VAT UPDATE
APRIL 2019

Covering material from January – March 2019

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VAT Update April 2019

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1. INTRODUCTION

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

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

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

1.1 Appeals pending

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

The HMRC website section which reports the progress of appeals originally said that it would be updated monthly, but it appears to be less frequent or regular than that. The list says "last updated 26 February 2019" after the previous update in October 2018.

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

- *Alan McCord*: HMRC seeking leave to appeal against the FTT decision that a car dealer was entitled to input tax on cars purchased for domestic sales, but denied input tax on cars purchased for sale to customers in the Republic of Ireland.
- *Blackrock Investment Management (UK) Ltd*: argument about application of reverse charge to software bought in for use in management of investment funds – UT dismissed HMRC's appeal on the "exemption" issue but referred the "apportionment" issue to the CJEU.
- *Done Brothers (Cash Betting) Ltd and others*: HMRC have been granted leave to appeal against the FTT decision that the company was entitled to exemption of its gaming supplies on fiscal neutrality grounds.
- *Fortyseven Park Street Ltd*: HMRC have been granted leave to appeal to the CA against the UT decision that the company's supplies were exempt licences to occupy land not excluded as "similar to hotel accommodation" (hearing listed for 10 April 2019).

- *Frank A Smart & Son Ltd v HMRC*: HMRC have been granted leave by the Supreme Court to appeal the CS decision in the taxpayer's favour on the deductibility of input tax on the cost of single farm payment entitlements. HMRC will seek a reference to the CJEU.
- *Hastings Insurance Services Ltd*: HMRC have applied for leave to appeal the FTT decision on place of establishment (UT hearing scheduled for 7 October 2019).
- *Hotels4U.com Ltd*: HMRC's list states "no appeal lodged" – FTT decision mainly in favour of the taxpayer. Hearing in November 2018 to decide whether to refer questions to the CJEU (decision awaited).
- *Jigsaw Medical Services Ltd*: company seeking leave to appeal against UT's decision denying zero-rating of their ambulance services as "passenger transport".
- *Lowcostholidays and Lowcostbeds*: being heard with *Hotels4U.com Ltd* (CJEU reference to be considered in November 2018).
- *MG Rover Group Ltd*: taxpayer is appealing to CA against UT's ruling that its *Fleming* claim could not succeed as it should have been made by the representative member of the group (hearing January 2019, decision awaited).
- *Newey (t/a Ocean Finance)*: HMRC describes the CA decision as a "partial win for HMRC". The case has been remitted to the FTT for further consideration in the light of the CJEU judgment (hearing listed for June/July 2019).
- *Pacific Computers Ltd*: MTIC case remitted by the UT to differently constituted FTT for rehearing (not on HMRC's list).
- *Pertemps Ltd*: HMRC will appeal against the FTT decision that the company's "mobile advantage plan" for employee travelling expenses did not involve making taxable supplies (hearing scheduled for July 2019).
- *Privin Corporation Ltd*: the FTT found in favour of a MTIC appellant. HMRC were granted leave to appeal to the UT, but it was agreed that the case would be remitted to a differently constituted FTT for rehearing (not on HMRC's list).
- *Rank Group plc*: HMRC has been granted leave to appeal against the FTT decision that certain supplies qualified for exemption on fiscal neutrality grounds.
- *The Core (Swindon) Ltd*: HMRC are seeking leave to appeal against the FTT decision (in this update) that certain products were "liquid meal replacements" rather than "beverages".
- *The Chancellor, Masters and Scholars of the University of Cambridge v HMRC*: CA has referred questions to CJEU (Case C-216/18) on deductibility of investment management costs where an endowment fund supports the whole of the university's activities.
- *The Wellcome Trust Ltd*: HMRC granted leave to appeal against the FTT decision that the company was not subject to a reverse charge on investment management fees.

- *Volkswagen Financial Services Ltd*: HMRC are considering the CJEU judgment on the partial exemption issues.
- *Zipvit Ltd*: (not on HMRC's list) taxpayer has been granted leave to appeal to the Supreme Court against the CA confirmation of decisions below that the company could not claim input tax on the VAT element of payments to Royal Mail without a VAT invoice, even though it was clear that taxable supplies had been made.

1.2 Other points on appeals

HMRC's list notes that the following cases are final:

- *Tesco Freetime Ltd and Tesco plc*: HMRC will not appeal against the UT decision reported in this update.
- *Wetheralds Construction Ltd*: the company was refused leave to appeal to the CA against the UT's decision that its supplies did not qualify for the lower rate as "installation of energy-saving materials".

1.3 Decisions in this update

The following cases from HMRC's list are in the current update:

- *Gala 1 Ltd v HMRC*: Court of Appeal dismissed taxpayer's appeal against refusal of claims for repayment of output tax on bingo – FTT/UT both ruled that only the representative member of the group could make the repayment claim (not on the HMRC list).
- *Greenisland Football Club*: HMRC describe the UT decision as a "partial win", even though the UT held that the club had a reasonable excuse and therefore was not liable to a penalty – HMRC won on the technical argument that the club was incorrect to issue a ZR certificate.
- *KE Entertainments Ltd*: Court of Session allowed HMRC's appeal against UT decision that change of calculation of bingo takings constituted an "adjustment of consideration" within reg.38, rather than leading to a time-capped repayment claim under s.80.
- *LIFE Services Ltd* and *The Learning Centre (Romford) Ltd*: Upper Tribunal held that fiscal neutrality was not infringed by different rules applying to welfare in different parts of the UK because of devolved regulatory powers.
- *Metropolitan International Schools Ltd*: taxpayer is appealing to CA against UT decision that its supplies were compound supplies of taxable education rather than zero-rated printed matter; CA dismissed argument about effect of s.84(10) in relation to refusal to allow transitional period.
- *Praesto Consulting Ltd*: CA allowed taxpayer's appeal (by 2-1 majority) against UT decision that legal costs were not incurred by the company nor in connection with the company's business.
- *SAE Education Ltd*: Supreme Court held that the company qualified for exemption as a "college of a university".

- *Tesco Freetime Ltd and Tesco plc*: UT dismissed HMRC's appeal against FTT finding in favour of taxpayer in relation to tax treatment of loyalty points scheme.

1.3.1 Other points on appeals

The Court of Appeal has heard an appeal by *United Biscuits (Pension Trustees) Ltd and another* against the High Court's refusal of a direct claim against HMRC for overpaid VAT on investment management fees that should have been exempt. Judgment was reserved, and will presumably be available for the next update.

2. OUTPUTS

2.1 Scope of VAT: linking supplies to consideration

2.1.1 Barter transactions

A company specialised in environmental services including demolition of buildings, and processing and recycling of industrial waste. It would therefore carry out a service for its customer, but also obtain scrap metal that it could sell. It would factor in the estimated value of the scrap in calculating the price to quote for a contract, but this was not disclosed to the client. It also purchased factory sites, including machinery which it was obliged to dismantle and dispose of, incurring costs. The price it was prepared to pay for the site was therefore affected by the estimated cost of dismantling, again not disclosed to the seller.

In Finland, sales of scrap metal are subject to a reverse charge mechanism. The company asked the tax authority for a ruling on the correct treatment of its supplies, and was told that it should be regarded as supplying demolition services and also buying scrap metal from its customers (i.e. it should gross up the two parts of the transaction).

The company disputed the characterisation of the transaction as including barter, and questions were referred to the CJEU. The questions asked whether the transactions should be treated as a single composite supply, or as two separate supplies, and whether the way in which the company fixed the price, and concealed the calculations from the customer, was relevant in determining the answer.

The CJEU considered that the fact that the company ascribed a value to the scrap metal in setting the price for a demolition contract indicated that there was a barter transaction. Although it might be difficult to ascertain a precise value of the consideration for that supply, that did not affect the principle that it should be charged in its own right. The only question was whether ascribing a value to the scrap did not accord with commercial and economic reality, which the court described as a "fundamental criterion for the application of VAT".

A similar decision was reached in relation to the purchase of sites with costs to be incurred in dismantling. In effect, the court has ruled that the company would have to disclose its estimates of scrap values and dismantling costs to its counterparties, because the VAT paperwork would require it.

The only possible get-out would be to argue that no value was ascribed to the barter element of the transaction as a matter of commercial and economic reality, which it would be for the referring court to ascertain.

CJEU (Case C-410/17): *A Oy v Veronsaajien oikeudenvalvontayksikkö*

There is an article about the implications of this decision in *Taxation*, 4 April 2019.

Taxation, 4 April 2019

2.1.2 Criminal conduct

An individual was prosecuted by Trading Standards officers and was subject to a confiscation order that was said to be compensatory, and was to be divided between the victims of the fraud. The details of the fraud were not presented to the FTT, which was hearing an appeal by the individual against VAT assessments for £11,503 relating to his trade. He had some genuine income, but this only reached the registration threshold if the fraudulent turnover was also included.

The judge noted that the award was intended by the Crown Court judge to compensate each victim for 100% of the money paid to the fraudster. That meant that the judge must have concluded that the fraudster had provided no consideration at all for the money paid. The Tribunal judge (Geraint Jones) drew a distinction between criminal conduct that involved a supply, such as drug dealing, and a fraud that merely obtained money by deception on the promise of supplies that were never carried out or intended to be carried out. In his view, mere deception did not amount to a supply of goods or services, and the assessments should therefore be quashed.

He also noted that HMRC had objected to the appeal on the grounds that the appellant should have rendered VAT returns. As he had not registered and had not rendered returns, he could not appeal against the assessments. The judge did not agree that it was necessary in the circumstances for the trader to register in order to submit nil returns, wait for them to be amended and then appeal against the amendments. He had a right of appeal under s.83(1)(b) against “the VAT chargeable on the supply of any goods or services”.

The appeal was allowed.

First-Tier Tribunal (TC06992): *Owen Francis Saunders*

2.1.3 Article

In an article in *Taxation*, Neil Warren considers the question of when a “donation” may be subject to VAT. He notes HMRC’s guidance in VATSC9000 on “what is sponsorship?” and the problems associated with specifying a “minimum donation”.

Taxation, 7 March 2019

2.2 Disbursements

Nothing to report.

2.3 Exemptions

2.3.1 Updated Notices

HMRC have updated their Notice *Finance* to reflect the revised treatment of personal contract purchases described in *R & C Brief 1/2019* (section 2.12.2 below). The changes are contained in para.4.4 "what supplies are not considered exempt credit". This now includes the following statement:

Some Personal Contract Purchase (PCP) or similar contracts may be described as HP. If they contain a contractually optional payment exercisable at the end of the contract, which at the outset of the contract is set at or above the anticipated open market value of the asset at the time the option will be exercised, they are treated as a supply of leasing services. There is therefore no supply of credit and the full value of each instalment is taxable – even if part of the fee is shown as credit in the agreement.

Notice 701/49

HMRC have also updated their Notice *Insurance* to reflect the anti-avoidance amendments made in respect of "specified supplies" of insurance-related services with effect from 1 March 2019. These are aimed at ensuring that input tax recovery is available only where the final consumers of these supplies are located outside the UK.

Notice 701/36

2.3.2 Pension fund management

The *Value Added Tax (Finance) (EU Exit) Order 2019* provides for the VAT fund management exemption to apply to pension funds that meet certain criteria from the date of the UK's exit from the EU, and removes the requirement for certain funds to invest wholly or mainly in securities for the exemption to apply. Following the 2014 decision of the CJEU in *ATP Pension Service*, HMRC have allowed businesses to choose whether to exempt fund management services under EU law or to apply UK VAT legislation. With this order, the government has decided to align UK law with EU law to provide certainty after the UK leaves the EU.

SI 2019/43

2.3.3 College of a university

In TC03358 (early 2014), the FTT allowed an appeal by a commercial company which claimed the status of 'eligible body' by reason of its close links with Middlesex University. The FTT examined the principles established by the precedent cases of *HIBT* and *School of Finance & Management* (*SFM*), which succeeded in winning 'eligible' status in the courts, and the more recent decisions in *London College of Computing* and *Finance & Business Training*, both of which have been decided by the FTT and confirmed by the UT as not qualifying. The following principles were drawn from the precedents:

(1) The SFM factors may be helpful in determining whether a body is a college of a university, but that list of factors is not exhaustive and factors within that list may not always be relevant;

(2) It is necessary to consider the particular circumstances and specific facts of each individual case, which may involve considering factors other than those listed in SFM;

(3) In considering any particular factor, it must be determined whether that factor is compliant with EU law. If it is not, that factor must be put aside and not taken into account in reviewing the evidence;

(4) The "fundamental purpose" test does not replace the similar objects test, but has something in common with SFM factor (ix) (having a similar purpose to that of the university);

(5) There must be at least some degree of integration of the body with the university concerned;

(6) It is inappropriate to follow a "check list" or "tick box" approach. The cumulative effect of the relevant factors must be assessed to derive an overall impression, weighing the factors in the balance: some factors may carry more weight than others.

The 'SFM factors' are matters identified in that case which should be considered in determining whether the links between the bodies are close enough to regard the company as a college of the university. The Tribunal considered the evidence under headings (a) – (o) in detail, and concluded that the following carried the greatest weight:

(1) Status of Associated College, combined from September 2010 with status of Accredited Institution.

(2) Long-term links between SAE Institute and MU. Similar purposes to those of a university, namely the provision of higher education of a university standard.

(3) Courses leading to a degree from MU, such courses being supervised by MU, which regulated their quality standards.

(4) Conferment of degrees by MU, received by SAE students at MU degree ceremonies.

The appeal hearing took longer than the initial time estimates of the parties (three days). In spite of the FTT extending the hearing time each day and making available a fourth day, it was not possible to complete it; there was therefore an adjournment until further court time could be found, which meant that four months passed. After the second part of the hearing, the Upper Tribunal gave its decision in *Finance & Business Training*, which led to further submissions being made to the FTT in this case. The FTT decided that that decision (which was binding on the FTT) did not mean that 100% of a company's activities had to be covered by the 'college of a university' umbrella; it had decided that 90% of this company's activities were so covered, and that was enough. The company's appeal was allowed, entitling it to a repayment of some £1.3m.

HMRC appealed to the Upper Tribunal (2016), which examined the FTT's findings of fact and its reasoning based on those findings. HMRC's challenge to the FTT's decision was based on the assertion that there was insufficient integration between the college and Middlesex University to justify the FTT's finding. HMRC's counsel acknowledged that this amounted to an attack on the FTT's findings of fact, or on the conclusions it drew from those facts; but he argued that those findings

were not supported by the evidence, or were based on an incorrect interpretation and application of some of the *SFM* factors. He cited the *Pendragon* decision in the Supreme Court as authority for the proposition that the UT should remake the FTT's unjustified decision.

The Upper Tribunal considered the arguments of both parties in detail. The Court of Appeal's ruling in *Finance & Business Training* has been handed down since the FTT decision in this case, and it provided a useful and binding explanation of the application of the EU law in this area. The UT should be very careful in overturning a decision of fact in a case about the application of an imprecise legal test: it would be necessary to be sure that there was an error in the FTT's approach.

The UT considered that it was necessary to adopt a multi-step evaluation of the relationship between the supposed "college" and the university:

- first, it would be necessary for both parties to have a common understanding of that relationship – both would have to regard the college as "of the university";
- second, that relationship would have to be of a college and university, rather than some other relationship such as partnership;
- third, the *SFM* factors would be relevant to consider whether the statutory test was met;
- fourth, it would be necessary to consider whether the body supplied education, which was accepted in this case.

The judges considered that the FTT had erred in failing to give proper consideration to the first and second of these tests, without which the *SFM* factors were irrelevant. HMRC's counsel's attack on the conclusions about the relationship between the bodies were well-founded: the status of "associate college" fell below the statutory requirement for a "college of a university". HMRC's appeal was allowed; submissions were invited on the possible consequences of the decision, in particular the action that the UT should take in relation to penalties.

The college appealed to the Court of Appeal (2017), which noted that there were several grounds of appeal, but in particular the UT gave leave in order for the CA to consider the meaning of "college of a university". Patten LJ started with an examination of that expression. In his view, when it was originally used in the FA 1972, it was relatively clear that it referred to the particular traditional collegiate structures of Oxford, Cambridge and Durham universities; he did not accept the college's contention that there had been an intentional widening of the scope of the provision in a minor change of the wording when the VATA 1994 was enacted. However, member states had the power to recognise "organisations with similar objects" under art.132 PVD, so the question was whether the appellant fell within that category. The Court of Appeal had considered the UK statute in some detail in *C&E v University of Leicester Students Union* (2001), and had concluded that the key factor in being "of a university" was that the other entities listed – "colleges, schools, halls, institutions" – had to be part of the university, rather than separate from it (as the union was).

The judge considered the various precedents listed above, and commented that *SFM* appeared to be much more open-ended than the *Leicester*

Students Union decision that was issued at around the same time. In his view: "in order to succeed, it must establish that it is what Peter Gibson LJ described in the *Leicester University* case as part of the university in the sense of being a constituent part of the university with all the rights and privileges for its students and other members which that entails. Inherent in that concept is the need to demonstrate some legal relationship between the university and college which establishes and confirms the status of the latter."

The judge examined the facts and the decisions of the two lower Tribunals in detail. His conclusion was that the "special relationship" between SAE and MU was not enough to satisfy what he described as the "harder-edged test" that he considered was required by the law. He clearly considered that *SFM* had been wrongly decided, and had therefore led the later Tribunals into consideration of factors that were not particularly relevant.

The grounds of appeal included the argument that making the exemption dependent on the university recognising the "college" as such introduced a subjective element and therefore contravened the principle of legal certainty. The judge did not agree: this was not a test on its own, as expressed by Judge Bishopp in the Upper Tribunal, but rather an indication that, as a matter of fact, the relationship between the two bodies was not close enough.

The appeal also attacked the UT for overturning a decision of fact based on a multifactorial assessment. The judge held that the FTT had applied the wrong tests, and therefore its conclusion based on those tests could not stand.

Black LJ and Sales LJ agreed, and the appeal was dismissed.

Supreme Court

The company appealed again to the Supreme Court, where the leading judgment was given by Lord Kitchin. He set out the history of the dispute and the main precedent cases, and summarised the law and the decisions below, noting the differences of approach to the key questions adopted by the FTT, UT and CA.

He went on to consider the correct approach to the interpretation of Note 1(b). This was subject to the general principles that exemptions must be narrowly construed, but must not be deprived of their meaning and effect. It was clear that Member States have some discretion over the bodies that they recognise as having educational aims, and may do so for commercial organisations as well as non-profit bodies; however, where they recognise a private commercial organisation as qualifying for exemption, they have to consider its objects.

He then noted the fact that over 100 bodies are entitled to use the legally protected title of "university" in the UK, and briefly outlined the different structures that exist, in particular in relation to the relationship between the "university" and "colleges".

He set out what he considered to be the key factors in interpreting Note 1(b):

- any college of a university, as an eligible body, must provide education;

- as a university can be recognised even if it is run for profit, the expression "college of a university" must be interpreted in the same way;
- there is nothing in the Note or in the broader context which requires the "constituent part" test applied by the CA – if that were right, it would effectively exclude all commercial providers, and that would run contrary to the decision by Parliament not to restrict the scope of the exemption;
- fourthly, the appropriate considerations were the characteristics of the educational services and the context in which they were delivered, rather than the precise nature of the legal and constitutional relationship between the body that provides them and the university.

If a college satisfied the "constitutional or structural" test, it would almost certainly be regarded as a college of the university; however, the converse was not necessarily true. The judge considered that the "integration" test explained in *SFM* and applied by the FTT was essentially correct. The presence of a foundation or constitutional document or some other legal relationship establishing the college as a constituent part of the university in a constitutional or structural sense will be sufficient to prove that it is a college of the university within the meaning of Note 1(b), save in an exceptional case. But that is not a necessary condition. In assessing whether a body is a college of a university the following five questions are also likely to be highly relevant:

(i) whether they have a common understanding that the body is a college of the university;

(ii) whether the body can enrol or matriculate students as students of the university;

(iii) whether those students are generally treated as students of the university during the course of their period of study;

(iv) whether the body provides courses of study which are approved by the university; and

(v) whether the body can in due course present its students for examination for a degree from the university.

The judge also listed some of the *SFM* factors that he considered less relevant.

He analysed the decisions of the UT and CA and set out why he disagreed with them, in particular Patten J's apparent focus on the structures of Oxford and Cambridge Universities and reliance on the 1988 Education Reform Act, which was not relevant in construing VAT law. He concluded that the FTT had applied the right test and come to the right answer, and the UT and CA had fallen into error.

The appeal was unanimously allowed by the Supreme Court.

Supreme Court: *SAE Education Ltd v HMRC*

2.3.4 More education

A German company operated a driving school, training in particular people hoping to obtain a category B or C1 licence (B allows the driver to drive vehicles up to 3.5 tonnes and C1 allows up to 7.5 tonnes). In a dispute with the tax authorities, it claimed the benefit of the exemption in PVD art.132(1)(j). Questions were referred to the CJEU, after the German court considered that the services might fall within "school or university education" but the entity would not satisfy the extra conditions of "having similar objects to bodies governed by public law".

The court noted that "school or university education" was an EU-wide concept that referred to an integrated system for the transfer of knowledge and skills covering a wide and diversified set of subjects. Even if it covered a range of practical and theoretical knowledge, driving tuition concentrating on these types of licence was specialised tuition which did not fit the definition. The exemption could not apply because of the subject matter, rather than because of the nature of the entity providing it.

CJEU (Case C-449/17): *A & G Fahrschul-Akademie GmbH v Finanzamt Wolfenbüttel*

2.3.5 Welfare services

The Upper Tribunal has considered together the appeals by HMRC in two related cases on the welfare exemption.

L.I.F.E. Services Ltd

In TC05197, the First-Tier Tribunal considered a non-profit limited company that provided day care services for adults with a broad spectrum of disabilities, principally learning problems. Its clients included those with severe autism, Down's syndrome, severe behavioural difficulties, learning disabilities, and Crohn's disease. The company provided its services under a formal care plan agreed with the social services department of Gloucestershire County Council, and was approved and registered to provide these services by the council. About 50% of the appellant's services were supplied to individuals in residential homes, 25% were paid for by individuals or their carers out of the personal budgets paid to them by the council, and 25% were paid for directly by the local authority.

The issue before the Tribunal was whether the company qualified for exemption of its welfare services under Sch.9 Group 7 item 9 as a "state-regulated private welfare institution or agency". Note 8 provides that "state-regulated" means "approved, licensed, registered or exempted from registration by any Minister or other authority pursuant to a provision of a public general Act, other than a provision that is capable of being brought into effect at different times in relation to different local authority areas." The company believed that it qualified because it was exempted from registration under the Health and Social Care Act 2008.

In the first of two hearings, the Tribunal concluded that this was not the case. The company was not subject to a requirement to be registered, which meant it could not be exempted from registration. The expression "exempt from registration" referred to certain bodies that fell within the Act but, owing to the specific services they provided, were explicitly exempted from the requirement. This company fell within a class of

entities that “may” be registered, but it was not required to be. This meant that the services were not exempt under VATA 1994.

The Tribunal then turned to the Directive, noting that art.132 has two provisions that refer to welfare:

(g) the supply of services and goods closely linked to welfare and social security work, including those supplied by old people's homes, by bodies governed by public law or by other bodies recognised by the Member States concerned as being devoted to social welfare;

(h) the supply of services and goods closely linked to the protection of children and young persons by bodies governed by public law or by other organisations recognised by the Member State concerned as being devoted to social welfare;

Art.133 permits member states to make the granting of exemption under certain paragraphs of art.132, which include para.(g), to bodies other than those governed by public law subject to one of four conditions (one of which is that the supplier be non profit making). Art.134 provides that a supply shall not be granted exemption within, among other paragraphs, (g) if it is not essential to the transaction exempted, or where the basic purpose of the supply is to obtain additional income through transactions in competition with commercial enterprises.

On this basis, the company advanced an argument that the UK law breached fiscal neutrality by exempting all welfare supplies provided by charities, but restricting identical welfare supplies provided by non-profit bodies such as the appellant.

The Tribunal noted that where the supply was made to the local authority, there would be no issue of fiscal neutrality, because the authority could claim the VAT back under s.33. This was the case even if the authority failed to do so, or failed to adjust the budget allocated to the company in order to allow for the recovery. The issue was with the other 75% of the company’s supplies.

The Tribunal considered the CJEU precedents of *Kugler* (Case C-141/00), *Zimmerman* (Case C-174/11) and *Kingscrest* (Case C-498/03) in detail. The PVD had changed the wording of art.132 to extend it to “bodies devoted to social welfare”, whereas the 6th Directive restricted it to “charities”. The UK’s wording in Note 9 breached fiscal neutrality in allowing exemption in this area to any charity, but not to a body such as the appellant company. The company’s appeal was allowed by the FTT.

Upper Tribunal – first hearing

HMRC appealed to the Upper Tribunal. The company sought to introduce two new grounds of appeal, one adding the Care Act 2014 as a relevant regulation to which it was subject, and the other relying on Judge Mosedale’s decision in *The Learning Centre (Romford) Ltd* (discussed below) that the welfare rules breached fiscal neutrality because of different regulatory environments in different parts of the UK. HMRC did not object to the first of these arguments being introduced, but did object to the second; the UT agreed that arguments about the devolution issue should be deferred to when HMRC’s appeal in the other case was heard by the UT.

HMRC's grounds for appeal involved criticism of the FTT's approach to the application of art.132(1)(g) PVD and also the FTT's application of fiscal neutrality, extending to the possibility of giving Group 7 item 9 a conforming construction.

The UT agreed with HMRC's argument that not all charities could benefit from the exemption at item 9. The wording did not imply that all charities were regarded as "bodies devoted to social well-being": only those charities with relevant objects could supply welfare services, and only those charities would fall within the exemption at item 9.

The UT also agreed with what appeared to be a contradictory alternative argument, that actually all charities are devoted to social welfare in the required sense (regardless of their objects) because of the overriding requirement for charities to confer a public benefit. The expression "devoted to social well-being" should be given a wide meaning. The UT considered that the first alternative was probably the better one, but either succeeded for HMRC.

The next question was whether there was a breach of fiscal neutrality in denying the exemption to non-charities and extending it to all charities. Based on CJEU precedents in *Kingscrest* and *Zimmermann*, the UT concluded that basing the exemption on either regulation or charitable status was within the margin of discretion allowed to member states – both were rational criteria for determining the scope of art.132(1)(g). This meant that there was no need to apply a conforming construction of the law, because the law conformed to the PVD anyway.

Lastly, the UT went on to consider whether the company could be regarded as "state regulated" under the requirements of the Care Act 2014. This permits a local authority to delegate some of its functions in caring for vulnerable people; there is a requirement for the local authority to carry out due diligence on the delegate and to monitor and inspect their operations. The UT did not think this went far enough to constitute "approval" within Note 8 of Group 7.

HMRC's appeal was allowed, subject to a further hearing to consider the "devolved nations" issue.

The Learning Centre (Romford) Ltd ('TLC')

In TC05946 (between the FTT and UT hearings in the above case), Judge Barbara Mosedale had to consider an appeal by a company that provided day-care to vulnerable adults. The company had applied in August 2014 to be deregistered with retrospective effect from 1 September 2009 on the grounds that its supplies were exempt. The application was refused, ostensibly because the company was not below the deregistration threshold. This clearly ignored the point of the application, and is described as "inept" by the judge. However, the appeal was about the underlying liability issue, rather than the inadequacy of the decision.

