 1 May 2016. The first flat received a completion certificate from the local authority on 16 June 2017. In October 2018, the company submitted an option to tax form to HMRC.

The company submitted its VAT return for the 09/18 quarter on 26 November 2018, claiming back £183,000 of VAT on the acquisition of the property, plus £601.05 of VAT incurred on legal fees related to the transaction. After an enquiry, HMRC refused the claim in July 2020, upheld on review in July 2021 and appealed to the Tribunal within the statutory 30 days.

The company's argument reveals a number of misunderstandings in the process. Apparently, the transfer to the company had originally been treated as a TOGC; when HMRC refused to accept that, the company claimed the input tax arising as a result. The grounds for appeal were that "fairness dictates" that the company and AG should not be out of pocket because of the simple transfer from the individual to his company. HMRC would be "unjustly enriched" by charging a transaction "that should never have been captured by the VAT legislation at all". There is no mention of AG submitting an option to tax, but it is implied that he must have done so – if he had not, the transfer to the company would have been exempt and the argument would have been about the clawback of input tax on the sole trader, rather than the refusal of input tax to the company.

HMRC justified the decision as legally and technically correct. The company had only made short-term letting supplies and had made no zero-rated supplies. The registration forms submitted by the company stated that this had always been the company's intention; they also stated that the company had intended to opt to tax, but that would make no difference to supplies of residential property. The form VAT5L contradicted an earlier board resolution of the company to the effect that it intended to sell the flats. There was some evidence of later consideration of selling the flats, but the evidence suggested that this was a change of intention after renting had commenced. The company had never declared any output supplies.

The company argued at the hearing that part of its case was that the acquisition should have been treated as a TOGC. Judge Abigail

Macgregor commented that this was not made clear in the grounds of appeal or skeleton argument, and was in any case inadmissible because the company had proceeded on the basis that it had incurred input tax on the acquisition. It was the refusal to credit that input tax that the appeal concerned, and it was not possible now to argue about whether the input tax should have been incurred.

There was no dispute that the company had converted the property into residential dwellings. The company argued that it had always intended to sell the flats, while accepting that it had as a matter of fact granted 1-year tenancies. The judge reviewed the contradictory evidence of the company's intentions from 2016 onwards, and the impression given by AG in his witness evidence, which was of someone who did not understand the VAT consequences of the declarations that were made in the various forms.

The company's argument about fairness was based on a letter from HMRC which suggested that the company would be able to claim back the input tax. However, this was in the context of the refusal of TOGC treatment (because the company was not registered at the time of the transfer and had not opted to tax); it was still subject to the condition that the company would have to do what the sole trader had intended to do to justify the recovery of the input tax, which was grant major interests. The judge discussed the sketchy arguments put forward about estoppel and dismissed them. She concluded that "*It is quite regularly the case that a transaction gives rise to output tax that must be accounted for to HMRC on the side of the supplier, but does not give rise to recoverable input tax in the hands of the recipient. While the nature of the supply is the same, the recipient's ability to recover input tax is affected by a great many factors, including the extent to which it is making taxable supplies, as was the case here.*"

The appeal was dismissed.

First-Tier Tribunal (TC09250): *Kenthouse Properties Ltd*

Lecture 12

3.4 Input tax claims on land

3.4.1 DIY claim

An individual built a static caravan on a concrete base on land that he owned. He rang HMRC on 27 October 2022 to find out whether he was entitled to any VAT relief; he was referred to a technical specialist, who expressed the view that the structure would be regarded as a "building", and was therefore eligible for zero-rating. On this basis, he submitted a DIY builder's claim, which was refused by HMRC on the grounds that the scheme did not cover caravans. He appealed to the Tribunal, arguing that HMRC should be required to stand by advice that had been clearly given on the basis of full and accurate disclosure of the facts.

Judge Nigel Popplewell reviewed a transcript of the call and expressed considerable sympathy for the appellant. He commented that he was not convinced by HMRC's grounds for excluding static caravans from the scheme, but the point had not been argued before him: the appellant's

only grounds of appeal were based on unfairness. HMRC argued that the FTT did not have jurisdiction to hear such an appeal.

The judge reviewed past cases on the point, and noted that he would have jurisdiction to consider a public law argument (i.e. unfairness or legitimate expectations) in the context of an appeal which fell within s.83 VATA 1994. However, this appellant had made a "freestanding" public law appeal - namely that HMRC should not be allowed to go back on their word and that by doing so they are behaving unconscionably. It was clear from the 2012 UT decision in *Hok* that the FTT has no jurisdiction to consider this as a basis for allowing a claim to a VAT refund.

The judge concluded with the following comment: "HMRC's patent misdirection calls into question the validity of the point they make in many tax cases where they criticise taxpayers for failing to contact HMRC to clarify their tax position. Whilst I do not underestimate the quality control issues faced by HMRC, if this is typical of the quality of advice that is given when making contact, then HMRC might want to consider whether that criticism is justifiable."

The appeal was struck out.

First-Tier Tribunal (TC09269): *Gregory Sewell*

4. INTERNATIONAL SUPPLIES

4.1 E-commerce

Nothing to report.

4.2 Where is a supply of services?

Nothing to report.

4.3 International supplies of goods

4.3.1 Fulfilment house

HMRC seized 24 tonnes of cat litter from an unapproved fulfilment house and refused to restore it to the owner; this was confirmed on review, and as a result the cat litter was destroyed. The company which owned the material appealed against the decision, which could only now be reversed by payment of compensation.

This was the first case to reach the Tribunal in relation to the Fulfilment House Due Diligence Scheme (FHDDS). Judge Rudolf commented that the decision would nevertheless be made in accordance with established principles.

The FHDDS was introduced by FA (no.2) 2017 and requires anyone operating a fulfilment business, as defined, to apply for authorisation from HMRC to do so. The definition is set out in s.48:

(1) For the purposes of this Part a person carries on a third country goods fulfilment business if the person, by way of business—

(a) stores third country goods which are owned by a person who is not established in a Member State, or

(b) stores third country goods on behalf of a person who is not established in a Member State,

ry goods on behalf of a person who is not established in a Member State,

at a time when the conditions in subsection (2) are met in relation to the goods.

(2) The conditions are that—

(a) there has been no supply of the goods in the United Kingdom for the purposes of VATA 1994, and

(b) the goods are being offered for sale in the United Kingdom or elsewhere.

The appellant accepted that the company which stored its goods was carrying on a FH business and had not applied for authorisation. The appellant had initially argued that it was not “a person not established in a Member State”, but now accepted that it was based in Turkey where its central management and control abides. This meant that it should have been registered for VAT in the UK under VATA 1994 Sch.1A as a NETP without the benefit of the Sch.1 turnover threshold.

The judge reviewed the law in the Customs and Excise Management Act 1979 dealing with seizure and forfeiture. The Tribunal had a supervisory

jurisdiction over decisions not to restore seized goods. The judge's task was therefore to consider whether the restoration decision was one which could not reasonably have been arrived at.

The judge stated that "HMRC are entitled to have, and apply, a policy in which compelling reasons are needed before restoration is made. That policy includes consideration of proportionality. Therefore, a decision will not be unreasonable *simply* because HMRC require compelling reasons before making restoration."

The director of the company had formed an intention to trade between Turkey and the UK in 2021. He had been given incorrect advice by a firm of accountants, who said that he would have to register for VAT only when his turnover reached £85,000. He incorporated a UK company with a postal address in London, but it was now accepted that the real business was in Turkey. Different accountants were engaged in 2022 but the same incorrect advice was given.

The fulfilment house was investigated by HMRC in November 2022. It was found to be storing goods for 55 owners, most of whom were NETPs based in Turkey. All their goods were seized, but most were left on site because of their size. The officers left a "warning of liability to prosecution" as they suspected that a criminal offence might have been committed. The owner of the FH did not inform the appellant that this had happened, and the company only contacted HMRC 32 days after the seizure – outside the time limit for applying for restoration. A claim for restoration was made and refused, and this decision was upheld on review.

The reviewing officer stated that the appellant company had made significant errors by failing to pay VAT. However, the company had paid import VAT; the officer who made the decision accepted at the Tribunal that this was an error. It was a factor that was taken into account in the decision which should not have been.

The judge was in no doubt that the decision could not stand. The original decision had wrongly concluded that the company was not the owner of the goods; the reviewing officer had corrected that, but had wrongly concluded that it had not met its VAT obligations, when it had paid import VAT. The director was "an innocent actor": he spoke almost no English, had been misled by his accountants, and had met his tax obligations on import. Had he known about the requirements for FHs to have approval, he would not have used an unauthorised FH. The judge did not accept HMRC's submission that "a reasonably careful importer of goods would have made themselves aware of these regulations".

The decision was set aside; the Tribunal's power was limited to requiring HMRC to reconsider it. A new decision should be made by an officer with no previous involvement in the case, taking into account the findings of the Tribunal.

First-Tier Tribunal (TC09258): *Petmaster Ltd*

Lecture 13

4.3.2 OSS guidance

HMRC have published a collection of online guidance about VAT OSS Union scheme registration, updating existing material and adding new sections. The collection covers when and how to register, when to cancel or make changes to a registration, what happens after cancellation, re-registering for the scheme, and registering for the scheme in an EU country.

www.gov.uk/guidance/register-to-report-and-pay-vat-on-distance-sales-of-goods-from-northern-ireland-to-the-eu

www.gov.uk/guidance/cancel-or-make-changes-to-your-vat-one-stop-shop-scheme-registration

www.gov.uk/guidance/check-how-to-report-and-pay-vat-on-distance-sales-of-goods-from-northern-ireland-to-the-eu

HMRC have also updated the online collection of VAT tertiary legislation to update the "Notice published by HMRC in accordance with VATA 1994 Sch 9ZD para 8(2)" by introducing a new section that outlines the process and timeline for VAT OSS registered businesses to notify HMRC if they no longer make eligible supplies under the scheme.

www.gov.uk/guidance/vat-tertiary-legislation/one-stop-shop-oss-and-import-one-stop-shop-ioss

4.4 European rules

4.4.1 Direct claim by customer

A German company (H) became the successor in title of a business (KG) which hired movable property to other businesses, among other things in the form of sale and leasebacks. It entered into six sale and leasebacks of motor boats which another company (E) had purchased from an Italian company. E paid the full price of the purchase, which was treated by the Italian company as an exempt intra-community despatch.

On the invoices reflecting the sale and leaseback, E charged German VAT to KG, which deducted it. Following an inspection of E's records, the tax authority discovered that the boats were in Italy at the time of the transaction; no German VAT should therefore have been charged. The authority notified KG that it should not have deducted VAT. Nevertheless, because E had entered it on an invoice, E was liable to pay it to the authorities under PVD art.203.

E later went into liquidation. The administrator applied for and was paid a refund of the German VAT that had been charged; the tax authority told them that they should raise sales invoices subject to Italian VAT, but they refused to issue such invoices to KG. KG asked the tax authority to allow the VAT it had suffered (which appears not to have been paid back by the liquidator) on an equitable basis, but the authority refused. KG appealed, arguing that it had a claim under the principles of the *Reemtsma* case. The court was not sure how to resolve the various issues: German VAT had been incorrectly charged, and Italian VAT had incorrectly not been charged. It seems that the appellant wanted the liquidator to issue Italian VAT invoices, enabling it to claim back Italian VAT – which would be at a higher rate than the German VAT it had paid.

