VAT UPDATE
APRIL 2021

Covering material from January – March 2021

Notes prepared by Mike Thexton MA FCA CTA (Fellow)

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

VAT Update April 2021

Contents

1. INTRODUCTION 1
1.1 Appeals pending 1
2. OUTPUTS 4
2.1 Scope of VAT: linking supplies to consideration 4
2.2 Disbursements 9
2.3 Exemptions 9
2.4 Zero-rating 19
2.5 Lower rate 24
2.6 Computational matters 27
2.7 Discounts, rebates and gifts 27
2.8 Compound and multiple 27
2.9 Agency 32
2.10 Second hand goods 33
2.11 Charities and clubs 34
2.12 Other supply problems 34
3. LAND AND PROPERTY 35
3.1 Exemption 35
3.2 Option to tax 41
3.3 Developers and builders 41
3.4 Input tax claims on land 50
3.5 Other land problems 50
4. INTERNATIONAL SUPPLIES 51
4.1 E-commerce 51
4.2 Where is a supply of services? 51
4.3 International supplies of goods 65
4.4 European rules 73
4.5 Foreign refund reclaims 78
5. INPUTS 80
5.1 Economic activity 80
5.2 Who receives the supply? 82
5.3 Partial exemption 85
5.4 Cars 90
5.5 Business entertainment 90
5.6 Non-business use of supplies 90
5.7 Bad debt relief 91
5.8 Other input tax problems 92
6. ADMINISTRATION AND PENALTIES 97
6.1 Group registration 97
6.2 Other registration rules 98
6.3 Payments and returns 102
6.4 Repayment claims 103
6.5 Timing issues 104
6.6 Records 104
6.7 Assessments 104
6.8 Penalties and appeals 104
6.9 Other administration issues 113

1. INTRODUCTION

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

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

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

1.1 Appeals pending

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

The HMRC website section which reports the progress of appeals was updated on 4 February 2021.

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

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

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

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

- *Chelmsford City Council, Mid-Ulster District Council, Midlothian Council*: HMRC are seeking leave to appeal on particular points against the FTT's decisions on local authority sports provision.
- *Good Law Project*: (not on HMRC's list) HMRC appealing against decision of High Court that it was lawful for them to disclose certain facts in relation to a dispute with a taxpayer, so it was not necessary for them to apply for a court order in order to be granted permission to do so (hearing scheduled for Court of Appeal in December 2020).
- *Netbusters (IK) Ltd*: HMRC are seeking leave to appeal to the UT against the FTT decision that the company's provision of sporting facilities was exempt.
- *NHS Lothian Health Board v HMRC*: Court of Session allowed taxpayer's appeal on grounds that "no repayment" had to be the wrong answer; remitted to FTT for reconsideration of the amount; HMRC seeking leave to appeal to the Supreme Court.
- *Pacific Computers Ltd*: MTIC case remitted by the UT to differently constituted FTT for rehearing (not on HMRC's list).
- *Privin Corporation Ltd*: the FTT found in favour of a MTIC appellant. HMRC were granted leave to appeal to the UT, but it was agreed that the case would be remitted to a differently constituted FTT for rehearing (not on HMRC's list).
- *Revive Corporation Ltd*: MTIC case remitted by the UT to the FTT for rehearing.
- *Royal Opera House Covent Garden Foundation*: HMRC succeeded before the UT in their appeal against the FTT decision on the partial exemption recovery percentage; taxpayer has been granted leave to appeal to the CA.
- *Target Group Ltd*: company has been granted leave to appeal against UT decision that its supplies of loan administration services did not fall within art.135(1)(d) – CA hearing scheduled for May 2021 (not on HMRC's list).
- *Thorsteinn Gardarsson t/a Action Day A Islandi*: HMRC have succeeded in their appeal against the FTT decision that a trader's products qualified as "books" rather than "stationery", and some issues have been remitted to a differently constituted FTT for further consideration.
- *Tower Resources plc*: HMRC have been granted leave to appeal to the UT on three grounds against the FTT's decision that a holding company was entitled to recovery of input tax on some overhead costs (hearing scheduled for April 2021).

1.1.1 Decisions in this update

- *Anna Cook*: HMRC succeeded in their appeal against the FTT decision that classes in Ceroc dancing qualified for exemption as "educational".

- *News Corp UK and Ireland Ltd*: HMRC succeeded in their appeal against the UT's decision that digital newspapers qualified for zero-rating.
- *The Wellcome Trust Ltd*: HMRC granted leave to appeal against the FTT decision that the company was not subject to a reverse charge on investment management fees. The UT referred questions to the CJEU (Case C-459/19): the answers are favourable to HMRC, and the UT is yet to reconsider the case.

1.1.2 Other points on appeals

The following cases are listed by HMRC as "no further appeal so the decision is final":

- *Crow Metals Ltd*: FTT did not consider that HMRC had proved there was no other explanation than fraud for transactions in scrap metal.
- *Landlinx Estates Ltd*: FTT was satisfied that grants of options to buy land were exempt (HMRC's decision was contrary to their long-standing policy).
- *Northumbria Healthcare NHS Foundation Trust*: CA confirmed that s.41 claim was available in full for VAT on leased cars provided to staff under salary sacrifice arrangements (law changed with prospective effect from later in 2021).
- *Newey (t/a Ocean Finance)*: after going to the CJEU and up and down the courts, the FTT confirmed its earlier decision that the business was properly run from Jersey and input tax was avoided.
- *The Core (Swindon) Ltd*: UT agreed with FTT that products were food replacements, not beverages.
- *The Ice Rink Company Ltd and another*: after remission by UT for reconsideration, FTT confirmed its decision that skate hire was a separate zero rated supply from rink access.
- *Wickford Development Co Ltd*: FTT allowed roller blinds as "building materials".
- *Window to the Womb (Franchise) Ltd*: FTT allowed appeal by company providing ultrasound scans: it was exempt healthcare.

It has been reported that the Supreme Court has refused leave to appeal in the cases of *LIFE Services Ltd* and *The Learning Centre (Romford) Ltd*: their welfare services did not fall within the exemption.

2. OUTPUTS

2.1 Scope of VAT: linking supplies to consideration

2.1.1 Consideration or loan?

HMRC assessed a property development company on the basis that seven receipts totalling £282,000 in 2016 were consideration for taxable supplies that had been omitted from its VAT returns. The company appealed to the Tribunal, arguing that the receipts had been loans. HMRC supported their assessments with the further argument that they had been raised to best judgement on 28 February 2018 because, up to that date, insufficient evidence had been provided about the nature of the payments.

Judge Heather Gething heard from witnesses and examined documents. The metadata underlying some of the documents referring to the receipts as loans was examined, showing in each case that the document had been originally created shortly before the payment was received into the company's bank account; the documents were therefore contemporary, and not created later.

Part of the problem arose from poor accounting records: it was not clear in all cases what was a personal advance to the director (who was going through a divorce) and what was for the company. The accounts had now been brought up to date and reflected the indebtedness of the company to the lender, which was a finance company specialising in loans to businesses that could not borrow from banks.