HMRC accepted that the company provided "welfare services", but not that it was a state-regulated entity. It therefore failed to qualify for exemption under Sch.9 Group 7 item 9 and note 6. The company argued that the requirement that all its staff should have a disclosure and barring service check ('DBS' check) (also known by its old title of the Criminal Records Bureau or CRB check) constituted the requisite state regulation.

It also had to comply with a number of other health and safety and employment law requirements.

Judge Mosedale considered the nature of these various requirements and what appeared to be required by note 6. She concluded that the company was not state-regulated within item 9. However, she went on to consider whether it was exempt within art.132(1)(g) PVD, which covers "the supply of services... by bodies governed by public law or by other bodies recognised by the Member State concerned as being devoted to social wellbeing". She summarised the taxpayer's representative's arguments in this regard as follows:

(a) EU law gave exemption to bodies 'recognised' and not merely 'regulated' by the UK;

(b) There was (said Mr McNicholas) a major widening of the scope of the exemption in the PVD from the 6VD and UK law had failed to recognise this as Group 7 Item 9 had not been amended when the PVD came into effect;

(c) The UK exercised its discretion improperly when implementing Art 132(1)(g) in not recognising TLC as TLC was largely state-funded;

(d) The appellant was in direct competition with LB Havering whose supplies were exempt and that meant the UK had breached fiscal neutrality in its implementation of Art 132(1)(g);

(e) Bodies located in Scotland and Northern Ireland making identical supplies to the appellant were granted exemption so there was a further breach of fiscal neutrality by the UK in its implementation of Art 132(1)(g);

(f) There was also a breach of fiscal neutrality for the reason stated in Life Services Ltd in relation to the exemption for charities.

As regards (a), Judge Mosedale did not agree that "recognised" was as wide in its meaning as the taxpayer contended. It appeared to her to afford some discretion to the Member State. She also rejected the argument (b) that the change of wording in the PVD required the UK to change the wording of item 9. She further rejected argument (c) that effectively all state-funded welfare should be treated as "recognised" for the purposes of the exemption. As regards (d), she noted that the CJEU had recognised that there were inherent differences between private welfare institutions and public authorities, so although possibly the UK should have considered the question of fiscal neutrality in exempting local authority welfare supplies and not those of bodies like the appellant, it was not incompatible with the Directive.

However, when she turned to (e), Judge Mosedale found for the company. She examined the proposition in considerable detail, including attempted refutation of the argument by HMRC's representative. In her view, a Member State has some discretion on which bodies it recognises for the purposes of the welfare exemption, but it cannot directly or indirectly recognise a body in one part of the State and not recognise an identical body in another region. That was the effect of devolution: the devolved powers in Scotland and Northern Ireland required companies such as the appellant to be regulated, so their supplies would be exempt. HMRC argued that the law was the same throughout the UK – regulated bodies

were exempt and unregulated bodies were not – but Judge Mosedale ruled that the indirect effect of the combination of devolution and the VAT law was incompatible with the PVD. She considered this to be clear in the law and in the CJEU precedent of *Zimmerman* (Case C-174/11), so she declined to make a reference to the CJEU.

Having decided in favour of the appellant in respect of (e), the judge did not need to rule on (f) as well. However, she did consider the argument, and concluded that it would also succeed – if all charities qualified for exemption whether or not they were state regulated, but commercial entities had to be state regulated, the principle of fiscal neutrality was breached. The appellant would not need to show that failing to regulate charities actually put it at a competitive disadvantage: it would be a question of principle.

The appeal only concerned whether the supplies were exempt. The judge was not addressed on the date from which exemption should apply, the date from which the company should be deregistered (presumably from the date that it was first registered) or the amount of VAT that should be repaid to it. If the parties could not agree on these questions, they would have to return to the Tribunal for a further hearing.

Finally, the judge commented that, had the supplies been properly standard rated, there would have been a further question about the recipient of that supply – where the funding came from the local authority, it might claim VAT back under s.33. However, she was not addressed on this issue, and she made no ruling on it.

The FTT therefore allowed this company's appeal as well.

Upper Tribunal – second hearing

The two appeals were considered together by the Upper Tribunal (Mr Justice Nugee and Judge Timothy Herrington). The issues were the outstanding consideration of the "devolved nations" issue from the first case and the whole of HMRC's appeal in the second.

The Upper Tribunal summarised the facts and the background to the disputes, as well as the FTT decisions in both cases, before turning to HMRC's grounds of appeal. These were:

- item 9 did not cause differing treatment: across the whole of the UK, regulated services were exempt and unregulated ones were not;
- there is a clear distinction between regulated services and unregulated ones, so there is no discrimination between similar services;
- EU law is "not insensitive to Member States' internal constitutions" so the UK was entitled to acknowledge its own devolved system in implementing art.132(1)(g).

TLC's counsel went through the history of the legislation. It was agreed that there was no difference between the situation in the different parts of the UK when the current rules on state regulation were introduced in 2002. The UT then reviewed the CJEU precedents in *Kugler*, *Kingscrest* and *Zimmermann*.

Turning to HMRC's grounds of appeal, the UT noted that art.132(1)(g) gave Member States some discretion in deciding what was "recognised"

for the purposes of the exemption. The judges accepted HMRC's argument that this had been properly exercised in 2002 when the rule was introduced. The subsequent decisions by the Scottish Parliament and the Northern Ireland Assembly to introduce regulation in their respective parts of the UK could not change the correctness of the VAT law. If it did, the devolved assemblies could effectively require the national government to introduce parallel systems in the rest of the UK or change the VAT law, which could not be right. The judges stated that "it is inevitable in a devolved system that in certain matters the devolved nations will diverge; in our judgment that does not mean that VAT rules that apply uniformly across the entire UK are themselves invalid for breach of the principles of fiscal neutrality".

Upper Tribunal: *HMRC v The Learning Centre (Romford) Ltd; HMRC v L.I.F.E. Services Ltd*

2.4 Zero-rating

2.4.1 Beverages?

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

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

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

The Tribunal heard witness statements from the owner of the business, two customers, and an officer of HMRC, as well as examining a "brief bundle" of documents and tasting the products. These were palatable but thick, not easily drunk through a straw and unlikely to be consumed as a casual drink for general refreshment.

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

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

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

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

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

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

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

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

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

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

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

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

The appeal was allowed.

First-Tier Tribunal (TC06874): *The Core (Swindon) Ltd*

2.4.2 Cakes?

In October 2016 a company submitted an error correction notice reclaiming £49,273 of output tax accounted for on one variation of a "raw choc brownie" product. In June 2017 it submitted a further claim for £261,989 in relation to the other three variations. It argued that they should be zero-rated as cakes: they were not sufficiently sweet to constitute confectionery, and similar competing products were zero-rated.

All the products were individually wrapped bars produced by cold compression of ingredients such as dates, cashews, cacao, syrups, concentrated grape juice and brown rice bran. The FTT noted the CA's comment in *Procter & Gamble UK* (2009) that the classification of foodstuffs should be "a practical question calling for a practical answer" and not an "over-elaborate, almost mind-numbing, legal analysis". The approach of the FTT in *Lees of Scotland Ltd & Thomas Tunnock Ltd* (TC03754) was also cited:

- *The test of whether [a product] is a cake is whether it displays "enough of the characteristics of a cake that it should be classified as such".*
- *The words in the statute must be given their ordinary meaning.*
- *If a product has the characteristics of two statutory categories (e.g. cake, confectionery), then it should be placed in that category for which it has sufficient characteristics to qualify.*
- *The test is the view of the ordinary person, informed as to:*
  - *Ingredients;*
  - *Process of manufacture*
  - *Unpackaged appearance (including size)*
  - *Taste and texture;*
  - *Circumstances of consumption (including time, place and manner of consumption);*
  - *Packaging;*
  - *Marketing.*

In addition to the factors identified above the Tribunal also considered (1) shelf life, (2) name/description and (3) "how it behaves" after it is removed from packaging.

The judge (Amanda Brown) examined evidence under each of the above headings to determine the characteristics of the product. She decided that the products did meet the statutory definition of confectionery (sweetened prepared products) even though they were not as sweet as some competing items. The question was then whether they fell within the exception for "cakes". The judge noted the idiosyncrasies of the legislation as illustrated by HMRC's policy on the difference between flapjacks (ZR) and cereal bars (SR). HMRC's internal guidance in the VAT Food manual was not consistent with the case law precedents.

The judge considered the various factors and tried to achieve a balance. She summed up as follows:

"*It is the Tribunal's view that the current state of the law on the taxation of food items is not fit for purpose and will necessarily present apparently anomalous results as tastes and attitudes to eating change. The Tribunal fundamentally disagrees with HMRC's guidance that the borderline between cake and confectionery presents few problems. The lines set and perceived by HMRC in the application of this out of date provision (as recognised by them in their anguished consideration of flapjacks and cereal bars) drives anomalous outcomes.*"

On balance, the products showed enough characteristics of cakes to be so categorised, and the appeal was allowed.

First-Tier Tribunal (TC06909): *Pulsin' Ltd*

2.4.3 Hot takeaways?

A dispute concerned whether various products sold by Eat Ltd should be zero-rated or standard rated in periods up to 2009. HMRC had refused voluntary disclosures in respect of breakfast muffins and grilled ciabatta rolls, and raised an assessment on further sales of the second. The total VAT at issue was over £1.2m. The appeals were stood behind *Sub One*, which was decided by the Court of Appeal in June 2014, but it only came before Judge Aleksander in the FTT in October 2018.

The judge quoted the test set down in *Sub One* for determining whether food was "heated for the purpose of enabling it to be consumed at above the ambient temperature":

"*This approach to the matter searches for the assumed common intention of the supplier and the consumer as to whether it is a term of the bargain that the product be supplied in order to be eaten hot. By this entirely objective enquiry, the court derives the terms of the bargain from what each party to the contract says and does (including the presentation of the supply in the shop and in any advertising).*"

In each case, the products were supplied to the Eat outlets in a condition ("pale and 90% baked") that allowed the outlet to finish the baking on the premises. They were displayed in this condition but not intended for customers to eat without finishing off in the outlet's grill. The products were clearly above the ambient temperature when sold to the customer.

The company's witness stated that the intention was to sell "fresh food" rather than "hot food". However, she also accepted that it was intended that the food should be eaten hot, and it was wrapped in a foil-backed sheet after finishing in order to retain its temperature.

The judge summed up by saying that the appeal was "hopeless". The outlets baked other products (e.g. croissants) and left them to cool; the muffins and ciabatta rolls were clearly intended to be eaten hot. The appeal was dismissed.

The judge criticised the company's advisers for the late submission of a witness statement and notification, two days before the hearing, that one of the witnesses was no longer working for the company and was not willing to be involved in the appeal. This had been known for three months, and more notice should have been given to HMRC and to the Tribunal. He invited HMRC to make an application for costs if they

considered that they had wasted time preparing to respond to a witness who did not appear.

First-Tier Tribunal (TC06953): *Eat Ltd*

2.4.4 Aircraft parts

A company appealed against assessments amounting to £2.38m and £177,000, together with penalties of £389,000. The dispute related to evidence of export or despatch; the company claimed that it had sufficient evidence to satisfy the regulations and the Notice, while HMRC did not agree.

In the alternative, the appellant argued that the supplies were of parts installed in qualifying aircraft, and were therefore zero-rated under VATA 1994 Sch.8 Group 8 para.2A. HMRC ruled that the company did not have enough information at the time of supply to justify zero-rating on that ground.

The judge (Tony Beare) noted puzzling discrepancies between the amounts appearing in the assessments and those in the notices of appeal. The assessments also clearly related to supplies to a number of customers, but the grounds of appeal appeared only to deal with supplies to the Rolls Royce group of companies. HMRC did not take issue with these discrepancies.

The company appealed against the penalty on the grounds that it had not been careless. The assessments were raised in 2015, relating to periods from 2011 to 2014, and were consolidated by the Tribunal in 2016 before finally coming to a hearing in November 2018.

The judge noted that the issues in relation to the assessments were whether the company either had the required evidence at the time of supply or within the three-month following period specified by Notice 725, and whether the supplies fell within para.2A. There had been miscommunications and misunderstandings between the parties on the question of export evidence over the years, and at the hearing it was agreed that a further attempt should be made to resolve those differences. That side of the dispute was therefore deferred, and a hearing would only be required if the parties could not reach agreement.

The judge turned to the question of installation in qualifying aircraft, which did not cover all of the supplies leading to the assessment. The law refers to "the supply of parts and equipment, of a kind ordinarily installed or incorporated in, and to be installed or incorporated in" aircraft that satisfy one of two conditions: either they are used by an airline operating for reward chiefly on international routes, or they are non-pleasure aircraft weighing at least 8,000kg.

The judge was referred to precedents such as *Collee* and *Mecsek-Gabona*, supporting the contention that exemptions should depend on the substantive rather than the formal conditions for the relief, and *A Oy*, which considered the meaning of "operating for reward chiefly on international routes". He analysed Notice 744C in some detail, noting that some of the guidance did not accurately reflect the legislation.

He then considered the evidence, which included "the internet" (for information about aircraft and airlines), documentation relating to the

supplies, and witness evidence. The witness explained that parts in the aircraft industry are usually specialised and tracked throughout the chain of supply. Although the company had not initially claimed zero-rating under para.2A, that was not because it was unaware of the intended use of the parts; it was because it was not aware of the definition or relevance of "qualifying aircraft".

The judge had to consider a number of submissions on questions of law in detail. The main issues of law arising were:

- whether HMRC were entitled, as a matter of correct procedure, to raise only in cross-examination certain arguments about the deficiency of confirmations of use obtained from customers, when these had not been itemised in the statement of case;
- whether it was necessary for the appellant to be certain of the use of the goods at the time of supply for para.2A to apply, if no valid confirmation had been obtained;
- whether it was necessary for the appellant to be aware of the concept of "qualifying aircraft" at the time of supply for para.2A to apply, if no valid confirmation had been obtained;
- whether, on the balance of probabilities and the outcome of the above considerations, each of the supplies fell within para.2A.

There were also questions of fact about whether the parts were to be installed or incorporated in a qualifying aircraft. The problem was that the parts were incorporated in engines that might be fitted to different aircraft operated by different airlines. The judge commented that the company appeared to have used its own confirmation form rather than the standard suggested by Notice 744C, and had sent it to customers with a "downright confusing" e-mail, and this had contributed to much of the disagreement between the parties.

The judge examined the evidence of facts available in respect of different parts supplied for different engines to different customers, and came to a variety of conclusions. There was a possibility that the parts might not be installed in qualifying aircraft, but in a number of cases that possibility was remote. However, in some cases there was no confirmation and therefore no evidence to justify zero-rating.

Turning to the questions of law, the judge decided that HMRC had not been in breach of the rules in only raising their criticisms of the confirmations at the hearing. The expression "to be installed" in para.2A suggested that certainty was required, with no "de minimis" exception. Although remote possibilities may sometimes be ignored in law, the judge preferred HMRC's view. After all, the confirmation suggested by Notice 744C gave a supplier a satisfactory and proportionate way of ensuring that the condition would be met.

In spite of that, it was not necessary for the appellant to have known at the time of supply that para.2A would be satisfied. It was enough that it knew the type of aircraft in which the parts would be installed, and subsequently discovered that those aircraft were qualifying aircraft.

This enabled the judge to find that certain supplies, that were for particular types of aircraft (Airbus A320, A330, A380 and A400M, and Boeing 787) qualified for zero-rating. In respect of the other supplies,

there was insufficient evidence, and the conditions for zero-rating were therefore not met.

The financial effect of this decision is not set out by the Tribunal. Presumably there will be a further discussion to see whether any of the supplies that did not satisfy para.2A could still be zero-rated as exports.

First-Tier Tribunal (TC06939): *McBraida plc*

2.4.5 Designed for handicapped persons

HMRC raised assessments of £122,543 and £53,246 on a company on the grounds that it had incorrectly zero-rated sales of two products that it considered qualified under Item 2(g) Group 12 Sch.8 VATA 1994. There were other items on the assessment that were not disputed by the company.

The Tribunal examined the history of the development of the products, which operated by electrical muscle stimulation to the legs and were aimed at people with osteoarthritis in their knees and other chronic mobility problems. The judge noted that there was no dispute that the products were "equipment or appliances" and that they had been supplied to "disabled persons for their personal use". The only question was therefore whether they were "designed solely for use by a disabled person".

Judge Amanda Brown commented that the company relied only on compliance with HMRC's published guidance; HMRC relied on a number of precedent cases, but had only provided ("disappointingly") one-paragraph summaries of all but one of these decisions. She said that "*HMRC essentially left this Tribunal to find and read the judgments to which they and Judge Reid referred* [in the *Pure Independence (UK) Ltd* case that was reproduced at length]. *This the Tribunal has done.*"

The approach adopted in earlier cases was to consider "(i) the identification of the designer and his intention; (ii) the function, purpose and actual uses of the finished article; (iii) any advertising and promotional literature and the market in which the product is supplied and its cost; and (iv) the availability and similar products and their comparative cost." The subjective intention of the designer, which may be self-serving, will be relevant but must be tested by reference to all the available documentary material. In this context the advertising/marketing material will be relevant, but technical documentation about product development will be even more significant.

The basic difference between the parties was that the company accepted that its products could be used by a wider population but that they were intended for disabled persons; HMRC believed that "designed solely" required a very narrow interpretation and excluded products with a wider application.

The judge sided with the company. Working through the factors identified above, she was satisfied that the company was the designer and clearly had the stated intention of making something aimed at disabled people. The products were used consistently with their planned function and purpose, and marketed to disabled persons, while recognising the possibility of use by a wider population. No comparable products had

been cited in evidence so no conclusion could be drawn on the fourth criterion.

The appeal was allowed.

First-Tier Tribunal (TC07005): *Actegy Ltd*

2.4.6 Updated Notices

HMRC have updated their Notice *Adapted motor vehicles for disabled people and charities* from the March 2017 version with only minor changes. Following a review and a public consultation over the VAT treatment of adapted motor vehicles by HMRC, a number of changes were made to the legislation with effect from 1 April 2017. These are:

- the introduction of a limit on the number of vehicles that can be purchased under the relief, with an eligible individual now being able to purchase only one vehicle that meets the qualifying conditions every 3 years;
- making customer eligibility declaration forms mandatory;
- making it mandatory for suppliers to send HMRC information about their zero rate supplies;
- the introduction of a penalty that will apply to any person that provides an incorrect customer eligibility declaration form.

Notice 1002

HMRC have updated their Notice *VAT reliefs for disabled and older people* from the December 2014 version with more information about zero-rating for computers and other electronic devices when sold as part of assistive technology systems. It expands on the reliefs available under VATA 1994 Sch.8 Group 12 and Sch.7A Group 10.

Notice 701/7

2.5 Lower rate

Nothing to report.

2.6 Computational matters

Nothing to report.

2.7 Discounts, rebates and gifts

2.7.1 Adjustments in the course of business

HMRC are consulting until 15 April 2019 on draft amending regulations making changes to the VAT rules on accounting for output tax adjustments following retrospective price reductions. The changes introduce new time limits within which businesses must adjust their VAT returns and send credit notes to customers. The government announced at Budget 2018 (in October 2018) its intention to introduce these changes from 1 September 2019.

The draft regulation inserts a new regulation 15C into SI 1995/2518, setting new rules for amending documents; new regulations 24A, 24B and 24C providing definitions; and a new reg.38(1ZA) requiring that adjustments under reg.38 are only made on the basis of the appropriate paperwork.

The main point appears to be in reg.15C, which requires the amending document to be issued within 14 days of when the consideration is adjusted. This in turn requires there to be a particular time at which consideration is adjusted, which may therefore imply a positive agreement between the parties. The need for this has been called into question in some Tribunal decisions in recent years.

A draft Tax Information and Impact Note states that the purpose is to restrict the use of reg.38 adjustments to circumstances in which there has been a genuine price reduction, and money has been refunded to the customer. It goes on to say that there is current litigation in progress about what is seen as improper use of reg.38 (which has no time limit) to recover output tax in circumstances when HMRC believe that the four-year cap in s.80 VATA 1994 should apply.

www.gov.uk/government/consultations/amendment-to-vat-regulation-38-statutory-instrument-technical-consultation

2.8 Compound and multiple

2.8.1 Books and courses

A further legal argument in the *Metropolitan International Schools* case has been considered by the Court of Appeal. In brief summary:

- in 2000, the taxpayer had agreed with HMRC a method of apportioning its sales between standard rated education and zero-rated printed matter;
- in 2009, HMRC notified the taxpayer that the view of the correct treatment had changed, and a retrospective assessment going back to 2006 would be raised;
- the company applied for judicial review, and also appealed on technical grounds to the FTT;

- the FTT found that there was a single zero-rated supply of printed matter, but that decision was overturned by the UT.

The company now made a further appeal to the Court of Appeal, arguing that the UT had been wrong to dismiss an argument it raised in relation to legitimate expectation.

The ground of appeal was that the UT had misunderstood the curious provision in VATA 1994 s.84(10), which allows the FTT to consider an appeal in relation to a matter that is not within s.83. It provides: “Where an appeal is against an HMRC decision which depended upon a prior decision taken in relation to the appellant, the fact that the prior decision is not within section 83 shall not prevent the tribunal from allowing the appeal on the ground that it would have allowed an appeal against the prior decision.”

The company argued that HMRC had taken a “prior decision” that no transitional period would be allowed for the run-off of existing contracts before the new liability decision would be imposed, and the FTT should therefore have been allowed to consider whether this was fair.

The CA did not agree that this is what the subsection means. It was inserted in response to a particular case (*JH Corbitt (Numismatics) Ltd*) in which HMRC had decided that the taxpayer’s records were insufficient to justify use of the margin scheme; this was a necessary precursor to raising an assessment based on the normal rules of VAT. The decision about the adequacy of the records would fall within HMRC’s discretion, and it was not in itself appealable. What is now s.84(10) would allow the FTT to overturn the assessment (the second decision) on the basis that it does not agree with the first decision.

That is of very limited application. The CA considered that it required there to be a “prior decision” on which the second decision “depended”. That meant that the second decision could not have been taken but for the first decision, in the sense that it was a “necessary legal precursor” to the second. In the present case, there was no separate or necessary decision that the school was not entitled to a transitional period. There was simply an assessment. Any argument about fairness would have to be considered in a judicial review claim, and not by the FTT. To interpret the provision otherwise would make it possible to argue about legitimate expectations in the FTT in most circumstances, which was contrary to the decision of the UT in *Noor*.

The company’s appeal was dismissed.

Court of Appeal: *Metropolitan International Schools Ltd v HMRC*

2.9 *Agency*

2.9.1 Taxi firm

In December 2017 HMRC assessed a taxi firm operator for the period from 1 March 2009 to 16 August 2016 and issued a late registration penalty. He appealed, contending that he had been below the registration threshold. The penalty assessment was withdrawn before the hearing; the trader had made no returns for the period, which would rule out a hearing of an appeal against the assessment, but the Tribunal had jurisdiction to consider the decision on registration.

The question was whether the appellant acted as an agent for taxi drivers in arranging contract work for local authorities and government departments, or acted as a principal, making the supply himself for the gross consideration.

There was a written contract between the operator and the drivers that the Tribunal found was in use during the period, and reflected the way in which the business operated. The operator negotiated contracts with the local authority, then found a driver to fulfil them; in general, drivers who owned their own cars would receive 90% of the gross consideration, while drivers whose cars belonged to the operator would receive 40%.

The judge (Charles Hellier) said that there were two ways of looking at the question of what taxable supplies the firm made. The first is to look at the nature of the obligations undertaken by the parties: whether the firm undertook to procure services for the customer or merely undertook to introduce a driver who would undertake the service; and the second is to examine what the consideration was paid for. He referred to *Tolsma* and *Newey* as relevant precedents.

HMRC’s representative put forward the following pointers towards the conclusion that the appellant acted as a principal:

(1) he owned and maintained the vehicles;

(2) the running costs of the contract work were born by him;

(3) the contracts were negotiated by him;

(4) he received monies and then paid the drivers;

(5) the cars bore his logo;

(6) he kept records of the contract work;

(7) the price paid to the drivers for the contract work was set;

(8) he held the relevant operator’s licence.

In response, the taxpayer’s representatives pointed to the following factors as indicating an agency relationship:

(1) the non-owner drivers had free use of the vehicles and kept them at home – they paid for that use by surrendering some of the fee they earned from the local authorities;

(2) the precise level of fee retained by the driver was set by negotiation with the appellant;

(3) the risk of bad debts fell on both the operator and the driver;

(4) the signs affixed to the vehicles were removable;

(5) the operator exercised no control over the use of the vehicles outside contract work;

(6) drivers could set their own fees for other work.

They relied on *Lafferty* (TC03493) and *Mahmood* (TC05358) in which taxi operators had been held to act as agents. The Tribunal examined these two cases and observed significant differences between the present situation and the points held to be significant there – in particular, the burden of bad debts fell entirely on the drivers in *Lafferty*, and in *Mahmood* there was no significant difference between cash business (where HMRC had accepted that the operator acted as agent) and account business.

The main problem, though, was that the operator accepted contracts with the customers before identifying a driver. It was therefore difficult to sustain the argument that there was a contract between the customer and the driver that was merely being arranged by the operator. He agreed to supply services to the customer, and then engaged a driver to fulfil his obligation.

The appeal against registration was dismissed.

First-Tier Tribunal (TC06963): *Bryn Williams*

2.9.2 Exit regulations

The raft of Brexit regulations referred to in section 4.3 includes *The Value Added Tax (Tour Operators) (Amendment) (EU Exit) Regulations 2019.* These regulations make changes to the TOMS, ensuring that when the UK leaves the EU, tour operators will continue to account for VAT under a modified version of the scheme which extends the scope of the zero rate to the margin on all travel services enjoyed outside the UK.

SI 2019/73

2.9.3 Updated Notice

HMRC have updated their Notice *Tour operators margin scheme* to reflect their revised treatment of forfeited deposits and cancellation fees with effect from 1 March 2019.

Notice 709/5

2.10 Second hand goods

Nothing to report.

2.11 *Charities and clubs*

2.11.1 Guidance

HMRC have updated their Notice *How VAT affects charities* from the October 2014 version with revised HMRC contact information for charities and community amateur sports clubs.

Notice 701/1

HMRC also updated their online guidance *Charities: HMRC guidance notes on how the tax system operates*, which mainly deals with direct tax obligations and reliefs, but also gives information about VAT obligations and reliefs where relevant. The main change in January 2019 appears to relate to Gift Aid, where there are limits on benefits that a donor can receive and still qualify for the income tax relief. It is important for charities to notify the donor that there is a split between a donation and a payment in return for the benefit. The point is also likely to be relevant in determining whether the transaction involves a supply for consideration by the charity.

www.gov.uk/government/collections/charities-and-community-amateur-sports-clubs-forms

2.12 *Other supply problems*

2.12.1 Open market value

A group of investment management companies included two separate VAT group registrations. One of these groups provided management services to the other; it was intended that these were charged at an arm's length price in accordance with direct tax transfer pricing principles. The supplier group deducted input tax on all its costs on the basis that it was making taxable supplies of management services, although it made no taxable supplies to any third parties.