The first point made by the court was that the situation was not comparable to *Reemtsma* because the German tax authority had refunded the tax improperly invoiced – it had been paid to the liquidator. The court commented that the fact that this might make it excessively difficult or practically impossible for KG to recover the money was not something that the tax authority was required to take into account: that would impose an unreasonable burden on the tax authority.

It would also impose an unreasonable burden on the tax authority to require it to determine whether the liquidator's failure to issue Italian VAT invoices amounted to a VAT fraud under Italian law. That went beyond the normal objective of preventing fraud, evasion and abuse which is part of the tax authority's duty.

The court noted the referring court's comment that H/KG could have brought a civil action against the liquidator to force them to issue Italian VAT invoices. The court appears to believe that this would enable H/KG to deduct Italian VAT, but presumably that would also depend on the liquidator accounting for output tax.

The conclusion of the court was that there was no right of direct refund from the tax authority in this circumstance.

CJEU (Case C-83/23): *H GmbH v Finanzamt M*

4.4.2 Capital goods scheme

Between 2007 and 2015, a Belgian lawyer carried out substantial works on the building which was 60% used for his professional firm and 40% as his private residence. The works were completed in 2015 and the extended and renovated building was put into use. Until 1 January 2014, the professional services of lawyers was exempt in Belgium. The lawyer registered for VAT as a result of the change in the law, and deducted some of the VAT incurred on the building work. He treated the expenditure as creating immovable property, which was subject to a 15-year adjustment period, as opposed to the 5-year period over which other capital items could be adjusted under Belgian law.

The tax authority took the view that the works only constituted alteration of an existing building, rather than construction of a new one, so the 5-year period was applicable. It adjusted the lawyer's VAT declarations; he appealed, and questions were in due course referred to the CJEU. The referring court was unsure whether the distinction between "acquisition of buildings" and "works on buildings with an equivalent economic life to new buildings" was justified by the wording of articles 187 to 189 PVD. It also questioned whether the extended adjustment period had direct effect.

The court discussed the operation of the relevant articles. There was a distinction between "acquisition of goods" and services such as those incurred by the lawyer in the present case; however, member states were allowed by art.190 to treat "certain services" as if they were goods for the purposes of the CGS. Belgium had clearly done so in this case. The principle of fiscal neutrality then required that similar circumstances should be treated in the same way. Someone who acquired a building identical to the lawyer's would have a 15-year adjustment period; that should also apply to the construction works.

Even though there were options for member states in the implementation of the CGS, it was still possible for the court to rule on whether the way in which it had been implemented complied with EU legal principles. Given that Belgium had implemented the scheme in general, it was required to operate the scheme in a way that complied with fiscal neutrality. That meant that the rules had direct effect and could be relied on by the lawyer.

CJEU (Case C-243/23): *Belgische Staat v L BV*

4.4.3 Subsidised medicines

The Hungarian system for subsidising pharmaceutical products has been considered by the CJEU before: pharmacies receive payment from the consumer and also from the NEAK (State insurance body), both of which are treated as taxable consideration for the supply; the manufacturer of the medicines is required to make a payment to the tax authority in order to have its products on the approved prescribing list. The tax authority then transfers this amount to the NEAK.

A manufacturer treated the payment as an adjustment to the taxable amount under art.90 PVD. The Hungarian tax authority disputed this, arguing that the rebate was a legal requirement comparable to a tax, rather than an adjustment of consideration. The CJEU did not accept that there was any meaningful difference; in accordance with the earlier decision in *Boehringer Ingelheim* (Case C-717/19), the rebate should reduce the taxable amount for the manufacturer's supply.

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

4.4.4 Joint and several liability

Advocate-General Kokott has given an opinion in a case concerning anti-fraud measures in Belgium. Belgian law penalises vendors who do not specify the identity of the purchaser on invoices, so facilitating black market sales by the purchaser. Even if the vendor has correctly accounted for the output tax on the sale, they can be made jointly and severally liable for the purchaser's VAT debt on undeclared sales, together with a penalty of up to 200%. In effect, therefore, the vendor can be liable for three times the tax owed by the purchaser.

The case concerned assessments levied on a drinks merchant which sold alcoholic beverages in 2011, recording them as sales to individuals. Following an audit, the tax authority concluded that they had actually been sold to unidentified businesses which would have sold them on, and the invoices had concealed their identities in order to facilitate fraud. The assessments were raised in 2018 and appealed. The referring court noted that the company had been fined for similar infringements in 2001/02 and 2004. Criminal proceedings were also initiated against the company and its managers in relation to activities in 2012, 2013 and 2014; the company was fined €20,000 for tax evasion.

In the appeal against the VAT assessments, the national court was unsure whether the rules were proportionate in circumstances where the alleged fraud was being carried out by someone else. It was also concerned that the criminal proceedings constituted "double jeopardy" – no one should

be punished twice for the same offence ("ne bis in idem"). Questions were referred to the CJEU.

The A-G pointed out that the criminal proceedings were in relation to different periods from the assessments, so "ne bis in idem" was not relevant to the case. She went on to consider the Belgian rules on joint and several liability in relation to art.205 PVD, which allows member states to transfer the liability for VAT to someone other than the supplier in prescribed circumstances. In her view, this could only apply to a specific tax debt: it could not be used to assess someone for the estimated tax liability of an unknown person.

She went on to consider whether a tax debt could arise under art.203 PVD for tax declared on an incorrect VAT invoice, even if it had already been paid over to the authorities. She considered that the penalty was not proportionate to the anti-fraud objectives of art.273 PVD, not least because collecting tax and penalties from third party facilitators might mean that tax authorities would not bother to go after the real perpetrators – leaving them unpunished and free to carry on further frauds. Her opinion was that the Belgian rules were not in accordance with the PVD.

CJEU (A-G) (Case C-331/23): *Dranken Van Eetvelde NV v Belgische Staat*

4.4.5 Split payment mechanism

In 2018 Poland applied for a derogation to use a "split payment mechanism" to reduce losses arising from fraud. It had already implemented an extended reverse charge mechanism and joint and several liability of supplier and customer, tighter rules for VAT registration and de-registration, and other measures. The split payment mechanism required output tax to be deposited in a special account which could only be used for restricted purposes – payment to the authorities, or payment of the VAT element of purchases. Permission to introduce the measure was granted; it originally took effect on 1 March 2019 for three years, later extended until 28 February 2025.

In June 2021, the administrator of an insolvent business applied for the release of the company's VAT account to pay property taxes to the local municipality. The tax authority refused; the decision was appealed, and questions were referred to the CJEU. The referring court noted differences between the Polish system and the split payment mechanism introduced by Italy, and questioned whether the Polish rules went further than was permitted by the terms of the derogation, or further than was required for the stated purpose of fighting fraud.

The court considered the objections raised by the administrator, including the requirement in the Polish law to include a statement on VAT invoices that was not included in art.206 PVD. It concluded that the rules had been introduced in accordance with the derogation, and were not contrary to the Directive.

Further questions about the interaction of the split payment system with insolvency procedures were held to be inadmissible, because they did not deal with VAT law.

CJEU (Case C-709/22): *Syndyk Masy Upadłości A v Dyrektor Izby Administracji Skarbowej we Wrocławiu*

4.4.6 Time limits for input tax claims

A Bulgarian property developer incurred sub-contractor costs in connection with building project between 2017 and 2019. The total VAT amounted to about €60,000 on 71 invoices. It only registered for VAT in November 2019 and filed a nil VAT return. Its project was delayed by the Covid pandemic; it filed a VAT return for its November 2020 period showing taxable outputs, and then a return for December 2020 claiming the input tax incurred before registration. Bulgarian law had made provision for delaying certain tax responsibilities during the pandemic, but had not extended time limits for VAT.

The tax authority refused the claim. Bulgarian law allows for input tax to be claimed in the period in which it is incurred or in the next 11 (monthly) periods; pre-registration VAT is treated as incurred on the date of registration. For this business, the claim should have been made in the November 2020 return at the latest. The company claimed that it had missed the deadline because its accountant had had Covid; questions were referred to the CJEU on the relevance of the decisions in *Ecotrade* (Case C-95/07 and C-96/07), *EMS-Bulgaria Transport* (Case C-284/11) and *X* (Case C-194/21). These all dealt with the appropriateness of limitation periods for claiming input tax and the right of the tax authority to enforce them. *X* dealt with an attempt to use the adjustment rules in art.184 and 185 PVD to make a late claim where the right to deduct had not initially been exercised within the time limits (the court ruled it out).

The questions referred asked whether, in the context of the pandemic, the imposition of the normal time limits breached the principle of effectiveness: had it become practically impossible or excessively difficult to exercise the right to deduct? The Bulgarian tax authority, supported by Spain, argued that the questions were inadmissible as they did not depend on the interpretation of EU VAT law, but the court stated that there was a presumption of relevance when a national court asked a question: the court would give an answer.

The court noted that Bulgaria had extended time limits for direct tax compliance, but according to precedent, direct taxes and VAT were not sufficiently similar to engage the principle of equivalence. There was no evidence that the 12-month time limit for making a claim breached the principle of effectiveness. The court ruled that the Bulgarian law did not breach EU legal principles.

CJEU (Case C-429/23): *'NARE-BG' EOOD v Direktor na Direktsia 'Obzhalvane i danachno-osiguritelna praktika' Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite*

4.4.7 Online gambling

Belgian VAT law was changed with effect from 1 July 2016 to remove exemption from online gambling except for lotteries. This was reversed by the constitutional court in 2018 on the grounds of domestic law, rather than the potential breach of the PVD and EU VAT legal principles; the constitutional court directed that VAT paid between 1 July 2016 and 21 May 2018 should not be refunded, because of the difficulty it would cause for the national budget. A number of companies made reclaims and appealed against their refusal, and questions were in due course referred

to the CJEU. These dealt with a potential infringement of fiscal neutrality through retention of the exemption for the Belgian National Lottery, and asked for guidance on how to apply the principle of fiscal neutrality in a situation such as gambling, where the member state has some discretion to apply the exemption to categories of games. They also asked whether the constitutional court had the right to direct that the state could retain the VAT collected for the period during which the exemption was not applied.

After Advocate-General Kokott delivered her opinion, some of the appellants (there were more than 20 of them) expressed disagreement with it and applied to have the oral procedure reopened. The court considered that it had sufficient information to answer the questions without a further hearing, and noted that it was not in any case bound to follow the A-G's opinion.

The court recited precedents on gambling and fiscal neutrality, in particular *Rank Group*, and discussed the factors that would be relevant and irrelevant in assessing whether the different games were comparable in the mind of the average consumer. The answer to the question was:

"Art.135(1)(i) PVD, read in conjunction with the principle of fiscal neutrality, must be interpreted as not precluding national legislation which differentiates between, on the one hand, the purchase of lottery tickets online and, on the other hand, participation in other forms of gambling offered online, by excluding the latter from the VAT exemption applicable to the former, provided that the objective differences between those two categories of gambling are liable to have a considerable influence on the decision of the average consumer to use one or other of those categories of games."

The court discussed the rules on "sincere cooperation" and the requirement for national courts to enforce EU law. It ruled that the national court should have applied the VAT exemption retrospectively and awarded the claimants their repayments, regardless of the judgment of the Belgian constitutional court. A separate claim for "damages equivalent to the VAT", which was based on a submission that those still benefitting from the exemption had received unlawful State aid, was ruled out.

CJEU (Case C-741/22): *Casino de Spa SA and others v Belgian State*

Slightly different questions were considered in another case arising from the same legal disputes in Belgium. The decision is very similar, although it considers the question of unjust enrichment in more detail and does not extend to the question of damages.