The judge made various findings of fact about the documents and the dates on which the evidence was produced during the course of the investigation. She was satisfied that the documents amounted to sufficient evidence that the payments were loans, and the assessments were therefore discharged.

Although there is occasional reference to the payments being loans "rather than consideration for services", it is surprising that the decision pays very little attention to the question of what the payments could have been for if they were not loans. There is only a passing comment that the company did not make any supplies of construction services to the lender during 2016. Although the burden of proof lies with the appellant to displace the assessment, that does appear to be a basic issue with the reasonableness of the best judgement assessment process.

First-Tier Tribunal (TC07985): *GLS Ltd*

2.1.2 Overpayments for car parks

In 2019, the Court of Appeal held in *National Car Parks Ltd v HMRC* that overpayments for parking, by people who put more money than was required in a meter because they did not have the correct change, was VATable consideration for the supply of parking. This contradicted an earlier FTT decision in 2012 in relation to a local authority, in which the judge had held that the statutory restrictions on the amount of parking charges meant that such overpayments had to be characterised as outside the scope of VAT. Following the CA decision, the same local authority made a voluntary disclosure, claiming a repayment on the basis that the original decision was not overturned and remained good law (in spite of

the fact that it appears the council had not been applying it). HMRC refused the claim for £4,500, and the council appealed.

Judge John Brooks rehearsed the decision of the CA, which he said was directly applicable to the present situation. The main precedents were "the Dutch potato case", *Campsa Estaciones de Servicio SA* (Case C-285/10), *Tolsma*, and *Isle of Wight Council*. These established that the supply of off-street parking was taxable, and that the VATable amount was the consideration actually received by the taxable person for the supply that was made.

The specific rules that determined the appeal in 2012 were also considered. Local authorities are not allowed to charge for services unless they have statutory authority to do so; the amount that may be charged for parking is laid down by regulations. The council argued that this distinguished its situation from that of a commercial company, as in *NCP*. Their representative contended that the transaction between the driver and the council was governed by statute, not by contract, and that changed the analysis.

The UT in *NCP* had specifically stated the view that the first *King's Lynn* case had been wrongly decided, and HMRC argued that this was binding on the FTT now. The CA had declined to confirm that part of the ruling, as it had not been argued before it, but Newey LJ said that he should not be taken to have endorsed the earlier decision; the council's representative argued that this meant the UT decision was not binding in this respect.

The judge referred to a statement by Lord Denning about offer and counter-offer in a parking case from 1971. The council made an offer of parking at the statutory rate; the driver made a counter-offer by putting a higher amount in the machine. HMRC said that was exactly the same as in *NCP*. The judge agreed with the council that it was not open to it to offer parking at a higher price, but he considered that there was nothing within the law to prevent a driver making a counter-offer at a higher price (for whatever reason) and this being accepted.

On that basis, the situation was indistinguishable from *NCP*, and the appeal was dismissed.

First-Tier Tribunal (TC07996): *Borough Council of King's Lynn And West Norfolk (No. 2)*

2.1.3 Compensation payments

HMRC have announced that they are revising Revenue & Customs Brief 12/2020 on the VAT treatment of early termination fees and compensation payments. The original Brief was issued following the CJEU decision in *Vodafone Portugal*, and suggested that many payments that had previously been regarded (in accordance with published HMRC policy) as outside the scope of VAT should instead have been treated as taxable contractual payments. The most controversial aspect of the Brief was the suggestion that the new policy would be applied retrospectively, and taxpayers should consider making adjustments to correct underpayments in the last four years.

It is this aspect that appears to be subject to the proposed revision. HMRC have indicated that they do intend to revise the policy, but to apply it only from a future date. In the meantime, businesses have the choice of

continuing to treat payments as outside the scope in accordance with the old policy, or treating them as consideration in line with the Brief.

Revenue & Customs Brief 12/2020

2.1.4 Grant-funded television

Questions have been referred to the CJEU on the VAT treatment of the Bulgarian public broadcasting body, which is funded partly by grants from the state budget and partly by the proceeds of its own business activities, comprising paid content (principally advertising) and non-broadcasting activities such as the sale of intellectual property and the rental of equipment.

Art.132(1)(q) PVD exempts "activities of public broadcasting organisations other than those of a commercial character". The questions relate to the body's right to deduct input tax. It considered that the public grants were wholly outside the scope, rather than exempt consideration for broadcasting services, and therefore did not come into the partial exemption calculation; the tax authorities took the opposite view. The questions for the court covered the scope issue, exemption, the right of deduction and the appropriate method of partial exemption if the tax authorities were correct.

The A-G referred to the decision in *Český rozhlas* (Case C–11/15), which considered the position of a state broadcaster that was funded by a licence fee. The people paying the licence fee had to pay it because they owned a receiver; there was no link between the payment of the fee and the provision of the service. There would be no difference between that case and the situation in which a broadcaster is funded by public grant, if there was no link between the payment of the grant and the provision of services – if the grant was simply a method of financing the "public mission" entrusted to the broadcaster by the state. However, if there was such a direct link, then the grant would be within the scope of VAT.

Although there was apparently some link between the grant and the amount of broadcast time, which the Commission considered might turn it into consideration, the A-G did not think that the connection was strong enough to be analogous to *Le Rayon d'Or* (Case C-151/13). That case featured a much stronger link between what was paid and what was done, and the state grants constituted third party consideration for services provided to the beneficiaries of those services.

The A-G considered and rejected the application of art.25 PVD. He therefore proposed that the first question should be answered on the basis that these grants were not within art.2.

The A-G went on to consider the scope of the exemption in art.132(1)(q). Even if the grant was outside the scope, the possibility of some other income falling within the exemption would be relevant to the questions on input tax recovery. He examined various submissions on the concept of "activities of a commercial character", and concluded that it covered "operations carried out for consideration and which do not constitute activities of general interest, as well as the provision of services carried out free of charge, insofar as they are financed by the proceeds of these operations against payment". In effect, to the extent that the operations

were not paid for by the public grant, they would not be exempt, because they would be paid for by commercial operations.

Turning to the issue of the right of deduction, the A-G noted the long-standing problem of the difference between “business/non-business” and partial exemption – the PVD prescribes ways of determining recovery where some income is exempt, but there is no set of rules governing the deduction where some income is outside the scope. Member States are entitled to set their own rules, as long as the overall result is fair. The answer to these questions is therefore vague: “a public broadcaster whose activities are financed by both public subsidies only by revenue from transactions subject to VAT is entitled to deduct the VAT due or paid on goods and services used for the needs of these activities, insofar as they are financed by revenue from transactions subject to VAT.” No method of working out the “insofar as” is prescribed.

CJEU (A-G) (Case C‑ 21/20): *Balgarska natsionalna televizia v Director of the Direktsia*

2.1.5 Foreclosure

During 2009, an individual Romanian lender granted several loans to a third party, for a total amount of €80,400, together with mortgage guarantees on several buildings. As the loans could not be repaid, the buildings were put up for auction and three of them were auctioned off to the lender. The buildings were then sold off in 2010, 2011 and 2012, along with another piece of land bought in 2005 and sold in 2010.