Following a visit to the supplier group, HMRC formed a view that it was not entitled to deduct all its input tax, and raised an assessment. They subsequently also raised an open market value direction under VATA 1994 Sch.6 para.1 in relation to the supplies of management services, charging additional output tax (which the other group would not be entitled to recover).

Following the CJEU decision in *Larentia + Minerva*, HMRC decided that the output tax assessments were its "preferred" assessments, while the input tax assessments were maintained as "alternative assessments".

HMRC's statement of case put forward the proposition that "open market value" in VATA 1994 s.19 and PVD art.72 is not the same as "an arm's length price" for transfer pricing purposes. OECD guidelines should therefore not be relevant in determining whether the direction was appropriate. Not all EU Member States are members of OECD, and the concept had to be an autonomous EU legal concept that could not be determined by reference to external guidelines.

HMRC went on to argue that there could not be a comparable service for determining the OMV in accordance with art.72; it was therefore necessary to assume that a supplier acting at arm's length would charge an amount at least equal to the full cost of providing the service.

HMRC applied to the Tribunal for a procedural direction that the question of whether OECD guidelines were relevant should be considered as a preliminary matter, before proceeding to the rest of the argument. Judge Greg Sinfield noted that the UT had set out the principles for determining whether a matter should be considered as a preliminary issue in the 2015 case *Wrottesley v HMRC*. Those conditions were clearly not met here, because the supposed preliminary matter would not be a "knockout blow" to either party.

HMRC sought to "clarify" their application as a request for a case management hearing about the admissibility of evidence, rather than a hearing to determine a preliminary issue. This was a surprise to the appellant, and the judge agreed that the application could not reasonably be interpreted in that way. The judge expressed dissatisfaction with HMRC's failure to clarify its application in advance, or possibly to withdraw it and resubmit a revised version.

The judge did not consider that a preliminary issue hearing would lead to any overall saving in time; there would be a danger that the preliminary issue could be referred to the CJEU, leading to a very long delay before the substantive hearing. The application was refused, and the parties were encouraged to draw up a list of agreed issues to be considered at the substantive hearing.

First-Tier Tribunal (TC06942): *Jupiter Asset Management Group Ltd*

2.12.2 Personal contract purchases

HMRC has revised its view of supplies involving personal contract purchases, following the CJEU decision in *Mercedes Benz Financial Services* (Case C-164/16). These contracts may now be treated as single supplies of taxable leasing services, depending on the level of the final optional payment. A payment set at or above the anticipated market value of the goods at the end of the contract will indicate leasing, with VAT due on the value of each instalment. A payment below market value is likely to be a supply of goods, with VAT due in full at the outset, and a separate exempt supply of finance. Businesses must adopt the correct treatment for all new contracts after 1 June 2019.

HMRC distinguish this situation from "HP with a balloon payment". They say:

"Many businesses offer HP contracts where the final instalment is a substantive amount ('balloon' payments), similar to those in PCP contracts, however the final instalment is not optional under HP contracts. Such agreements normally have a much lower option fee to acquire the asset which is payable immediately after (effectively at the same time as) the balloon payment. Where the option fee is clearly below the anticipated market value of the asset these supplies are not affected by the MBFS ruling, regardless of the level at which the balloon payment is set."

In considering the appropriate treatment, HMRC will generally accept that the optional payment is set below the anticipated market value if it is

below the value expected based on historical depreciation rates in immediately preceding years for the same or similar assets, such as the same model of car. Businesses must maintain, as part of their business and accounting records, evidence which demonstrates how they have arrived at the figures they have used.

HMRC give the usual advice about correcting past periods where there is a change in policy resulting from a defeat for the department in litigation. Taxpayers who have accounted for VAT in accordance with HMRC's view (treating these contracts as supplies of goods) may make an adjustment to past returns if they wish to, but they do not have to.

The note is unusually complex, because there are a number of different possible ways in which people could have made mistakes in the accounting. For example, if a PCP contract is to be treated as services and VAT is accounted for only on instalments received, it has to be fully taxable (no exempt finance). So corrections must also be consistent and logical.

Revenue & Customs Brief 1/2019

HMRC have included in an updated *General VAT Guide* their view that hire purchase contracts are agreements for the sale of goods if the option fee payable at the end of the contract is small.

Notice 700

2.12.3 Updated Notice

HMRC have updated their Notice *Sponsorship* from the March 2002 version with a new section on crowdfunding and other general improvements.

Notice 701/41

3. LAND AND PROPERTY

3.1 Exemption

3.1.1 Clawback charge

Balhousie Holdings Ltd (BH) operated some 25 care homes in the north-east of Scotland and was registered as a VAT group with subsidiaries that carried on related activities. The dispute in the First-Tier Tribunal (TC05131) related to a sale-and-leaseback arrangement in which a care home, constructed under the zero-rating provisions for RRP properties, was transferred to a Real Estate Investment Trust (REIT). HMRC considered that this triggered the self-supply charge on a change of use – described as “potentially business ending” by the company’s accountants.

BH argued that it did not fall within the legislation because it had not disposed of its “entire interest” in the property, as required by para.36(2). The sale of the property was inextricably linked to the leaseback. It was clear that BH would continue to use the building for residential purposes after the transactions, so the “mischief” that the legislation was aimed at had not occurred.

HMRC responded that the sale transaction was the “first grant of a major interest” by BH. It could not qualify for zero-rating because the grantee was not going to use it for a RRP; it was going to lease it back to BH. The transaction was therefore exempt, and that triggered the self-supply charge in Sch.10. It was necessary to look at each transaction separately, so it was not permissible to consider the sale and leaseback as part of a single whole.

There were references to numerous precedents from different taxes and legal contexts; to Notice 708, with each side putting a different slant on what the guidance meant and was supposed to mean; and to Hansard, with each side trying to discern the intention of Parliament when Sch.10 was rewritten in its current form.

The FTT considered that the taxpayer’s arguments were stronger. The purpose of the legislation appeared to be to prevent tax avoidance where there was a change in the underlying use of the building, not where there was a funding arrangement such as a sale and leaseback. It was appropriate to interpret the legislation according to what appeared to be its purpose: that required the Tribunal to regard the sale-and-leaseback as a single indivisible whole. In that light, the company had not disposed of its entire interest, and the legislation did not bite. The appeal was allowed.

HMRC appealed to the Upper Tribunal. There was no dispute concerning the facts: the only argument was whether the FTT had been correct in law to look at the transactions together. Lady Wolffe rehearsed the legislation and the factual background, then noted that HMRC had changed their position. They now argued that the “disposal of its entire interest” should be interpreted as involving no more than a comparison of the situation before and after the transaction: if the company did not own “its entire interest” after the transaction, it had disposed of it. It did not matter that it had retained some other interest. This meant that arguments about a “scintilla temporis” (a moment of time) were no longer relevant.

HMRC's representative made some general observations about the transactional nature of VAT. Cases such as *Southern Primary Housing* (2003) and *Robert Gordon's College* (1995) showed that it was necessary to consider individual parts of a composite transaction, and not to regard them as part of a single whole unless one was merely ancillary to the other as in *Card Protection Plan*. She also noted that zero-rating, as an exception to the general rules of VAT, had to be interpreted strictly, and made submissions about the proper approach to the interpretation of the VAT Act and the relevance of its purpose.

HMRC argued that there were four errors of law in the FTT's decision:

(i) the reference to an "entire interest" in paragraph 36(2) of Schedule 10 is to the particular interest in land which was the subject of the initial zero-rated supply;

(ii) a sale of land is a transfer of a party's entire interest in land irrespective of whether a separate interest in that land is obtained as the result of a connected transaction;

(iii) the appellant therefore disposed of its entire interest in the care home when it sold it to the REIT on 8 March 2013; and

(iv) the disposal by the appellant gave rise to a charge to VAT in terms of paragraph 37 of Schedule 10.

The judge set out HMRC's arguments on these points. The company's representative responded with several sources that supported the FTT's conclusion on the purpose of the legislation, including a statement by the Exchequer Secretary in Hansard of 31 January 2011 and RCB 49/2010. A number of alternative scenarios were suggested in which the clawback would not apply, to illustrate the illogicality of applying it in this case.

The judge agreed with HMRC on the authority of the precedents for the proposition that VAT had to consider individual transactions rather than a composite whole. She also rejected the supposed explanations of the purpose of the provision as "uninformative".

After detailed consideration of all the arguments, the judge concluded that the fundamental question was the meaning of "disposed of its entire interest". The company wanted to compare the situation before and after the transactions, and draw a benefit from the fact that it had similar rights in relation to the property; but this was based on a fallacy. Those similar rights were not connected to the supply that had originally been zero-rated, but from a different supply. The "entire interest" referred to what was derived from the original zero-rated supply, and it was no longer owned; it had been disposed of.

HMRC's appeal was allowed.

The company appealed to the Court of Session. The judge rehearsed the facts again, then considered arguments about the proper interpretation of VAT law. Principles of construction that consider the overall effect of transactions were developed in response to artificial tax schemes, and have little application to VAT; VAT depends on a rigorously objective approach to the law in order to preserve the fundamental principle of fiscal neutrality.

The principle of purposive construction is relevant: the legislation should be interpreted in accordance with its purpose, but the transactions undertaken by the taxpayer must be construed objectively, without regard to the taxpayer's underlying purposes or intentions.

The judge listed four fundamental principles of VAT that applied to the situation:

- VAT is a tax on economic activity, an expression that has been given a wide and objective meaning;
- the tax is transactional in nature, applying to individual transactions in the chain that ultimately results in the supply of a good or service to a consumer;
- fiscal neutrality, that requires all economic activities to be taxed in the same way, regardless of their purpose or results;
- objectivity in analysing and construing the transactions at each stage.

The judge noted from the precedent of *BLP Group* that the VAT treatment has to follow the form of transaction chosen by the taxpayer. It is not relevant that a different transaction could have been chosen that would have been taxed differently.

The judge also noted that the CJEU ruled in *Halifax* that it was only appropriate to recharacterise transactions in cases of abuse. In general, VAT had to follow the objective characteristics of the actual transactions undertaken.

The judge analysed the legislation, noting that it constituted a restriction on an exception to the general rules of VAT. He considered that the reasons for the restriction were sound, because of the possibility of abuse of the zero-rating relief. The self-supply charge could arise separately on a change of use or on disposal of the taxpayer's entire interest.

Applying the law to the facts, the judge considered that the sale and leaseback had to be treated as two entirely separate transactions. It was not possible to regard them as a single whole; in substance and in form, they were distinct. The application of the law was then straightforward: the company had disposed of its entire interest in the property, and the charge arose. "Any other construction would in our opinion fail to recognise the transactional structure of VAT, and would fail to give effect to a properly objective analysis of the sale and leaseback."

The decision of the Upper Tribunal was upheld and the appeal was dismissed.

Court of Session: *Balhousie Holdings Ltd v HMRC*

3.1.2 CJEU on sale and leaseback

A similar situation to the *Balhousie* case has been referred to the CJEU, which has given a judgment that is at first sight encouraging to the taxpayer; however, it concerns different legal provisions, and may therefore not overturn the Court of Session's decision.

The significant difference is that the company incurred and recovered input tax on the construction, alteration and renovation of buildings that were used in a wholly taxable trade. The similarity is that it then entered

into a sale and leaseback transaction without opting to tax. The Belgian authorities decided that the exempt sale required a disallowance of the input tax already claimed. Questions were referred to the CJEU, noting that the sale and leaseback was a purely financial transaction designed to increase the liquidity of the taxable person, and the building remained in the possession of the taxable person and remained in use in its taxable activity without interruption.

The court considered whether there was any reason to adjust the input tax within articles 184 – 186 PVD (change in factors affecting entitlement to deduct) or articles 187 – 189 PVD (capital goods scheme). As regards articles 184 – 185, the court held that the continuing use for taxable purposes indicated, subject to verification by the referring court, that there were no changes in the factors used to determine the amount of the deductions. Contrary to the Commission's submissions, the mere creation of the leaseback arrangement did not break the close and direct relationship between the input tax incurred and the use of the goods or services for taxable output transactions.

Turning to articles 187 – 188, the court noted that an adjustment under the CGS would be required if the capital item was "supplied" during the adjustment period. The concept of "supply of goods" does not refer to the transfer of ownership in accordance with the procedures prescribed by the applicable national law, but "covers any transfer of tangible property by one party which empowers the other party actually to dispose of it as if he were its owner" (*PPUH Stehcemp* Case C-277/14). If the sale and the leaseback were considered together, they would not apparently satisfy this definition, because the recipient of the "sale" would immediately be subject to the terms of the lease.

The court considered that it was proper to regard the two transactions together in line with decisions such as *Part Service* (Case C-425/06) – that is, they were so closely associated that it would be artificial to split them. It is interesting that the CJEU did not make the same point as the Court of Session in relation to only considering the "big picture" when there is avoidance; *Part Service* is an avoidance case, but the same principles could apply to the present purely commercial transaction.

The conclusion was that there was no obligation imposed by the PVD to adjust the input tax already deducted as a result of the transactions at issue. A second question asked whether such an adjustment would satisfy the principles of neutrality and equal treatment. The court commented that this would only arise if the referring court decided that there were changes in the factors that gave entitlement to deduction; but, if that were to be the case, such an adjustment would not infringe the principles cited.

The problem in applying this to *Balhousie* is that the zero-rating of the new building and the clawback on "disposal of the entire interest" are purely UK rules not contained within the PVD. There may be an argument that "disposal of the entire interest" should be interpreted in a manner consistent with "supply of goods" in the *Mydibel* case, in which case the clawback could not apply. However, as one is about clawback of input tax paid and recovered, and the other is about clawback of VAT not charged on a purchase, the situations are not "on all fours".

CJEU (Case C-201/18): *Mydibel SA v État belge*

3.1.3 Letting of vineyards

An individual entered into contracts allowing the use of vineyards for an annual payment in arrears. The contracts were for one year but were automatically renewable. The Portuguese tax authority formed the view that the supplies were taxable and raised assessments totalling over €100,000. Questions were referred to the CJEU on whether the letting ought to be exempt.

The court ruled that the use to which the land was put by the tenant was not in general relevant in determining whether there was a letting of immovable property; nor was the term of the tenancy, except in the case of very short-term letting. The main relevant point was whether the activity was passive letting or included other active management services. There was nothing in the order for reference that suggested this was the case. The contract appeared to be for the leasing or letting of immovable property.

Restrictions on the "rights of the tenant as owner" were not enough to change the nature of the supply (e.g. not being allowed to replace the vines with a different crop); also an argument that there was in fact a transfer of a "totality of assets" was similar to that rejected in the recent case of *Mailat*.

CJEU (Case C-278/18): *Mesquita v Fazenda Publica*

3.1.4 Updated Notice

HMRC have updated their Notice *Hotels and holiday accommodation* to reflect their revised treatment of deposits and prepayments with effect from 1 March 2019.

Notice 709/3

3.2 Option to tax

Nothing to report.

3.3 Developers and builders

3.3.1 Zero-rating certificate

HMRC issued a penalty under VATA 1994 s.62 for £53,101 to a not-for-profit sports club on the basis that it had issued a zero-rating certificate when not entitled to. The club appealed on the basis that the building qualified for zero-rating as a "village hall or similar".

In the FTT (TC06321), the club relied on the *Caithness Rugby Football Club* decision: it was not necessary for a separate community group to control the use of the building, as long as the intended use was always for the local community rather than exclusively for the club. In her submissions, HMRC's representative said that HMRC believed that

Caithness had been decided wrongly and turned on its own specific facts. Not only should this confirm the penalty, but it also counted against allowing a reasonable excuse defence.

The Tribunal found that the clubhouse was used by many local groups with no preference being given to the club. In 2017 the clubhouse was extensively used for an After Schools Club, karate classes, a Women & Toddlers group, a Ladies Keep Fit and Irish Dancing classes as well as a church on Sundays and several birthday parties. The judge was satisfied that this met the appropriate test as set out in *Caithness* and other cases.

The judge also considered that, if he was wrong on that conclusion, the club had a reasonable excuse. Although the club secretary had not rung HMRC's helpline, which he might have done, he had carried out research by reading the published guidance and had taken professional advice from two people before issuing the zero-rating certificate. That met the standard of "a reasonable thing for a responsible trader conscious of and intending to comply with his obligations" to have done.

The appeal was allowed, and HMRC appealed to the Upper Tribunal (Mr Justice Horner). HMRC contended that the FTT had failed to give adequate reasons for its finding that the clubhouse had been intended for use solely in a manner similar to a village hall, and also that the FTT had erred in concluding that the club had not been operating a business.

The UT agreed with both of these grounds. The FTT had commented that "the local community makes extensive use of the facilities", but that was not the correct test. The reasons given for the conclusion did not justify it, and that was an error of law. There was no attempt to assess the intended balance between use by the local community and club members, nor the actual use that ensued. It appeared from the evidence that the club's use was not incidental and ancillary.

In relation to the second ground, the FTT had failed to take into account the deeming provision in VATA 1994 s.94(2) that the provision of facilities by a club to its members is to be regarded as a business. The UT returned to the *Lord Fisher* tests and suggested that even without the deeming provision, the FTT's conclusion would have been untenable. Although the finding that there was no business was on its face one of fact, the underlying issue was one of law. "If the FTT does not ask itself the right question, it is never going to obtain the right answer." The conclusion was one that the FTT, properly instructed in the law, could not have reached.

On the other hand, the FTT's consideration of the reasonable excuse question was "unimpeachable". It could only be overturned on the grounds that it was an unreasonable decision; the question the FTT had asked itself was the correct one, whether the taxpayer had done an unreasonable thing for a trader of the sort envisaged in the position it had found itself. The FTT had concluded that the club's actions were not unreasonable, and there were no grounds for interfering with that conclusion. The FTT had also concluded that the club's witness was entirely credible, and that was the basis of the decision; that was a conclusion that, having heard the witness and seen him cross-examined, was also open to the FTT to reach.

The appeal against the secondary conclusion of the FTT was dismissed, although HMRC would have succeeded on the first two grounds.

Upper Tribunal: *HMRC v Greenisland Football Club*

3.3.2 Listed buildings

A dispute arose over the application of the repealed zero-rating of certain works of alteration to listed buildings. The trader appealed against assessments covering five return periods. The question was whether the works were "repairs" (standard rated) or "approved alterations" (zero-rated). As the legislation no longer applies to current supplies, it is enough to note that the Tribunal accepted most of the trader's arguments and allowed the appeal to a large extent.

The judge went through a number of factors that were not relevant to the argument, some of them raised by the appellant and some of them raised by HMRC. He was particularly critical of an assertion by HMRC that there had been deliberate conduct leading to an inaccuracy, which in his opinion was an allegation of fraud wholly unjustified by any evidence.

The assessments were substantially reduced.

First-Tier Tribunal (TC07030): *Cube Construction (Southern) Ltd*

3.3.3 Articles

In an article in *Taxation*, Neil Warren points out a significant side-effect of the new reverse charge for the construction industry for small businesses. Because reverse charge supplies are excluded from the FRS, a construction business using the FRS will not have to account for any VAT on such supplies to HMRC; but it will also not collect any VAT from its customers, and will still not be entitled to deduct any input tax on its costs. It will therefore lose the benefit of using the FRS in relation to that part of its business that is subject to the reverse charge, and should consider whether the FRS remains beneficial after 1 October 2019.

Taxation 17 January 2019

In an article about the Finance Bill debates in *Taxation*, Richard Curtis noted debate about the detailed rules on the effect of reverse charge supplies on registration liability. What is now FA 2019 s.51 inserts a new ss.(9A) into VATA 1994 s.55A, providing that "An order made under subsection (9) may modify the application of subsection (3) in relation to any description of goods or services specified in the order." S.55A(3) provides that reverse charge supplies count for registration liability purposes. There appeared to be a concern that more small builders would be made registrable by the new rules because their costs would be added to their outputs in determining whether they had exceeded the threshold, but the government minister responded that the provision would allow an order preventing this unintended effect. This demonstrates how many complicated and often unpredictable consequences may arise from such a change.

Taxation 24 January 2019

3.4 Input tax claims on land

3.4.1 DIY claim

A retired civil engineer owned a house with a number of outbuildings. In 1992 one of these was converted into a “granny annexe”. When the occupant died in 2009, the appellant and his wife decided to demolish the annexe, build a new house on its footprint, and sell the adjoining house in which they had lived up to that point. Planning consent was applied for in April 2014, including the description “Single storey and first floor extension to existing annexe”. A further application was made in September 2016 with different wording: “subdivide dwelling & annexe into 2 separate dwellings”. Planning consent for the new house was granted in November 2016 and construction was completed in January 2017.

It was an agreed fact that the appellant intended to demolish the existing annexe and construct a completely new dwelling, and this is what he did. The foundations were replaced, there was no longer a common wall (although the buildings were otherwise adjacent), and the former internal access was blocked up.

The appellant and his wife moved into the new house in January 2017 and sold their old house in 2018. They claimed £31,381 under the DIY Builders Scheme. This was refused by HMRC on the basis that the conditions were not satisfied; a number of arguments were dropped before the hearing, leaving the main question as whether the project satisfied the definition of a “dwelling”.

The appellant argued that the new structure was a new dwelling because the old annexe had been demolished to below ground level, satisfying Sch.8 Group 5 Note 18. HMRC argued that the fact that the annexe had previously been attached to the old house meant that “the existing building” was “the house and the annexe”, and that had not been demolished. The appellant further argued that Note 16(b) was satisfied, even if the new structure counted as “an enlargement or extension”, because it had created an additional dwelling. HMRC argued that the new structure was substantially on the footprint of the old annexe: in their view, the “new dwelling” had to fall entirely within the extension in order for the exception in Note 16(b) to be satisfied. There was a subsidiary argument about the possibility of apportionment and a partial refund because of the words “to the extent” in the Note.

Judge Ian Hyde agreed with HMRC’s view on Note 18. The building before and after the works had to be considered. The building before the works was “the house and the annexe”; that had not been demolished.

On Note 16(b), the judge agreed with the appellant. VAT recovery is allowed “to the extent the enlargement or extension creates an additional dwelling or dwellings”. This requires two elements to be present, an “enlargement or extension” and that the enlargement or extension “creates an additional dwelling or dwellings”. In the judge’s view, both elements were satisfied. The new dwelling was substantially larger than the original annexe (with two storeys and a lean-to kitchen), so there was an extension; it created a new self-contained dwelling, because the internal access had been closed off.

On the question of apportionment, the judge considered that the present situation was different from the cited precedents of *Wright* (TC01523) and also *Languard New Homes* (UT 2017). Here, the whole of the cost was focused on and attributable to constructing the new house. There was no reason to apportion it between "enlargement or extension" and "new dwelling" – it was a single project to deliver a new dwelling.

The appeal was therefore allowed.

First-Tier Tribunal (TC06870): *Roy Tabb*

3.4.2 Electric blinds

An individual appealed against the refusal of part of a DIY claim that related to electric blinds installed in an "eco-build" property. The rejected amount was £2,303 out of a total claim of £14,505.

The question was whether the electric blinds were "ordinarily incorporated into buildings of that description" and were therefore "building materials". In the appellant's view, "buildings of that description" should be taken to cover "eco-buildings", in which he asserted that electric blinds for regulating temperature were normal. He also argued that they were not excluded as "electrical appliances" because they related to the heating of the building.

The Tribunal interpreted the Upper Tribunal decision in *Taylor Wimpey* as allowing some consideration of use as well as size in comparing "buildings of that description". HMRC only recognised "size", but the Tribunal was satisfied that eco-build dwellings constituted a distinct type of building for the purpose of the test.

However, the evidence presented to the Tribunal did not convince the judge that electric blinds of this type were "ordinarily installed", and on that basis the appeal had to fail. The question of whether they were also "electrical appliances" was not considered.

First-Tier Tribunal (TC06985): *David Cosham*

3.5 Other land problems

Nothing to report.

4. INTERNATIONAL SUPPLIES

4.1 E-commerce

4.1.1 MOSS

The *Value Added Tax (Place of Supply of Services) (Supplies of Electronic, Telecommunication and Broadcasting Services) (Amendment and Revocation) (EU Exit) Order 2019* provides that, after Brexit, the relaxation on MOSS introduced on 1 January 2019 will be reversed. It will no longer be possible to use MOSS in the UK because it is an EU scheme.

SI 2019/404

4.1.2 Non-Union MOSS

HMRC have published new guidance on the VAT IT system for businesses established outside the UK if the country leaves the EU without a deal in place. This covers:

- how to pay VAT on sales of digital services to UK consumers;
- how to claim UK VAT refunds (sub-divided into claims for VAT incurred on business expenses before 30 March 2019- or whenever Brexit happens – and claims for VAT incurred on business expenses afterwards);
- how to check UK VAT numbers.

www.gov.uk/guidance/vat-it-system-changes-for-businesses-outside-the-uk-if-the-uk-leaves-the-eu-with-no-deal

4.2 Where is a supply of services?

4.2.1 Admission to an event

Questions were referred to the CJEU by the Swedish courts to determine the charge to VAT where a taxable person based in Sweden charges other Swedish taxable persons for running a seminar, but that seminar takes place in another Member State. The Advocate-General (Sharpston) gave an opinion, followed shortly afterwards by the full court judgment.

PVD art.53 states that in the case of supplies to a taxable person, "the place of supply of services in respect of admission to cultural, artistic, sporting, scientific, educational, entertainment or similar events, such as fairs and exhibitions, and of ancillary services related to the admission … shall be the place where those events actually take place". Art.54(1) extends the "place of the event" rule to ancillary and organisational services relating to events, where the customer is a non-taxable person.

The Implementing Regulation art.32(1) provides that art.53 should apply to "the supply of services of which the essential characteristics are the granting of the right of admission to an event in exchange for a ticket or payment, including payment in the form of a subscription, a season ticket or a periodic fee." Art.32(2) gives further details, describing "(a) the right of admission to shows, theatrical performances, circus performances,

fairs, amusement parks, concerts, exhibitions, and other similar cultural events; (b) the right of admission to sporting events such as matches or competitions; and (c) the right of admission to educational and scientific events such as conferences and seminars". Art.33 provides that ancillary services are within art.53 PVD if they relate directly to the admission (e.g. cloakroom and sanitary facilities); but mere intermediary services such as the selling of tickets are excluded.

The appellant in the case is a Swedish association of professionals. It provides educational and vocational training to consultants in return for a fee. Among other activities, it runs five-day courses that may take place in other Member States. All the participants are taxable persons established in Sweden. The question referred was whether the expression "admission to events" in art.53 covered a service in the form of a five-day course on accountancy which is supplied solely to taxable persons and requires advance registration and payment. The Swedish tax administration, the UK, France and the Commission all submitted written observations to the court.

The A-G noted that "vocational training" is exempt under art.132(1) PVD. However, that would only be relevant if the appellant was a body "recognised by the Member State as having [educational] objects". The Commission submitted that the exemption was not relevant; the A-G commented that there was no material available before the court to reach a decision on the point.

The A-G went on to discuss the principle that services are supposed to be taxed where they are consumed. Educational services, being intangible, are not necessarily consumed where they are physically delivered; it is at least arguable that the participants would consume the service where they used the knowledge, i.e. back in Sweden.