CJEU (Case C-73/23): *Chaudfontaine Loisirs SA v Etat Belge*

4.4.8 Public broadcaster

Denmark charged a licence fee to owners of televisions and radios for nearly a hundred years before it was abolished in 2022. VAT was charged on this fee from the introduction of the tax in 1967; a group of individuals brought an action against the finance ministry for reimbursement of the VAT they had paid from 2007 to 2017, arguing that such a fee was not consideration for a supply of services and was therefore outside the scope of VAT.

It was accepted by all parties that this was the case; however, Denmark justified the charge on the basis of an existing treatment at 1 January 1978 and the standstill provisions which allowed derogations for such treatments in effect at that date (now PVD art.370 and Annex X). The applicants argued that the rules for the licence fee had changed significantly since 1978 so that the standstill rules were no longer applicable to it.

A-G Szpunar has given an opinion. In his view, the first question referred had already been answered by the CJEU in its October 2023 decision in *GIS* (Case C-249/22): an equivalent derogation in art.378 for countries joining the EU after 1 January 1978 did permit those countries to charge VAT on a broadcasting levy even though there was no link between the payment and the services.

The second question was whether the derogation continued to be valid in view of the extension of the charge after 1978 to cover more types of receiving device such as smartphones and computers. The A-G appears to endorse the "always speaking" concept that was rejected by the UK Supreme Court in the *NewsCorp* case: "This does not, however, preclude the introduction of changes to that system which are limited to taking account of the technological innovations that have occurred in the meantime, without altering the event giving rise to the obligation to pay the fee to finance that activity… Member States are not entitled to extend the scope of derogations from the general rules of the common VAT system but may adapt their national legislation to new circumstances." The A-G did not accept the argument of the applicants that receiving broadcasts was not the primary function of computers and smartphones – in his view, the relevant criterion was the purpose for which the revenue was raised (the financing of the public broadcaster), and that had remained unchanged.

The A-G also considered that the allocation of a small portion of the revenue (about 5%) to finance other activities from 2007 to 2017 did not affect the applicability of the derogation. He acknowledged that this answer was less clear than that given to the first two questions, but he considered that the variation was either still within the overall purpose of the rules, or else was de minimis and could be disregarded.

CJEU (A-G) (Case C-573/22): *A, B, Foreningen C v Skatteministeriet*

4.5 Foreign refund reclaims

4.5.1 Article

In an article in *Taxation*, Neil Warren considers whether it is worthwhile to claim cross-border VAT, either as a UK business claiming in the EU, or a foreign-based business claiming from HMRC. He points out issues such as time limits, the need to consider domestic blocking orders in different countries, and the time and expense involved in completing a claim form in a foreign language. Since Brexit, UK businesses claiming EU VAT have to use the 13th Directive system, which is less advantageous than the streamlined system brought in to replace the 8th Directive in 2010.

He quotes Luigi Lungarella, VAT Director at PKF Littlejohn, on foreign businesses making claims from HMRC:

"Based on my experience, I know that many overseas businesses are having problems with getting refunds from HMRC. The main problem is that the department often asks for excessive levels of information and is out of line with most European tax authorities in terms of the high numbers of questions being asked about claims. This could make the UK appear to be an unfriendly place for business and act as a disincentive for an overseas business choosing the UK as a venue for, say, major conferences and events."

Taxation 8 August 2024

5. INPUTS

5.1 Economic activity

Nothing to report.

5.2 Who receives the supply?

Nothing to report.

5.3 Partial exemption

5.3.1 Tax tip

In a short article in *Taxation*, Alex Millar points out the possible advantages and disadvantages of timing expenditure for a partially exempt business. If expenditure is split up around the end of the VAT longer period rather than all falling in one year or the other, the de minimis rules can allow full recovery in both years.

Taxation 15 August 2024

5.4 Cars

Nothing to report.

5.5 Business entertainment

Nothing to report.

5.6 Non-business use of supplies

5.6.1 Legal fees

A company (V) appealed against assessments totalling over £50,000 for periods 12/18 to 06/21. HMRC ruled that legal fees were not solely received by the company and were not directly and immediately linked to the company's business.

The legal fees related to civil lawsuits between two companies (V and B) and an individual (KB) on the one hand, and two other individuals on the other hand. The case had been heard in the High Court in 2020 and the Court of Appeal in 2021. The FTT judge (Judge Rudolf KC) referred to the published decisions for a summary of the background to the litigation.

V, B and KB were attempting to enforce an alleged oral agreement made in 2012 by which the other individuals would transfer shares in two broadcasting technology companies to a joint venture vehicle. B was 51% owned by V, and was supposed to receive the transfer of shares. The lawsuit was eventually settled by a compromise for £500,000.

The judge referred to precedent cases on "direct and immediate link", citing in particular *BLP Group*, *Royal Opera House*, *Sofology Ltd* and *Frank A Smart Ltd*. The summary of the principles set out by the judge in *Sofology* was quoted with approval, even though it was only a FTT decision. The test required assessment of the specific facts and circumstances of the transactions, not by investigating the subjective intentions of the taxable person; it was not enough for a cost to have a

"close economic link" or even a "necessary economic link" with taxable outputs; a "but for" test was not appropriate; if a cost had a direct and immediate link with an exempt output, there would be a restriction in the input tax deduction.

V was an investor in other companies. Its claim in the civil case related to an alleged loss arising from the defendants' actions that diminished the value of its investments. It claimed the input tax on the legal fees on the basis of a claimed connection with intended taxable supplies that would be made once the claims had been settled. HMRC queried the claim and correspondence followed about the nature of V's business and the lawsuit. Their conclusion was that B, which had never been registered for VAT, was the business that was most closely connected with the lawsuit, as it had suffered from the breach of the agreement; for that reason, V should not be allowed to deduct the input tax. HMRC also noted that KB and another individual appeared to be involved in the dispute, so V was clearly not the sole recipient of the services.

New advisers were appointed in December 2021 to argue the case with HMRC. They stressed that B was a shell company and that V was taking the action in connection with its business of investing in and managing other companies. It was not incurring costs for B, but rather incurring costs for itself in relation to future taxable supplies. HMRC repeated their view that V was incurring costs for another company that was a member of its corporate group, but not part of a VAT group.

A review was requested in August 2022 with further submissions by the representatives; the reviewer confirmed the original decision. The legal costs were incurred to protect the company's shareholdings rather than being linked to any management consultancy outputs; the company was not the sole recipient of the supply.

Judge Rudolf noted that the evidence presented to the FTT, as well as the decisions in the civil case, suggested that the purpose of the lawsuit was to force transfer of valuable shares to B; the intention was then to realise the value by selling shares. V might have made supplies of management consultancy, but that was not the purpose of the lawsuit. B also made no taxable supplies; it was at the time simply a vehicle to hold the shares that were supposed to be transferred, and any further development of its business was cut short by the failure to complete that transfer.

After a long examination of the history of the dispute in the legal case and the dispute between the appellants and HMRC, the judge's decision is quite brief. In his view, it was clear that the legal costs were connected with the purpose of protecting the value of investments, and with the intended sale of equity at a profit. There was no direct and immediate link with potential taxable supplies of management consultancy. Earlier responses to HMRC's enquiries in February and April 2021 were consistent with this; the attempt to link the taxable supplies of management consultancy to the costs of the litigation only emerged rather later.

The judge concluded "it cannot be said the legal services supplied to Visual are 'part of the cost components of that person's taxable transactions which utilise those goods and services.' In fact, no relevant taxable supplies were being made at the time the costs were incurred."

That was enough to dismiss the appeal, but the judge also briefly considered whether V had received the supplies. The evidence was not entirely clear: an individual paid the legal fees on behalf of V, on a promise of reimbursement out of the settlement (but is apparently owed more than the total settlement0; the engagement letters and invoices were not explicit, but implied that services were supplied to all three claimants (V, B and KB). If the first part of the decision had been in favour of the appellant, the judge would have apportioned one-third of the cost as deductible input tax. However, that was academic, and the appeal was dismissed.

First-Tier Tribunal (TC09292): *Visual Investments International Ltd*

Lecture 14

5.7 Bad debt relief

Nothing to report.

5.8 Other input tax problems

5.8.1 Alleged fraud

HMRC issued a decision in May 2020 to deregister a company on the grounds that the registration had been used principally or solely for the facilitation of fraud. There were also assessments to deny input tax and to deny zero-rating on *Kittel* and *Mecsek-Gabona* grounds, amounting to nearly £1 million in total.

The business related to the purchase and sale of cars. HMRC alleged that the sole director and shareholder had a long history of involvement in businesses that were connected with missing trader fraud, and the company had entered into over 100 transactions with defaulting traders in 2019.

Judge Kim Sukul reviewed the disputed transactions and the history of the business. The decision is quite brief for one dealing with MTIC fraud, running to only 76 paragraphs. The conclusion was that the director did not actually know that the transactions were fraudulent, but he should have known on the basis that the only reasonable explanation was that they were so connected. That was enough to uphold the deregistration decision on the basis of the *Ablessio* principle. The judge made small amendments to both the input tax and output tax assessments where it appeared that HMRC had not met the burden of proof to show that there was a tax loss connected with fraud. However, in the main, the appeals were dismissed.

First-Tier Tribunal (TC09286): *YBA Ltd*

5.8.2 New form for non-business claims

Form VAT126 is used for claims under s.33 and following provisions for VAT incurred in respect of various entities' non-business activities. The form has been updated so it can now be completed digitally for first claims. Consequently VAT Notice 998 (*VAT Refund Scheme for museums and galleries*) and VAT Notice 749 (*Local authorities and similar bodies*) have been updated to confirm how to claim VAT refunds..

www.gov.uk/guidance/claim-a-vat-refund-as-an-organisation-not-registered-for-vat

6. ADMINISTRATION AND PENALTIES

6.1 Group registration

6.1.1 Grouping application rejected

Judge John Brooks has heard an appeal about HMRC's refusal of an application by Barclays Bank to include a Delaware-registered corporation (BSC) in the UK VAT group. The application was made on 1 December 2017; the decision to refuse it was upheld on review and appealed to the Tribunal. HMRC put forward three reasons for the decision:

- BSC was not established in the UK, nor did it have a fixed establishment in the UK, and was therefore not eligible for grouping under s.43A VATA 1994;
- A conforming construction of UK legislation required that only the UK branch of a foreign established entity was included in the VAT group, in line with the CJEU decisions on grouping and branches in *Svenska* and *Danske Bank*;
- If BSC was held to have an establishment in the UK, HMRC were entitled to refuse grouping on the grounds of protection of the revenue.

The decision goes through the procedure by which the UK branch of BSC was set up in great detail. BSC has been incorporated in 1993 and carried out a number of outsourced functions for the Barclays group; apart from the UK branch it had no presence outside the US. The UK branch consisted of four employees who were based in an office in Cheshire. They all had employment contracts that were signed in January 2018, but stated that they commenced "not later than 1 December 2017".

There was plenty of documentary evidence about the reasons for establishing the branch. VAT savings of £10 million were included, but were by no means the only or main reason: because BSC provided services to UK and other European and Asian operations within the group, it made sense to have people based in the UK time zone. Bank regulations governing outsourcing were also cited as a reason for employing people in the UK, and the appellant submitted that the branch made a significant contribution to the foreign entity's operations.

The handling of the application by HMRC officers was also examined in detail, including the reasons given for the decision on review. This concentrated on the VAT saving, which HMRC estimated at £15 million to £20 million a year. HMRC considered that there was no evidence of a reduction in administrative burden that would arise as a result of refusal of grouping. The decision therefore concentrated on the use of HMRC's power to deny grouping for the protection of the revenue.