During a tax audit in 2016, the tax authority concluded that the 2010 transactions should have been treated as subject to VAT, as they fell within the scope and exceeded the registration threshold. The sale in 2011 was exempt under Romanian law because it fell after 31 December of the year in which the property had been occupied, but the 2012 sale was also considered to be taxable.

The lender argued that he should not be treated as a taxable person in these circumstances. The court of first instance agreed that this was not in the character of economic activity because it was not directed to obtaining income on a permanent basis. The sale of the buildings bought at auction was simply a way of recovering the principal of the loans made during 2009. The tax authorities appealed, and questions were referred to the CJEU.

The court referred to various precedents on the terms of art.9 PVD and the treatment of sales of immovable property. The simple acquisition and sale of a good cannot fall within “exploitation to generate revenue having a permanent nature” (*Slaby and others*, Cases C-180/10 and C-181/10). Likewise, the mere exercise of the right to property by its holder cannot, on its own, be regarded as an economic activity (the same case, and also *Prizma* Case C-331/14 and *IO* Case C-420/18).

The number and extent of sales cannot constitute a criterion for distinguishing between the activities of someone acting in a private capacity and an economic operator (*Slaby* again, and *Paulo Nascimento Consulting* Case C-692/17). On the other hand, as regards the sale of building land, steps taken to market the asset were suggestive of economic

activity rather than a simple exercise of the right of property (*Prizma* again).

Applying those principles to the facts as set out in the order for reference, the court considered that what the lender had done fell within the sound management of private assets, rather than economic activity. It would be for the referring court to confirm whether there were any more active steps such as marketing the land, but it appeared that simply acquiring the buildings against which the loans had been secured, and selling them off, was specifically related to recovering the original loans. This also did not appear to be a "direct extension of an economic activity consisting in the granting of loans".

CJEU (Case C‑ 655/19): *Administraţia Judeţeană a Finanţelor Publice Sibiu and Another v LN*

2.1.6 Collective management organisation

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

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

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

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

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

The full court judgment sets out relevant extracts from Romanian copyright law, which provides that royalties paid to collective management organisations "is not revenue of those organisations, nor can it be treated as such". It also refers to the fact that the organisation acted on behalf of "members and non-members", but collected royalties for each in exactly the same way.

The court considered that it was clear that the copyright holder supplied services for consideration to the user of the work, notwithstanding the involvement of the management organisation. There was a legal relationship between them and reciprocal performance in the form of permission to use the work and payment of a royalty. *SAWP* dealt with a different situation, in which there was no supply for consideration but rather compensation. It did not matter what the classification of the service might be – the fact that there was a supply for consideration was enough to bring it within the scope of VAT under art.2 PVD.

The terms of the transaction were then clearly within art.28. This was a "legal fiction", but the VAT consequences followed – the full amount charged to the user was subject to VAT, and the onward payment to the copyright holders would also be subject to a requirement to issue a VAT invoice if the copyright holder was a taxable person.

CJEU (Case C‑ 501/19): *UCMR - ADA Asociaţia pentru Drepturi de Autor a Compozitorilor v Asociatia culturala , Suflet de Român*

2.1.7 Updated Manual

HMRC have updated the VAT *Business/Non Business Manual* with added guidance on the VAT treatment of religious services.

VBNB44500

2.2 Disbursements

Nothing to report.

2.3 Exemptions

2.3.1 Services for insurance company

A company operated in the insurance sector, designing and marketing insurance products. It designed a special product for an insurance company, placed contracts with insured persons on behalf of the insurer (adapting those policies if necessary and assessing the risks), and then managed the insurance contracts and the settlement of claims. The company considered that all of its income for 2011 was exempt. The tax office rejected the application for exemption; it considered that the company supplied several distinct services, of which only the placing of the insurance contracts was exempt.

In due course, questions were referred to the CJEU to clarify the scope of *Aspiro* (Case C-40/15), in which policy servicing and claims management services were held not to be exempt. The referring court was not sure whether such services might be exempt if provided by the same person that had acted as an intermediary in arranging the insurance policy when it was issued.

The court started by considering the principles of single complex supplies, as set out in *Stadion Amsterdam* (Case C-463/16) and other cases. A supply that is a single supply from an economic point of view should not be artificially split; that will be the case where two or more elements or acts supplied by the taxable person to the customer are so closely linked that they form, objectively, a single, indivisible economic supply.

The court considered that the starting point of the company’s services was the grant of a licence to use the product. That did not appear to require the company’s services to be used to sell the product, and it was therefore separable (although it would be for the referring court to determine this question with certainty). There did not appear to be anything that would render the grant of the licence and the intermediary services as a single supply. The court said that the referring court would have to make the same determination about the intermediary services and the contract management services. Those decisions were for the national courts alone, and the CJEU would not interfere.

However, in order to give a useful answer, the court would consider whether any part of the resulting supply or supplies could be exempt. The referring court appears to have regarded the grant of the licence as the “principal supply”. In the *Aspiro* decision, the CJEU had set down two criteria for a service to fall within “insurance related services of insurance agents and brokers”. In the first place, the supplier of services must be related to the insurer and the insured party, including an indirect relationship if the supplier of services is a subcontractor of the broker or agent. In the second place, its activities must cover the essential aspects of the work of an insurance agent, such as the finding of prospective clients and their introduction to the insurer, with a view to concluding insurance contracts. The grant of a licence to use a product did not fulfil either of these criteria.

The answer given therefore states that the supply cannot be exempt, if the referring court concludes that the licensing is the principal element of a single supply. Although the CJ sometimes gives a hint that the referring court has proceeded on the wrong premise, there does not appear to be any suggestion of that here.

CJEU (Case C‑907/19): *Q-GmbH v Finanzamt Z*

2.3.2 Educational dancing

TC07149 (July 2019 update) concerned the borderline between classes that are sufficiently “educational” to qualify for the exemption for private tuition, and those that are purely recreational and are standard rated. Classes in Pilates, yoga and belly-dancing have all fallen on the standard rated side; this concerned a teacher of Ceroc dancing, who operated a self-employed business as a franchisee of an organisation that owned the Ceroc brand and intellectual property.

The teacher operated through a company between 2006 and September 2010, and again after September 2012; in between those two dates, she operated as a sole trader and did not register for VAT. HMRC assessed for output tax and initially also charged a penalty for failure to notify liability, but the penalty was withdrawn before the appeal hearing.

The FTT judge considered the nature of Ceroc, which is a system of dance moves (up to 900 in total) that are taught in an organised syllabus to have a wide application to different styles of dance. The owner of the franchisor company gave evidence about the development of the system and its similarity to Key Stage 3 physical education in schools, although it was accepted that Ceroc itself was not taught in schools.

The judge noted that the main CJEU precedent, *Haderer* (Case C-445/05), was concerned with the relationship between the self-employed teacher and the pupils, rather than with the subject matter of the tuition. However, he considered it instructive for the guidance it gives in other areas. In particular, the CJEU noted that exemptions must be interpreted strictly, but also should be interpreted consistently with the objectives pursued by those exemptions and should comply with the requirements of the principle of fiscal neutrality inherent in the common system of VAT. The requirement of strict interpretation does not mean that the terms used to specify the exemptions should be construed in such a way as to deprive the exemptions of their intended effect.