It was agreed that the seminars were "educational" in nature. The A-G considered that the key concepts for a decision were whether they were "events" and whether the supply related to "admission". After consulting the Oxford English Dictionary and drawing a distinction between "an event" and longer courses, the A-G summarised his opinion as follows:

"I therefore consider that art.53 PVD covers indivisible educational activities planned in advance that take place at a specific place and over a short period of time and that concern a predefined subject matter. Conversely, educational activities lacking one or more of those characteristics, such as a series of separate meetings or workshops taking place at different dates or locations, courses scheduled over a prolonged period of time or open-ended cycles of meetings, especially if their programme or agenda are not defined in advance, fall outwith that notion."

The A-G examined the legislative history, including the introduction of the VAT package in January 2010 and the change to the place of supply of ancillary services to taxable persons that followed a year later. He concluded that the use of the terms "admission" and "event" was "anything but accidental or random" – it was subject to protracted discussions and was intentional.

The Swedish authority and the Commission argued that "admission" should have a restricted meaning, but the A-G commented that this would

deprive art.53 of much of its substance. The context and the differences between art.53 and art.54 suggested that the legislature intended to distinguish between three different categories of educational services:

- the broadest category is "educational activities";
- only some educational activities constitute "educational events";
- only some services in relation to educational events are "essentially in respect of admission".

The A-G looked for an "objective, clear and workable criterion" to identify and distinguish the third, narrowest category. He considered that the key was the identification of individuals attending: "In practical terms therefore, as soon as the supplier of an event controls the number of individuals able to gain access and charges a taxable person a fee in respect of their admission, such an event is likely to fall within art.53." The following paragraphs develop the idea and identify the distinguishing features.

"In contrast, the provision of an event as such, that is to say a service that consists of organising or hosting an educational event and marketing it as a whole falls outwith art.53. This might be, for example, when a service consists of selling a ready-made training course or seminar to a taxable person with a view to its further resale to other taxable persons or with a view to offering it collectively to a more or less precisely defined group (for example, to the members of staff and accompanying family members) even if the overall capacity is set out."

"Where 'admission' to an event constitutes one of many components of a composite service (and thus cannot be regarded as its essential element), that service taken as a whole should be subject to the general rule in art.44. That would be the case, for example, when a service consists of organising a business trip for the chief accountant of a company, including not only participation in an educational conference, but also catering, accommodation and visits to a number of tourist attractions."

"It follows that where the organiser of an educational event sells the service of providing such an event as a whole to a third-party, to an employer that intends to offer its employees in-house training or to the owner of a conference centre who intends to market that event himself, that transaction is outwith art.53 and is to be taxed in accordance with art.44. By contrast, where the taxable person who acquired such a turnkey event (re)sells the available places to another taxable person for a price that essentially depends on the number of persons to be admitted, the 'admission' to that event is the essence of such a service and, accordingly, art.53 applies. Similarly, where an employer who has bought the supply of services in respect of an event realises that the conference room in which that event is to take place can host more persons than it has employees, decides to sell the remaining places to one or more taxable persons and (naturally) charges a price per person admitted, that or those transactions will also be subject to art.53."

The Swedish authority and the Commission recommended the consideration of additional criteria in relation to the application of art.53. The A-G did not agree, and commented on their suggestions as follows. Technical and practical aspects in relation to registration and payment

should be irrelevant because they did not alter the nature of the service. The Commission argued that art.53 should only apply where the supplier did not know all the participants (and their taxable status) in advance, but the A-G did not accept that this could distinguish "a right of admission" from something else. It would be arbitrary and prone to manipulation. Likewise, the fact that an event is offered to the general public, rather than to a specific predetermined group of persons, did not change the essential nature of the supply.

Sweden and the Commission also argued that art.53 should only apply if it did not impose a "disproportionate administrative burden" on the taxable persons (i.e. registration for the supplier and cross-border refund claims for the participants). This was one of the objectives of the VAT Package, set out in the recitals to Directive 2008/8 which introduced it. The A-G described this as a "volatile and random consideration" that would make the application of art.53 arbitrary and would lead to a great deal of litigation. It would therefore achieve the opposite of the apparent objective of Directive 2008/8.

The A-G concluded by commenting specifically on the seminars at issue, which might go further than the full court will do in its judgment. He was satisfied that the courses constituted "events"; the question for the referring court to consider was whether the appellant provides a "right to be admitted", rather than other types of service in relation to the seminars. If individual participants were charged a price "per person", that would indicate that it was a right of admission.

The full court judgment is briefer, but it comes to the same conclusion. In particular, the judges note that:

- the preamble to a Directive has no legal force, and cannot override the words of the Directive itself;
- the administrative inconvenience that would be suffered by the taxpayer in having to charge VAT in other countries (and its members in having to claim that VAT back) could not determine the outcome;
- services should in principle be taxed in the place of consumption, which supported the charge where the seminars took place;
- the fact that the courses were subject to advance registration and payment did not have any significance in the decision.

The full court did not hold that there was anything left to be determined by the referring court: these courses were subject to art.53.

CJEU (Case C-647/17): *Skatteverket v Srf konsulterna AB*

4.2.2 Updated Notice

HMRC have updated their Notice *Place of supply of services* from the November 2017 version to reflect changes to the VAT rules for supplies of digital services to consumers from 1 January 2019, including non-EU businesses becoming eligible to use the non-union VAT MOSS scheme.

Notice 741A

4.2.3 Specified supplies (1)

The Value Added Tax (Input Tax) (Specified Supplies) (EU Exit) Regulations 2019 have been laid before Parliament. The intention is to maintain the current position on exempt financial services after the UK exits the EU, ensuring that businesses will be unable to reclaim VAT paid on the costs of making supplies of certain VAT exempt financial services when those services are supplied to a UK customer. The regulations will come into force on a date to be appointed by Treasury order.

The change substitutes "the United Kingdom and the member States" for "the member States". This confirms that there will be no widening of the scope of the input tax deduction – the provision of specified financial services to people belonging in the EU will not qualify for input tax deduction.

SI 2019/175

4.2.4 Specified supplies (2)

The *Value Added Tax (Input Tax) (Specified Supplies) (EU Exit) (No 2) Regulations 2019* provide that, after Brexit, UK businesses will be entitled to recover input tax attributable to making specified supplies to customers in the EU, on the same basis that they can now claim input tax on supplies to customers outside the EU.

SI 2019/408

4.3 International supplies of goods

4.3.1 Conditions for exemption

The Czech authorities refused to allow exemption (i.e. zero-rating) for some supplies made of goods despatched to a destination outside the EU. The subject matter was postal exports of military memorabilia; the trader despatched some 400 to 500 collectors' items to customers each month, and did not submit VAT declarations because he considered them to be exempt.

The tax authority maintained that its conditions for exemption were proportionate to prevent evasion and were permitted by the PVD. In its view, the appellant's assertions were not supported by any evidence.

The referring court was not certain that the requirement to place exports under a customs procedure was a permitted requirement, in particular where the taxable person could show that the goods have actually left the territory of the EU. The question was therefore whether such a requirement was permitted under art.146 as a condition for the purposes of preventing evasion, avoidance or abuse within art.131.

The court considered that the principles underlying art.146 required exemption of goods that left the EU, because they should be taxed at the point of consumption. The requirement to place them under a particular customs procedure should not determine the right of exemption.

However, Member States did have some discretion to impose conditions under art.131, limited by the principle of proportionality.

In effect, the Czech rule made exemption conditional on compliance with a formal obligation, when the requirement should be to fulfil the substantive conditions. This was not proportionate to the objective. As there was no allegation of evasion in the present case, exemption should depend on proving that the goods had left the EU as part of the supply, which appeared to be satisfied.

CJEU (Case C-275/18): *Milan Vinš v Odvolací finanční ředitelství*

4.3.2 Guidance on "no deal" Brexit

HMRC have added two new guides to its collection for traders in the event the UK exits the EU without a deal. One is for businesses wishing to register for transitional simplified import procedures from 7 February 2019. The other sets out changes that will be made to the rules and processes for VAT IT systems, including the UK VAT MOSS. It contains guidance for businesses:

- claiming VAT refunds from EU Member States;
- checking the validity of UK VAT registration numbers;
- using the UK VAT Mini One Stop Shop to report sales of digital services to consumers in the EU;
- below the VAT digital services threshold and making sales of digital services to consumers in the EU.

HMRC have also published correspondence to VAT-registered businesses only trading with the EU, explaining how to prepare for changes to customs, excise and VAT if the UK leaves the EU without a deal.

Separate guidance is anticipated for importing or exporting goods across the Irish border. HMRC will update the guidance as further details become available.

The guidance was further updated on 21 March with a new guide on how to declare and pay import duty/VAT on goods intended for business use when brought into the UK in baggage or a small motor vehicle.

www.gov.uk/government/collections/trading-with-the-eu-if-the-uk-leaves-without-a-deal

The government has published further guidance pages for UK businesses collating existing stakeholder and sectoral guidance on Brexit, focusing on preparing for the no deal scenario in certain sectors including professional and business services, electronics, machinery and parts and chemicals. The majority of the guidance within the new webpages is not new but has been collated by sector for ease of reference and bookmarking. Some of the guidance may change depending on the terms upon which the UK leaves the EU, so stakeholders are advised to monitor these pages for updates.

www.gov.uk/business-uk-leaving-eu

The Law Society has published guidance for solicitors highlighting the changes in civil and commercial cooperation that will occur in the event the UK leaves the EU on 29 March 2019 without a withdrawal agreement

and transitional arrangements in place, and the steps solicitors should consider in order to prepare for changes to VAT goods and services.

www.lawsociety.org.uk/support-services/brexit-and-the-legal-sector/

HMRC has published guidance on how to account for import VAT on all goods brought into the UK if the UK leaves the EU without a deal. The guidance states that businesses registered for VAT in the UK will be able to account for import VAT on their VAT return ("postponed accounting") rather than pay when, or soon after, the goods arrive at the UK border. This will apply to goods from both EU and non-EU countries. All businesses importing goods into the UK will also need a UK economic operator registration and identification (EORI) number from the date of Brexit (stated in the guidance as 29 March, but now uncertain).

HMRC have published an impact assessment for the VAT treatment of low value parcels in the event of a no-deal exit. It explains the requirement for the overseas supplier of parcels valued at £135 or less to account for the import VAT, and also the removal of low value consignment relief which exempted parcels worth below £15. There is also further guidance from the Department for Business, Energy & Industrial Strategy (BEIS).

There is also a "Communications pack – import VAT on parcels in the event of a no-deal EU exit".

www.gov.uk/government/publications/hmrc-impact-assessment-for-the-vat-treatment-of-low-value-parcels

HMRC have also published an updated impact assessment for the movement of goods, covering the cost of customs and safety and security declarations, paying import duty and import VAT and mitigating facilitations.

www.gov.uk/government/publications/hmrc-impact-assessment-for-the-movement-of-goods-if-the-uk-leaves-the-eu-without-a-deal

There is a similar document for services, covering such matters as regulations laid in respect of fund management services, VAT mini one-stop-shop, tour operators margin scheme, and specified supplies of financial services..

www.gov.uk/government/publications/hmrc-impact-assessment-for-vat-and-services-if-the-uk-leaves-the-eu-without-a-deal

HMRC have issued guidance on the measures businesses need to take to prepare for no-deal, including applying for EORI numbers and registering for the new Transitional Simplified Procedures in relation to importing goods from the EU using roll on, roll off locations. HMRC has sent letters addressed to all VAT-registered businesses identified as trading with the rest of the world, or with the EU and the rest of the world.

www.gov.uk/government/news/hmrc-urges-business-owners-to-make-sure-they-are-ready-for-no-deal

There is also detailed guidance about using the National Export System to declare exports.

www.gov.uk/guidance/export-declarations-and-the-national-export-system-export-procedures

Recent statements include a plan for a "unilateral, temporary approach" to checks, processes and tariffs on the Northern Ireland land border – however, this seems so uncertain that it is impossible to plan for.

www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2019-03-13/HCWS1406

On 22 March, HMRC announced that importers would be allowed to delay submission of their first supplementary customs declarations and payments of import duties after the UK leaves the EU until 4 October 2019. However, this date no longer seems relevant, given the delay to Brexit itself that was negotiated shortly afterwards.

www.gov.uk/government/news/hmrc-outlines-extension-of-transitional-simplified-procedures

4.3.3 Exit regulations

The government is in the process of laying a range of statutory instruments covering customs, excise and VAT, to apply in the event of the UK leaving the EU without an agreement. HMRC have brought these together on a dedicated web page, together with a number of draft public notices to support the regulations.

www.gov.uk/government/collections/customs-vat-and-excise-regulations-leaving-the-eu-with-no-deal; www.gov.uk/government/publications/statutory-instruments-relating-to-eu-exit

The Minister for the Cabinet Office has outlined the government's approach for these SIs if the UK leaves the EU with a deal in place – their implementation would be deferred. The UK would be treated as still a member state for many purposes during the transition period, so many of the SIs would be deferred or revoked.

www.parliament.uk/documents/lords-committees/constitution/Correswithministers/CDL2611.pdf

As well as some others already covered in sections 2.3 and 2.9, these regulations include:

- *The Value Added Tax (Miscellaneous Amendments and Revocations) (EU Exit) Regulations 2019* – these regulations make amendments and revocations to existing rules relating to EU arrangements such as 'acquisitions', which will no longer be relevant after the UK leaves the EU.

  SI 2019/59

- *The Value Added Tax (Accounting Procedures for Import VAT for VAT Registered Persons and Amendment) (EU Exit) Regulations 2019* – these regulations provide for postponed accounting in respect of import VAT following the UK's withdrawal from the EU, allowing businesses to account for import VAT on their normal VAT returns, provided their VAT registration number is shown on the customs declarations.

  SI 2019/60

- *The Value Added Tax and Excise Personal Reliefs (Special Visitors and Goods Permanently Imported) (Amendment) (EU Exit) Regulations 2019* – these regulations make consequential amendments to two existing orders to ensure that certain goods brought into the UK by private individuals, diplomats and visiting forces will continue to be free of UK VAT and excise duty after Brexit.

  SI 2019/91

- *The Taxation (Cross-border Trade) Act 2018 (Appointed day No 3) and the Value Added Tax (Postal Packets and Amendment) (EU Exit) Regulations 2018 (Appointed day) (EU Exit) Regulations 2019* – these regulations bring into force from 28 January 2019 the definition of import VAT contained in the Act, which will apply to imports from EU member states following Brexit. Also brought into force from 28 January are those parts of the new 'postal packets' regulations (SI 2018/1376) establishing HMRC's registration scheme for overseas suppliers, to enable registration in advance of exit day.

  SI 2019/104

- *The Taxation (Cross-border Trade) Act 2018 (Value Added Tax Transitional Provisions) (EU Exit) Regulations 2019* – these regulations set out transitional provisions to deal with certain issues arising from amendments made to VATA 1994 in connection with the UK's withdrawal from the EU. These include: rules to ensure that VAT and import duty amendments in Part 3 of the Act do not have effect in relation to supplies/acquisitions taking place, or removals commenced, before exit day; and references to inaccuracies or failures in relation to 's.55A statements' about the reverse charge on specified supplies will only include such statements due before exit day.

  SI 2019/105

- *Statistics of Trade (Amendment etc) (EU Exit) Regulations 2019* – these regulations amend EU regulations which are being brought into force in the UK by the *European Union (Withdrawal) Act 2018*, to ensure that UK legislation is in place to collect information required for trade statistics after the UK leaves the EU.

  SI 2019/47

- *The Crown Dependencies Customs Union (Guernsey) (EU Exit) Order 2019*

  SI 2019/254

- *The Crown Dependencies Customs Union (Isle of Man) (EU Exit) Order 2019*

  SI 2019/257

- *The Crown Dependencies Customs Union (Jersey) (EU Exit) Order 2019*

  SI 2019/256

- *The Customs (Crown Dependencies Customs Union) (EU Exit) Regulations 2019*

  SI 2019/385

- *The Finance Act 2011, Schedule 23 (Data-gathering Powers) (Amendment) (EU Exit) Regulations 2019*

  SI 2019/397

- *The Value Added Tax (Miscellaneous Amendments, Revocation and Transitional Provisions) (EU Exit) Regulations 2019*

  SI 2019/513

4.3.4 Updated and New Notices

HMRC have updated their Notice *Importing biological and chemical substances for research free of duty and VAT* from the April 2018 version, with revised guidance on requesting a review of an HMRC decision, and a new telephone number for the National Import Reliefs Unit.

Notice 366

HMRC have updated their Notice *Importing goods for disabled people free of duty and VAT* from the July 2017 version with revised information on asking for a review of an HMRC decision, and a new telephone number for the National Import Reliefs Unit.

Notice 371

HMRC have updated their Notice *Importing commercial samples free of duty and VAT* from the April 2018 version with a revised telephone number for the National Import Reliefs Unit.

Notice 372

Other similar updates have been made to:

- Notice 3001: *Customs special procedures for the Union Customs Code* (new address for HMRC''s authorisations and returns team in Leeds)
- Notice 342: *Importing miscellaneous documents and other related articles free of duty and VAT*
- Notice 343: *Importing capital goods free of duty and VAT*
- Notice 368: *Importing inherited goods free of duty and VAT*
- Notice 374: *Importing goods for test free of duty and VAT*
- Notice 702/7: *Import VAT relief for goods supplied onward to another country in the EU*
- Notice 728: *VAT on new means of transport* (revised claim forms for returning members of NATO forces and amended postal addresses for submission of forms)
- Notice 760: *Customs freight simplified procedures* (confirmation that applications for authorised economic operator status must now be made online)

HMRC have published a new Notice *Import VAT on parcels you sell to UK buyers*. It explains the import VAT rules that will apply to sellers based outside the UK who send parcels worth up to £135, if the UK leaves the EU without a deal. Sellers will be able to register with HMRC to report and pay the VAT, or pay a parcel operator to do this on their behalf.

Notice 1003

4.4 European rules

4.4.1 Roadmap for reform

The European Commission has published its proposed 'roadmap' for moving away from unanimity and towards qualified majority voting by member states for making policy decisions in certain areas of EU taxation, which it would like to achieve by 2025 in four main steps. The Commission believes that the time taken to agree tax decisions at EU level, bound up with issues of sovereignty, means the unanimity rule is no longer suitable for dealing with common problems such as fraud and the digital economy.

The four steps are:

- Member States agree to move to "qualified majority voting" for decisions on measures that improve cooperation and mutual assistance in fighting tax fraud and evasion, and in promoting administrative initiatives for EU businesses such as harmonising reporting obligations.
- QMV is introduced to progress measures in which taxation supports other policy goals such as fighting climate change, protecting the environment or improving public health.
- QMV is extended to help modernise EU rules that are already harmonised such as VAT and excise duty.
- Lastly, QMV will apply to major tax projects such as the Common Consolidated Corporate Tax Base and a new system for taxation of the digital economy.

IP/19/225

4.4.2 Infringement proceedings

The European Commission has decided to refer the UK to the CJEU over its failure to amend the *VAT (Terminal Markets) Order*, which allows zero-rating for certain commodity derivatives in the UK. The Commission began infringement proceedings in March 2018 with a 'letter of formal notice' and sent its reasoned opinion in July.

IP/19/470

4.4.3 VAT reform

The Romanian presidency of the EU Council has presented its priorities for economic and financial affairs (ECOFIN) for its term from January to June 2019. These include the pursuit of efforts towards modernising the VAT system and work on the proposals on taxation of digital economy.

ECOFIN Release 22/01/2019

4.4.4 Generalised reverse charge

In October 2018, ECOFIN agreed the Commission's proposal allowing member states to apply the VAT reverse charge mechanism to domestic supplies of goods and services above an invoice threshold of €17,500. The amending directive has been published in the EU official journal and came into force on 16 January 2019. This generalised reverse charge is intended as a temporary anti-fraud measure pending implementation of the definitive EU VAT system; it will expire on 30 June 2022. Member States have to meet certain strict criteria and apply to the Council for authorisation before introducing such a measure.

www.consilium.europa.eu/en/press/press-releases/2018/10/02/vat-fraud-council-agrees-to-allow-generalised-temporary-reversal-of-liability/

4.4.5 Payment Service Providers

The Council has adopted a Directive to insert new articles 243a to 243d in the PVD to impose new obligations on Payment Service Providers to obtain information and retain it. This is intended to counter the risk of growing fraud in relation to internet trade. The measures are intended to come into effect on 1 January 2022.

https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018PC0813

4.4.6 E-commerce

The Council has reached agreement on the new measures to apply to online marketplaces from 1 January 2021. They will be treated as buying and selling the goods supplied through them, making it harder for the ultimate suppliers to avoid paying VAT. A new "one stop shop" will enable online marketplaces to meet their obligations without having to register in every Member State in which they have customers.

europa.eu/rapid/press-release_IP-19-1595_en.htm

4.4.7 Reverse charge procedure

Hungary was granted a derogation from the normal liability rules under art.193 PVD in respect of supplies of staff. The derogation was required because the supplies concerned did not fall within the categories that can in any case be covered by a reverse charge procedure under art.199(1)(a). The derogation was notified to Hungary on 11 December 2015 without a start date, but with a termination date of 31 December 2017. Hungary had made the application by letters dated 23 December 2014 and 8 May 2015.

Hungary then sought to impose charges of approximately €1.2m on a trader in respect of periods up to July 2015. Questions were referred to the CJEU on whether Hungary could enforce the derogation from the date

on which it had applied for it, or only from when it received notification that it was authorised.

The CJEU held that the measure could not be implemented before 11 December 2015.

CJEU (Case C-434/17): *Human Operator Zrt v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága*

4.5 Foreign refund reclaims

4.5.1 Updated Notice

HMRC have updated their Notice *Refunds of VAT paid in the EU for businesses established elsewhere* from the September 2018 version with more information on certificates of status.

Notice 723A

5. INPUTS

5.1 Economic activity

5.1.1 Holding company registration

A company appealed against assessments for £80,307 for its periods 01/11 to 09/14 and £68,699 for periods 12/14 to 09/16, and decisions to deregister the company with effect from 1 October 2016 and to refuse to reinstate that registration. The company is the holding company of a group involved in mineral exploration and exploitation. It was incorporated on 30 May 2003 and is listed on AIM. It had originally been involved in oil and gas exploration in Kazakhstan, but after withdrawal of government licences in that country it acquired two new subsidiaries involved in the exploitation of tungsten. The issue was whether the company was carrying on a business involving making supplies for a consideration. The judge (Tony Beare) noted that the arguments put forward related to the company's rights under the PVD, rather than the slightly differently worded UK legislation.

The judge started with the recent precedent of the Court of Appeal decision in *Wakefield College*. The judgment noted: "A supply for a consideration is a necessary but not sufficient condition for an economic activity. It is therefore logically the first question to address. It requires a legal relationship between the supplier and the recipient, pursuant to which there is reciprocal performance whereby the goods or services are supplied in return for the consideration provided by the recipient... There is no need for the consideration to be equal in value to the goods or services. It is simply the price at which the goods or services are supplied." Reference was also made to the CJEU precedents of *Gemeente Borsele*, *Finland* and *Apple & Pear Development Council*; and *Tolsma*, *Town and County Factors* and *Pavlina Bastova*. The judge also referred to the decisions of the UT in *Norseman Gold* and the FTT in *African Consolidated Resources*, both of which concerned very similar situations to the present case.

The judge commented that these cases showed the entitlement to deduction depended on two factors: making taxable supplies for consideration (PVD art.2) and doing so in the course of an economic activity (PVD art.9). It was possible to satisfy the first without satisfying the second, as in *Borsele* and *Finland*, but it would be rare. However, in relation to holding companies, the judge was satisfied that charging for management services to subsidiaries would inevitably constitute an economic activity. He said that this was confirmed by the CJEU in *Cibo Participations*, with consistent but not decisive comments in *Larentia + Minerva* and *MVM*. In effect, the divergence between art.2 and art.9 arising in *Borsele* and *Finland* (because the objective of the activity was not to earn remuneration) could not apply to holding companies, as long as they made supplies to subsidiaries for consideration.

Turning to the facts of the case, the judge examined board minutes dating from 2007, before the later subsidiaries were acquired. These referred to raising invoices for management services "when the [current] subsidiaries are generating revenue". A similar minute from 2012 referred to the recent purchase of one of the later subsidiaries and the imminent purchase

of the other, and also noted an agreement to recharge costs when [the recently purchased subsidiary IRS] "generates revenues and is thus in a position to reimburse such fees to the company"; there were further minutes in the same terms in 2015 and 2016.

The director of the appellant (and also the sole director of the subsidiaries) gave evidence that there was always an understanding that the costs would be recharged to the subsidiaries, and the apparent condition in the minutes about ability to pay only referred to the timing of invoicing. The possibility that no revenues would ever be generated had not been considered, even though this had been the case in Kazakhstan. In support of this, he pointed out that the holding company had started to issue invoices to one of the subsidiaries at the end of 2014 and had continued to do so on a regular basis, even though some of them remained unpaid.

HMRC had taken the position in December 2014, shortly before the first invoice was issued, that the supplies of management services were not economic, because they were not made for consideration. This view was reiterated in further correspondence up to 2017. The judge examined the different positions of HMRC and the company's adviser and the way the argument had developed over the period from 2014 to 2017, including a concession by the adviser that the invoices raised in 2014 did not accurately describe what was being charged (1,336 hours of a consultant's time at €60 per hour, rather than 360 hours at £200). The judge noted that the adviser had not apologised for this discrepancy, which the judge thought would have been appropriate. The relevance was that the appellant appeared to be recharging its own costs without a mark-up (in fact, at a slight loss), rather than adding any value or charging for its own management time.

The judge commented that the evidence was unclear, incomplete and inconsistent, and it was therefore difficult to find the facts with certainty. The board minutes were the only written evidence of the agreement between the holding company and the subsidiaries, and they were "thoroughly inadequate as regards setting out the precise terms of the agreements between [the companies]." HMRC had focussed ("quite rightly") on these shortcomings, arguing in particular that there had never been an intention to invoice the subsidiaries until HMRC wrote to the company in December 2014. However, the subsidiary had also generated its first revenues in 2014, so there was another possible explanation for the timing of the first invoice.

The judge concluded that:

- the subsidiaries had entered into an agreement with the holding company to reimburse the fees of consultants engaged to work on their behalf;
- the agreement provided that no invoices would be raised if the subsidiary never generated any revenues;
- after a subsidiary had started to generate revenues, the holding company had the right to raise invoices even if the subsidiary did not have the funds to meet them.

The judge went on to conclude that the holding company was making supplies to its subsidiaries throughout the period. HMRC had not questioned this, and it was borne out by the finding that there had been an agreement to engage consultants to carry out work on their behalf. However, until the contingency (the subsidiary starting to generate revenues) had been satisfied, these supplies were not made for a consideration. There was a legal relationship between the parties (so *Tolsma* did not apply); but the contingency broke the necessary link between the supply and any payment (in line with *Bastova*, *Norseman Gold* and *African Consolidated*). One of the two "later" subsidiaries had started to generate revenues, and from this point onwards, supplies were made to it for consideration; the other had not yet reached the threshold. The company's representative argued that the facts were very different from the three cases cited, but the judge did not agree. The agreement was more specific than in *Norseman* (where the FTT noted "a vague intention to levy an unspecified charge"); but there was still no guarantee that the contingency would ever be satisfied.

HMRC argued that the mere fact of invoicing did not mean that there were supplies for consideration. The judge disagreed; in his view, the raising of invoices was evidence to support the existence of the legal relationship and the obligation to pay. Invoicing might not indicate a supply for consideration if there was absolutely no possibility that the invoice would be settled, but that was not the case here.