The judge first considered the issue of whether BSC was "established in the UK" for the purposes of s.43A. This concept had been considered at length by the Upper Tribunal in the 2022 case *HSBC Electronic Data Processing (Guangdong) Ltd and others v HMRC*. Although different words were used in different parts of the PVD and in the UK legislation, it was apparent that the same concepts applied to "fixed establishment" for

grouping and for place of supply. The judge considered and rejected the submission by the appellant's representative that the threshold was lower for grouping purposes.

It was therefore necessary for the Tribunal to consider what human and technical resources were available to BSC at the date of the application. The evidence was that three of the four employees were still working full-time in other parts of the group on 1 December 2017, and the agreement to make the office space available had not yet been formalised. The judge concluded that the branch did not have the necessary human and technical resources on 1 December 2017 either to make supplies or to receive supplies for its own purposes, and was therefore not a fixed establishment.

The appellant's representative asked the judge to indicate when he would consider that there were such resources available, but he declined to do so. He commented that it would clearly be useful for a later dispute about grouping, but the Tribunal had only been addressed on the situation at 1 December and no other date had been put forward. It was therefore not appropriate to comment.

That was enough to decide the appeal in HMRC's favour. For completeness, the judge also considered the other two issues. On *Danske Bank*, it was clear that UK law and practice had always been to allow the whole of a foreign entity to join the UK VAT group, provided there was a UK fixed establishment. HMRC invited the judge to find that this was inconsistent with the PVD, as expounded by the CJEU in the two cases, and a conforming construction should be applied. The judge said that a conforming construction was not possible: the UK law was clearly incompatible with the decisions of the CJEU. To change the long-standing law and practice would have significant consequences, and that was not a matter for a Tribunal.

The judge also considered the protection of the revenue issue. It was clear that there was a substantial saving of VAT, but the appellant argued that it was not the sole or main purpose of the grouping application. HMRC submitted that this was not necessary: the concept of "protection of the revenue" did not require an abuse in the *Halifax* sense, but could also apply to situations in which HMRC had to make a decision and the VAT saving was greater than was considered acceptable.

The parties disputed the nature of the simplification objective of the PVD permission of grouping. The company contended that it is a business facilitation measure allowing a business choice over its corporate structuring, enabling complex multinationals to group and be taxed in the same way as a single company organised in divisions, whereas HMRC contended that it is to remove complexity in relation to VAT accounting.

The judge agreed with the appellant, finding support in a range of decisions, including recent judgments of the CJEU in *Adient* and *Finanzamt T v S* (covered below) as well as older cases including *Commission v Ireland* and the 2019 Court of Appeal decision in *Lloyds Banking Group*. In this last case Rose LJ (as she then was) said:

The establishment of a VAT group initiates the tax liability of the VAT group, and terminates the separate tax liability of those of its members who were taxable persons for VAT purposes before joining the group. The VAT treatment of the group's transactions, both to and from entities

outside the group, is comparable to VAT treatment of a single taxable person operating individually. Transactions between the individual members of the group, and which remain therefore within the group, are considered as having been carried out by the group for itself. Consequently, a VAT group's internal transactions do not exist for VAT purposes.

It was therefore necessary to consider whether the savings from VAT grouping went beyond the mere consequences of treating the companies as part of a single entity. The judge concluded that they did not: had BSC had the required human and technical resources on 1 December 2017, HMRC would not have been entitled to refuse grouping on revenue protection grounds. As this was a decision of HMRC over which the Tribunal only has supervisory jurisdiction, the judge stated that HMRC could not reasonably have been satisfied that it was necessary to make the decision, so it would have been an unreasonable decision.

Nevertheless, the appeal was dismissed because of the lack of a fixed establishment on 1 December 2017.

First-Tier Tribunal (TC09275): *Barclays Service Corporation and another*

Lecture 15

6.1.2 Intra-group supplies

The CJEU has given its judgment in the case about the effect of grouping on which the A-G's opinion was covered in the July update. The case deals a matter that has been considered by the UK courts a number of times, with inconsistent results: do supplies of goods or services effected for consideration between persons forming part of a VAT group (a VAT group's 'internal transactions') fall within the scope of value added tax (VAT) and, if so, are they subject to VAT? This is a further reference in a case that has already been the subject of one judgment (Case C-269/20) and is similar to the related case *Diakonie* (Case C-141/20), which is referred to several times in the judgment.

Advocate-General

The A-G summarised the facts as follows:

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

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

The hospital area, as such, in so far as it is dedicated to patient care, falls within the sphere of the economic activities carried out by S, for which S is liable for VAT, whereas the lecture rooms, laboratories and other

premises are used for the teaching of students, an activity which that foundation carries out in the exercise of its powers as a public authority and in respect of which it is not considered to be liable for that tax.

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

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

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

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

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

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

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

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

The A-G observed that this only applied if the supply was made by "a taxable person". It was therefore essential to establish the scope of the concept of "taxable person". Under what is now art.9 PVD, such a person had to "independently" carry on an economic activity. Art.11 prescribed

the possibility of grouping by referring to treating different persons as “a single taxable person”. This meant that the members could no longer be regarded as a taxable person or persons once they were subsumed within the group. The A-G noted that this was consistent with the Guidelines resulting from the 119th meeting of the VAT Committee in November 2021, which, though not binding, nevertheless constitute an aid to the interpretation of the Directive.

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

This distinction between the two concepts was confirmed by the CJEU judgment in *Diakonie*, in which it held that the fact that an entity is a member of a VAT group cannot be regarded as automatically meaning that that entity does not carry out economic activities ‘independently’ for the purposes of the Directive. The A-G concluded from these past cases that the referring court’s view (that internal group transactions were taxable) was not supported by precedent.

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

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

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

Full court

The full court rehearsed the same precedents as the A-G and agreed with the opinion. Where a member state has implemented the grouping rules, it is required to treat the members of a VAT group as no longer independent; transactions between members of the group cannot therefore constitute supplies for the purposes of art.2 PVD, and are outside the scope of VAT. This is the case regardless of whether that would result in "a tax loss": the supposed loss of revenue would arise from the general scheme of VAT in relation to deductibility of input tax, rather than specifically from the grouping rules.

This conclusion is inconsistent with a line of cases in the UK, and it will be interesting to see how (or if) HMRC respond and how (or if) the courts apply the ruling in the appeals by *Hotel La Tour* and *Prudential Assurance*.

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

Lecture 16

6.2 Other registration rules

Lecture 17

6.2.1 Tax tip

In a short article in *Taxation*, Alex Millar comments on the benefits of voluntary VAT registration, noting that the raising of the registration threshold should not be an incentive to deregister where the trader can recover more input tax than the output tax due. The advantages are greatest for businesses which make only zero-rated supplies or supplies outside the scope of UK VAT which would be taxable if made in the UK (or fall within the *Specified Supplies Order*). He includes a reminder of the possibility of a backdated registration if a trader has not noticed the potential benefit of claiming VAT in such a situation.

Taxation 18 July 2024

6.2.2 Registration tool

HMRC have launched a new online tool aimed at businesses which are considering registering for VAT. The tool will estimate the impact of registration on the business, including amounts of VAT that might need to be paid or reclaimed. In order to use the tool, businesses will need access to sales and costs figures; they will also need to understand what rates of VAT apply to different goods and services, and what proportion of their income and costs are exempt or outside the scope of VAT.

The tool will "give you an estimate of how much VAT on average you might need to pay or reclaim in each return period." It concludes with the warning "You should not use any of these figures to complete a VAT Return if you register for VAT."

www.gov.uk/guidance/check-what-registering-for-vat-may-mean-for-your-business

6.2.3 Change of registration details

HMRC has contacted JVCC stakeholders about planned restrictions on the use of the VAT484 from Monday 5 August 2024, and they emailed the agent and VAT-registered trader base on 11 July with an update. The agent email said:

From 5 August, any request to change your clients' VAT registration details should be made using the Agent Service Account, and not by using the VAT484 form or any other postal or electronic means.

Agents are reminded that changes to bank account details and client email addresses can only be submitted by the client. Using the digital route is quicker, more secure and will avoid any unnecessary delays.

For customers that are unable to access and use our digital services such as those who are digitally excluded or need assistance with digital services, HMRC will always provide a service to meet their needs, continuing to offer support through non digital channels such as the phone, which includes our 'needs extra support' service.

We know some customers will still need to apply for a change to their details via post on a VAT484 form if they are digitally excluded or, for example, notifying us of taking over someone else's VAT responsibilities. These customers can contact HMRC to ask for a form.

Updated guidance will be available at Change your VAT registration details *from August.*

www.tax.org.uk/changes-to-the-use-of-paper-form-vat-484

6.2.4 Change of registration details

From 1 April 2024, the VAT registration threshold has increased from £85,000 to £90,000.

The deregistration threshold has increased from £83,000 to £88,000 from the same date.

It should be noted that sole traders approaching the £90,000 threshold may want to consider transferring their business to a partnership or limited company before they breach the thresholds. The transferee business will not inherit the turnover of the transferor under VATA 1994 s.49 as these rules only apply when the transferor is a taxable person.

Essentially the transferee will be treated as a start up and as such you will be extending the time the business can operate without being VAT registered (subject to the aggregation provisions below).

Aggregation

A 'business splitting direction' under VATA 1994, Sch 1, para 1A and 2 is more commonly seen when two different legal entities carry on parts of a trade concurrently. For example, you could have the wet sales of a pub being made by a VAT registered sole trader spouse whereas the food sales are made by a non-VAT registered spouse. This is essentially one business artificially split and HMRC can issue an aggregation direction if they see

fit. If an aggregation direction is issued, the VAT registered spouse would need to deregister and the two spouses would need to register as a partnership. It is important to appreciate that aggregation directions can never be backdated so they only take effect from the date of issue or later if specified.

Unfortunately, the aggregation law is not limited to that situation.

The law allows HMRC to issue a direction to any persons who are closely bound to one another by financial, economic and organisational links, where those persons carry on activities 'in the course of which he makes or made those taxable supplies form only part of certain activities, the other activities being carried on concurrently or previously (or both) by one or more other persons'. Newly incorporated companies are therefore susceptible to an aggregation direction when incorporation was prompted by a desire to delay VAT registration.

The effect of the direction is to aggregate the turnover of the current and previous businesses when considering the historical registration test. This might give the impression that the aggregation is having retrospective effect BUT this is not the case.

Consider a sole trader with 12 months taxable income to 31 October 2024 of £84,000 (£7,000 per month). November 2024 is expected to be £7,000.

New clients mean income will increase to £14k per month from 1 December 2024 so he incorporates on 1 December 2024 to delay the VAT registration date. The newly formed company will not inherit the sole trader turnover so the trade appears to have started afresh for registration purposes. The company will breach the registration threshold at end of June 2025 (7m x £14,000) and will be compulsorily registered from 1 August 2025.

Had the sole trader business continued, he would have breached the limits on 31 December 2024 and had a registration date of 1 February 2025. Incorporating has delayed the VAT registration date by six months.

HMRC would have to issue an aggregation direction before 1 August 2025 for the company to have an earlier registration date than 1 August 2025. For instance, if HMRC issued an aggregation direction on 1 June 2025, the registration date would be effective from 1 June 2025 i.e. it cannot be retrospective.

So incorporating to delay a VAT registration does work. It will only stop working when HMRC issue an aggregation direction but these instances are very rare – and will not have retrospective effect in any event.

As always, we should ensure there is a commercial reason for making such a transfer. The limited liability that a corporate offers a growing business should provide the commercial basis for the transfer.