In her opinion for that case, A-G Sharpston suggested that there should be a dividing line between exempt tuition and "purely recreational activities of no educational value"; she then went on to say "but any subject or activity in which instruction is commonly given in schools or universities must in my view fall within the scope of the exemption, regardless of whether it follows a strictly defined programme or curriculum." The full court did not adopt the same distinction in the same terms, but agreed that an activity which was ordinarily taught in schools or universities could be taken outside the concept of "school or university education" if it was purely recreational.

The judge summarised the principles derived from this case and also from *Hocking* (TC04130 – the Pilates case) and *Eulitz* (Case C-473/08) as follows:

(1) That the subject or activity should be one that is ordinarily, or commonly, taught in schools or universities.

(2) The subject or activity is not limited only to education which leads to examinations for the purpose of obtaining qualifications or which provides training for the purpose of carrying out a professional or trade activity, but includes other activities which are taught in schools or universities in order to develop pupils' or students' knowledge and skills.

(3) The subject or activity should not be one that is purely recreational.

(4) The supply must be one of tuition in that subject or activity, in the sense of a transfer of knowledge or skills. The tuition must be educational in character but, beyond that, there is no test of comparability with what actually happens in a school.

(5) The mere presence of an element of teaching cannot shift an activity which is otherwise purely recreational from one side of the line to the other.

The fifth principle presented a difficulty: it had to be a question of judgement as to where the line should be drawn between something that was "too recreational" to be educational, and something that was more educational than recreational.

HMRC accepted that dance was a subject that was ordinarily taught in schools. The issues were therefore whether teaching Ceroc was the same as teaching dance, and whether learning Ceroc was a purely recreational activity.

HMRC argued that Ceroc was a specific form of dance, and should therefore not be equated with teaching of dance in schools in the same way that belly-dancing was not considered "a subject ordinarily taught" in the *Cheruvier* case. The judge did not agree. The Ceroc methodology was broader and applicable to many forms of dance; statements by the franchisor suggesting it was more specific were intended to protect intellectual property, and should not be interpreted out of context.

HMRC argued that the advertising for Ceroc events emphasised the social and fun aspects, and it was therefore purely recreational. The judge considered that it was necessary to carry out an objective analysis of the supply from the teacher to each individual pupil. There was a significant transfer of knowledge and skills at each event, and it was therefore not purely recreational. Dance itself was accepted by HMRC as a subject ordinarily taught and not purely recreational.

The FTT judge concluded that, comparing the National Curriculum for PE with the Ceroc method, it fell within the exemption. The appeal was allowed.

HMRC appealed to the Upper Tribunal, where it came before Mr Justice Zacaroli and Judge Thomas Scott. The basic facts were all agreed as summarised in the FTT decision, and the parties also agreed that the UK legislation correctly reflected the PVD (with "ordinarily" meaning the same as "commonly", so that "ordinarily taught" meant the same as "covering school or university education").

HMRC appealed on the following grounds:

(1) Ground 1: The FTT erred in concluding that the relevant supplies constituted the teaching of dance. Ceroc is a distinct form or style of dance, and there was no evidence before the FTT that Ceroc was commonly taught in schools or universities.

(2) Ground 2: The FTT erred in law in its interpretation of the "purely recreational" test.

(3) Ground 3: The FTT erred in concluding on the facts that the classes taught by Ms Cook were not "purely recreational".

In order to succeed in the appeal, HMRC had to succeed either on Ground 1, or on both of Grounds 2 and 3.

The main case law precedents that were binding on the UT were the CJEU decisions in *Haderer*, *Eulitz* and *A&G Fahrschul-Akademie*. The judges noted that this was the first time that a superior UK court had considered

the exemption since *Haderer*. The UT also referred to the UK cases, which now included *Premier Family Martial Arts LLP* (TC07509). The only one that the judges considered of "material assistance" was *Hocking*, where Judge Berner had concluded that there is no free-standing test of "comparability" between the way in which a subject is taught in schools and in the case in dispute: "the tuition must be educational in character but, beyond that, there is no test of comparability".

HMRC's Grounds 1 and 3 were *Edwards v Bairstow* challenges – they were appeals against findings of facts that, they claimed, disclosed an error of law. The bar for overturning a FTT decision on these grounds was set high, requiring the UT to conclude that the FTT's decision had been "irrational". The UT set out how it proposed to consider this question.

The FTT had had to consider the question whether teaching Ceroc was "private tuition in dance" (which is ordinarily taught) or "private tuition in a style or form of dance, namely Ceroc" (which is not). The FTT had concluded that teaching Ceroc was "teaching generic dance" for two reasons: the number of moves involved in Ceroc, and the methodology or approach to teaching dance.

The key reason for the FTT's decision that Ceroc was "not a subset of modern jive" was the number of moves: "it incorporates a wide range of moves and techniques from different dance genres and is therefore a generic dance technique of broad application." The UT did not consider that this logically followed. There was no evidence before the FTT as to the number of moves permitted in any other dance form or style, so there was no basis on which the FTT could conclude that the number of moves indicated that it was a form of dance. Second, the fact that Ceroc incorporated a wide range of moves from other genres did not support the conclusion that it was not "its own form or style".

The three main conclusions about Ceroc were that it was (a) a brand, (b) a methodology for teaching dance, and (c) a generic dance technique of broad application. The FTT's conclusions on (a) and (b) were irrelevant to the nature of the supply, and they did not support (c). The FTT had reached a conclusion that was not supported by the evidence relied on, and it therefore had made an error of law within the sense of *Edwards v Bairstow*.

The UT went on to identify further problems with the decision: it had disregarded some of its primary findings of fact that indicated that Ceroc was a form of dance, and failed to take into account relevant evidence that led to that conclusion. This included the Ceroc website's statement in 2012 (within the relevant period): "What is Ceroc? Ceroc is a fusion of jive and salsa, fun and easy to learn."

Finally, the FTT appeared to have placed reliance on some irrelevant factors, such as the apparent similarities between the Ceroc syllabus for beginners and the Key Stage 3 dance syllabus taught in schools. The skills described (alignment, balance, stamina, rhythm, mobility and coordination) were too abstract and generic to determine what Ceroc was, or whether it was a subject commonly taught in schools.

The UT therefore concluded that the FTT had made an error of law under Ground 1, and considered whether to remit the case or to remake it. Both

sides accepted that there was sufficient evidence for the decision to be remade. The judges considered a number of factors that indicated that Ceroc was a distinct form of dance, and allowed HMRC's appeal on that basis.

As they had heard argument on Grounds 2 and 3, the judges commented on them. The FTT had come to the wrong conclusion on the nature of the "recreational exclusion" as set out in the *Haderer* case. If something purely recreational was taught in schools, that would not make the same thing exempt if it was privately taught outside a school. It is possible for something that is taught in schools in a non-recreational way to be taught outside schools in a way that is purely recreational (an example would be a history quiz in which a quizmaster imparts knowledge to participants but purely for recreational purposes). The "purely recreational" qualification applied both to the subject taught in schools and the particular supply under consideration (making out HMRC's Ground 2). That required reference to all the circumstances of the supply; the extent to which the supply comprised tuition (namely the transfer of skills or knowledge) was relevant but not determinative.