There was a "circularity" in relation to the timing of the supplies. They were potentially "continuous supplies" within SI 1995/2518 reg.90, in which case the time of supply would be fixed when an invoice was raised or when payment was made. However, the judge had decided that the supplies made before the "threshold event" were not made for consideration – that could not be changed by the raising of an invoice in respect of those pre-threshold services. The Upper Tribunal in *Norseman* had also adopted the view that reg.90 could not apply to services that were not, in principle, made for consideration.

There was a further question about whether the holding company was carrying on an economic activity. HMRC had not distinguished this as a separate issue in its statement of case; although that had been submitted before *Wakefield College* demonstrated that "supply for consideration" and "economic activity" were distinct arguments, HMRC could have applied to amend their grounds afterwards. On procedural grounds, therefore, HMRC were barred from arguing that the company could be "non-economic" even though it was making supplies for consideration.

The judge also considered that the CJEU case law ruled such an argument out in any case. In the case of a holding company, *Cibo* suggested that there was no such distinction: any holding company that supplied management services to its subsidiaries for consideration should be regarded as carrying on an economic activity.

Finally, there was the question of when the economic activity commenced. It was arguable that there was an intention to make taxable supplies for consideration before the threshold date, and economic activity was therefore continuous. The Upper Tribunal decision in *Norseman* was unclear on the point, because the uncertainty in that case had been greater. Although the judge considered it arguable, he concluded from remarks in

Norseman that economic activity only commenced once the contingency had been satisfied.

The conclusions were that:

- the appellant was not a taxable person prior to the threshold date, and it was not entitled to input tax credit for services received before that date;
- it was a taxable person after the threshold date, but was only entitled to input tax credit for costs incurred in relation to the subsidiary that had passed the threshold;
- overhead costs should be apportioned in a manner that was fair and reasonable.

First-Tier Tribunal (TC06879): *W Resources plc*

5.2 Who receives the supply?

5.2.1 Loyalty points

The Tesco Clubcard scheme includes a feature whereby customers can obtain vouchers that are used to buy goods and services from third parties. The third parties are then paid by Tesco for making the supply. The company claimed input tax deduction in relation to the payments made to third party "redeemers", and HMRC refused, ruling that this was third party consideration for a supply made to someone else (the customer). Assessments and decisions affected some £166m of input tax incurred between 1 September 2002 and 25 February 2017.

The FTT judge (Colin Bishopp, TC06050) reviewed the operation of the scheme, and accepted the evidence of the company's witness that it involved no element of bounty: it cost the store several hundred million pounds a year to run, and the only purpose of incurring that cost was to promote the business. The cost of the scheme was one factor built into the price of goods offered for sale.

The judge went on to examine the agreements between Tesco Freetime and "deal partners", under which third parties would make supplies in return for Clubcard rewards vouchers. He quoted at length from the Supreme Court decision in *Loyalty Management UK* (*Aimia*), which concerned very similar arrangements and arguments.

HMRC's argument was that the customers paid nothing for the points they received, and what Tesco paid to third parties was third party consideration for a supply to the customers. They argued that the contracts should not be looked at on their own, but examined in the context of the "economic reality" of the situation as a whole. This was particularly important where, as here, the contracts were equivocal on the question of who was supplying what to whom.

After 73 preliminary paragraphs, the first comment under "discussion and conclusions" is:

I have laboured, I regret for too long, to reconcile the competing requirements that I must pay heed to the contractual position, to the economic reality of the facts as I find them to be, and to prior authority; and I have been puzzled by the extent of that authority. The arguments in this appeal occupied four days of tribunal time, and resulted in several rounds of submissions and responses after the hearing had concluded. Those factors have caused me to wonder, both during the hearing and thereafter, whether there is some complication to loyalty schemes such as the Clubcard scheme which has escaped my notice since, try as I might to find that complication, I have failed. Rather, it seems to me that the VAT analysis is in truth both simple and straightforward once one puts aside some misconceptions and understands how the scheme works.

HMRC had argued that Judge Bishopp should ignore the Supreme Court's judgment in *Loyalty Management* because, as Lord Carnwath had pointed out, the CJEU seemed to uphold HMRC's case. The judge responded that the majority in the Supreme Court had clearly been aware of the objection and had overridden it; he was bound to follow them.

He also considered that HMRC's presentation of the economic reality was "demonstrably false". The customer was not getting "something for nothing", and there was no untaxed consumption. The precedent on which HMRC extensively relied, *Kuwait Petroleum*, contained a difficult paragraph that appeared self-contradictory; the judge felt able to ignore it because the loyalty scheme in that case differed in several respects from those that have come afterwards.

The judge spelled out in some detail his view that some element of what the customer pays for "premium goods" (i.e. earning points) is used to pay for the redemption supply. The customer therefore bears the burden of the cost of both supplies, and also bears the tax on both supplies. The amount paid by Freetime to the deal partner was not "new money injected into the arrangement" that would result in untaxed consumption if Freetime was allowed input tax recovery; it came from the customer's fully taxed initial purchase of premium goods.

The company's appeals were allowed, and HMRC appealed to the Upper Tribunal (Mr Justice Zacaroli and Judge Jonathan Richards). HMRC maintained the same arguments as they had put to the FTT: either the payments by the appellant were third party consideration for supplies to customers, or they fell to be apportioned, with the larger amount being third party consideration and a smaller amount representing consideration for a supply of fulfilment services. The appellant maintained that the whole consideration was for a supply to it of fulfilment services.

The judges re-examined the contracts and the various precedents before going on to HMRC's view of the "economic reality" of the arrangements. HMRC argued that the fact that there was no "sticking tax" when rewards points were redeemed was a strong indicator that the economic reality was that the appellant was paying for consumption by third parties, and it would be wrong to allow that to go untaxed. The judges cited *Redrow* as authority for the importance of considering a claim to input tax from the point of view of the person claiming it, rather than a third party. HMRC's argument was inconsistent with the judgments of the House of Lords in *Redrow* and the Supreme Court in *Aimia*; the circumstances were

materially similar and the highest courts had concluded that the claimant was entitled to the deduction.

HMRC wanted to "pull the camera back" to view the customer obtaining rewards as "deal partners agreeing to make supplies to Clubcard members without requiring a payment from them". The judges suggested that there was no reason to stop there: as Judge Bishopp had done in the FTT, the camera could be pulled back further to view the points arrangement in the context of the business as a whole, in which case it was clear that the costs incurred in running the promotional scheme (including paying for redemption of points) were cost components of taxed sales to consumers. There was no untaxed consumption.

The UT commented that HMRC's attempt to compare the scheme to *Baxi* (where the Supreme Court did not depart from the CJEU decision) and distinguish it from *Aimia* (where the Supreme Court did depart) was not particularly helpful. It was necessary to consider the legal principles and apply them to the facts of the current arrangement, rather than to try to apply principles that a different court had considered relevant in the context of different circumstances. That was even more true of CJEU decisions, which only explain the legal principles and leave it up to the national courts to apply them.

The UT also rejected an argument from HMRC that Lord Reed in *Aimia* had only gone against the CJEU decision because there was "sticking tax" on the earlier supply of points by Loyalty Management to the shops that issued the points to collectors. The judges did not agree that this was such a critical condition in Lord Reed's reasoning, but rather that it was a "sense-check" of his conclusions. The passage that HMRC sought to rely on indicated no more than that, where the grant of loyalty points involves a taxable supply of a contractual right to receive goods and services, that tends to suggest that the redemption of points does not involve a further taxable supply to collectors.

The judges concluded by saying that they had considered HMRC's arguments carefully, but they did not consider the arguments compelled any conclusion other than that it is entirely consistent with both economic reality and applicable principles of VAT law that the appellant should obtain credit for input tax incurred in paying deal partners to honour rewards due under the scheme. They were also satisfied that the appellant had discharged the burden of proof to show that it was entitled to full credit, because the contracts and economic reality led to the conclusion that the whole of the consideration paid to deal partners was for services supplied to the appellant.

HMRC's appeal was dismissed.

Upper Tribunal: *HMRC v Tesco Freetime Ltd and another company*

5.2.2 Legal fees

A company claimed input tax of nearly £80,000 incurred in relation to legal fees incurred in defending civil proceedings brought by another company against one of its directors. HMRC raised an assessment to disallow the VAT (together with a careless inaccuracy penalty, which was suspended). The company appealed to the First-Tier Tribunal (TC05245),

arguing that the VAT was incurred by the company in the course of its business.

The director was a former employee of the plaintiff, which sued him for breach of the conditions of his employment. Initially the plaintiff also threatened to sue the company he had set up in competition with it, but the lawsuits that followed only involved the director and three other employees who had left to join his company. If the plaintiff had succeeded, it would probably have joined the company in a further action to account for lost profits. However, the director won in the Court of Appeal, and leave to appeal to the Supreme Court was refused.

The disputed invoices were addressed to the director at his home, but paid by the company. The director stated that he had always considered that the plaintiff was attacking both him and the company, and it was trying to put the company out of business. The very first invoice concerned the initial "letters before action" that were issued to both the director and the company: it was addressed to and paid by the company, and HMRC had not objected to the deduction of the input tax. The judge considered that there was no material difference between that invoice and the subsequent ones, and HMRC could and should accept the invoices as alternative evidence under reg.29. The relationship between the lawyers, the director and the company remained the same. The situation was similar to the *P&O Ferries* case. The link between the company's business and the lawsuit was much more direct and immediate than the general benefit of "keeping the owner out of jail" as in *Becker* or *Rosner*.

The FTT allowed the appeal, and HMRC appealed to the Upper Tribunal. The UT judges summarised the issues as first whether the supplies had been made to the company, and second whether they had been used for the purposes of the company's business. HMRC argued that the economic reality was that the supplies of legal advice were made to the individual director, and the company derived no benefit from them. The company's representative responded that the FTT had been entitled to reach the conclusion it did on the basis of the evidence before it.

The judges agreed with HMRC's representative that the starting point had to be the contracts for services, which were clearly between the individual and the solicitors. The FTT had set out reasons for considering that the supply was made to the company, but it had not at any point made a finding that the company was entitled to legal services or contractually obliged to pay for them. This was an error of law that was sufficiently grave to require the decision to be set aside and potentially lead to the case being remitted to the FTT for reconsideration.

However, the decision on the second issue was more conclusive. The legal action had been for breach of confidentiality and breach of fiduciary duty, and these could only have been personal claims against the individual. There was a possibility that the company could have been joined in the action later, but that would have required different claims and different legal hurdles for the plaintiff. This meant that there was no direct and immediate link between the supplies and the company's business: it was much closer to the *Becker* and *Rosner* cases than the FTT had held. There was undoubtedly a benefit to the business in protecting the shareholder and director from legal action, but the business was not directly engaged in that action. The UT considered that the binding CJEU

precedent in *Becker* was directly applicable, and therefore HMRC's appeal had to be allowed.

The company appealed again to the Court of Appeal. Two of the judges (Hamblen LJ and Haddon-Cave LJ) essentially agreed with the FTT: the reality of the situation was that the supplies were made to both the company and the individual, and the lawsuit was aimed principally at closing down the company and appropriating its profits. The two judges considered that the UT had ignored a number of key findings of fact by the FTT and had therefore erred in overturning its decision. Hamblen LJ noted that a finding of criminal conduct by the individual in *Becker* would not have had the same consequences for his company as losing the litigation would have had for Praesto, so the facts could be distinguished.

Etherton LJ disagreed, for essentially the same reasons that the UT gave: the lawyers were acting for the individual in relation to a personal action, and there was no more than speculation that the company would have been involved had he been unsuccessful. He considered that *Becker* was a recent applicable precedent case that overrode the older Tribunal non-binding decision in *P&O Ferries*.

The company's appeal was allowed, but given that it was only a majority decision, that may not be the end of the matter.

Court of Appeal: *Praesto Consulting UK Ltd v HMRC*

5.3 Partial exemption

5.3.1 Overheads or directly attributable?

The FTT has considered a dispute about two different aspects of partial exemption:

- whether particular expenses were directly attributable to taxable or exempt supplies, or whether they were residual;
- if they were residual, how they should be apportioned.

The context was a dispute over an agreed partial exemption special method that had been in place since 1999. The company sold clothes, mainly by mail order, and often on credit, with finance charges generating significant amounts of revenue. In 2006 HMRC concluded that the PESM was too generous to the company and issued a "special method override notice" that effectively made the recovery provisional until the extent of "use for making taxable supplies" could be agreed.

HMRC in due course raised assessments for the periods from 08/06 to 05/16 totalling £42.4m. These were the background to the FTT hearing, but the Tribunal had to consider preliminary issues rather than coming to a final decision. It set out lengthy findings of fact about the business and its customers, some of them redacted to preserve sensitive business information.

The dispute centred on the treatment of a list of 15 different categories of marketing expenditure. The company argued that marketing material should only be regarded as having any link to exempt supplies if it made

reference to the provision of credit. After detailed analysis of the business, the judge concluded that the two sides of that business were so interdependent that nearly all the marketing material was “residual”, regardless of whether it referred to credit. Indeed, material that only referred to credit was also residual, because sales on credit were sales of clothes, and sales of clothes were likely in many cases to generate financial income.

The judge drew a distinction between “residual” input tax and “overhead” input tax. “Overheads” are referable to the business as a whole, but not to any particular supplies. The marketing expenditure was “residual”, in that it was referable to both exempt and taxable supplies. In deciding how to apportion that input tax, it was therefore appropriate to consider “use” for the two streams of income rather than “the business as a whole” (described as a “one pot standard method”).

Neither side favoured the use of the standard method. HMRC favoured a turnover-based method, using the finance income as a percentage of total income, and applying it to the marketing expenditure. Different pots of input tax would be dealt with differently, but in HMRC’s view, this was the fairest way of dealing with this category. The company suggested several different ways of apportioning the expenditure, including “page count” (numbers of references to provision of credit within physical marketing), streaming of expenditure on marketing to those who paid off their balances each month and those who did not (i.e. those who generated finance income), and an adjusted turnover method that excluded some of the interest.

The judge did not favour any of these suggestions. He accepted the company’s argument that including all the finance charges was not fair: someone who paid the minimum balance each month would incur ongoing interest charges that would be less and less closely connected with any marketing expenditure that had generated the sale in the first place. However, a turnover-based method would be capable of providing a fair apportionment, if adjustment was made for this factor.

The judge stated that directions would be issued for future case management of the dispute. Presumably the two sides will attempt to reach an agreement on the basis of the decision, failing which they will return with new proposals for the judge to consider.

As the judge specifically disapproved the basis of the assessments, the taxpayer has succeeded to some extent, but it is not clear whether the margin of success is wide or narrow.

First-Tier Tribunal (TC07022): *N Brown Group plc and another*

5.3.2 Direct attribution or overhead?

A charitable industrial provident society provided supported accommodation to people in need. Local authorities contracted with the society for the supply of support services (agreed to be standard rated) and accommodation (exempt). A dispute arose concerning input tax deducted by the society in relation to the costs of acquiring, repairing, maintaining, securing and cleaning accommodation. HMRC issued an assessment to reduce the input tax deducted between 1 February 2010 to 30 April 2014 from £1,314,198 to £548,419. In HMRC’s view, there was no direct and

immediate link between the costs of accommodation and the provision of standard rated support services, so the input tax incurred on those costs was wholly irrecoverable.

The Tribunal considered the legal basis of the society's services, which were supplied in accordance with a government programme introduced in 2003 called "Supporting People". This provided for "accommodation-based support" and also "floating support" (because this term was used by different people to mean different things, the judge redefined it as "non-accommodation-based support"), that was not tied to accommodation. The local authority was obliged to provide support and accommodation to people covered by the programme; it might subcontract the whole responsibility ("accommodation-based support"), or it might provide the accommodation itself and subcontract the other aspects.

The appellant society provided both types of service. It was estimated that about 90% of its contracts were accommodation-based support. The hope and expectation of the local authority and the society was that those receiving this service would gain the necessary skills to move into their own accommodation in due course, so it was a short to medium term provision (six months to two years). Once a person moved into permanent accommodation, they might receive non-accommodation-based support for a further period.

Judge Jane Bailey examined the way the society's contracts operated in detail, as well as the way in which the costs related to the pricing of the contracts the society bid for. In general, the individual receiving accommodation-based support paid rent to the society, normally funded out of housing benefit.

The judge considered that the supply of accommodation-based support services to the local authorities had two strands, the provision of support and a commitment to providing accommodation to the person receiving that support. Although there were two parts to the supply, both of them important to the recipient authority, it would be artificial to split them. That supply was wholly taxable. On that basis, the objective purpose of the society in acquiring, maintaining, repairing, cleaning and keeping secure its properties had a direct and immediate link with the taxable supplies of accommodation-based support services. The judge said that she was not applying a "but for" test: it was not just that the appellant could not carry out its contractual obligations if it did not have accommodation available; it was the case that the appellant acquired and maintained the properties specifically in order to bid for contracts and then (if successful) supply integrated housing and support in accordance with its contractual obligations.

The appellant had relied heavily on the UK case of *Mayflower Theatre Trust* and on the CJEU decisions in *Sveda* and *Iberdrola*, whereas HMRC relied on *BLP Group plc*. The basis of the decision appears to be closer to *BLP Group* – there was a direct link to a taxable supply, rather than a link to the activities of the entity as a whole.

First-Tier Tribunal (TC06921): *Adullam Homes Housing Association Ltd*

5.3.3 Branches and head offices

A dispute arose between the French authorities and the Paris branch of a UK financial company. The issue was the right of deduction in relation to input tax incurred by the branch in connection with the trade of the London head office.

The branch carried out banking and financial transactions for local clients, which were subject to an option to tax. It also supplied services for the head office. It deducted the whole of the VAT on expenditure related to these two categories of supplies. The tax authority ruled that it was not entitled to deduct input tax on expenditure related to purely internal transactions with its head office. Expenditure that was used for both internal and external purposes had to be apportioned. Questions were referred to the CJEU on both types of expenditure:

- in relation to that used exclusively for the head office's activities, should the rules of deduction be those applicable to the branch or to the head office, or should some composite method be applied?
- what rules should be applied to mixed use expenditure?

The court noted that the head office was partly exempt. It also noted that precedent case law regarded a head office and branch as a single taxable person; in general, the branch did not "independently carry on an economic activity". That meant that the branch would be entitled to deduct input tax on goods and services that had a direct and immediate link with the carrying out of taxed transactions, including those of its principal establishment established in another Member State, with which that branch forms a single taxable person, on condition that those transactions would also give rise to deduction if they had been carried out in the State in which that branch is registered. On mixed use expenditure, the rules of partial exemption required an apportionment.

The taxpayer argued that the apportionment should be carried out using only the proportion applicable in the country where the branch was established. That was its interpretation of the CJEU judgment in *Le Credit Lyonnais* (Case C-388/11), in which it was held that a head office could not work out its deductible proportion on the basis of the creditable turnover of all its fixed establishments in other Member States. The CJEU distinguished the two situations, holding that *Le Credit Lyonnais* was a decision that sought to prevent distortion of the deductible proportion by transactions that had no relation to the inputs. It was not intended to rule out taking into account transactions carried out by a fixed establishment which have a direct and immediate link with expenditure carried out by another fixed establishment.

The French government proposed that the right of deduction should only be determined by reference to the turnover between the fixed establishment and the principal establishment. The CJEU rejected that because those were only internal transactions and only supplies to third parties should be considered.

The formal answer to the first question was: "in relation to the expenditure borne by a branch registered in a Member State, which is used, exclusively, both for transactions subject to VAT and for transactions exempt from that tax, carried out by the principal

establishment of that branch established in another Member State, it is necessary to apply a deductible proportion resulting from a fraction the denominator of which is formed by the turnover, exclusive of VAT, made up of those transactions alone and the numerator of which is formed by the taxed transactions in respect of which VAT would also be deductible if they had been carried out in the Member State in which that branch is registered, including where that right to deduct stems from the exercise of an option, effected by that branch, consisting in making the transactions carried out in that State subject to VAT."

This is a difficult sentence to comprehend. The denominator is "the bottom of the fraction", so this means that the deductible proportion for branch costs used for head office activities appears to be:

(HO outputs that would be taxable in France)/(total HO outputs relating to branch expenditure)

The second question related to the appropriate proportion to apply to overhead expenditure of the branch. In this case, the court ruled: "in order to determine the deductible proportion applicable to the general costs of a branch registered in a Member State, which are used for both transactions of that branch in that State and transactions of the principal establishment of that branch established in another Member State, account must be taken, in the denominator of the fraction which makes up that deductible proportion, of the transactions carried out by both that branch and that principal establishment, it being specified that it is necessary that, in the numerator of that fraction, besides the taxed transactions carried out by that branch, solely the taxed transactions carried out by that principal establishment must appear, in respect of which VAT would also be deductible if they had been carried out in the State in which the branch concerned is registered."

This equally opaque sentence suggests that the deductible proportion for branch overheads used for both branch and HO activities is:

(HO outputs that would be taxable in France + branch taxable outputs)/(HO outputs plus branch outputs)

CJEU (Case C-165/17): *Morgan Stanley & Co Int plc v Ministre de l'Économie et des Finances*

5.3.4 Connected companies

The FTT has considered an argument by HMRC that payments for "management services" between connected companies with common directors cannot constitute consideration for a supply because the director should or could provide the service anyway in his own personal capacity.

The same individual owned two companies, one of which had been incorporated in 1995 to provide "technical testing and analysis", and the other of which was incorporated in 2001 to provide "engineering related scientific and technical consulting activities". The reasons for having two companies were explored by the Tribunal, which was satisfied that there were sound commercial reasons; there was nothing artificial in the arrangements. The shareholder-director had different activities and different customers, and it made sense to keep them apart. In particular, one of his clients insisted on owning any intellectual property generated

during the work, and the two-company arrangement protected against this to some extent.

The basic dispute was over HMRC disallowing input tax claimed by one company on management fees charged by the other. However, this also had a knock-on effect on partial exemption calculations, because the company had invested in residential property and had claimed some input tax under the de minimis limits. If the intra-company transactions were removed, the de minimis tests were not satisfied.

There were disputes over whether the documentation adequately described the services, and also over the proper tax point, given that annual invoices were raised some time in arrears. The judge accepted that this was a reasonable procedure for someone who attended to accounting matters after the year end.

The decision places importance on company law: a director of a company is required to act in the best interests of that company and not to put himself in a position with conflicts of interest. The matter would have been clearer if the director had separate service contracts with each company and there were specific obligations to each that could be sold on, but the Tribunal was satisfied that there was a genuine supply between the companies on the basis of the evidence. This was a continuous supply and the tax points were then correct. As a result, the de minimis tests were satisfied, and the appeal was allowed in full.

First-Tier Tribunal (TC07033): *Computational Structural Mechanics Ltd*

5.3.5 Article

In a *Taxation* article mainly aimed at students, Edd Thompson reviews the workings of the Capital Goods Scheme.

Taxation, 14 March 2019

5.4 Cars

Nothing to report.

5.5 Business entertainment

Nothing to report.

5.6 Non-business use of supplies

Nothing to report.

5.7 Bad debt relief

5.7.1 Withdrawal of relief

A factoring company appealed against assessments withdrawing bad debt relief it had claimed in its returns. The chief executive explained the way in which the business operated, giving an example in which a customer (also called a "supplier" – the source of the debts) factored an invoice worth £1,000. The appellant would advance £764, being 80% of the debt, less its charge of £30 plus VAT; when the debt was collected, the remaining £200 would be paid over to the customer (or would be credited to its account, as the funding of customers was an ongoing process).

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

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

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

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

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

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

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

The appeal was dismissed.

First-Tier Tribunal (TC07010): *Regency Factors Ltd*

5.8 Other input tax problems

5.8.1 Disputed supplies

A clothing manufacturer appealed against disallowance of £67,000 of input tax on purchases from six suppliers between 03/11 and 03/14. The HMRC investigating officer had visited the premises of several of the suppliers and found them empty; they were mostly recorded as "missing" by HMRC. However, HMRC did not argue *Kittel*: instead, they disallowed the input tax based on inadequate purchase invoices and lack of evidence of the goods arriving. The company claimed that it had made large purchases with cash, which could not be traced to bank statements, and by barter; HMRC considered that there ought to be better evidence to support the existence of these transactions.

The judge commended the investigating officer for her diligence in trying to fill in the audit trail. Where she could match transactions to the bank statements, she had allowed the input tax; where she could not, she invited the company and its accountants to provide alternative evidence. This they had failed to do. The judge considered that the onus of proof lay on the company to provide it, given that there were doubts about the various suppliers. In the absence of sufficient evidence, the assessments were upheld.

First-Tier Tribunal (TC07011): *New Collection Leicester Ltd*

5.8.2 Carbon credits

A company appealed against decisions disallowing input tax on carbon credits in periods 03/09, 06/09 and 09/09. The total in dispute was over £36m, but this was reduced following review to only £7.1m, then increased by the time of the hearing to £7.7m.

The judge set out the issues as follows:

1. whether HMRC were entitled to deny input tax on the basis that the invoices were deficient;
2. whether the decision not to accept alternative evidence was unreasonable, and whether the decision to consider was the original one or its confirmation on review;
3. whether the company ought to have known that the transactions were connected with fraud;
4. whether the assessments were valid under s.73 VATA 1994;

5. whether they were made in time.

The decision runs to 2,064 paragraphs, which is surely a record. The following is necessarily a very brief summary.

On the first issue, the company submitted that it had met the substantive conditions for deduction, and any defects in the invoices (it was agreed they were non-compliant) were mere "formal conditions" that, in accordance with CJEU decisions, were less important. The company's counsel claimed that the recent CA decision in *Zipvit* supported this argument (rather than supporting HMRC's case, as HMRC claimed). HMRC argued that the PVD gave Member States discretion to consider what was acceptable in place of valid VAT invoices, and the issue of fraud was highly relevant to the exercise of that discretion.

The judge considered that the defects in the VAT invoices were fundamental (no VRN, suggesting that the VAT would not be paid to HMRC). The *Zipvit* decision supported HMRC's view that the non-payment of the VAT by the supplier was relevant to the exercise of their discretion. The appeal on this ground was dismissed.

On the second issue, the Tribunal concluded that it was the reasonableness of the original decision that was subject to its supervisory jurisdiction. As the reviewing officer expressly agreed with the non-exercise of discretion, there was no separate decision for the Tribunal to examine. The reasons given by the officer for the decision were:

a) the supplier was not registered for VAT;

b) the transactions were connected to fraud and

c) the appellant failed to conduct reasonable due diligence in relation to the transactions.

The Tribunal accepted that these were reasonable factors to take into account, and rejected the appellant's submission that the existence of fraud should not be a relevant factor. The appeal on this ground was dismissed.

The third issue turned on "means of knowledge", and occupies 1,263 of the 2,064 paragraphs. The judge commented that a number of the company's senior employees had the means of knowledge through the due diligence and supervision that they carried out; some of them had given unsatisfactory evidence, but he was not satisfied to the requisite standard that they actually knew of a connection to fraud. It appeared that MTIC "infection" in carbon trading had arisen relatively quickly and was not widely known about until 3 June 2009; up to that date, the company would not have been on sufficient notice to have suspected its transactions. From that date, it should have re-investigated the transactions, and that would have given it the "means of knowledge".