6.3 Payments and returns

The CIOT has produced a budget representation on repayment interest and commercial restitution. It points out the unfairness of the differential in

rates between the interest charged by HMRC on overdue tax and credited on repayments of tax. CIOT says "At a time when HMRC's service levels are widely recognised as being at an all-time low, the interest regime is doing little to incentivise timely repayments by HMRC, suffocating business and personal investment while monies are 'stuck' with HMRC. This hurts the ability to do business and hinders growth."

www.tax.org.uk/ref1361

6.4 Repayment claims

6.4.1 Article

In an article in *Taxation*, Ciaran McGee discusses the Upper Tribunal decision in *Telent Technology Services*, in which the doctrine of estoppel allowed HMRC to have the taxpayer's appeal struck out. The matter in dispute was VAT that had been assessed and paid following an appeal that had been withdrawn; claiming that VAT back again afterwards was not exactly the same as appealing the assessment, but withdrawing that appeal had effectively conceded the same issues, and they could not be argued again.

The article notes that the taxpayer won a different dispute on estoppel in *Vistry Homes Ltd*, where the substantive appeal is yet to take place. The crucial difference was that in *Vistry*, appeals had been withdrawn in respect of different contracts in different periods, and that did not prevent the company arguing about other supplies in later periods.

Taxation 8 August 2024

6.5 Timing issues

Nothing to report.

6.6 Records

6.6.1 Article

In an article in *Taxation*, Mark Morton writes an open letter to Rachel Reeves, asking for Making Tax Digital for Self-Assessment (due to be introduced from 6 April 2026) to be reconsidered. Among his criticisms of MTD are the fact that HMRC's own research suggests that the additional revenue generated as a result of MTD for VAT is £19 per quarter per business where the business trades below the registration threshold, and £57 per quarter per business for larger businesses. The supposed effect on the "tax gap" seems unlikely to be realised in practice.

Taxation 8 August 2024

6.7 Assessments

6.7.1 Best judgement

A company running an internet café appealed against an assessment for just over £5,000 covering the period for which it was registered between

2014 and 2016. Judge Rachel Gauke reviewed the methodology used by the HMRC officer in raising the assessment in some detail, and also considered a long and wide-ranging list of ground of appeal put forward by the appellant. Many of these were fundamentally misconceived, and the appeal was dismissed in its entirety. Some of them constituted complaints about HMRC's conduct which could not be dealt with by the Tribunal; a claim that the company could not afford to pay the assessment was also not relevant to the appeal.

First-Tier Tribunal (TC09287): *Dominion World Ltd*

6.7.2 Suppression of sales

The proprietors of two restaurants appealed against assessments for underdeclared income. Both accepted that there had been some suppression of sales but disputed HMRC's figures. Judge Jane Bailey pointed out that they had not formally appealed against the related "deliberate conduct" penalties, but they were allowed to make an application at the start of the hearing to submit a late appeal. They also applied for permission to vary the grounds of appeal to include a claim that they had not been raised within the statutory time limits.

The judge considered the arguments in detail, and came to the following decisions:

- The grounds of appeal should not be amended, so it was not necessary to consider the time limits. The chronology of events showed that the claim had no real prospect of success, so it did not warrant detailed consideration.
- Both assessments were made to best judgement, but one of them should be reduced on the basis of the evidence presented.
- The applications to make late appeals against the penalties were also refused, so it was not necessary to consider whether those assessments were justified. The delays were serious and significant without good enough reasons.

The judge commented that the witness statements submitted by the appellants, and oral submissions during the hearing, did not "contain statements of fact that were within the knowledge of the person making the statement". Rather, they were skeleton arguments and assertions of belief about what might have happened or what ought to have happened. They could therefore be given little weight.

The decision contains a description of the "test eat" visits and the conclusions drawn from them by the HMRC officers. This is followed by an account of the dispute over the assessments and the progress of the appeal, which took several years to reach a hearing.

The small success for one of the appellants arose because officers carrying out a test eat visit had failed to record the entry times of some of the customers. That raised the possibility of double counting, and the conclusions drawn could not be relied upon. The judge removed those customers from the count and ordered a recalculation of the liability on a different basis. The judge considered and rejected the appellants' claims that this cast doubt on the reliability of all the other conclusions drawn from the visits.

Apart from this small reduction in the amount of one of the assessments, all the appeals were dismissed.

First-Tier Tribunal (TC09289): *Bangla Lounge (Harborne) and another*

6.8 Penalties and appeals

6.8.1 Default surcharge

In TC08856, a company appealed against default surcharges at 10% (£2,613) and 15% (£3,662) for its 08/21 and 11/21 periods respectively. The company sold high-end cars, and had had an excellent compliance record up to the pandemic, with a DD in place for HMRC to draw the VAT declared on the returns that were always filed on time. After that, a number of problems arose, and the company entered the surcharge regime after paying late for period 08/20. The DD was cancelled, and the trader applied for TTP to cover a number of liabilities. This agreement ran up to 15 November 2021, with monthly payments being made. However, it appeared that at least some of the VAT for all the periods from 11/20 to 11/21 was paid late.

The return for 08/21 was also filed late, on 12 October. The director claimed to have believed that the TTP direct debit would cover future liabilities as well as past ones; he paid the VAT for this period by credit card on 25 November when he realised that no payment had been made. The 11/21 return was filed on time, but once again the payment was made after the due date when the director realised that no DD had been taken.

Judge Nathanial Rudolf sympathised with the appellant, but did not consider that he had a defence against the surcharge. It was not objectively reasonable to have expected the DD arrangement made a year earlier to cover the current liabilities, without checking that this was so. It would not have taken long to discover that no DD was in place and to correct that situation; to fail to do so at all, after leaving the filing of the returns to the last minute, was not the action of a reasonable trader. The appeal was dismissed.

The judge noted that "Mr Sadiq himself said at the start of his evidence: *If it is down to the law, I am guilty and must pay the fines*. We pay tribute to the measured, calm and courteous way Mr Sadiq presented this appeal."

Nevertheless, the company appealed to the Upper Tribunal, where it came before Judge Rupert Jones. The judge explained at some length the scope of an appeal to the Upper Tribunal, which can only be based on a material error of law in the FTT decision. Permission will only be granted if the grounds contain an arguable matter of this type.

The appellant's main complaint was that the FTT hearing was unfair because it was conducted by video: he believed that he was unable to participate effectively by that medium. He stated that at times during the video hearing he froze and was unable to raise matters or explain his case adequately – hence why he asked for an in-person hearing of his application for permission to appeal to the UT. He submitted that he was

not asked whether he consented to a video hearing before the FTT and would not have consented to it if he had had the choice.

The UT judge did not consider that this disclosed an arguable error of law. He discussed at length the various grounds of appeal that the appellant put forward, and dismissed them all. However, he also independently considered whether the FTT had erred in law in relation to its decision on the late return for the 08/2021 period, and concluded that there were two arguable errors of law: the FTT had noted that the trader should have filed on time even if he could not be sure that the return was accurate and complete, whereas that might constitute a reasonable excuse for late filing; and the FTT had concluded that the return had left the making of the return until the last day for filing, when there was no evidence or finding to back up that conclusion. For these two reasons, the judge gave permission to appeal against the finding that there was no reasonable excuse for late filing in 08/2021.

The judge also found an error of law in that the FTT had concluded that the lack of a reasonable excuse for late filing necessarily implied that there was no excuse for late payment. It was possible to file late but to have paid the liability on time, so they were separate matters that should be examined separately. Permission was also granted to appeal against the finding that there was no reasonable excuse for late payment for the same period.

The judge pointed out that this was not an indication that an appeal would succeed, and that an appeal to the Upper Tribunal was within a costs shifting jurisdiction. In view of the amounts of money involved, he invited the parties to discuss a settlement or to find out if HMRC would waive their entitlement to costs.

Upper Tribunal: *Spirit Motor Co Ltd v HMRC*

A company appealed to the FTT against surcharges of £666 for 03/21 and £2,043 for 09/21. The director gave evidence, which was not challenged, to the effect that he had asked his accountants to change the address HMRC held for the company when he moved house, and had been told this had been done, but HMRC continued to send default surcharge notices to the old address. He happened to return and found one notice, following which he rang HMRC to clarify the situation. In spite of some letters from debt collectors, acting for HMRC, being addressed to the correct new address, further letters (including a review conclusion on the default surcharges) were sent to the old address up to May 2023. The company had changed its registered office address at Companies House in March 2020.

The judge concluded from all the evidence that it was more probable than not that HMRC had only been notified of the change of address after March 2021. It was not necessary for the appellant actually to see the surcharge liability notices for them to be properly served according to the "postal rule"; the judge found that they had been so served by being sent to the address that HMRC had on their files. The surcharge for 03/2021 therefore stood. The matters put forward as reasonable excuses – reliance on the accountant to notify the change of address, and shortage of funds because of Covid – were barred by statute.

After that period, the obvious confusion in HMRC's records about the proper address meant that the notice had not been properly served, and the surcharge was therefore discharged.

First-Tier Tribunal (TC09245): *Hana Services Ltd*

Lecture 18

A company appealed against 15% default surcharges for the five periods 02/2021 to 02/2022, totalling just under £250,000. The company had paid its VAT liabilities and/or filed its returns late for periods 11/2017, 08/2018, 11/2018, 05/2019, 05/2020, 08/2020 and 11/2020. It had therefore reached the 15% level (from 05/2020 onwards). All of those penalties had been paid without challenge or appeal.

The managing director of the company gave evidence to the Tribunal. He accepted that the surcharges had been correctly calculated and validly issued, but he claimed that the company had a reasonable excuse. It carried out highly specialised construction work for the NHS and other government or quasi government bodies under framework agreements and had delivered more healthcare construction projects than any other contractor in Scotland over the last few years. During the COVID 19 pandemic, work reduced and those NHS Boards for whom the appellant company was still working ceased to comply with their contractual agreements regarding payment terms. It became almost impossible to contact their finance departments, as their staff left to shield and/or work from home. In spite of this, the NHS Trusts still expected the company to fulfil its contractual obligations, including prompt delivery of VAT invoices. This caused insuperable cash flow problems.

The Presiding Member of the Tribunal (G. Noel Barratt) referred to the test of a reasonable excuse in *The Clean Car Company*: "was what the taxpayer did a reasonable thing for a responsible taxpayer conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?" In the view of the Tribunal, what this company had done was not only reasonable, but the only thing it could have reasonably done in the circumstances: it carried on working for the NHS in spite of not being paid. HMRC objected that the pandemic had caused cash flow difficulties for many businesses but this was not always a reasonable excuse; the judge considered that the circumstances of this business were different from most others, and the problems it faced were extreme.

HMRC pointed to the previous poor compliance record. The Tribunal considered that this strengthened, rather than weakened, the appellant's case: the company had not objected to any of the previous surcharges, but only the ones that were caused by the extreme problems it claimed it suffered in the five periods concerned. Interestingly, the decision does not refer to the *Steptoe* case at all.

The appeal was allowed on the basis of an objectively reasonable excuse.

First-Tier Tribunal (TC09264): *MPMH Construction Ltd*

Lecture 18

6.8.2 Penalties

A company and its director appealed against corporation tax and VAT assessments relating to output tax and input tax, and related penalties. The company ran a restaurant in Birmingham; HMRC claimed that it ran a second restaurant which it had omitted from the records, but the company denied this. The VAT at issue was over £1 million, and the penalties over £735,000; the corporation tax and penalties totalled over £2.75 million.