The UT then considered whether Ground 3 was also satisfied. This was another *Edwards v Bairstow* question: HMRC put forward a number of propositions in support of the argument that the FTT could not reasonably have concluded on the evidence that the Ceroc events were not "purely recreational", but the UT disagreed. There was sufficient evidence before the FTT to support the conclusion, even if there clearly were recreational aspects to the Ceroc evenings. An exception was made for "Freestyle or Party Evenings", which did not involve any formal tuition, and which therefore were purely recreational. These should have been considered separately by the FTT, rather than being treated as the same as all other supplies.

HMRC's appeal was allowed on Ground 1; the decision was set aside and remade, with the result that the supplies were not exempt from VAT.

Upper Tribunal: *HMRC v Anna Cook*

2.3.3 Welfare

In TC07346, a charitable trust appealed against a decision by HMRC that its supplies were exempt as "welfare services". The FTT judge noted that the result of HMRC's decision would be that the appellant would be due a repayment of £400,000 in net overpaid output tax. It appears that the Trust's customers were local authorities, so it would lose the right to recover input tax without being able to reduce its effective charges to its customers.

HMRC had confirmed in December 2004 that it regarded the trust's services as taxable, but reversed this following a request for a non-statutory clearance in March 2015. The reason for that request was a planned construction project on which the Trust intended to reclaim input tax.

The Trust's service is supplied to local authorities in connection with decisions about putting children on the Child Protection Register or taking them into care. The chief executive of the Trust argued that the focus of the services was the parents, and that the Trust did not provide any care to

children. However, the assessment was carried out at a residential centre where the quality of a parent's care could be observed.

The Tribunal examined the Trust's services and its history, and considered the EU and UK legislation and VAT Notice 701/2. The 2011 version of the Notice specifically includes "assessment of families to be included on the at risk register by providers mentioned in section 3 [which includes charities]" as an exempt supply, being "services directly connected with the care or protection of children and young persons".

The Trust argued that there was only an indirect connection between its services and the care and protection of children. There were several intervening factors and intermediaries between the service provided and that care and protection. It argued that its main supply was welfare advice and information, which carried a lower rate of 5%, and any actual welfare service was an incidental part of that main supply.

HMRC argued that the nature of the supply was directly connected to care and protection, given that it assessed children at risk in supervised accommodation and made reports that were the basis for decisions on child protection. The fact that it did not itself make the decisions did not mean that the service was not "directly connected".

The judge started by noting that the Trust had only registered in the first place because HMRC had told it to, and it had paid a late registration penalty. She agreed with the decision in *YMCA Birmingham* that the fact that the recipient of the supply was the local authority did not stop the supply being one of welfare services if it was connected to the protection of children. She also accepted HMRC's argument that the UK legislation's wording ("directly connected") had to be interpreted in a manner consistent with the EU wording ("closely related"). The Trust's attempt to use dictionary definitions to pick apart "directly connected" therefore did not succeed.

In summary she found that the "essential purpose" of the supplies made by the Trust was to ensure that the child is better cared for and has optimal protection, and that was both closely linked and directly connected with the protection of children and also to their care. The alternative description of its supplies as "welfare advice" could not be supported, because Sch.7A excludes "advice provided solely for the benefit of a particular individual or according to his personal circumstances" – that was exactly what the Trust did.

The appeal was dismissed, and the trust appealed to the Upper Tribunal, where it came before Judge Swami Raghavan and Judge Guy Brannan in an online hearing on 8 February 2021. The trust accepted that its supplies constituted welfare, but now argued that the FTT had been wrong to hold that its supplies of accommodation were ancillary to the provision of care. If they were not ancillary, they would be excluded from exemption by Group 7 Note 7, entitling the charity to reclaim input tax on the building work.

The UT briefly reviewed the FTT's findings of fact, which were not disputed. The parties had agreed with the conclusion of the FTT that there was a single supply, but they differed on the nature of that supply. The FTT's conclusion was based on *Card Protection Plan*: the supply of accommodation was not an aim in itself, and therefore had to be an

ancillary supply. The trust argued that an "essential part of the supply" could not be ancillary, but the FTT judge had disagreed.

The trust argued two points. Firstly, the FTT had wrongly conflated *identification* of supply for the purposes of Note 7 with the *nature of a transaction* for the purposes of VAT liability classification. In their argument, it was not necessary for the purposes of Note 7 to reach a view that the supply takes any particular form in terms of it being a single, mixed, composite or ancillary supply. In any case a finding that the provision of accommodation fell within a larger single composite supply did not, consistent with European case law, preclude Note 7 carving out accommodation from the exemption and applying a different tax treatment.

The second argument was that the FTT had applied the wrong test by referring to only one of the two elements of the *CPP* principle: it only considered whether the accommodation was "an end in itself", without going on to consider whether it was "a means of better enjoying the principal services". The FTT had been wrong to use a dictionary definition of "ancillary" rather than the EU case law.

The argument about whether Note 7 applied whenever there was an identifiable supply of accommodation, even if it was part of a larger supply, involved consideration of such cases as *Talacre Beach Caravan Sales* and the French undertakers case. After considering the precedents, the judges concluded that the reference to "supply" in Note 7 cannot be interpreted so as to capture a supply which is itself an element in a single supply for VAT purposes. In effect, that reflects the normal conclusion that a single supply cannot have more than one VAT treatment.

The judges went on to consider the trust's argument on the application of *CPP*. They commented that this ran contrary to the apparent intention and logic of the provision: it was more consistent with the intention of the law that accommodation that was essential to welfare should be exempt as part of the welfare, and it would be counter-intuitive to conclude that the more essential the accommodation was, the more it should be treated as taxable. HMRC's interpretation of Note 7 was entirely consistent with art.134 PVD in that "directly connected" supplies must be essential to the exempt services. The converse also applied: it was easy to see why "non-essential" accommodation should be excluded from exemption under Note 7. Even so, it was hard to see what function Note 7 served: it did not appear to add anything to Note 6, because accommodation or catering would only be "a supply of welfare" if it was ancillary to such a larger supply.

The judges concluded that the trust had failed to show any error of law on the part of the FTT, and the appeal was dismissed again.

Upper Tribunal: *The Lilias Graham Trust v HMRC*

2.3.4 Social character

Advocate-General Pitruzella has given an opinion in another case about the conditions for exemption of welfare services should be interpreted, in particular the expressions "provision of services closely linked to social assistance" and "organisation having a social character". The dispute

concerned a lawyer registered in Luxembourg who acted as an agent within the protection regime for incapable adults.

It appears that the Luxembourg authorities had treated his activities as not VATable from 2004 to 2013, but then assessed him to VAT. He argued that he should be treated as exempt within the local version of art.132(1)(g) PVD, and the change of view of the authorities was an infringement of the protection of legitimate expectations.