The decision sets out a long and detailed list of events in June 2009 that shows how the fraud became clearer and the orchestrated attack on the market unravelled. Europol estimated that at its peak in 2009 VAT carousel fraud had cost EU Member State treasuries around £5 billion and that up to 90% of all carbon trading in some European countries was as a result of fraudulent activities. HMRC estimated UK VAT losses from carbon credit trading as between £250-300 million.

The conclusion was that the company had "means of knowledge" in respect of transactions between 15 – 18 June 2009 and 28 – 29 July 2009, but not for other transactions between 8 – 10 June 2009. There was no means of knowledge in respect of certain other transactions between 18 May and 3 June, but these were already subject to the denial of input tax because of inadequate invoices.

The lack of means of knowledge on some transactions meant that the appeal succeeded in respect of £245,891 in 06/09; however, it was dismissed in relation to £6,162,121 for that period, and £1,322,800 for 09/09.

The Tribunal then turned to the validity of the assessments raised to collect those sums. The appellant argued that HMRC had not "raised" assessments; however, there was no statutory procedure for doing so, and the Tribunal was satisfied that what HMRC had done was enough to satisfy the law. All an assessment must contain is: the name of the taxpayer, the amount of tax due, the reason for the assessment and the period of time to which it relates.

On the fifth issue, the question was whether HMRC had had "sufficient knowledge of the facts" for more than 12 months before issuing the assessments (which were notified to the company in January 2013). HMRC stated that the assessments were made within 12 months of a report from Pinsent Masons on 21 September 2012 that set out important information. The company argued that the officer had sufficient information by December 2011. The Tribunal had to consider when the officer formed the opinion that he had sufficient information, and if that subjective view was only formed in September 2012, whether it was perverse that he had not formed it earlier.

After more than 300 paragraphs considering the cross-examination of the officer and the investigation process, the Tribunal concluded that the appellant had demonstrated that the officer had sufficient information to justify a *Kittel* assessment by September 2011, which meant that the assessment for 06/09 was raised out of time. The assessment only covered £1,665,780 of the denied input tax; HMRC had never paid the remainder to the appellant, so it did not need to be assessed.

The fact pattern for 09/09 was different, and the judge did not consider that the appellant had satisfied the burden of proof in respect of that. The officer had only become aware of the trades in July 2009 in August 2011, and he then started to investigate them. He did not receive replies to his answers until July 2012, which was when the 12 month time limit began to run. The assessment for 09/09, raised in January 2013, was therefore in time. The judge also accepted the officer's evidence that he did not hold the opinion that he had sufficient information in respect of this assessment until after receiving the report in September 2012.

The appeal was allowed in part, in relation to the 06/09 assessment. On all other points the appeal failed.

First-Tier Tribunal (TC07026): *Tower Bridge GP Ltd*

5.8.3 More missing traders

A husband and wife partnership traded in computer software. It made four purchases of "branded high end, noise cancelling or wireless headphones", and HMRC denied the input tax on the basis of connection to fraud. The total amount involved was £262,000 in the three monthly return periods from 01/16 to 03/16.

The Tribunal examined the history of the deals and concluded that the partners did not know that they had been drawn into a fraudulent scheme. However, they ought to have known. There were too many features of the deals that were "too good to be true" or should have raised suspicions. The overall conclusion is a reminder of the factors to avoid in order to steer clear of involvement in MTIC fraud:

"*There is not one factor that is conclusive in reaching our decision. Taking in totality the unusual nature of the transaction to Goldhill Associates, the clear similarities of the transaction to the features of MTIC fraud which Goldhill Associates knew about, the small role that Goldhill Associates needed to perform, the fact that the prices seemed very out of line with trade prices offered elsewhere, and the significant basic errors that were being made by their supplier and customer, we consider that the Respondents have proved on balance of probabilities that Goldhill Associates should have known that the only reason for the transaction was that it was connected to fraud.*"

First-Tier Tribunal (TC07036): *Michael Gold and another t/a Goldhill Associates*

5.8.4 Updated Notice

HMRC have updated their Notice *Local authorities and similar bodies* to specify that activities with academies or multi-academy trusts in relation to travel for training, childcare vouchers and school trips are treated as non-business activities. There are other points listed in "what's changed", but it appears that these relate to updates made in August 2018 to the February 2016 Notice.

Notice 749

6. ADMINISTRATION AND PENALTIES

6.1 Group registration

6.1.1 Updated Notice

HMRC have updated their Notice *Group and divisional registration*. There is more information about intra-group charges for services bought-in through overseas establishments of group companies, and the introduction of a £7,500 de minimis limit for such charges from April 2019. A new section sets out the implications of the Skandia decision for UK VAT groups. The changes to eligibility criteria in FA 2019 have not yet been included.

8. VAT rules and the Skandia Judgment

8.1 Background

Skandia America Corporation had a head office in the United States and a fixed establishment in Sweden, and believed that supplies made to its Swedish branch were intra-company transactions and consequently not subject to VAT. The Swedish tax authority disagreed, and following referral to the CJEU a judgement was passed that under the Swedish grouping provisions only the establishment physically located within Sweden could belong to a Swedish VAT group. Therefore Skandia America Corporation would be liable to pay VAT on its supplies to its Swedish branch, and the Swedish VAT group would have to account on VAT for those services under the section 43(2A) charge. [This is a curious statement as clearly the VATA does not apply to transactions relating to the American head office and a Swedish fixed establishment.]

The UK's VAT grouping provisions in contrast bring the whole body corporate into the VAT group, and consequently supplies between an overseas establishment and a UK establishment of the body are not normally supplies for UK VAT purposes, as they're transactions within the same taxable person.

This has not changed following the decision as the court did not consider the UK's rule, however in some circumstances the UK VAT accounting will change.

8.2 UK VAT accounting resulting from the judgement

The implication of the Skandia judgment is that an overseas establishment or fixed establishment of a company that also has a UK establishment or fixed establishment is part of a separate taxable person if the overseas establishment is VAT-grouped in a member state that operates similar 'establishment only' grouping provisions to Sweden. Furthermore, the effect of their VAT grouping rules is that the part of the company physically located in that country becomes part of the VAT group there, and is no longer part of the single taxable person of the company's head office and branches.

This will be the case whether or not the entity in the UK is part of a UK VAT group. Businesses must treat intra-entity services provided to or by such establishments as supplies made to or by another taxable person and account for VAT accordingly:

- *services provided by the overseas VAT-grouped establishment to the UK establishment will normally be treated as supplies made in the UK under place of supply rules, and subject to the section 43(2A) charge if taxable*
- *services provided by the UK establishment to the overseas VAT-grouped establishment will normally be treated as supplies made outside the UK under place of supply rules – therefore they will need to be taken into account in ascertaining input tax credit for the UK establishment – if the supplies are section 43(2A) charge services, they should be reported on the trader's European Sales Listing of such supplies.*

If the UK entity is in a UK VAT group, the same applies to supplies between the overseas establishment and other UK VAT group members in UK. Under these circumstances the legislation in VATA section 43(2A)-(2E) does not also apply, as the overseas establishment is not seen as part of the UK VAT group.

It's the responsibility of individual businesses to adhere to local VAT grouping rules where they operate outside of the UK and to assess how it applies to their own particular circumstances.

Notice 700/2

6.2 Other registration rules

6.2.1 Business splitting

An individual ran a single business involving plastering and floor screeding. On the advice of his accountant, to reduce his VAT liabilities, he divided the activities into a sole trade (plastering) and a partnership with his wife (floor screeding). The partnership worked mainly on new build properties and was VAT-registered to enable VAT recovery on materials in relation to what were mainly zero-rated supplies; the sole trade fell below the registration threshold, therefore avoiding the need to charge VAT to mainly private customers.

In 2017 HMRC issued a ruling that the two activities were part of a single business, and it should have been registered for VAT with effect from 1 March 2013. In the correspondence and ADR that followed, the taxpayer and his accountant were clear that the split of the business was VAT-driven: it was essential to be able to recover input tax on materials in respect of zero-rated work, and it was essential to remain competitive in private work where most of the rival operators were not registered.

The Tribunal examined a range of evidence on how the business or businesses operated, noting that the husband and wife's tax returns were prepared correctly on the basis that there was a sole trade and a partnership. There was a joint account for the husband and wife in the trading name of the partnership. However, there were inconsistencies in some of the invoices received from suppliers for materials, and also in invoices issued to customers. An advertising brochure promoted both activities, one on each side of the page.

HMRC noted that this was not a dispute about a direction under VATA 1994 Sch.1 para.2, which can only have prospective effect. That was only relevant where there were genuinely two businesses. In HMRC's view, the activities had not been effectively separated, which meant that the historical turnover tests applied to the combined supplies.

The Tribunal considered a number of previous cases in which separation of sole trades and sea partnerships had been considered, including *Burrell* (HC 1997), *Belcher* (TC05891), *Sea Breeze* (VTD 16,350) and *Salmon Tail* (VTD 16,190). They were all fact-specific and were therefore of little assistance, other than demonstrating that it was possible for a business to operate in this way.

The Tribunal weighed a number of different factors, including the clear intention to create separate businesses, and the imperfect execution of that intention. The judge concluded that the separation was effective from 1 December 2013, but up to 30 November 2013 there was as a matter of fact a single business. That meant that HMRC could not treat the two activities as a single taxpayer from 1 December 2013 without issuing a prospective direction; however, it appears that they would be able to assess the single trade for output tax between March and November 2013. The appeal was therefore allowed in part.

First-Tier Tribunal (TC06910): *Darren Vaughan*

6.2.2 No change to EDR

A company that had been trading since 1995 was advised during 2016 to register for VAT and apply for the flat rate scheme. The owner of the company chased up the process on a day when only an assistant was in the accountants' office; he instructed her to submit an online registration application, even though she was unwilling to do so without the relevant experience or anyone to supervise her or authorise the submission. Nevertheless, the client persuaded her to do so, with the effective date of registration set at 1 August 2016.

The accountants subsequently applied for the EDR to be changed to 14 February 2011, which was refused because it was more than four years earlier; they then applied for it to be changed to 6 September 2012, four years before the online application. They said that the date had been entered in error, and argued that the client was entitled to backdating by four years.

HMRC refused, as no reason had been given for regarding the date given at the time of application as an error. At the hearing, the trader's representative argued that the date should be changed because the person who completed the form had explained that she had not understood the implications of the date she chose, and therefore filled the form in wrongly by mistake; the business owner had also not understood the effect of the date he told her to put down. The intention was to reinvoice clients from the earlier date and so benefit from the FRS.

For HMRC, it was argued that the Tribunal only had supervisory jurisdiction in such an appeal. HMRC's refusal to amend the EDR was not unreasonable in the required sense. In addition, a backdated registration date was not automatically granted on application: it had to be "agreed with the Commissioners". HMRC's counsel said that the "error"

related to the applicant's judgement as to what date to include and the outcome of the chosen date, rather than an error as to the date actually included.

The judge agreed with HMRC. According to the uncontested evidence of the owner and the accountant's assistant, the date of 1 August 2016 was deliberately chosen. The owner's explanation of the "mistake" confirmed that he had misunderstood the implications of the date he chose, rather than mistaking the date itself. The decision to refuse a change was in line with HMRC's internal guidance at VATREG25400, and appeared to be "reasonable" in the sense that it took into account all relevant factors and did not take into account irrelevant ones.

The trader appeared still to be confused about the effect of the date of registration, because in witness statements before the Tribunal different reasons were given for the request to backdate – it was either reinvoicing under the FRS, or to claim input tax, but it could not be both. The judge noted that no evidence had been presented about the possibility of backdating entry into the FRS (to give the advantage of reinvoicing) or the recoverability of input tax, so he made no findings in respect of either matter.

Overall, the decision to refuse to change the validly and deliberately chosen date of 1 August 2016 could not be said to be unreasonable. The appeal was dismissed.

First-Tier Tribunal (TC06957): *S P Henson Engineering Ltd*

6.2.3 Status dispute

An individual appealed against a decision to compulsorily register him for the period from 1 May 2012 to 30 June 2014, a belated notification penalty of £45,443, and an assessment for £113,342 of VAT. As he had not filed a VAT return, he could not appeal against the assessment, but the Tribunal had jurisdiction to consider the other matters.

The individual claimed that he was an employee of another business and was therefore not the person liable to be registered. However, answers he had given in interviews with HMRC contradicted this; he had no evidence to support the assertion that he was an employee (e.g. PAYE records). The judge was satisfied that HMRC had shown on the balance of probabilities that he was liable to be registered, and confirmed both that decision and the penalty.

First-Tier Tribunal (TC07050): *Salman Ali Chaudry*

6.2.4 Agricultural flat rate scheme

A farmer was removed from the AFRS by HMRC with effect from 31 October 2012 on the grounds that he was receiving too much benefit under the scheme. At the same time, HMRC removed Shields & Son Partnership from the AFRS for the same reason, and that firm appealed the decision. The CJEU held in 2017 that the UK law did not comply with the PVD in imposing the limit on benefit under the AFRS. The present appellant's accountants wrote to HMRC in March 2018 claiming that the decision meant their client should be restored retrospectively to the AFRS and he should be refunded £65,688 in accordance with their supporting calculations. HMRC refused; their letter cited the £3,000

benefit rule as the reason, and appeared to assume that the application was to apply from a current date.

HMRC subsequently sent a much more detailed reply setting out the time limits for appealing against the 2012 decision; the accountants filed an appeal to the Tribunal in July 2018. The Tribunal therefore had to consider whether to entertain an appeal made over five years after the deadline.

Robert Maas appeared for the appellant. He informed the Tribunal that of 38 cancellations in 2012 by HMRC 33 had related to Northern Irish farmers, one of which was Shields & Sons. In his view the Applicant had only had two possible challenges to the October 2012 decision – first that no reasonable body of Commissioners could have reached the decision or secondly that HMRC had acted in bad faith. In his view both of these are virtually impossible for a taxpayer to establish, particularly bearing in mind that the burden of proof is on the taxpayer. His argument was therefore based on the rights of the taxpayer where the state has acted in breach of EU law, as set out in cases such as *Deville* (C-240/87), *Metallgesellschaft Ltd* (Cases C-397/98 and C-410/98) and *Fleming* (UKHL 2008).

According to the 2018 UT decision in *Martland*, the FTT should consider the length of the delay, the reasons for it, and then “all the circumstances of the case”, including the respective prejudice to the parties. In this case, the delay was long, but the reason was the extreme difficulty of overturning the original decision; the prejudice to the applicant was considerable, as its appeal was almost bound to succeed on the basis of CJEU precedent, whereas HMRC were already considering their response to the *Shields* decision and would not therefore have to address the matter afresh.

HMRC’s representative argued that allowing appeals out of time on the basis of developments in case law would lead to many closed cases having to be reopened and would undermine the administration of justice and the principle of legal certainty.

The judge distinguished the cases that were cited for the appellant. In his view, there was no good reason for the trader not to have lodged an appeal against the 2012 decision within the time limits, as Shields had done. Accordingly, the application for leave to appeal out of time was dismissed.

First-Tier Tribunal (TC07018): *Hampton George Hewitt*

6.2.5 Updated Notice

HMRC have updated their Notice *Who should register for VAT* to reflect the new place of supply rules for digital services supplied to consumers from 1 January 2019, including non-EU businesses who make such supplies becoming eligible to use the VAT MOSS scheme.

Notice 700/1

6.3 Payments and returns

6.3.1 Flat Rate Scheme disadvantage

A company joined the FRS on 1 March 2013. Its business was accident vehicle management, and part of this involved the provision of courtesy cars following accidents. It claimed input tax on the purchase of three cars, believing that these were "capital goods used in the business" and therefore eligible for deduction for a FRS trader.

HMRC refused the claim on the basis that goods purchased to generate income by being leased, let or hired were not eligible for input tax deduction under the FRS. In September 2015 the company applied to be removed from the FRS with effect from 1 January 2015; it had purchased further vehicles in June 2015. A visiting officer raised a number of questions about this, not least because the last four VAT returns had shown expenditure of £329,737 against net income of £85,476.

The company did not respond to the enquiries, and the officer raised an assessment for input tax claimed in the period 06/2015. The appellant's agent then replied, setting out a schedule of invoices raised. These showed that the company was never eligible to use the FRS on the basis of its billings, although as many of its invoices (two-thirds) were disputed or unpaid, it had been eligible on the basis of actual receipts. The company requested that its entry into the FRS should be cancelled from the outset. HMRC responded that backdated removal from the scheme was not possible; the company was allowed to leave it in July 2015, which would leave all the purchases of cars blocked for input tax.

The company's argument was that it should never have been in the FRS at all, as it was not entitled to use the scheme. Judge Malcolm Gammie examined the schedule of invoices and noticed a number of discrepancies. He was unsure how much reliance could be placed on it. The company appeared to suffer an extraordinary level of bad debts. No explanation was given for this. However, it was clear that HMRC had not taken into account the possibility that the company should never have used the FRS in coming to their decision and confirming it on review. After considering a number of precedent cases about backdating applications relating to the FRS, the judge decided that the appropriate course of action was to require HMRC to reconsider and remake their decision, taking into account the company's evidence about its turnover, which would require further explanation and verification.

The assessment was neither confirmed nor set aside, as the validity of the input tax claim would depend on the outcome of HMRC's further decision.

First-Tier Tribunal (TC06911): *Apex Vehicle Management Ltd*

6.3.2 Wrong FRS rate

A sole trader registered for VAT and used the FRS from 2008. At the time she used the rate for "business services not listed elsewhere", which was 9%, reduced to 8% for the first year of registration. After she incorporated the business in January 2014, she received a control visit; the officer realised that she had never increased the rate after the first year, nor taken into account the further increases following rises in the standard

rate of VAT. By 2014 the rate should have been 12%, although the company was entitled to use 11% for its first year. In October 2015 HMRC raised an assessment for £3,359 reflecting VAT underpaid by the company. No action was taken in respect of the sole trade.

The trader's argument against the assessment could not succeed: she claimed that HMRC had not informed her of increases in the rate, but they had no such responsibility. However, the business had suffered a fraud at the hands of an employee, and this involved overstating turnover. The judge noted that the ADR had led to an agreement by HMRC that some of the liability was based on fictional turnover and the assessment would be reduced.

The judge then turned to an appeal against a series of default surcharges. After considering the circumstances of individual periods, he came to the overall conclusion that the fraud was the type of unexpected event that HMRC have erroneously said was the only thing that could make an excuse reasonable. He therefore cancelled all the surcharges under appeal.

He then commented on a claim by HMRC's representative that "even in a case where the due date for payment was extended, the due date for a return remained at the last day of the month following the end of the VAT period." The judge suggested that this could not be right – if so, most traders would be in default most of the time, even if their payments were made by the supposedly concessionary 7-day deadline. He commented that it would be a sensible and laudable move for HMRC to publish any directions that they had made under SI 1995/2518 reg.25A(2), which provides for the extension of deadlines in relation to electronic returns and payments, on their website. He also noted that HMRC's schedules of defaults, which are in other respects very helpful, still show the due dates as being the end of the month following the return period, with an asterisk and a footnote in very small print explaining that there is an extension.

First-Tier Tribunal (TC06964): *JCA Seminars Ltd*

6.3.3 Updated Notice

HMRC have updated their Notice *VAT flat-rate scheme for small businesses*. The main change is an amendment to Step 5 of the table in section 4.1 to clarify the process for choosing the correct business sector. This permits the use of "any other activity not listed elsewhere" only if the business does not fit anywhere else.

Notice 733

6.4 Repayment claims

6.4.1 Calculations

In TC05257, a company appealed against an assessment for £460,630 to reverse an adjustment it had made to its output tax for the period ending 12/12. The appeal was a lead case for two other taxpayers with similar issues. The issue related to the calculation of participation fees for bingo. HMRC had published a Brief (07/07) which suggested that the correct approach was to calculate the participation fees on a "session by session" basis rather than "game by game". The companies believed that their adjustment reflected this approach, and entitled them to make an adjustment under reg.38 SI 1995/2518 because there had been a "decrease in consideration for a supply, which includes an amount of VAT".

Customers pay a fixed sum to participate in a session of bingo which entails the right to play in several separate games of bingo, each of which offers a cash prize. For the purposes of VAT, this sum is divided into a stake and a participation fee. The stake is the element of the sum which is paid by the customer that is used to fund the prize for the winner. It is not consideration for any supply.

The company had historically accounted for output tax on participation fees on a game basis, in accordance with HMRC's published guidance at the relevant time. HMRC's Brief 07/07 indicated that it should have been accounted for on a session basis. The effect of the Brief and the session basis allowed the company to reduce the value of the participation fees (on which VAT was payable) where the participation fees for games within the session were added to the stake money (which was outside the scope of VAT) received from customers to guarantee a certain level of prize or to create additional prize money for other games within the session.

The company argued that a change in calculation of the apportionment between stake and participation fee resulted in a change in the amount of consideration for the supply – if the participation fee had gone down, then more of what the customer paid was stake money; that meant that the consideration for the VATable supply had reduced, and reg.38 was engaged. The company issued an internal credit note to adjust the VAT.

HMRC argued that the amount paid by the customer had not changed, so any claim had to be made under s.80 VATA 1994, and it would therefore be out of time. In HMRC's view, the apportionment between stake and fee must be known by the end of the session; it was therefore not possible for there to be an adjustment to consideration after the end of the relevant period, which is what reg.38 requires.

The FTT noted that a similar issue had been decided in the taxpayer's favour in the case of *Carlton Clubs plc* (TC01389). HMRC had not appealed that decision, but argued that it was not binding and had been wrongly decided. In their view, the company had made a mistake in its earlier periods (albeit because it had followed HMRC's policy), and could only correct it by making a s.80 claim.

The decision considered the detailed arguments of the taxpayer about the relationship between the valuation provisions which deem part of a mixed payment to be consideration for a supply, and HMRC's response that

art.90 PVD and reg.38 require an "event between customer and supplier" subsequent to the original supply.

The judge (W Ruthven Gemmell) explained in considerable detail why he preferred the company's arguments. He did not agree that art.90 required a repayment to the customer; reg.38 provided for "adjustments in the course of business", which covered this situation. The appeal was allowed.

HMRC appealed to the Upper Tribunal, arguing that the FTT judge had erred in his interpretation of the legal provisions, in particular in relation to "decrease in consideration". HMRC continued to maintain that the amount paid by the customer had not changed, so there could be no "decrease". There were in total 8 different grounds of appeal.

The Upper Tribunal ruled that HMRC's arguments were misconceived. The focus of the VAT legislation was on "consideration for the supply". The single payment from the customer did not change, but the amount of it that constituted consideration did change. The company had not made a mistake when using a lawful method of apportionment on the "game" basis, and was acting properly when instructed to change to a different lawful basis; HMRC had invited retrospective claims by reference to s.80, but that did not prevent the taxpayer from making any other lawful claim, including one under reg.38. An argument that the FTT should have regarded the "session payment" as a "single supply" was rejected because, once again, the focus should have been on consideration, not supply. The FTT had come to the correct decision, and HMRC's appeal was refused.

HMRC appealed again to the Court of Session, which overturned the decisions below. The crucial question was whether the circumstances of the case met the terms of reg.38. In the court's view, the conditions of reg.38 were more specific and narrower than those of s.80. The conditions were:

- there had been an increase or decrease in consideration for a supply which included an amount of VAT; and
- the increase or decrease occurred after the end of the accounting period of the original supply; and
- the increase or decrease must be evidenced by a credit or debit note.

That suggested that the standard situation for the regulation to apply was a commercial transaction in which a price was renegotiated and adjusted between the parties. That limited scope was supported by the context in which the regulation appeared, and also by CJEU decisions such as *Goldsmiths (Jewellers) Ltd* and *Freemans plc.*, These cases confirmed that what is now PVD art.90 was concerned with the consideration actually paid and received, not other adjustments to a trader's VAT liabilities.

The recalculation of the proportions of the customers' payments that were stake and consideration did not make any difference to the rights and obligations of the taxpayer and the customers in the real world. Those were settled in the past, and this was merely a different way of working out the VAT liability. That could only fall within s.80, not within reg.38.

The taxpayer also relied on VATA 1994 s.19(4), which required an apportionment where a single payment related to more than one thing. It

argued that such an apportionment could be reconsidered over a period of time where the underlying calculation was difficult, citing the *First National Bank of Chicago* case as authority for the proposition that the CJEU supported such an approach. The company argued that HMRC's notices on the subject of apportionment constituted an exercise of a power to determine the correct way of carrying out the calculation. The court accepted this as a general proposition, but did not agree that it brought the matter within reg.38. HMRC's instruction to use a different method of calculation related to the internal accounting of the taxpayer, and did not change the consideration in the sense required by reg.38.

HMRC's appeal was allowed.

Court of Session: *HMRC v KE Entertainments Ltd*

6.4.2 Group claims

The Court of Appeal has now heard combined appeals in several cases about the correct person to make a reclaim where a company was a member of a VAT group and is no longer:

- *MG Rover/BMW (UK) Holdings Ltd;*
- *Lloyds Banking Group/Standard Chartered Bank;*
- *Gala 1 Ltd (*now *2016 G1 Ltd).*

MG Rover

In the first case, Rover had been part of BMW's VAT group at the time when output tax was overpaid on some of its transactions. It had left the group and was independently registered by the time the *Fleming* claim window opened, and it claimed the repayment. BMW also claimed. HMRC considered that BMW's claim was correct, but Judge Mosedale held that the legal fiction of the single entity only lasted as long as the companies remained within the VAT group registration. Once the group had split up, the rights to repayment would be reallocated to what she called "the real world supplier" (RWS) – the company on whose transactions the VAT had been overpaid. BMW and HMRC appealed to the Upper Tribunal.

Lloyds

In the second case, a subsidiary had left the SC group and joined the Lloyds group. A similar repayment claim arose; a different FTT judge came to the opposite conclusion, that the representative member at the time of the error had filed the erroneous VAT return, and it was therefore that company that had the right and the responsibility to correct it.

There were in fact two separate periods, during one of which the subsidiary had itself been the representative member of a VAT group, and SC had been its corporate holding company. SC claimed the repayment on the basis that, as the holding company, it had borne the burden of the overpaid tax. The FTT held that the subsidiary was entitled to the repayment for this period, and SC appealed. For the second period, during which SC was the representative member, SC was entitled to the repayment, and Lloyds appealed.

Gala

In the third case, the claim related to mechanised cash bingo (MCB) and main stage bingo (MSB). The claimant company was the representative member of an extant VAT group that was formed in 1997; the group now contained companies that had operated MCB and MSB in the past at times when they were not members of the VAT group – they had been in a different VAT group, or had been separately registered.

HMRC accepted that a right to claim could have been transferred to the current representative member on acquiring the generating member, as long as the former registration (group or individual) had ceased, the entire trade and assets had been transferred, and a valid claim was made. However, this could not apply if the company had been a member of a different group which still exists now; only the representative member of that other group could claim.

Upper Tribunal – MG Rover and Lloyds

The Upper Tribunal heard these two appeals together, and summarised the positions of the various appellants as follows – that the right to claim:

(i) lay with the representative member for the time being of the VAT group of which the RWS had been a member at the time of the supply (BMW's view);

(ii) lay with the representative member of that group until the RWS left it, when it reverted to the RWS (MG Rover's and Lloyds' view); and

(iii) lay with the representative member while the VAT group was extant but on the coming to an end of the VAT group devolved on the company which had borne the economic burden of the wrongly charged VAT (SC's view).