Judge Michael Blackwell set out the reasons HMRC gave for believing that the company ran the second restaurant, and the director's explanations for each of them. He concluded that the evidence was enough to create a suspicion that the company might have run the restaurant, but not enough to prove it on the balance of probabilities. In his view, the explanations were credible and supported by some of the documentary and other evidence, which was understandably sketchy as the dispute went back over 10 years.

The judge set out a number of criticisms of the way in which the HMRC officer had identified and calculated suppressed profits. In his view, the methodology was flawed, and the differences identified were more indicative of "chaotic record-keeping by the appellant" than suppression of profits.

On zero-rating, the appellant claimed that this had been manually calculated at the end of each day, because the tills did not distinguish between SR and ZR sales. The appellant claimed that 12% was a rounded-down estimate; however, the judge did not consider that this was enough to displace the officer's estimate of 1% for one period and 2% for another period. Although that might well be too low, the burden of proof lay with the appellant to show that the best judgement assessment was wrong, and he had failed to do so.

The appellant had also not produced any evidence to support claims about a car being used only for business purposes and covered with company logos. Once again, the officer's assessment stood. The same conclusion followed for input tax claimed on fuel.

There were input tax claims for "rental of kitchen equipment" from another company owned by the director. The judge found the evidence to be contradictory and unsatisfactory, and concluded that the input tax should not be allowed.

The appellant argued that the flaws in the process meant that the assessment as a whole was not made to best judgement and should be set aside in its entirety. The judge agreed that there were errors in the assessment, but did not consider that this was one of those rare occasions when the whole assessment was invalidated. There was no allegation of dishonesty against the officer, and amendments made to the assessments showed that he had kept an open mind. The Tribunal preferred to uphold the assessment in principle and make appropriate corrections to the amount.

The judge examined the basis on which "deliberate" penalties had been levied, and concluded that these should be downgraded to "careless". As a result, the conditions for issue of a PLN to the director were not met.

On the corporation tax side, the conditions for a discovery assessment for the oldest periods were also not met, so the assessments were discharged.

The decision does not set out the detailed effect on the amounts payable by the company, but there must be a huge reduction in this partial allowing of the appeals.

First-Tier Tribunal (TC09244): *B J Shere Khan Star City Ltd and another*

Lecture 18

A company appealed against assessments for £23,000 in underdeclared VAT for periods 09/2013 to 06/2018, and penalties of £14,500 for deliberate behaviour. These had been transferred to the director by a PLN. The VAT assessments were based on corporation tax calculations: those had concluded that for the director to meet unaccounted expenditure and personal drawings there must have been an underdeclaration of VAT by reference to unaccounted for sales.

The company argued that the assessments were out of time and also flawed in the way they had been calculated. In addition, it was argued that HMRC had not met the required standard to show that the inaccuracies were deliberate, so any penalty should be reduced to the "careless" scale at 18%.

The company ran a general store. A corporation tax enquiry in 2018 led to the conclusion that private expenditure on mortgage payments, car leasing and other personal expenditure had gone through the company's books. This led to adjustments to the declared turnover: the extra drawings were treated as the allowable expense of remuneration (chargeable to income tax and NIC), and there was therefore no increase in corporation tax – only an assessment to VAT on the balancing figure, which was undeclared sales. Because there was no increase in corporation tax, the company had not been able to appeal against the adjustments made.

Judge Nathaniel Rudolf KC went through the history of the dispute and the way in which the assessments had been issued. He dismissed the company's arguments about the time limits and various different objections on fairness as ill-founded. He then had to consider whether HMRC had used best judgement in raising the assessments. The company had had ample opportunity to demonstrate why HMRC's figures were wrong, and they had not done so. The fact that the review process reduced the assessments and penalties (by about a third in each case) did not indicate that the officer had not used best judgement, but showed that allowance had been made for representations by the company's agent.

The fact that the director was solely responsible for the company's activities meant that he must have known that the company was meeting his personal expenditure. Beyond denying it, no other explanation had been offered. The only explanation left was that over six years the accountants were not put in the full picture and deliberately so. It could only have been as a result of a decision that was thought about. The coincidence of carelessly failing to declare the full amount of turnover when such personal payments were made was too much.

The appeals against the assessments and the PLN were dismissed.

First-Tier Tribunal (TC09265): *Sprowston Food and Wine Ltd*

A company appealed against assessments raised in December 2018 for periods from 08/2014 to 08/2018. The amount had been reduced on review from nearly £5.5 million to just over £5 million. Penalties of £2.8 million were added on the basis of deliberate but not concealed conduct, discounted to 56% by mitigating factors, and were transferred to a director by a PLN. The director appealed against the PLN.

The essence of the dispute was that the company had applied the second-hand margin scheme incorrectly. HMRC alleged that the director knew how it was supposed to work, and had deliberately accounted for VAT on the margin on goods which should have been subject to VAT in full.

Judge Amanda Brown noted that the evidence bundle ran to 15,000 pages: the decision was of necessity only a summary, and she would only refer to documents to which she had specifically been directed during the hearing. She went through the history of the enquiry as set out in the HMRC officer's evidence. This included numerous cooperation requests to tax authorities in other jurisdictions, because one of the main sources of the error was use of the margin scheme for sales of goods bought in from EU suppliers (which is prohibited). Import VAT had been declared and claimed as input tax but the onward supply of the imported goods had been treated as margin scheme supplies. A significant number of the purchase invoices bore no VAT number, but the invoices had nevertheless been used as the basis for taxing the onward supply under the margin rather than A&M issuing their own purchase invoice. In addition, goods were described as "unworn", suggesting that they were ineligible for the margin scheme.

The assessments were raised on the basis of "best judgement"; the appellant's representative argued that the attitude of the investigating officer had been prejudiced, and this satisfied the high hurdle an appellant had to clear to discharge an assessment in full on the basis that it was not raised to best judgement. The judge did not agree. Much of the director's evidence had been self-serving, "incredible" and inconsistent.

The judge did not accept his evidence as reflecting his true knowledge or understanding of the circumstances in which the margin scheme was actually used by the company.

After summarising the evidence of several witnesses, including an ex-HMRC officer who appeared as an "expert witness" for the appellant, the judge reviewed the law concerning the operation of the margin scheme and the ways in which the company had failed to apply it. As well as including ineligible goods, the company's stock book records were not adequate. The director claimed that his accountant had responsibility for the VAT returns, but the judge agreed that the accountant had been instructed to prepare the returns on the basis of the entries in the stock book; it was not his fault that he had included items in the margin scheme that did not qualify, if they were entered as such in the book.

The judge reviewed the complaints about the officer's conduct and attitude, and dismissed them. The assessment was raised to the best of his judgement. There was no evidence before the Tribunal on which it could conclude that the amount of the assessment was overstated. The director either deliberately, or with "blind eye knowledge", prepared the stock book to include imported goods and new goods, also recording incorrect

supplier names. This justified the deliberate penalty and the PLN; the 40% mitigation given by HMRC was reasonable.

All the appeals were dismissed.

First-Tier Tribunal (TC09270): *Ancient & Modern Jewellers Ltd and another*

Lecture 18

6.8.3 Late appeals

An individual applied to appeal out of time against a post-clearance demand note (C18) relating to three importations of goods in 2019. HMRC had compared the values declared with similar goods imported by other traders and had concluded that they had been undervalued. The amount assessed was £11,097 of duty and £17,827 of import VAT.

Judge Natsai Manyarara reviewed the history of the enquiry, which included a number of letters from the investigating officer which did not elicit a reply from the trader. The decision letter was sent on 20 July 2022, followed by the C18 on 28 July 2022. A reply arrived in October 2022, claiming that the trader had not received any of the earlier correspondence. Further correspondence followed, including a statutory declaration that the trader had changed his name on 15 November 2021.

HMRC objected to the application to appeal out of time. Their representative set out the various failures to engage with the process and the delays involved. The first letter sent to him had required him to inform HMRC of any health or personal circumstances that might make it difficult to deal with HMRC; he only mentioned responsibilities for caring for his wife and family, on which he relied as a reason, 18 months later.

The judge found the appellant to be an evasive witness who, although assisted by a professional interpreter, had a sufficient understanding of the questions in English to start to reply before the interpreter translated some of them.

Even if some of the correspondence had not been received, there was still a delay after the trader undoubtedly had received the C18 in October 2022. He had managed to continue to trade while carrying on his caring responsibilities, so it was unclear why they prevented him from engaging with HMRC.

The judge reviewed the rules on compliance with deadlines and admitting late appeals according to *BPP Holdings*, *Denton*, *Martland* and *Data Select*. She needed to establish the length of delay, the reasons put forward for that delay, and the extent of the prejudice to each side in allowing or refusing the application.

The delay was clearly serious and significant. The reasons put forward were rejected as not meeting the necessary test of reasonableness, with careful explanation. The claim not to have received any of the correspondence went against the weight of the evidence provided by HMRC, including the fact that the trader's own agent provided the address HMRC used as the trader's principal place of business.

Turning to the evaluation of prejudice, the judge agreed that there was considerable force in HMRC's claim that the grounds of appeal were

"extraordinarily weak" – he had failed to rebut any of the conclusions HMRC had reached in relation to the value of the goods, when it should have been easy for him to provide bank statement evidence of the amount actually paid for them. The balance of prejudice fell on the side of refusing the application. She noted that the Upper Tribunal had stated in Romasave that "permission to appeal out of time should only be granted exceptionally, meaning that it should be the exception rather than the rule and not granted routinely." The application was dismissed.

First-Tier Tribunal (TC09228): *Amir*

Lecture 19

A company was assessed to output tax of £159,813 on 30 September 2020, but only appealed to the Tribunal on 19 May 2023. Judge Nigel Popplewell heard an application to make an appeal out of time.

The judge set out the facts of the case, which concerned a company which receives government money for training ex-offenders. The basis for the assessment was not fully explained in the hearing or in the decision, because the issue was solely whether the appeal should be allowed to proceed.

The judge applied the *Martland* tests. The delay was over two and a half years, and no good reasons had been given. The taxpayer was professionally represented, and his accountant should have advised him to make a timely appeal.

The director of the appellant claimed that he had not been notified of his appeal rights. From his online research, he and his accountant had concluded that he could either appeal to the Tribunal or apply for ADR, which he had applied for – but HMRC had refused because he had not made an appeal.

The judge noted that there was still a significant delay between the refusal of ADR on 30 November 2022 and making the appeal on 19 May 2023, and no explanation was given. He also noted that the appellant claimed the Google search took place in early 2021, which was "difficult to square" with the rejection of the application for ADR in November 2022. The judge could not believe that HMRC took nearly two years to process an application for ADR and then reject it.

The accountant had made it plain to HMRC that the appellant did not agree with the assessment in an e-mail on 22 November 2020. The appellant could have argued that he thought that constituted a valid appeal, but he had not done so. The judge commented that a direct tax appeal is made initially to HMRC; if this had been such an appeal, he would have considered the lateness in relation to 22 November 2020 rather than 19 May 2023, and would have concluded that it was not serious or significant. However, the VAT rules required an appeal to be made to the Tribunal.

Two comments are particularly telling:

"We accept Mr McNeil's evidence that one of the delays in the process was due to his attempts to obtain information from Strode. But this could have been done after an appeal had been made to the tribunal as part of ongoing discussions with HMRC."

"We suspect that the reason for the delay was that Mr McNeil was concentrating on his business rather than on the assessment. That is wholly understandable. But it is not a good enough reason to displace the delay at the final evaluation stage of the *Martland* test."