It was also questioned whether this was an economic activity, because the remuneration was determined by the court on a case-by-case basis, and was linked to the resources of the person concerned. It was not guaranteed to cover the service provider's costs. The questions also concerned the fact that the arrangement was a triangular relationship where one of the parties was an independent judicial authority which appointed the appellant to provide services to someone else.

The court asked the A-G to consider the questions about the scope of the exemption, rather than the questions on economic activity and legitimate expectations. That may mean that the full court is confident that those questions do not raise new points of law and can be more easily dealt with.

The A-G noted that there is a similar case before the court (Case C-1/20), referred by the Austrian court. He drew on the principles highlighted by the other case in formulating his opinion in this one.

The A-G considered what a lawyer in the position of "curator and supervisor" did. Some of the work appeared to fall within the principles of earlier cases on welfare such as *Kugler*, *Zimmermann* and *Les Jardins de Jouvence*. The appellant claimed that those elements were "preponderant", while the Luxembourg authorities acknowledged only that they formed "part" of the service.

The A-G suggested that to determine the social nature of these representation activities, certain elements provided for by the detailed provisions must also be taken into account:

a) the cost of these mandates, when the adult does not have sufficient financial means, is the responsibility of the State;

b) the compensation paid for the services, the amount of which must be fixed by the court, is calculated in particular on the basis of the income and the nature of the assets of the incapable person;

c) the representative is subject to review by the court;

d) the compensation paid is often a lump sum and rarely corresponds to the services rendered.

The A-G considered that elements of what the lawyer did had the necessary social character. However, there were other parts of the role that were instead within the framework of the exercise of a liberal professional of lawyer, rather than the performance of the social function of curator. It would be for the referring court to consider the question of the proportion of these activities: if the appellant was correct in describing the social activities as "preponderant", the A-G considered that exemption could apply.

However, it was also necessary for the supplier to be "an organisation having a social character". This was something that was for the Member State to recognise or not, subject to the principle of fiscal neutrality. The A-G did not accept that the mere status of lawyer, or the context of a profit-making professional activity, ruled out the classification of the appellant as "having a social character". If the Member State ruled out the possibility of such a person being so treated, it might have exceeded the authority delegated to it by the Directive; the referring court might take it upon itself to "recognise" the appellant.

Overall, the opinion was favourable to the appellant, while leaving both parts of the question largely to the referring court to determine.

CJEU (A-G) (Case C-846/19): *EQ v Administration de l'Enregistrement, des Domaines et de la TVA*

2.4 Zero-rating

2.4.1 Digital newspapers

The Court of Appeal has overturned the decision of the Upper Tribunal in favour of News Corp and held that digital newspapers were, until the law was changed with effect from 1 May 2020, standard rated.

Background and FTT

The publisher of *The Times*, *The Sunday Times* and *The Sun* claimed zero-rating for the daily digital editions of its newspapers on the grounds that they were "newspapers" and therefore covered by VATA 1994 Sch.8 Group 3 item 2, or else had to be given the same treatment as the paper versions on the grounds of fiscal neutrality. The FTT (TC06385) heard appeals against decisions covering the periods September 2010 to June 2014 and January 2013 to December 2016.

Judge Brannan noted the history of the relief for newspapers, which were free of Purchase Tax from 1940 to 1973; this was continued for VAT under the authority of what is now PVD art.110, which allows Member States to retain "exemption with deduction of input tax" for categories of supply that were so treated on 1 January 1991, provided that the rules were adopted for clearly defined social reasons and for the benefit of the final consumer, and were in accordance with Community law. The social policy required by Article 110 which lay behind the UK's decision to zero rate newspapers and books etc was the promotion of literacy, the dissemination of knowledge and democratic accountability by having informed public debate.

The judge reviewed the production of the titles and compared the printed and digital versions. It was suggested that the characteristics of a "newspaper" included that it was an "edition-based" publication, rather than comprising "rolling news" such as might be found on a website. The digital versions of these titles satisfied that definition.

The company's counsel argued that the purpose of the legislation would be served by treating digital publications as zero-rated. He also suggested that the 1973 wording should be updated to apply to present-day technology, rather than being frozen at the time it was written.

HMRC's counsel responded that the wording of Group 3 clearly referred to supplies of goods, not services. There was no doubt that digital newspapers were electronically supplied services (the rules on place of supply in Sch.4A include them in a definition). There was also a clear distinction in the EU legislation; allowing zero-rating would be an impermissible extension of zero-rating.

The judge agreed with HMRC that the implication of the wording of Group 3 was that it related to goods. The idea of legislation being interpreted in accordance with current technology ("always speaking") was set out in a speech by Lord Wilberforce in *Royal College of Nursing v DHSS* (1981), and it excluded the situation in which there was an apparent intention that the law should be restrictive in its operation. As zero-rating was an exception to the general rules of VAT, it was not possible to use a purposive interpretation to extend the scope of the relief beyond the straightforward meaning of the words.

The judge went on to consider the issue of fiscal neutrality. Although he was satisfied that the digital editions satisfied similar needs of customers to the print editions, he did not accept that this was enough to require an extension of the scope of the legislation. In accordance with the *Deutsche Bank* decision of the CJEU, fiscal neutrality could not override the clear words of the law; the 1991 "standstill" in art.110 was such a clear requirement.

HMRC's counsel sought to rely on the recent Commission consultation on the possibility of extending reliefs to digital publications, which implied that they were not currently entitled to the same treatment, and also on art.98, which excluded digital publications from the lower rate. The judge did not consider either argument was particularly relevant in the interpretation of UK law on zero-rating.

Nevertheless, he accepted HMRC's fundamental position and dismissed the appeals.

Upper Tribunal

The company appealed to the Upper Tribunal, where it came before Mr Justice Zacaroli and Judge Greg Sinfield. They summarised the FTT decision as "although the digital versions are the equivalent to the newsprint editions, they are not 'newspapers' within the meaning of Item 2." The company argued that the digital editions were properly to be regarded as "newspapers", and even if they were not, the principle of fiscal neutrality required them to be treated in the same way as the print versions.

HMRC responded by arguing that the FTT's finding that the digital editions were similar to the print versions of the newspapers was one which no reasonable tribunal could have reached; they also introduced the new argument that the company's case was inconsistent with Articles 96 to 99, 110 and 114 of the PVD.

The decision starts with a consideration of what is meant by a "strict" interpretation of the statute, to be balanced with giving effect to Parliament's purpose. "A strict construction is not to be equated, in this context, with a restricted construction": it should be consistent with the objectives which underpin the provision and not in such a way as to deprive a relief of its intended effects.

The legislative purpose of Item 2 was a matter of common ground: to promote literacy, the dissemination of knowledge and democratic accountability by having informed public debate. This amounted to "clearly defined social reasons" within art.110 PVD, so as to justify the preservation of the zero-rating of newspapers upon the UK's accession to the EU.