Lloyds and MG Rover also submitted that a reference should be made to the Court of Justice.

The Upper Tribunal reviewed the UK law and the EU basis for it. The judge noted that s.80 refers to "a person [who] has accounted for VAT for a prescribed accounting period..." making a claim for repayment. CJEU precedents were examined for their limited guidance: *Ampliscientifica Srl* (Case C-162/07), *Commission v Ireland* (Case C-86/11), *Commission v Sweden* (2013), *Skandia* (Case C-7-13), and *Larentia + Minerva* (Case C-108/14). The Tribunal derived the following principles from these cases:

(1) during the currency of grouping, domestic legislation is required to have the effect that the only taxable person is the single taxable person so that the individual members of the group are not treated as taxable persons. This affects in particular whether or not a supply is made and the quantification of VAT liability;

(2) the purposes of Article 4(4) are administrative simplification and the avoidance of abuse;

(3) member states have a margin of discretion in the implementation of Article 4(4), but must exercise that discretion having regard to the purpose of the Article and in accordance with EU law principles including that of fiscal neutrality (whereas fiscal neutrality is not an object of grouping (if it were one would expect grouping to be

mandatory), member states must exercise their discretion with due regard to that principle).

None of the cases dealt directly with the way in which the rights and obligations of the several persons who were treated as the single taxable person should be permitted or required to be allocated among them. However, the Tribunal considered that it was at least consistent with these judgments for the rights and obligations which have arisen during the grouping to continue to be treated as rights and obligations of the members, treated as a single person, after grouping ceases.

The domestic precedents on grouping in general were *Thorn Materials Supply Ltd* (HL 1998), *Barclays Bank* (CA 2001) and *Intelligent Managed Services Ltd* (UT 2015). There was also a decision of the Court of Session on the precise question at issue in this appeal, *Taylor Clark Leisure* (2016).

The Tribunal then considered the "*San Giorgio* line of cases" which have considered the trader's rights to recover taxes levied in breach of EU law (*SpA San Giorgio* Case C-199/82; *Societe Comateb* Cases C-192 to 219/95; *Weber's Wine World* Case C-147/01; *Reemtsma Cigarettenfabriken* Case C-35/05; *Lady & Kid A/S* Case C-398/09; *Danfoss A/S* Case C-94/10; and *Alakor Gabonatermelo es Forgalmazo Kft* Case C-91/12). SC argued that the *San Giorgio* principle extended a right of repayment to it as holding company of the subsidiary during the period it had overpaid VAT, because the holding company had borne the burden of that tax. The Tribunal did not accept that this was a correct reading of these cases, which provided for a primary right of repayment to the trader who had accounted for the tax, and then a secondary right to the consumer as the person who bore the economic burden of paying it if it was otherwise excessively difficult for the consumer to obtain a repayment through the supplier. An investor in the supplier was not a person who was considered to have borne a burden as a result of the operation of the VAT system.

After consideration of the arguments of all the competing parties, the Tribunal came to a relatively simple conclusion. The rights and obligations of all the members of the group were treated as falling on a single taxable person that was deemed to exist. The representative member was the person responsible for making returns, and was liable to be assessed under s.73 if returns were not filed or wrongly filed. Other members could become jointly and severally liable for the whole of the VAT, but there was no mechanism in the UK law for dividing the liability between them, nor for dividing an entitlement to a repayment. Under s.80, it was the person that had overpaid VAT that made a repayment claim; there was nothing in the law to prevent the fiction of the deemed single taxable person continuing after the VAT group had been dissolved. The FTT had been correct in *SC/Lloyds*, and wrong in *BMW/MG Rover*.

If the former representative member had been dissolved, it might be excessively difficult or practically impossible for recovery of overpaid VAT by this route, and it might then be possible for others to make a claim. However, that was not the situation in any of the cases under review.

Upper Tribunal – Gala

The Upper Tribunal heard this appeal after the Court of Session had heard Taylor Clark and the Upper Tribunal had heard the two appeals above. The parties agreed the following points:

- On the basis of *Taylor Clark* and *MGR*, Gala accepted for the purposes of the appeal that the right to reclaim repayment of overpaid VAT was the right of a single taxable person, and that those rights were vested in the representative member. Therefore, save in an exceptional case, VAT could only be reclaimed by the representative member and not by the real world supplier (RWS).
- HMRC accepted that, although the case where a group has been dissolved and the representative member has been irrevocably dissolved is the paradigm example of an exceptional case where it was virtually impossible or excessively difficult for wrongly paid tax to be recovered through the representative member, it was not the only case, since it is not possible to define, in advance, all cases which could be regarded as exceptional.

The company raised a number of "special circumstances" that it considered ought to enable it to claim, but the UT rejected them all. The UT also declined to make a reference to the CJEU.

Court of Appeal

All the appeals were joined together in the Court of Appeal, where Lady Justice Rose gave the leading judgment (agreed without elaboration by Henderson LJ and Patten LJ). Since the above decisions, the Supreme Court has decided the *Taylor Clark* case. The appellants had to accept that the SC's decision was binding, but argued that the UK law was not compliant with art.11 PVD and that this had not been raised before the SC. The appeal was therefore based on a claim that s.43 and s.80 VATA 1994 infringed EU law and had to be given a conforming construction in line with the *Marleasing* principle.

The judge reviewed the EU precedents on grouping, none of which directly addressed the question at issue in the present case (that of *San Giorgio* rights to recovery of taxes wrongly levied). The cases included *Ampliscientifica* (Case C-162/07), *Commission v Ireland* (Case C-85/11), *Commission v UK* (Case C-86/11), *Commission v Sweden* (Case C-480/10), *Larentia + Minerva* (Cases C-108/14 and C-109/14) and *Skandia America Corp* (Case C-7/13). She also considered UK precedents on the consequences of changes in VAT groups, including *Thorn Materials Supply Ltd* and *Barclays Bank plc*. She went on to examine CJEU cases on unjust enrichment and effectiveness, ranging from *San Giorgio* to *Reemtsma*, *Marks & Spencer* and *Banca Antoniana Popolare*.

After rehearsing the facts of each of the cases, she commented that she intended no disrespect to the other judges by focussing on the reasoning of the UT in *MG Rover/Lloyds Banking Group*, before referring to the Supreme Court's decision in *Taylor Clark*.

The appellants had separate representatives who divided the issues between them. They "made common cause on the principal arguments on whether the UK's implementation of article 11 was compliant with the

wording of the article and with the effective enforcement of the *San Giorgio* rights."

The judge considered the arguments about s.43 and concluded that there was nothing in the objectives, context or wording of article 11 as interpreted by the CJEU that rules out the model adopted in the UK law. There was nothing in the difference between s.43 and "compulsory VAT grouping" in Sch.1 para.2 (a business splitting direction). VAT grouping had significant consequences for the rights and obligations of the members of the group, and was consistent with the simplification objective underlying the PVD provision.

The appellants argued that their *San Giorgio* rights were needed in the instance that the "real world supplier's" customer sued for a return of the wrongly charged VAT. If the UT decisions were correct, the RWS would have no way of recovering that VAT either from HMRC or from the person currently holding the group registration of the group the RWS had left. The judge said that the CJEU has had several opportunities to consider the incidence of the *San Giorgio* right, albeit not in the context of VAT grouping. It has set out the principles to be applied and emphasised that it is for the national court to assess whether, in a particular case, the application of domestic legal rights and procedures complies with the principle of effectiveness. She considered that the result in these appeals was sufficiently clear so that a reference to the CJEU was not appropriate.

She drew a distinction between a person suffering loss as a result of tax being wrongly paid and a person "bearing the economic burden of the tax". She did not accept that a purely hypothetical claim by the customers of the RWS should create a general right of reimbursement from the state. There might instead be a right of recovery from the representative member, if the representative member could make a claim. That was all part of the internal arrangements within the group, and not an issue between HMRC and the RWS. "A court in future may need to consider a claim brought against a representative member by a real world supplier who has reimbursed the VAT to its own customers and seeks a remedy against the representative member who accounted for that VAT to HMRC. None of the Appellants is in that position and the possibility of such a situation arising does not justify conferring a *San Giorgio* right on these appellants."

There was a separate question in the *Lloyds/Standard Chartered* appeal: what happens to the right of repayment if a VAT group is dissolved? The judge considered the simplest solution to be compliant with the law: the last representative member retained the right to claim, "whether or not it is the same legal entity as fulfilled that role at the time of the supplies and whether or not it is still a taxable person". A number of other grounds of appeal were considered and rejected.

Gala put forward five factors that constituted "special circumstances", cumulatively if not individually, that indicated it ought to be given a repayment. The judge did not agree that the circumstances were exceptional, and agreed with the assessment of the Upper Tribunal. There was no error of law.

Court of Appeal: *Lloyds Banking Group plc and others v HMRC*

6.4.3 Unjust enrichment

A water utility company was privatised in April 1990 and charged standard rated VAT on certain infrastructure works until 4 December 1996, after which they were treated as zero-rated. The company reclaimed that VAT by a *Fleming* claim filed on 30 March 2009. The amount was approximately £12m: it had not been precisely quantified, but the parties believed it could be agreed if the Tribunal determined whether it was repayable as a matter of principle.

Before the FTT (TC05852), HMRC accepted that the supplies should have been zero-rated, so VAT had been overpaid. They claimed that repayment would unjustly enrich the trader (s.80(3) VATA 1994). That question was the sole issue for the hearing.

The parties agreed that the burden of proof lay with HMRC to show that the VAT had been passed on to the customers. The trader accepted that it had a regional monopoly of supply, so it could not have lost business by charging more for its services. The cost of water connection was so minimal in relation to the cost of a new building that the VAT on it was unlikely to have any effect on the customer or on demand. The company always levied infrastructure charges at the maximum amount allowed by its regulator. The only question for the Tribunal was therefore whether the regulator would have allowed a higher charge if the work was known to be zero-rated. If not, the trader would have suffered no economic damage by levying VAT and handing it over to HMRC.

The maximum amounts set by the regulator were treated as “excluding VAT”. Therefore the company had always charged the amount allowed and had added VAT to that. The Tribunal also noted that many of the company’s customers would have been developers of new houses or taxable commercial buildings who would have been entitled to recover the VAT charged.

The Tribunal (Judge Barbara Mosedale) considered expert witness evidence relating to the way in which the regulator set the charges and the economic basis underlying the charging system. After detailed consideration of a number of factors, she concluded that it was more likely than not (the standard of proof required) that the regulators set the maximum levels of infrastructure charges without considering VAT at all. That meant that the charges would have been the same even if it had been known that they should have been zero-rated, and the company had suffered no loss. The appeal was dismissed.

The company appealed to the Upper Tribunal (Mrs Justice Falk and Judge Jonathan Cannan), putting forward four grounds:

(1) The FTT failed properly to identify the principles in *Baines & Ernst* (a 2006 CA decision on unjust enrichment).

(2) The FTT failed properly to apply the principles in *Baines & Ernst*.

(3) The FTT reached conclusions and/or made findings of fact which no person acting judicially and properly instructed as to the relevant law could have reached (in the *Edwards v Bairstow* sense). The UT noted, and the company’s counsel accepted, that grounds (2) and (3) were effectively the same point and should be considered together.

(4) The decision of the FTT would have been different if a letter dated 6 September 1989 from Customs & Excise to the Water Authorities Association ("WAA") had been before the FTT. This amounted to an application to adduce new evidence on appeal, which HMRC opposed.

The UT reviewed the FTT's findings of fact, and considered the statement of the principles on unjust enrichment that had been analysed by Judge Mosedale at the beginning of her decision. Although this was included in the grounds of appeal, the company's representative did not in fact take issue with the FTT's analysis of the law. The first ground was therefore dismissed.

The real issue was whether the FTT had come to unjustified conclusions in applying the law. The company's representative argued that there was no evidence before the FTT that would justify "unwarranted speculation" about how the Secretary of State fixed the infrastructure charges. He listed five preliminary conclusions and the overall conclusion that there was sufficient evidence that the level of infrastructure charges was not affected by VAT.

HMRC's counsel (who also appeared for HMRC in *Baines & Ernst*) pointed out that the *Edwards v Bairstow* hurdle for overturning FTT findings of fact is very high. The company argued that the FTT had "speculated", but the UT agreed with Judge Mosedale that "The Tribunal is not prohibited from reaching a conclusion on what a person was likely to have done in a given set of circumstances that did not in fact occur, if there is sufficient reliable evidence to reach a conclusion on that matter." Although the decision was "not straightforward", overall the UT was satisfied that the FTT made findings on the basis of the evidence before it, having appropriate regard to the burden of proof. In the light of its findings it drew inferences on the balance of probabilities as to what regard the regulators would have had to the incidence of VAT. That was the function of the FTT and the UT did not consider that the inferences it drew amounted to unwarranted speculation. They were supported by evidence, and it was open to the FTT to draw those inferences.

Turning to the additional evidence that the company wanted to adduce, there was argument about whether it was appropriate for the UT to consider it. However, the UT did not in any case consider that the letter added much to the material that was before the FTT, and there would be no real prospect of success based on admitting it. That ground of appeal was refused.

Overall, the company's appeal was dismissed.

Upper Tribunal: *Anglian Water Services Ltd v HMRC*

6.5 Timing issues

Nothing to report.

6.6 Records

6.6.1 Voluntary disclosures

HMRC have updated their guide to making a voluntary disclosure. The update relates only to direct taxes, where there is a "digital disclosure service". The guide also includes addresses for disclosure of the need to register and for errors on a VAT return.

www.gov.uk/government/publications/hmrc-your-guide-to-making-a-disclosure

6.6.2 Making Tax Digital: round-up

The Financial Secretary to the Treasury, Mel Stride MP, made a statement to Parliament on MTD on 19 February setting out HMRC's progress.

According to HMRC's research, 81% of the mandated population were aware of MTD as of December 2018 and 83% of those had started to make the necessary preparations.

hansard.parliament.uk/commons/2019-02-19/debates/802C22E7-88AF-4B3D-A5A6-E98E60F54E50/MakingTaxDigital

Meanwhile, research from KPMG found a majority of businesses saying they need more support ahead of the 1 April start date. The survey asked 1,000 businesses which statement best described their attitude to MTD and the 2019 deadline. The responses showed:

- 64% saying it is a good idea but that they need more support;
- 19% saying it offers their business no benefit;
- 12% supportive and ready for the deadline; and
- 5% saying it would be damaging to their business.

HMRC updated their MTD "timeline" to reflect the fact that the pilot is now open to most business types.

Date	Activity
October 2018	Open to sole traders and companies (except those which are part of a VAT group or VAT Division) provided they are up to date with their VAT. Those who trade with the EU, are based overseas, submit annually, make payments on account, use the VAT Flat Rate Scheme, and those newly registered for VAT that have not previously submitted a VAT return, are unable to join at this point. Those customers with a default surcharge within the last 24 months will be able to join the pilot by the end of October 2018.
Late 2018	Private testing begins with partnerships and those customers that trade with the EU.
Late 2018/early 2019	Open to other sole traders and companies who are not up to date with their VAT, users of the Flat Rate Scheme and businesses newly registered for VAT that have not previously submitted a VAT return.

Early 2019	Open to partnerships and those customers that trade with the EU.
Spring 2019	Pilot open for Making Tax Digital customers that have been deferred.
April 2019	Making Tax Digital mandated for all customers (except those that have been deferred).
October 2019	Making Tax Digital mandated for customers that have been deferred. The 6-month deferral applies to customers who fall into one of the following categories: trusts, 'not for profit' organisations that are not set up as a company, VAT divisions, VAT groups, those public sector entities required to provide additional information on their VAT return (Government departments, NHS Trusts), local authorities, public corporations, traders based overseas, those required to make payments on account and annual accounting scheme users.

The online guidance has been updated for the same development.

www.gov.uk/guidance/use-software-to-submit-your-vat-returns

The timeline has now been replaced by a Q&A document containing "mythbusters", attempting to dispel what the department regards as common misconceptions about the new system.

www.gov.uk/government/publications/making-tax-digital

There are also updates to the guidance in relation to the pilot and businesses for whom mandatory digital record-keeping and reporting is deferred until October 2019.

www.gov.uk/government/publications/making-tax-digital-how-vat-businesses-and-other-vat-entities-can-get-ready

HMRC have re-worked their agents' guide to the MTD pilot, producing a step-by-step guide to signing clients up for MTD for VAT. This includes new guides for linking clients to an agent services account, and checking when MTD becomes mandatory for a business. There is also a reminder that applications for sign-up must be made at least one week before the next VAT return is due, to preserve current direct debit arrangements.

www.gov.uk/guidance/making-tax-digital-for-vat-as-an-agent-step-by-step

In an article in *Taxation*, Carl Reader discusses the development of digital reporting and assessing the future benefits for the tax profession.

Taxation, 10 January 2019

HMRC have published a guide to help people check when businesses must join MTD for VAT...

www.gov.uk/guidance/check-when-a-business-must-follow-the-rules-for-making-tax-digital-for-vat

...and a similar guide for businesses. Businesses paying VAT by direct debit cannot sign up in the 7 working days before, or the 5 working days after, the due date of their VAT return.

www.gov.uk/guidance/making-tax-digital-for-vat

6.6.3 MTD Notice

HMRC have updated their Notice *Making Tax Digital for VAT* from the July 2018 version, to clarify the making tax digital turnover test based on the VAT threshold from April 2019 and to reflect deferral of the rules until October 2019 for certain businesses, for whom the soft-landing period for establishing digital links between software applications will also be extended for a further 12 months until 30 September 2020.

The Notice was further updated in March with a new section on who may be exempt from MTD for VAT, on grounds including disability, remoteness of location, insolvency or religious belief, and how to claim the exemption.

Notice 700/22

6.7 Assessments

6.7.1 Best judgement

The Tribunal had to consider assessments in relation to underdeclaration of sales, leading to underdeclaration of VAT and income tax, and the use of the undeclared money to pay wages that were not subjected to PAYE or NIC. The assessments covered years from 1996/97 to 2010/11. There were a number of specific findings, in many cases on the basis that the trader had offered no defence to the figures, and the appeal was allowed in part, reducing the total amount payable in the various taxes and penalties.

First-Tier Tribunal (TC06923): *Terence McCloskey*

6.7.2 Understatement

A partnership running a convenience store appealed against assessments and penalties for periods 01/11, 07/14 and 10/14. The taxpayer argued that the understatement in respect of some agreed assessments was the fault of the firm's former accountants, and no penalties should be imposed. In respect of the disputed assessments, the firm contended that there had been no understatement of output tax.

The Tribunal examined the history of the HMRC enquiry into the operation of the shop's till and the preparation of retail scheme calculations by the accountant. The judge was satisfied that there had been deliberate manipulation of the till in some periods, and confirmed the assessments to that extent. However, he also accepted that some of the errors arose because of the accountant's incorrect calculations under the retail scheme, and in those periods, there should be no penalty for the taxpayer. The appeal was allowed in part.

First-Tier Tribunal (TC06947): *Chauhan t/a One Stop Shop*

6.7.3 Moving the liability

HMRC assessed a trader to a total of £553,799 in VAT and £193,829 in penalties on the basis that the company had understated its outputs. HMRC had picked up the case from discrepancies between VAT returns and reports of payments to the company by customers under the Construction Industry Scheme. When the enquiry started in early 2015, the taxpayer's agent admitted that a deliberate decision had been taken to understate the VAT because the company was due repayments under the CIS. On the front of each VAT return from 2011 onwards there was a hand-written summary of the "true" tax due and the smaller amount actually paid.

The judge went through the history of the enquiry and the taxpayer's minimal defences. There was nothing unusual or unforeseeable about the CIS deductions, and the trader could not use them as an excuse for manipulation of VAT payments. The appeal was dismissed.

First-Tier Tribunal (TC06959): *Tony Demolition Workers Ltd*

6.8 Penalties and appeals

6.8.1 Default surcharge

A company appealed against surcharges of £3,005 and £2,595 for its 07/11 and 10/11 periods. The first surcharge was later reduced from 15% to 10% (£2,003). The company ceased to trade in 2013 and was deregistered in 2015. The company maintained that the payments were made on or before the due dates and, supported by an e-mail from the bank, argued that they should have been received on the same day.

HMRC stated that its account did not receive same day transfers under Faster Payments in 2011. The payments would have had to go through BACS and would have taken 3 days. HMRC's evidence (ledger printouts) presented to the Tribunal showed inconsistent dates of receipt (although all were late). They did not produce bank statements to show the actual dates, and as the onus was on them to show that the surcharge was due, the appeal was allowed. The basis given was s.59(7)(a): the payment was despatched at such a time and in such a manner that is was reasonable to expect that it would be received by the Commissioners within the appropriate time limit.

First-Tier Tribunal (TC06863): *Dads Tyres Ltd*

A company appealed against a 15% surcharge of £5,614 for its 08/17 period. The trader was not represented at the hearing, but the correspondence showed that the reason for the late payment was a financial limit on same day transfers: although the payment was accepted by the bank on Friday 6 October, it was not released until the following Monday.

The Tribunal examined the history of the company's defaults, and noted that an earlier surcharge had been cancelled by HMRC on review; the same circumstances had been accepted as a reasonable excuse, as it was the first time that the VAT payment had exceeded the daily transaction

limit. This could not be a reasonable excuse on the second occasion, because the company should have been aware of the rules. The appeal was dismissed.

First-Tier Tribunal (TC06878): *Synergy Lifting Ltd*

A company appealed against a 5% surcharge of £470 for its 08/17 period. The excuse offered was a delay in the provision of information by the company's accountants. That could not be a reasonable excuse; it was not even an excuse, given that the company itself stated that the accountants notified them of the liability on the day before the due date. The appeal was dismissed.

First-Tier Tribunal (TC06883): *J G Eng Services Ltd*

A company appealed against a 2% surcharge of £448 for its 11/17 period. The appellant claimed that it had attempted to submit the return in good time through the Government Gateway; after one unsuccessful attempt, it had resubmitted and believed that all was in order. The direct debit was not collected on time because the return had not been received. The company only checked the Gateway again on 22 January 2018, and resubmitted the return on that date. The company also claimed to have submitted everything on time for previous periods, and claimed not to have received a SLN for the 11/16 period that started the liability period.

Judge Fairpo found on the balance of probabilities that a SLN had been issued to the correct address and not returned undelivered. The company had no evidence of the problems with the Gateway and could not show any reasonable basis for believing that the return had been submitted. The appeal was dismissed.

First-Tier Tribunal (TC06884): *Tech Set Ltd*

A company appealed against a 2% surcharge of £541 for its 04/17 period. The excuse offered was a problem with the company's accounting software; the company claimed that it was only "the paperwork" that was late, and the payment had been made on time, but no evidence had been offered to HMRC on review or to the Tribunal in support of this. A claim of disproportionality was routinely dismissed, and the surcharge was upheld.

First-Tier Tribunal (TC06890): *Coldstar (UK) Ltd*

A company appealed against a 10% surcharge of £1,301 for its 06/17 period. It had been in the surcharge regime since 06/15, and had been late in four periods since then, but two of these were repayment periods and the other two gave rise to penalties below £400 that were not collected.

The trader put forward a number of "excuses", including a "lack of clarity from HMRC on what the actual deadlines were". HMRC submitted that a reasonable trader, if unsure of his responsibilities and in receipt of several SLNs, would have contacted HMRC to check. The other various reasons were normal hazards of trade. Judge Fairpo agreed with HMRC that none of the reasons offered amounted to a reasonable excuse, and dismissed the appeal.

First-Tier Tribunal (TC06901): *Real Estate Strategies Global*

A company appealed against a 15% surcharge of £4,670 for its 12/17 period. It had given instructions for a payment of £31,314 at 09:47 on the

due date, but had been unaware that there was a "same day transfer" limit on its account of £25,000. The bank processed the payment the following day, so it was one day late.

The judge (Tony Beare) said that he found the question of reasonable excuse a difficult one. The company's mistake was honestly made; however, he accepted HMRC's argument that the company should have exercised greater care, knowing that it was liable to a surcharge if it was late again. A claim of disproportionality was considered in more detail than is usual, but the judge concluded that this was not a "wholly exceptional case" and dismissed the appeal.

First-Tier Tribunal (TC06950): *Contentisking Ltd*

A company appealed against a 15% surcharge of £1,039 for its 01/18 period. No one appeared for the appellant at the hearing, so the judge had to consider the arguments based on a bundle of correspondence. The company claimed that the notice of the surcharge was the first letter it had received about late payment. However, records of telephone conversations suggested that it had received correspondence during 2017, and the judge (Nigel Popplewell) accepted HMRC's assertion that SLNs had been issued to the correct address and not returned. There is no explanation for the apparent fact that the surcharge was levied at 15%, but the company claimed not to be aware of previous surcharges; a 10% surcharge should have been collected.

The company's offered excuses were mainly concerned with an inability to pay, which in the absence of special circumstances could not succeed. Once again, a claim of proportionality was considered in some detail, including reference to and analysis of the principle from CJEU precedents, but the amount was considered to be both absolutely and relatively modest. The Tribunal did not have jurisdiction to consider a claim that HMRC were being "unfair". The appeal was dismissed.

First-Tier Tribunal (TC06968): *Ye Old Cider Bar Ltd*

A company appealed against a 15% surcharge of £764 for its 09/17 period, when it was one day late paying. The company had been late in 06/16, 09/16, 12/16 and 03/17; the 2% and 5% surcharges had not been collected because they were below £400, but the 10% surcharge had been levied. The grounds of appeal appeared to be nothing more than a complaint that the fines were excessively harsh and "bullying", which could not succeed. The appeal was dismissed.

First-Tier Tribunal (TC06980): *The Red Sky at Night Group Ltd*

A company appealed against surcharges totalling £33,337 for its 01/17 and 04/17 periods. Before the hearing HMRC had cancelled a surcharge for 07/17 and slightly reduced the 04/17 amount.

The decision is very brief. The judge noted that "HMRC do not keep copies of all correspondence with taxpayers, particularly where the correspondence is in a standard form. This is entirely understandable, as the amount of storage required to do so (even in electronic form) is impractical. However HMRC keep an electronic log of such correspondence. This is the case for SLNs. The bundle of documents placed before us in evidence did not include any extracts from HMRC's

electronic log. Nor is there any correspondence included in the bundle which otherwise evidences the receipt by the Appellant of any SLNs."

In the absence of any evidence to support the assertion that the SLN had been served on the appellant, the Tribunal had to assume that it had not been served. The onus was on HMRC to show that the surcharge had been properly charged. The appeal was allowed.

First-Tier Tribunal (TC06981): *Once Upon a Time Marketing Ltd*

A company that had been in the payments on account regime since April 2011 paid an instalment one day late on 1 June 2017. It was therefore in default and should have received a SLN. The balancing payment for the quarter to 09/17 was not received until 8 November, so a 2% surcharge of £40,895 was issued. The POA due on 30/11/17 and 31/12/17 were also paid late, so a 5% surcharge was issued amounting to £38,749. The company applied for a review, claiming that no notification of the surcharge was received before a letter dated 20 February and received on 6 March 2018.

The company's representative pointed to some errors in the letter that was sent in February (e.g. the date for the surcharge extension period was blank). HMRC subsequently withdrew the 12/17 surcharge for reasons that are not entirely clear. HMRC's representative did not provide a screenshot from HMRC's records to back up the assertion that the SLN was sent in August, but maintained that it should be assumed to have been delivered unless the company could show the contrary.