Neither side had presented any information about the technical merits of the appeal to the judge, apart from HMRC describing it as "weak". The judge therefore placed little weight on this in the final evaluation stage.

The application to appeal out of time was rejected.

First-Tier Tribunal (TC09273): *Ariston Development Ltd*

Lecture 19

A company appealed in August 2022 against corporation tax and VAT assessments totalling £491,000 in tax. The disputed decisions were contained in a CT review conclusion letter dated 16 December 2019 and a VAT review conclusion letter dated 26 August 2021. HMRC had not raised VAT penalties, but corporation tax penalties remained under consideration.

The company applied to make an appeal out of time; HMRC opposed the application, except in relation to the corporation tax penalties. HMRC applied for that part of the appeal to proceed once they had completed their review, and the Tribunal agreed.

HMRC also submitted that there was no right of appeal against the VAT assessment, because the appellant had not submitted a VAT return for the period.

Judge Greg Sinfield reviewed the long history of the HMRC enquiry and attempts by accountants and solicitors to resolve it. He concluded that the corporation tax appeal was late without sufficient reason, and refused to grant permission to bring the appeal.

However, he came to a number of interesting conclusions in relation to the VAT appeal. First, there were two appeals: one against the decision to register the company, and the other against the assessment. The director had asked for both to be reviewed; it appeared that HMRC had never issued a review conclusion in respect of the registration decision, and the review conclusion in respect of the assessment had been delivered to the trader's previous address. The judge accepted that the director had only become aware of it nearly a year after it was issued. He had then acted reasonably promptly to take advice and lodge an appeal.

Even so, he could not appeal against the registration decision until the review conclusion had been issued: when HMRC provided that document, he would have 30 days to appeal. He could also not appeal directly against the assessment, because HMRC's objection was valid: no appeal can be made against an assessment if no return has been filed. However, he could still challenge the validity of the assessment by appealing against the registration decision.

The judge issued a decision that the appeals had to be struck out in their present form, and expressed the hope that the parties would enter discussions to resolve the VAT registration and CT penalties disputes, or at least narrow the areas of disagreement.

First-Tier Tribunal (TC09271): *Heaven Dry Cleaners Ltd*

6.8.4 Outcome of ADR

Hearing of an appeal was listed on 9 December 2021 but postponed three times on the appellant's application. When it was listed again for 25 June 2024, the appellant made a further application for a 6-month postponement on 15 May on the grounds that the appellant's only witness was medically unfit to attend. No evidence was provided of the medical condition, but HMRC did not dispute the evidence in the individual's witness statement, so Judge Kim Sukul decided that there would be no prejudice to the appellant's case to proceed. The appellant renewed the application on 3 June, but the judge cited the Tribunals Rules: the Tribunal may proceed with the hearing if the Tribunal is satisfied that the party has been notified of the hearing and considers that it is in the interests of justice to proceed with the hearing. After a 3 year delay from the initial decision, it was not in the interests of justice to delay further. The application was refused, subject to the appellant's right to make further submissions by 20 June. None were received. The appellant did not attend the hearing itself, but there was a 357-page hearing bundle and a 111-page bundle of authorities, and the judge was satisfied that the issues could be properly considered.

The judge described the background as follows:

The background to the agreement concerns a series of appeals relating to various HMRC decisions in respect of five connected appellants. The parties agreed to settle matters in dispute, including the issue of VAT and penalty assessments relating to the Appellant, following a 'shuttle mediation', which took place between the parties on 3 February 2020. The mediation was conducted on a 'without prejudice' basis. After the mediation, all written notes were required to be destroyed.

There were two ADR mediators present at the mediation, as well as five HMRC officers and four representatives for the Appellant. The representatives for the Appellant included the partner of a firm of accountants and a VAT consultant.

'Shuttle mediation' is a form of ADR that involves the mediator facilitating communication between the disputing parties. The mediator shuttles back and forth between the parties in separate rooms conveying proposals and counterproposals to resolve the dispute. As such, the parties did not communicate directly.

The result of the mediation was set out in an ADR Exit Document, signed by the parties on 3 February:

The appeal against the VAT assessment appealed under reference TC/2016/03806 is withdrawn.

HMRC will reverse the output tax due from Andrew Quay LLP under the bad debt provisions with the result that no VAT will be payable.

The appeal against the penalty determination appealed under reference TC/2016/03803 is withdrawn.

HMRC's view was that this meant that the VAT assessment was cancelled but the penalty of £472,500 remained payable. The appellant considered that the cancellation of the VAT would also mean that there would be no penalty. In correspondence, the appellant submitted that the agreement to withdraw the appeal against the penalty was based on that understanding.

The judge agreed with HMRC that the FTT had jurisdiction to determine whether the exit agreement constituted a binding contract which would compel the withdrawal of the current appeal. She was satisfied that the requirements for a valid contract existed on the basis that there was an agreement, an intention to create legal relations and consideration.

According to precedent (*Rainy Sky SA v Kookmin Bank*, UKSC 2011), the ultimate aim of interpreting a provision in a contract, especially a commercial contract, is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant. The judge considered the wording of the exit agreement to be clear and explicit and, in her view, it would have been apparent to a reasonable person in the Appellant's situation what the disputed provision meant. In such circumstances, it was not possible for the appellant to go behind the agreement. Having found the language used by the parties to be unambiguous, she had to apply it.

A mistake by one party to a contract is capable of displacing the agreement, if the other party knew or ought reasonably to have known of it. The judge accepted that the appellant had misunderstood the contract, but also accepted that HMRC were unaware of that misunderstanding. As she thought the wording was clear, there was no reason to suppose that HMRC should have been so aware. The unilateral mistake by the appellant could not, therefore, undermine the validity of the contract.

The judge allowed HMRC's application for the Tribunal to issue a direction to enforce the ADR exit agreement, and issued further directions to the effect that the appellant's appeal should be withdrawn.

First-Tier Tribunal (TC09291): *Andrew Quay Hull LLP*

Lecture 19

6.8.5 Back and forth appeal

In TC08177, heard in 2021, an individual appealed against a PLN of just over £1.7 million in relation to inaccuracy penalties charged on a company of which he was the sole shareholder and director. The alleged inaccuracies related to HMRC's assertion that the company sold alcoholic goods in the UK rather than dealing in them while they were outside the scope. An assessment was raised on the company for periods 02/16 to 08/17; the company did not appeal, but went into liquidation. HMRC charged a penalty on the company on 23 October 2018, and sent the PLN to the director on 26 October on the grounds that the company was likely to become insolvent.

Judge Zachary Citron examined the evidence presented, which included numerous indications that the company was involved in something unlawful. However, he did not consider that HMRC had shown, on the balance of probabilities, that the goods had been removed to the UK before they were sold. This meant that the appeal had to be allowed, because the alleged inaccuracy on which the penalty was based fell away.

In case this decision was appealed and found to be incorrect, the judge also considered the question of deliberate conduct. In his view, if there was any inaccuracy in the returns, the director would have known about it, and any resulting penalty would have been attributable to him.

In September 2022, the Upper Tribunal set aside this decision and remitted the case to the same FTT panel for reconsideration in the light of the UT's findings. The error of law was that the FTT had considered the burden of proof to have lain on HMRC throughout, because it was a penalty case; however, as the only defence offered against the penalty was that the VAT itself was not due, that issue should have been determined with the burden of proof lying on the appellant.

In TC08809, the FTT judge noted that he was not to disturb the original findings of primary fact, nor to make any new findings; he was required to reassess the consequences of those findings. There were some disputes about what were the findings of primary fact and what the UT meant by those terms. On going through those findings and reassessing them, the judge came to a decision that may have surprised and will certainly have disappointed HMRC: on the basis of all the evidence, and applying the civil standard of proof, the judge was satisfied that the company had discharged the burden of proof to show that the goods were neither located in the UK at the point of sale, nor transported to the UK as part of the company's sales. The appeal was allowed again.

HMRC appealed again to the Upper Tribunal, where the case came before Judge Andrew Scott and Judge Julian Ghosh. HMRC submitted that the second FTT decision was "perverse" in the *Edwards v Bairstow* sense – that no reasonable panel could have come to the decision on the evidence before it.

The judges noted that the FTT had approached its task on the correct basis in 2023 (and HMRC did not dispute this). There was a "very high hurdle" to clear before an appellate Tribunal would overturn a fact-finding Tribunal on the basis pleaded by HMRC, and they had not cleared it. They argued that findings about the unreliability of the director's evidence and illicit activity in the supply chain should have led the FTT to conclude that no weight should have been placed on the documentary evidence, but the judgement that some weight should be so placed was not one that no reasonable panel could have reached. There was some evidence to support the FTT's decision, so it had to stand.

HMRC's appeal was dismissed.

Upper Tribunal: *HMRC v Mohammed Zaman*

6.8.6 No jurisdiction

A NHS Trust claimed repayment of VAT charged to it on supplies of locum doctors. HMRC refused the claim, and the Trust appealed to the FTT, where it came before the senior judge, Greg Sinfield. The decision was not concerned with the liability of supplies of locum doctors, but rather whether the appeal should be struck out, either because there was no right of appeal under s.83 VATA 1994, or the appeal was not made in time.

The trust's advisers had filed the claim on 27 March 2023, stating that it was a protective claim for the previous four years which would be held over pending resolution of TC08682 *Isle of Wight NHS Trust and others*, which dealt with the same issue. In January 2023, Judge Anne Scott had decided that there was an appealable matter within s.83 and refused to strike out the appeals by the other trusts.

HMRC responded to the claim in May 2023, stating that it was not valid under s.80 VATA 1994 because such a claim should be made by the supplier. In their view, the *Isle of Wight* decision had held that the trusts had standing to appeal against a decision that supplies of locum doctors were taxable, but did not support the view that they could claim back VAT if it was wrongly charged. That was a commercial matter between the supplier and the customer.

Correspondence followed between the advisers and HMRC, and on or shortly after 18 September 2023, the trust submitted a notice of appeal to the Tribunal. The notice said that the trust was not represented and did not give details of the advisers; it stated that the trust did not hold a review decision letter and wanted HMRC to repay £937,000. The trust's finance director ticked the box to say that the appeal was in time, which suggested that it should be within 30 days of the decision.

The grounds of appeal explained that HMRC's policy on the liability of locum doctors contradicts the wording of the UK law, but nevertheless made it impossible for the suppliers to refund the VAT until HMRC change that policy. In their view, this gave them grounds to claim the VAT back directly from HMRC. Further correspondence ensued between the Tribunal and the advisers (after their existence had been confirmed by the finance director); the Tribunal issued a direction in January 2024 to hold the case over behind *Isle of Wight*. However, in May 2024, HMRC applied to have the appeal struck out.

HMRC argued that the *Isle of Wight* case meant that the trust could have appealed against the decision issued to Isle of Wight NHS Trust in August 2021 (it would have standing to argue about the decision), but it had not done so, and was out of time to do so now. Even if it was entitled to make an appeal about the letters from HMRC to its advisers in May and July 2023, it was still out of time by September 2023.

The trust submitted that it was making an appeal against the liability decision and was doing so on the same basis as the other appellants in the *Isle of Wight* case. The judge did not accept that this was the basis of the appeal; all the correspondence, and the wording of the notice of appeal, suggested that the trust was making a claim under s.80. There was no indication at any point that the trust was disputing the liability decision itself.. The judge said it was clear from the decision of the Upper Tribunal in *Earlsferry Thistle Golf Club*, which was binding on him, that a customer could not make a s.80 claim, which meant that only the supplier had a right of appeal about refusal of a s.80 claim under s.83. Accordingly, the appeal had to be struck out.