The "always speaking" doctrine was examined, giving the example of dogs: "*If Parliament, however long ago, passed an Act applicable to dogs, it could not properly be interpreted to apply to cats; but it could properly be held to apply to animals which were not regarded as dogs when the Act was passed but are so regarded now.*" The FTT had concluded that "always speaking" was ruled out by the standstill clause operating from 1 January 1991. The Upper Tribunal disagreed, and distinguished the present situation from the *Talacre* case, in which the

standstill provision had been considered by the CJEU: in that case, the UK law specifically excluded the contents of caravans from zero-rating, whereas in the present case, the question was whether the term "newspapers" should be construed as including the digital versions that have come into existence since 1991.

The judges went on to consider the meaning of "newspapers" in item 2 of Group 3, and the FTT's conclusion that Group 3 only dealt with supplies of goods. They considered that the FTT had been wrong to decide this; the restriction in item 6 to physical supplies did not imply that items 1 to 5 were so limited, and the restrictions in notes 1(b) and note 2 were not present in the legislation when it was originally enacted in 1972. The extension in note 1(b) to cover loans of goods did not imply that only goods could be covered in the first place. Overall, as s.30 VATA 1994 referred to "goods and services", it was not material whether something constituted "goods" or "services" for its inclusion in Sch.8; it was whether it fell within the categories described.

HMRC raised a challenge to the finding that the digital editions were similar to the print editions on the ground that no reasonable Tribunal could have reached that conclusion on the basis of the facts that it had found. The judges reviewed the findings and concluded that this attack failed to reach the high threshold required by *Edwards v Bairstow*. The differences between the print and digital editions, both in terms of content and functionality, were not as significant as the similarities.

Having rejected (1) the FTT's conclusion that the fact that the digital versions are not goods precludes them from being newspapers within Item 2; (2) the FTT's conclusion that either or both of Article 110 of the PVD and the requirement for a strict construction precludes reliance on the "always speaking" doctrine; and (3) HMRC's challenge to the FTT's findings of fact, the remaining question was whether, on the basis of those findings, including that the digital versions are the same or very similar to the newsprint editions, the application of the "always speaking" doctrine leads to the conclusion that the digital versions are "newspapers".

Dictionary definitions were inconsistent and therefore not conclusive. It was necessary to consider not only whether the innovative product met the legislative purposes underlying the zero-rating of newspapers; it would also have to share the essential characteristics of newspapers. The FTT had decided that it did.

HMRC also argued that art.98 specifically excluded the application of lower rates to electronically supplied services, until it was amended by a Directive in 2018. The judges considered that this was irrelevant: art.98 had no application in this case, because zero-rating was permitted under art.110, and the zero rate was not a "reduced rate" within art.98.

Because the judges decided that the digital versions were "newspapers" within the meaning of the legislation, and therefore zero-rated under the statute, it was not necessary to consider the question of fiscal neutrality. The appeal was allowed.

Court of Appeal

HMRC appealed to the Court of Appeal, where Lady Justice Simler gave the leading judgment, with which Sir Geoffrey Vos MR and Lady Justice Rose agreed. The appeals were on two grounds:

- the UT had erred in law in its application of the "always speaking" principle of statutory interpretation; and/or
- the UT had misapplied the relevant principles of EU law that govern zero-rating.

HMRC argued again that the word "newspapers" in Item 2 Group 3 could only apply to tangible goods, not to services; zero-rating provisions had to be strictly construed, and the UT decision was contrary to both UK and EU law.

News Corp argued that the UT decision was correct, and also argued again that fiscal neutrality required similar treatment for similar products in any case. That amounted to a further appeal against the FTT decision on that issue, which had not been considered by the UT as it had not been relevant.

The judge started by reviewing the EU context, going back to the history of transitional permission to retain zero-rates that is now contained in art.110 PVD. She saw the force in HMRC's suggestion that the development of the law over time showed that the EU did not intend electronic publications to be anything other than standard rated, and clearly excluded them from the reduced rates; she also saw the force in the taxpayer's argument that the reduced rates and related provisions were not relevant, because art.110 operated independently of them.

She went on to rehearse the UK law on zero-rating and on books and electronic services, before turning to the FTT judgment. She summarised that as having determined that the digital versions were similar to newspapers, but the standstill provision operated to prevent the extension of zero-rating to them; and fiscal neutrality, being a principle of interpretation only, could not bring within a relief something that was outside it.

The Upper Tribunal had been based on the FTT's finding of fact that the products were "newspapers", and had differed only in the use of the "always speaking" principle. The UT had accepted that it was necessary to interpret zero-rating provisions strictly, but that did not mean that the interpretation should be "restrictive and circumscribed". The decision was not that Group 3 should be extended to include digital newspapers, but rather that digital newspapers were always within it.

After summarising the competing arguments (which remained the same as they had been in the Tribunals), the judge considered the statutory construction of the word "newspapers" in Item 2. This had to be done in accordance with English law principles but without contravening applicable EU law principles. The court's task was to ascertain and give effect to the meaning of the words used by Parliament.

She went on to examine in detail the concept of "always speaking" and interpretation of the words of statute in changing circumstances. She concluded that the words used by Parliament led to the inference that the clear legislative intent was to include tangible or physical items only and to exclude from Group 3 (and in particular from Item 2) supplies that were not of tangible things. Her reasons were several and detailed:

- the similarity between the items in the list in Group 3, and the separate mention of "covers, cases and other articles supplied" with them, was indicative of an intention that the items were all physical;
- Item 4 specifically referred to printed music, where a different form was available even when the legislation was written, suggesting that it was only the physical item that should be included;
- the notes to the Group, contrary to the view of the UT, were a good guide to what was originally intended, and the addition of services (i.e. lending) suggested that the Items themselves were goods;
- the anti-avoidance provision in Note 2 was directed at the exclusion of "goods" that were supplied with something else – that indicated that it was clearly understood that the basic zero-rating provisions applied only to goods;
- the fact that zero-rating is a derogation carried the presumption that Parliament intended a narrow or circumscribed interpretation, not a broad, permissive one;
- basing the argument on the underlying social policy contained the fallacy that such an interpretation would extend to other things that were definitely not newspapers, such as "rolling news".

For all these reasons, she considered that the UT had erred in law. To interpret Group 3 as only referring to tangible physical items did not deprive it of its intended effect. Rather it gave the words used by Parliament in Group 3 and Item 2 a meaning which they fairly and properly bore in the context in which they were used. To read "newspapers" as including the digital news services would amount to an impermissible expansion of the zero-rating provision in Item 2.

The company's representative accepted that it was very hard for him to succeed on fiscal neutrality alone, and the judge agreed. The main difficulty was that the comparison was not being made between the appellant's supplies and those of a competing trader, but rather between two different supplies made by the appellant. The CJEU stated that the prevention of distortion of competition only operated between competing traders (*Marks & Spencer plc* Case C-309/06). The FTT's consideration of the similarities between the digital and physical versions were in any case directed at the question of whether they were both "newspapers", rather than any influence on the decision of the average consumer to buy one or the other, which is the relevant test of fiscal neutrality (*Rank Group plc* Cases C-259/10 and C-260/10). Overall, the FTT had been correct to conclude that the digital versions were not within the scope of the legislation, and the scope of a relief could not be extended by the application of fiscal neutrality (*Deutsche Bank* Case C-44/11).

HMRC's appeal was allowed.