The judge was satisfied that the company's witness provided evidence of strict procedures about opening and dealing with post. On the balance of probabilities, the SLN had not been received; HMRC had not provided any evidence that it had been sent. The default for the 09/17 quarter became the first default, chargeable at 0%. The appeal was allowed.

First-Tier Tribunal (TC07002): *LSDM Ltd*

A company appealed against a surcharge of £163.60 for its 04/18 period. Although the taxpayer did not appear and was not represented, the judge noted that HMRC had not provided any evidence that a SLN was sent, and so concluded that they had not satisfied the burden of proof to show that the surcharge was properly levied. The appeal was therefore allowed.

First-Tier Tribunal (TC07007): *Skelton Electrical Ltd*

Oddly, the same decision has been reissued under a different number, with a note that it has been "Amended pursuant to rule 37 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009". However, it is not apparent that anything has actually been changed.

First-Tier Tribunal (TC07031): *Skelton Electrical Ltd*

A company appealed against a 5% surcharge of £417 for its 04/17 period. The 2% penalty was below the £400 threshold, so this was the first default to trigger an actual penalty. It claimed that it had been unable to pay (it was 8 days late) because a particularly large contract had been subject to an unexpected delay in payment by the customer. HMRC argued that this was within the normal hazards of trade.

The judge noted the normal restrictions on shortage of funds being an excuse, but dismissed the appeal because the appellant had provided no

evidence, either to HMRC or to the Tribunal, to support its assertion. It had therefore not satisfied the burden of proof.

First-Tier Tribunal (TC07017): *Bard Electrics Ltd*

A firm of solicitors appealed against two surcharges, one for £503 for 05/13 and one for £1,507 for 11/13. Permission to appeal late had been granted at an earlier hearing, but when it came to the full appeal, the firm was not represented and did not answer the telephone. The Tribunal decided to proceed without the appellant, and then refused a later application to set aside its decision.

The grounds of appeal were "problems with the bank" for which no evidence was produced, and "the proprietor being on holiday and out of contact", which could not be an excuse. There were also claims of hardship and harshness of the penalty, which could also not succeed.

The appeal was dismissed.

First-Tier Tribunal (TC07028): *Porter & Company*

A sole trader solicitor appealed against a 5% surcharge of £590 for his 03/17 period. He claimed that he had been unable to access his online account due to changes made by HMRC without his knowledge or agreement. He had attempted to pay his VAT online and found that the password and ID did not work; he used the "webchat" facility but could not resolve the problem. He was only able to contact technical support after the intervening weekend; it then took another five days to receive a "replacement" ID, but it was the same as his original one, which HMRC had changed in August 2016. When the solicitor entered this, it was accepted, and he was able to make payment.

The Tribunal examined the correspondence between the solicitor and HMRC about the matter. HMRC had initially claimed to have no record of the webchat, but later a transcript was provided. It was clear that the appellant was using the wrong ID, but he appeared to have made reasonable efforts to resolve the problem and make the payment on time. The judge concluded that he had a reasonable excuse, and allowed the appeal.

First-Tier Tribunal (TC07042): *Peter Gerard Farrell*

6.8.2 Penalties

A trader claimed input tax on transactions in his 12/05, 03/06 and 06/06 returns. £22m in respect of 12/05 was repaid in tranches; a similar amount for the two following periods was never repaid. HMRC later refused repayment on *Kittel* grounds. The trader appealed, but the appeals were eventually struck out in 2015 for the appellant's failure to comply with an unless order. Applications to reinstate the appeals were refused, exhausting the trader's rights by 2 November 2017 when the Upper Tribunal confirmed the refusal. In August 2017, HMRC issued misdeclaration penalty assessments on the inaccuracies in the 03/06 returns. The total in penalties was just over £2.5m. The trader appealed against the penalties, and HMRC applied to have the appeal struck out.

The appellant contended that HMRC's delayed repayment of the 12/05 reclaim was relevant to the misdeclaration penalties. He had applied for a repayment supplement in 2006; this was refused and the refusal was

appealed. In August 2017, HMRC conceded that appeal. However, they told the appellant that the supplement would be offset against the misdeclaration penalties that he owed.

Judge Mosedale made a number of decisions. First, she allowed the appeal to proceed even though it had been made late. She then considered an application for summarily allowing the appeal on the following four points of law:

(a) the assessment was invalid because (i) it referred (allegedly) to the wrong assessing provision (VATA 1994 s.63 rather than the technically correct s.76) and/or (ii) because the appellant had not been given a chance to state his defence before he was assessed;

(b) The provision giving liability was repealed without saving;

(c) The assessment was out of time.

The judge dismissed the argument about referring to s.63 rather than s.76. There was no requirement that an assessment should refer to the section under which it was raised. She also rejected the argument that s.63 required HMRC to consider whether there was a reasonable excuse before they issued a penalty assessment – in her view, the literal meaning of the words could not support that interpretation.

The appellant's point about the repeal of s.63 depended on the fact that the replacement of the penalty provisions in 2009 specifically preserved HMRC's right to assess earlier periods under s.60, but not s.63. The judge did not agree: there was a different reason for that saving provision, and it was the intention of Parliament that s.63 would continue to be available in respect of misdeclarations arising before the change of the law.

The relevant time limit for the penalty assessment was in s.77(2): "subject to subsection (5) below, an assessment under s.76 of an amount due by way of any penalty….referred to in subsection (3) …of that section be made at any time before the expiry of the period of 2 years beginning with the time when the amount of VAT due for the prescribed accounting period concerned has been finally determined." HMRC argued that this 2 year time limit only started to run on 2 November 2017, when the appeal rights had been exhausted. The taxpayer argued that s.77(2) only applied to assessments, not to repayment claims, because it referred to "determination of VAT due".

Judge Mosedale agreed with HMRC on the time limit point – it had to run from the determination of the appeal, not from the return period. That could either be the date the appeal was struck out (September 2015) or the final refusal of reinstatement (November 2017), but in either case, an assessment raised in August 2017 was within 2 years of it. She rejected the distinction between assessments and repayment claims: "the VAT due for the period" could be VAT due in either direction.

The judge went on to consider whether she should require HMRC to pay the repayment supplement. She concluded that she had no jurisdiction to consider whether they were entitled to set off the supplement against the penalty. She had no need to consider whether the penalty itself should be paid upfront, because that was clearly not required by the law. The only

issue was whether HMRC were entitled to exercise a right of offset, and that was a matter for judicial review, not for the FTT.

The appellant also argued that the penalties were criminal in nature for the purposes of the European Convention on Human Rights. She agreed (indeed, HMRC had conceded the point): they were punitive and deterrent in nature, and could not be described as a minor matter. She did not accept that the set off amounted to a presumption of guilt, nor was his right to a fair trial breached.

The trader also made an application to amend his grounds of appeal against the penalty. HMRC applied to have all the amendments struck out. The judge decided that they should only be struck out if they had no reasonable prospect of success, and on that basis, the only ground that survived was the argument that the penalty was disproportionate because of its absolute size. In an earlier case, Judge Mosedale had held that a percentage penalty could never be disproportionate, because a larger error posed a larger risk to the public purse; but she accepted that the Upper Tribunal had identified the lack of an absolute maximum as the one feature of the default surcharge regime that was arguably disproportionate, so she accepted that this was at least a possible ground of appeal.

In all other respects, the appeal was dismissed.

First-Tier Tribunal (TC06892): *Dhalomal Kishore*

A partnership appealed against a penalty of £15,379 for its 05/15 period. The firm comprised a husband and wife and their two children, although it was acknowledged that the husband was the only active participant. It had sold a property in March 2015 and charged £33,800 in VAT, but filed a nil return for the period. HMRC picked this up from an enquiry into the buyer's tax return, and in due course issued a "deliberate, prompted" penalty.

The taxpayer appointed an agent to argue the case, but the agent's advice included a number of surprising features (such as advising not to pay the tax so it could be used as leverage in arguing about penalties) and delays.

The judge (Christopher McNall) drew a distinction between the different levels of penalty as follows:

We consider that 'careless' for these purposes can be equated with 'negligent conduct' in the context of discovery assessments, which is to be judged with reference to the reasonable taxpayer, and what the (hypothetical) reasonable taxpayer, exercising reasonable diligence in the completion and submission of his return, would have done. Hence, careless does connote some fault, sufficient to attract censure when measured against an objective standard.

'Deliberate' goes beyond that. In terms of inaccuracy, we consider it to mean 'done with a set purpose'. That purpose must be to produce an inaccuracy, within the meaning of Schedule 24. There is an element of intent in 'deliberate' which is not present in 'careless'. It represents a higher degree of fault.

He did not find it an easy decision. He accepted that the officer had given coherent and impressive evidence. However, he did not consider that HMRC had discharged the burden of proof of demonstrating that the

inaccuracy was deliberate. It was careless; HMRC had made a reasonable decision to give discounts for "helping and giving", but none for "telling", because the explanations for how the error arose were slow in coming and incomplete.

The appeal was allowed in part.

First-Tier Tribunal (TC07051) *Faux Properties*

6.8.3 Article

There is a summary in *Taxation* of a workshop on practical aspects of penalties, in which the attitude of HMRC and the way in which the various rules apply was the subject of discussion based on reported cases and case studies. Most of the examples relate to direct taxes, but many of the practical implications are similar to VAT.

Taxation, 10 January 2019

6.8.4 Late appeals

On 4 November 2014, two individuals were issued with personal liability notices in respect of penalties levied on a company of which they had been directors. They appealed to the Tribunal on 30 May 2018; HMRC objected on the grounds that the appeals were brought three and a half years late.

The Tribunal referred to *Martland, Data Select*, *Denton* and *BPP*, and the overriding objective of the Tribunal Rules that the First-tier Tribunal should deal with cases fairly and justly. The procedure to be adopted is:

(a) establish the length of the delay;

(b) establish the reason for the delay; and

(c) evaluate all the circumstances of the case, which includes weighing up the length of the delay, the reasons for the delay, the extent of the detriment to the applicant in not giving permission and the extent of the detriment to the party other than the applicant of giving permission.

The judge rehearsed the history of HMRC's enquiry into the company and the subsequent correspondence. The appellants claimed that a great deal of correspondence had been sent to the company but they had never received it, because it was in receivership or had been struck off. The HMRC officer dealing with the case did not believe that personal liability notices, sent to home addresses, would not have reached the intended recipients, but in any case correspondence about the matter had been received from 2016 onwards. The appeal was therefore very late even on the appellants' version of events.

The appellants claimed that when they received the copies of the notices in January 2016, they did not include a calculation of the liability. They had been trying to establish the way in which the penalty was calculated in order to dispute it. According to them, they did not receive such an explanation until they saw the hearing bundle a week before the appeal hearing.

The judge (Tony Beare) considered from the correspondence and the evidence of the parties that their version of events was entirely plausible. Given the efforts that they had made to establish the facts after they were

chased about liability by Debt Management, it was unlikely that they would have "sat on their hands" for a year if they had actually received the notices in November 2014. HMRC could not claim to have been unaware of an intention to bring an appeal.

Balancing the matters as required by *Martland*, the judge gave permission for the late appeals to proceed.

First-Tier Tribunal (TC06860): *Hollie Apps; Mark Stymest*

By contrast, the same judge did not allow a late appeal against assessments to VAT for £645 and £6,690 issued in July and October 2015 and not appealed until about 11 months after the expiry of the 30 day window. The judge rehearsed the same precedent cases, and also noted that he had heard (and allowed) a similar application by the same taxpayer in relation to income tax in 2017. The reason given was the same in both cases: his brother had died of cancer in November 2016 and he had to care for his 88-year old mother. HMRC argued that these were not sufficient reasons, and that the circumstances of the VAT appeal were different to those of the income tax case.

The judge agreed with HMRC that the cases were different. The assessments to income tax were made on 11 October 2016, which meant that the brother's illness and death were clearly directly relevant to the appeal window. The review conclusion on the VAT matters was issued in February 2016, some 9 months before the brother died.

According to precedent, the judge should not spend too long considering the relative merits of the cases, but he did not see anything particularly strong in the grounds of appeal that would outweigh the seriousness of the delay. Leave to appeal out of time was refused.

First-Tier Tribunal (TC06875): *David Fiorini*

A trader applied for permission to appeal out of time against two penalty assessments and a VAT assessment. The penalties were for period 11/14 and 05/15 and the assessment for 05/15. The trader did not appear and was not represented, because it could not afford to pay its accountants.

Judge Richard Thomas examined the history of the disputed amounts, and commented that HMRC's application to have the appeals struck out was misguided: until and unless he gave permission for the appeals to proceed, there was nothing to strike out.

He started by considering whether the appeals were, in fact, late. In respect of the VAT assessment, the officer had reviewed her own decision, which the judge considered to be contrary to the intention of the legislation; the confusion around the review procedure meant that there was not, as yet, a start date for the appeals process. The appeal was therefore not late. However, in spite of the confusion, the requests for the two penalties to be appealed were late.

The judge was not impressed by explanations given by the accountants in relation to the delay: they said that the taxpayer had taken over the handling of the matter herself, but the evidence suggested that the firm was still acting for her throughout. The judge regarded their conduct as "deplorable", and it was in the interests of natural justice to allow the trader to contest the disputed amounts. She had had no way of knowing that her representatives were not doing what they should have been doing.

He considered that there was a prima facie case for reducing the penalties from "deliberate" to "careless"; HMRC had made several errors in failing to offer proper reviews; the underlying assessment was not being appealed out of time. These factors outweighed any prejudice to HMRC in allowing the appeals to proceed, so he granted permission.

First-Tier Tribunal (TC06984): *Pramukh Enterprises Ltd*

Another trader sought leave to appeal against an assessment and penalty that were issued in August and September 2009 in relation to input tax claimed on invoices that were made out to a different company. The appellant's reasons for lateness were the loss of the underlying records and his own ill-health. The judge considered that the lack of records would make it almost impossible to hear an appeal in any case; the ill-health appeared to fall when the appeal was already several years late. The application was refused.

First-Tier Tribunal (TC07039): *Akeel Bajwa*

6.8.5 Hardship

A company lost an appeal to the FTT (TC06308) concerning the application of the lower rate to the lift passes sold for its "snow dome". It applied for leave to appeal to the Upper Tribunal on two different grounds (statutory construction and fiscal neutrality), and leave was granted on one ground each by two different judges. The company had not paid any of the VAT before the FTT appeal, and HMRC had accepted that hardship applied. However, the effect of s.85(3) VATA 1994 was that the company was required to pay the VAT (£294,715 plus interest) as it had lost the FTT appeal.

The company applied to HMRC under s.85B for application of its discretion to allow the appeal to continue if "financial extremity" would result from the payment of the tax (now assessed at £484,000 plus interest, including later periods). HMRC accepted that paying the whole of it would cause financial extremity, but concluded that the company should pay £300,000 in three equal instalments, by 15 December 2018, 15 January 2019 and 15 February 2019. The company requested a review of this decision by the Upper Tribunal.

The judge noted that HMRC were requiring payment of more VAT than was under appeal from the FTT's decision. The company put forward a group consolidated cash flow forecast based on what it considered was an "optimistic" prediction of the outcomes for the year ahead. The judge concluded that it was realistic rather than optimistic: there were reasons to suppose that the next year would be better than the previous one.

The judge considered the cash flow forecast and witness evidence from the company's finance manager. It appeared that the company had not considered alternative sources of financing, including increasing its prices or its borrowings, in order to pay the VAT.

The judge also considered the difference between "hardship" in s.84(3B) and s.85A and "financial extremity" in s.85B(4). The test for continuing an appeal after a judicial decision against the taxpayer was more stringent than for the initial entry into the appeals process. He analysed the statutory requirement: "might reasonably be expected to result" did not

require certainty but a degree of possibility. The "result" required some causal nexus, but it did not have to be direct or immediate.

The forecast suggested that the company would go into deficit during 2019 and be over £200,000 overdrawn by November. The plan was for the substantive hearing to be scheduled between March and June. The appeal would therefore not be determined until September or October. The judge considered that it would have been reasonable for the company to have taken some steps to trade through what it must, if it was confident of winning the appeal, have regarded as a temporary difficulty. The judge calculated what the cash flow forecast would have shown if some modest steps were taken to delay payments and advance receipts, and the overdraft was increased from £50,000 to £80,000. The deficit would fall to a little over £100,000 in each of the months from July to October 2019.

At last, the judge concluded that this constituted "financial extremity". The deficits were significant, and the position would last for several months. The modest actions would not be enough to keep the company afloat.

Adjusting the forecasts again, the judge decided that a single payment of £155,000 would leave the company with sufficient resources, as long as it took some steps of its own to manage its cash flow during the appeals process. He therefore directed that HMRC's decision should be replaced by a requirement to pay that amount before the appeal could proceed to the Upper Tribunal.

Upper Tribunal: *Snow Factor Ltd v HMRC*

6.8.6 Reinstatement

A trader appealed in 2013 against assessments made in relation to periods in 2011; that appeal was withdrawn in 2016. The appellant sought to reinstate the appeals. The assessments related to purchases of mobile telephones without adequate supporting evidence for the deduction of input tax.

HMRC argued that the FTT had no power to reinstate: the taxpayer had notified the Tribunal under s.85(4) that she no longer wished to proceed with the appeal, and that constituted an agreement that determined the appeal as if the Tribunal had determined it. The taxpayer would have to resile from the notification within 30 days of making it (s.85(2)).

The judge agreed with this. The flexibility in the Tribunals Rules (in particular Rule 5) and the provisions about reinstating appeals (Rule 17) do not override s.85. That was enough to dispose of the application. For completeness, the judge also commented on whether it would have been appropriate to allow reinstatement in the circumstances, had he had jurisdiction. In line with *Martland*, he considered that the combination of the length of the delay and the poverty of the reasons overrode any prejudice to the taxpayer. The application would have been refused.

First-Tier Tribunal (TC06993): *Shazadi Neelam Baig*

Another trader had had an appeal struck out, followed by the striking out of an application to reinstate. He applied for the reinstatement proceedings to be reinstated; the judge decided that he had jurisdiction to do that, but he refused the application on its merits.

The applicant was one of the appellants depending on the *Sub One* case on hot takeaways. He had claimed a repayment of £27,837. The judge examined the history of the appeals process and the earlier decisions. He himself had made the decision to strike out a second application to reinstate, but he had changed his view of the law: he should consider, on its merits, not the substantive appeal or even whether the substantive appeal should be reinstated, but whether the reinstatement application should be reinstated.

The chances of success were slim, given that the appellant and his representative had failed to reply to a number of Tribunal communications, including an unless order from Judge Mosedale. Nothing further was heard from the representative until eight months after the appeal was struck out. There had been no material change in the appellant's circumstances; HMRC appeared to have done nothing wrong in relation to any part of the process.

The decision was therefore not to reinstate the reinstatement application, which meant that the substantive appeal and proceedings relating to it remained struck out.

First-Tier Tribunal (TC07034): *Joseph Thomas Reno*

6.8.7 Procedure

In TC06047, the FTT decided that a Community Amateur Sports Club did not qualify for treatment as a charity for VAT purposes. It was common ground that the basis on which the FTT had decided the case was wrong in law; it had decided the point in question on a basis which was entirely unprompted and of its own volition.

In their response to the appellant's grounds of appeal to the UT, HMRC sought to introduce a new argument on the basis of which they contended that the FTT's conclusion could be justified, and therefore the appeal should be dismissed. The appellant argued that HMRC should not be allowed to run the new argument. The FTT had found in favour of the appellant on all the points relevant to the issue, and there was therefore no material part of the FTT decision left to uphold in favour of HMRC.

The FTT's error was to consider that a "subsidiary purpose" of "providing social facilities to the residents of Eynsham" was enough to override the overall charitable purpose of "the advancement of amateur sport", and this meant that the appellant was not "established for charitable purposes only" for the purposes of FA 2010 Sch.6.

The judge considered a range of precedents and came to the unusual conclusion that the proper course would be to remake the FTT's decision by allowing the taxpayer's appeal on the particular issue that had determined the case against it. This would mean that, although it had appealed against the FTT decision, the FTT decision would now be remade in its favour; as HMRC disputed a number of other findings of the FTT, HMRC would become the appellant.

If the parties considered that further directions were required to govern the conduct of the further appeal, they "have liberty to apply".

Upper Tribunal: *Eynsham Cricket Club v HMRC*

6.9 Other administration issues

6.9.1 Finance Act 2019

The FA 2019 received Royal Assent on 12 February. The VAT provisions are:

s.51 – construction industry reverse charge

s.52 & Sch.17 – new rules on vouchers

s.53 & Sch.18 – groups: eligibility

http://www.legislation.gov.uk/ukpga/2019/1/contents/enacted/data.htm

6.9.2 Spring Statement

Meanwhile, the Spring Statement on 13 March contained references to VAT simplification in the public sector and in relation to partial exemption and the capital goods scheme. Following the introduction of MTD for VAT in April 2019, the government will focus on supporting businesses through the transition to digital reporting and record-keeping, and it will not make MTD mandatory for any other taxes or businesses during 2020.

www.gov.uk/government/publications/spring-statement-2019-written-ministerial-statement

6.9.3 Alternative dispute resolution

HMRC have updated their online guide to ADR from the February 2016 version with more information on the types of dispute for which ADR can and cannot be used. HMRC made alternative dispute resolution part of its normal business in September 2013.

www.gov.uk/guidance/tax-disputes-alternative-dispute-resolution-adr

There is an article by Robert Maas in *Taxation* about ADR and the problems of HMRC going back on an ADR agreement in the *Serpentine Galleries* case.

Taxation 21 February 2019

6.9.4 Administrative agreements with trade bodies

HMRC have updated their Notice summarising a number of agreements with trade bodies. They note that the agreement with the Association of British Insurers was withdrawn with effect from 1 February 2019 and superseded by HMRC's Partial Exemption Manual. The agreement with The Brewers' Society was withdrawn with effect from 1 June 2018.

Notice 700/57

6.9.5 Promoters of tax avoidance schemes

HMRC sought a declaration from the FTT that certain arrangements were "notifiable" by a company (CCL) under the Disclosure of Tax Avoidance Schemes rules in FA 2004. Although the scheme concerned income tax, there is an interesting discussion of the way in which schemes are identified as discloseable. In this case, it was clear that the scheme was the type of scheme for which a premium fee within the meaning of the

legislation might be charged, and it related to a standardised tax product. CCL earned a substantial proportion of its income from administering the scheme.

However, the scheme was made available by other parties, not CCL. It was therefore not the promoter, and HMRC's application was refused.

First-Tier Tribunal (TC06949): *Curzon Capital Ltd*

6.9.6 Online marketplaces

HMRC have issued 4,600 joint and several liability notices to online marketplaces since September 2016 when legislation came into effect requiring action against overseas sellers who fail to comply with their VAT obligations. This has yielded over £200m in additional VAT up to November 2018 and HMRC have seen a steep increase in registration applications from overseas retailers. HMRC told the Public Accounts Committee in April 2018 that they expect these measures, together with the fulfilment house due diligence scheme, to raise just under £1bn in extra VAT by 2023.

In the period since 2016 the number of applications for VAT registration by overseas businesses grew to 58,000 from just 1,650 applications between 2015 and 2016.

www.mynewsdesk.com/uk/hm-revenue-customs-hmrc/pressreleases/thousands-of-sellers-red-flagged-to-online-marketplaces-reveals-hmrc-2822768

6.9.7 Fulfilment House Due Diligence Scheme

HMRC have published new guides on the rules for businesses that store goods in the UK for sellers established outside the EU. Separate guides cover:

- applying for approval;
- record-keeping and due diligence obligations;
- how to cancel or change a registration.

www.gov.uk/guidance/fulfilment-house-due-diligence-scheme; www.gov.uk/guidance/carry-out-checks-and-keep-records-if-youre-approved-for-fhdds; www.gov.uk/guidance/change-your-details-or-cancel-your-registration-for-fhdds

6.9.8 Consultation

As announced at Budget 2018, HMRC are consulting on the introduction of legislation in Finance Bill 2020 to restore the department's position as a preferential creditor in company insolvencies for certain tax debts, including VAT, PAYE, employee NICs and CIS deductions with effect from April 2020. The consultation closes on 27 May 2019.

www.gov.uk/government/consultations/protecting-your-taxes-in-insolvency

6.9.9 Security

A company appealed against a notice of requirement to deposit security of £146,988.33 or £127,888.33 if the appellant chose to submit monthly VAT returns. The HMRC decision-maker explained her reasons for considering the company a risk to the revenue, including VAT debts of £103,070 and a PAYE debt of £96,760. The company had been in default for 10 periods and the surcharge rate had been at the 15% rate since 11/16. A related company, 100% owned by the same individual, had a VAT debt totalling over £400,000; another owed a further £15,000. The individual was the subject of an ongoing COP9 enquiry in relation to other matters.

The judge explained that it was only possible for the FTT to consider whether HMRC's decision was reasonable, and it was only possible to consider the information available to HMRC when the decision was taken. The officer accepted that she had not looked into the validity of the £400,000 debt in any detail, and the trader disputed it. The judge decided that this was a flaw in the decision. However, he was satisfied that, even without that factor, the decision would have inevitably been the same. The underlying debt, the history of non-payment by the appellant company and the ongoing COP9 enquiry were sufficient on their own to justify the requirement for security.

The appeal was dismissed.

First-Tier Tribunal (TC06941): *CNM Estates (Tolworth) Ltd*

6.9.10 Compliance checks

HMRC updated their factsheet *General information about compliance checks* in March 2019 with more detail on what they may request during a compliance check.

CC/FS1a

6.9.11 Prosecutions

A company director has been jailed for over 8 years for a £5.9m tax fraud involving retention of employee PAYE and NIC deductions and the use of fake invoices to claim input tax. The fraud was discovered after a VAT inspection turned up forged invoices. The VAT loss was over £1m, and the discovery led to a further investigation.

http://tinyurl.com/y3rkkerz

Another eight-year sentence was handed down to a man who fled the UK during his original trial but was tracked down to Prague. He had defrauded the revenue of £17m by smuggling raw tobacco, mislabling it as furniture.

http://tinyurl.com/yx94xzt5

Three sisters were sentenced to a combined five years for defrauding the retail export scheme through use of passport details from actual tax reclaim forms filled out by international customers at the Selfridges store in Manchester where one of the sisters worked; the claims were made by the other two, who worked on duty free counters at the airport.

http://tinyurl.com/y7wy4sm3

An individual was sentenced to three years and two months after admitting VAT fraud amounting to £337,000. He had traded trucks and specialist plant and machinery of £3.2m in value without accounting for any VAT.

http://tinyurl.com/y4t3bf9q

An individual was sentenced to two years in jail after making a series of fraudulent VAT repayment claims totalling £233,142.

https://tinyurl.com/y4x2yk6g

Another individual was sentenced to two years in jail for using money acquired through VAT tax fraud to repay money he had previously made as a forger. He was previously jailed for five years and eight months and ordered to pay a £96,000 confiscation order for running a huge counterfeiting operation at a factory producing fake banknotes. Upon release, he used fake passports and driving licences to set up bogus companies and bank accounts to fraudulently claim £180,591.20 VAT repayments, £75,000 of which he laundered through a bogus Cypriot account to use to pay most of the confiscation order.

https://tinyurl.com/y23c2c8a