If the judge had decided that he did have jurisdiction, he would instead have struck out the appeal on the basis that it was made late. There was no doubt it was made more than 30 days after any decision by HMRC; the notice of appeal should have acknowledged this and given reasons for the lateness. The Tribunal could only allow an appeal to be brought late if it was satisfied with the reasons, and if no reasons were given, it could not be satisfied.

HMRC's application for strike-out was granted.

First-Tier Tribunal (TC09266): *Hampshire Hospitals NHS Foundation Trust*

Lecture 19

6.8.7 New ground of appeal

A company which provides nursing staff to clients historically only accounted for VAT on its commission. HMRC raised assessments in 2016 for seven VAT periods from 09/2014 to 04/2016 with an overall total of £265,590, reduced to £221,325 by the time of a procedural hearing in 2024. The appeal had been stayed in 2017 pending separate judicial review proceedings.

Judge Heidi Poon reviewed the history of the appeal, which had been lodged seven years ago. The original grounds had been amended following an application in November 2018, which HMRC opposed but the Tribunal allowed. HMRC was granted permission to appeal by the Upper Tribunal, but a hearing listed for June 2020 was vacated pending the determination of the judicial review which had been brought in conjunction with another appellant, Delta Nursing. The JR claim was unsuccessful: Delta's assessments totalling £1.865 million were confirmed. Delta has since gone into liquidation. The judge reviewed the JR decision and the main reasons it was unsuccessful.

Following that, in August 2023 the Tribunal issued directions to require the Appellant to confirm and clarify its position in relation to its grounds of appeal. In response, the appellant lodged an application dated 28 August 2023 for permission to add a new ground of appeal, which was that the assessment was not raised to best judgement. HMRC opposed the application to adduce the new ground of appeal. The company no longer sought to rely on legitimate expectations, which had effectively been ruled out by the JR.

The judge reviewed the nature of the "best judgement" argument in some detail in order to decide whether it stood a reasonable chance of success, as well as considering the extreme lateness of the application without strong reasons being put forward. In her view, there had been plenty of opportunity to raise this ground earlier, and it appeared to be a roundabout way of arguing again something that had been dismissed in the JR. The application was refused.

First-Tier Tribunal (TC09278): *1st Alternative Medical Staffing Ltd*

6.8.8 Case management

HMRC raised assessments on a company and a PLN on the company's director in relation to an alleged missing trader fraud. The assessments totalled £1,164,739 for the VAT periods from 07/19 to 01/20. The company traded in scrap metal, plastic goods and second-hand clothing. HMRC had submitted the returns to extended verification and reached a decision to refuse the input tax claims on *Kittel* grounds in November 2021. In December 2021, HMRC issued a penalty to the company amounting to £349,421, and notified the director that he was liable to pay that penalty on 1 March 2022.

The director applied for a direction debarring HMRC from taking any part in the proceedings. This required that HMRC had only a "fanciful" chance of success, rather than a "realistic" one. Judge Nigel Popplewell set out the principles of making such a summary decision. In reaching its

conclusion the court must not conduct a "mini-trial”; the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial.

The director’s representative submitted that HMRC’s approach was that merely being a director made the individual liable for the company’s penalty under VATA 1994 s.69D. That, he claimed, was a fundamental error of law. HMRC also alleged that he had neglected his obligations and fiduciary obligations as director; it was claimed that mere neglect could not be sufficient to justify a PLN.

HMRC’s representative responded that this was a misrepresentation of HMRC’s pleaded case, which made it clear that they based the PLN on the director’s role in running the business, not merely on his status. The judge agreed that this was a fair representation of HMRC’s stated case. The director’s responsibility for the company’s actions was something that required testing at trial. The application to debar was refused.

The appellants also claimed that HMRC’s assessments were out of time, and applied for further and better particulars of HMRC’s case in relation to the time limit issue, as well as specific disclosures.

The judge agreed with an earlier statement of Judge Brown on further and better particulars: it was necessary to ask whether the amended statement of case, together with the decision letter and the witness statement provided, enabled the appellants to know the case they have to meet on the time limit issue. This requires the appellants to understand the facts on which the assessing officer relied and when the evidence of those facts came to her attention. The judge was firmly of the view that the documents already provided fully enabled the appellants to understand the case without the need for anything more. Once again, it would be possible for the appellant’s representative to test the matters relied on by HMRC at the preliminary hearing that would consider the time limit issue, but there was no reason to require any further information beforehand.

The application for disclosure asked for HMRC to produce all documents in HMRC’s possession relating to the time limit issue – progress logs in relation to the alleged defaulters, responses from the VAT fraud policy team, documents recording input from supervisors and technical teams, meeting notes, and documents recording when HMRC received information from the company and the suppliers. HMRC’s representative argued that this was a “fishing expedition” – a broad application hoping for “something to turn up”. The judge disagreed: he considered some of the information applied for to be highly relevant. However, the breadth of the application was disproportionate. He issued a direction that HMRC should disclose within 42 days:

- All the progress logs in relation to the decision to assess the first appellant (which will include progress logs in relation to each alleged fraudulent defaulter relied upon); and
- All draft means of knowledge submissions, responses from VAT fraud policy, and all related documents that record input from supervising officers and any relevant technical team in relation to that decision;

- But only to the extent of documents in their possession, custody or control and which do not attract legal privilege.

First-Tier Tribunal (TC09260): *Jeneruhl Trading Ltd and another*

6.9 Other administration issues

6.9.1 REULA detail revoked

The *Retained EU Law (Revocation and Reform) Act 2023 (Commencement No 2 and Saving Provisions) Regulations* (SI 2024/714) have been revoked by a further Statutory Instrument. This means that the Retained EU Law Act 2023 s.6 will not now be brought into effect as planned on 1 October 2024. It would have amended EU Withdrawal Act 2018 s.6.

The Explanatory Notes to the original SI described the provisions that were to take effect, and will not now take effect, as follows:

Regulation 2 brings into force section 6 (role of courts) of the Act on 1st October 2024. Section 6 of the Act makes amendments to section 6 (interpretation of assimilated law) of the European Union (Withdrawal) Act 2018 (c.16) ("EU(W)A")

Section 6(2) of the Act consolidates the provisions of section 6 EU(W)A as modified by the European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020 (S.I. 2020/1525).

Section 6(3) of the Act substitutes a new section 6(5) of EU(W)A which establishes a new test to be applied by higher courts when considering whether to depart from assimilated EU case law. Section 6(4) of the Act inserts a new subsection (5ZA) into section 6 of EU(W)A, which establishes a new test to be applied by higher courts when considering whether to depart from assimilated domestic case law.

Section 6(8) of the Act inserts new sections 6A, 6B and 6C into EU(W)A. Section 6A EU(W)A establishes a new reference procedure enabling a lower court or tribunal, which is bound by assimilated case law, to refer a point of law concerning assimilated case law to a higher court to decide. Section 6B EU(W)A establishes a new procedure for the law officers of the UK Government and their counterparts in Scotland, Wales and Northern Ireland to refer a point of assimilated case law to a relevant higher court on a case which concluded in the lower courts. Section 6C of EU(W)A confers on law officers of the UK Government or their counterparts a right to intervene in proceedings before a higher court where departure from assimilated case law is being considered.

Regulation 3 sets out saving provisions. The new test in section 6 of EU(W)A to be applied by the higher courts when considering whether to depart from assimilated case law, and the right of the law officers to intervene under section 6C of EU(W)A do not apply to those cases specified in regulation 3(2).

This does not add to the ease of understanding the current status of VAT law.

SI 2024/976

6.9.2 Guidelines for Compliance

HMRC have issued Guidelines for Compliance no.8, "Help with VAT compliance controls". It is concerned with procedures and internal controls rather than any technical VAT issues. It is "designed to help you understand our expectations as you plan, carry out, and review the accounting and compliance processes that ensure VAT is accurately declared by your business." In its approach it is reminiscent of the Tax Toolkits published by HMRC – detailed documents that identify risks of non-compliance and suggest ways of mitigating those risks. The guideline is divided into a number of detailed subsections:

- General approach to VAT compliance controls
- Order to cash – dealing with systems to record sales
- Procure to pay – dealing with systems to record purchases
- Employee expenses (see below)
- Record to report
- VAT reporting
- VAT reporting – manual adjustments
- Outsourcing
- Next steps – correcting errors and guidance

As an example of the content, this is a list of "control points" at the start of the section on employee expenses:

1. An expense policy should be in place and communicated to managers and employees.
2. The expense policy should specify examples of invalid claims, including personal and non-business use.
3. Access to the expenses system should be controlled through job profiles.
4. Ensure employees are trained to use the system accurately, including valid types of expense, VAT treatment, and the evidence required for input tax claims.
5. A valid VAT invoice or VAT receipt must be held to claim input tax. You can reclaim VAT on supplies of £25 or less without a receipt, if you can show that the supplier is VAT registered.
6. Automatic VAT calculation based on type and tax code is preferred to manual entry.
7. Data entry validation should be in place for location, dates and VAT value if entered.
8. Duplicate entries should be detected and queried.
9. Input tax must only be claimed in accordance with applicable employee subsistence rules.
10. Input tax must only be claimed in accordance with the rules on motoring expenses.

11. Input tax must only be claimed in accordance with the business entertainment rules.
12. Input tax must only be claimed in accordance with applicable rules on employee mobile phone call charges.
13. Workflow ensures that manager authorisation is required before posting to ledgers.
14. Ensure interface failures with the main accounting system are reported and followed up.

The Guidelines for Compliance are generally aimed at larger businesses, but the approach of this document could be adapted for use by smaller ones as well. It is likely to indicate what HMRC officers will look for and ask about when carrying out assurance visits to larger businesses in future.

www.gov.uk/government/publications/help-with-vat-compliance-controls-guidelines-for-compliance-gfc8

Lecture 20

6.9.3 Publication of decisions

The President of the Upper Tribunal (Tax and Chancery Chamber) has issued guidance on the publication of decisions of that chamber.

The following decisions will be published:

- final decisions following substantive oral hearings;
- decisions refusing permission for judicial review;
- decisions following any interlocutory oral hearing, except for matters of routine case management or decisions on costs applications;
- decisions refusing permission to appeal a decision of the First-tier Tribunal or Upper Tribunal where this is made following an oral hearing – this is a change of practice for the Upper Tribunal.

The following decisions will not be published:

- decisions granting permission for judicial review;
- decisions on interlocutory matters decided on the papers, i.e. without an oral hearing (although if the judge considers the matter to be of wider interest this will be published);
- decisions granting permission to appeal a decision of the First-tier Tribunal or Upper Tribunal;
- decisions refusing permission to appeal a decision of the First-tier Tribunal or Upper Tribunal where this is made on the papers, i.e. without an oral hearing.

Where the decision is published it will be posted on the Tax and Chancery Tribunal Decisions webpage.

www.judiciary.uk/guidance-and-resources/guidance-on-the-publication-of-decisions-in-the-upper-tribunal-tax-and-chancery-chamber/

www.gov.uk/government/consultations/changes-to-the-procedure-rules-on-the-provision-of-written-reasons-for-decisions

6.9.4 Judicial review guide

The Administrative Court Judicial Review Guide 2024, outlining part of the Court's work, has been published online. The Guide covers all the stages of a claim for judicial review. It is some 250 pages long, and is required reading for all those who conduct judicial review cases (whether or not they are lawyers – it includes a section for litigants in person).

The Administrative Court Judicial Review Guide 2024 has been published - Courts and Tribunals Judiciary