Court of Appeal: *HMRC v News Corp UK & Ireland Ltd*

There is an article in *Taxation* by Jim Burberry and Philip Munn discussing the implications of this decision.

Taxation, 4 March 2021

HMRC have published a Brief to clarify that their victory in the CA has no impact on the introduction of the zero rate for electronic publications that took effect on 1 May 2020. It only restricts the zero rate to physical printed matter supplied before that date.

They also note that News Corp has applied for leave to appeal to the Supreme Court, so organisations may wish to protect their position by making claims for overpaid VAT based on the Upper Tribunal decision until the litigation has concluded.

Revenue & Customs Brief 3/2021

2.4.2 Women's sanitary products

As announced at the Budget in March 2020, women's sanitary products are eligible for the zero rate from 1 January 2021.

HM Treasury Press Release 1 January 2021; *Notice 701/18*

2.5 Lower rate

2.5.1 Reduced rate extended

The reduced rate of 5% which currently applies to certain supplies relating to hospitality, hotel and holiday accommodation and admission to certain attractions was due to revert to the standard rate on 31 March 2021, but it will be extended until 30 September 2021. A new reduced rate of 12.5% will then apply to the same supplies until 31 March 2022, after which the standard rate will apply. Regulation 55K of the VAT Regulations will be amended so that businesses using the flat-rate scheme will also benefit.

Budget Red Book 2.46

2.5.2 Roof or insulation?

The FTT has heard another appeal about the liability of installation of insulated roofing on conservatories. A company appealed against the reduction of a VAT repayment claim for its 01/18 period to nil and its replacement with an assessment for £13,457. It had started in business in May 2017, and claimed that 90% of its sales qualified for the reduced rate. HMRC conducted a visit in March 2018 to assess whether this was correct.

The company argued that HMRC had wrongly concluded that it was repairing or renovating conservatory roofs. It said that it was aware of the difference and charged 20% where appropriate; however, in most cases, it was fitting specialised energy-saving products to the existing roof structure.

The key argument was, of course, whether the supplies could be distinguished from those made by *Pinevale Ltd* (Upper Tribunal 2014) and *Wetheralds Construction Ltd* (Upper Tribunal 2018). Unfortunately, the company had argued that its supplies were "almost identical to those supplied by Wetheralds" at a point in the correspondence when

Wetheralds had succeeded in the FTT, before the Upper Tribunal overturned that decision.

HMRC argued that "energy-saving materials" must have "no other purpose": in this case, the company fitted external lightweight tiles that provided an additional protection against the elements, and that was a modification to the roof that was not simply installation of insulation.

Judge Michael Connell noted that the company's own description of its typical job involved far more than the mere fitting of insulation. The UT in *Wetheralds* had considered what the typical customer thought was being purchased, so the marketing material was relevant: this referred to "conservatory roof replacement", "roofing specialists", a "bespoke conservatory roofing system" and a "new insulated lightweight conservatory roof".

The case law showed that the reduced rate applied only where the works in question related to materials which are installed for the purpose, quite separate from any other purpose, of saving energy. The appellant's supplies changed the character of the roof in a way that simply insulating it would not.

The judge also considered the possibility that he should determine the nature of a single complex supply that included something that qualified for the reduced rate. He referred to the principles of the *Mesto Zamberk* decision as cited by the Upper Tribunal in *Metropolitan International Schools*:

"(1) The *Mesto* predominance test should be the primary test to be applied in characterising a supply for VAT purposes.

(2) The principal/ancillary test is an available, though not the primary, test. It is only capable of being applied in cases where it is possible to identify a principal element to which all the other elements are minor or ancillary. In cases where it can apply, it is likely to yield the same result as the predominance test.

(3) The "overarching" test is not clearly established in the ECJ jurisprudence, but as a consideration the point should at least be taken into account in deciding averments of predominance in relation to individual elements, and may well be a useful test in its own right."

Applying this to the facts, the judge was satisfied that the typical consumer would regard the supply as much more than just insulation. It would therefore not qualify for the reduced rate. The appeal was dismissed.

First-Tier Tribunal (TC07976): *Conservatory Roofing Systems Ltd*

2.5.3 Updated Notice and Manual

HMRC have updated the Notice *VAT on Energy-saving materials and heating equipment* to give further information on air source heat pumps and air conditioning units. Up to now, the guidance has suggested that air conditioning units could not qualify as energy saving materials under the heading "air source heat pumps" (which are included in the list in VATA 1994 Sch.7A Group 2 Note 1). The updated guidance advises that deciding whether any particular product is to be treated as an air source heat pump will depend on the facts of the case.

Notice 708/6

HMRC have updated the guidance in the *VAT Energy Saving Materials and Grant Funded Heating Supplies Manual* to clarify that an “air source heat pump” does not include an air conditioning unit (which effectively would be pumping heat out of a building rather than using the outside air to heat a building). The manual says that “The question of whether or not any particular product falls to be an air source heat pump will depend on the facts of the case.”

VENSAV3080

2.6 Computational matters

Nothing to report.

2.7 Discounts, rebates and gifts

Nothing to report.

2.8 Compound and multiple

2.8.1 Fitness and nutrition

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

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

Advocate-General

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

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

- single complex supplies, where the supply by the taxable person consists of two or more elements or acts which are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to consider separately.
- dependent ancillary supplies, where one element does not constitute for customers an end in itself but a means of better enjoying the principal service supplied.

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

The elements of a single complex supply merge into a different type of supply, and cannot be separated out. Examples include a restaurant meal.

If this is the case, the weighting of the individual elements within the complex supply is irrelevant, and it has to be considered as a whole, for example to decide whether it constitutes a supply of goods or a supply of services.

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

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

Indicative factors of dependent ancillary supplies include:

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

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

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

After considering all these principles, the A-G turned to the particular supplies in the case. The two elements served the same overall aim, being to boost physical well-being and athletic performance. However, the fact that they were supplied under a single contract did not necessarily lead to a conclusion that they should be treated as a single supply.

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

other. The nutrition service was also not a negligible element, if it constituted 40% of the value of the supply.

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

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

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

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

Full court

The full court started by refusing an application by the Portuguese government to have the reference ruled inadmissible on the grounds that the referring court had not described the facts in the level of detail required by the rules of reference. The court commented that there was sufficient information to understand the situation and to provide a useful answer.

The referring court had assumed that it was possible for the nutritional advice service to be exempt, which the Portuguese authorities disputed. The court considered that issue first. As the service was provided outside the context of a hospital, it could only qualify for exemption under art.132(1)(c) as "the provision of medical care", which would require a therapeutic aim – the diagnosis, treatment and, in so far as possible, the cure of diseases or health disorders. This did not have to be interpreted in a particularly narrow way, and could be extended to protecting, maintaining or restoring health.

It was for the referring court to determine, but it appeared from the order for reference that the persons carrying out the service did hold a recognised qualification. It was therefore necessary to focus on the purpose of the supply. The context of art.132 was the public interest. It was accepted that a nutrition monitoring service provided in a sports facility could, in the medium- and long-term or viewed very broadly, be a

tool to prevent certain conditions, such as obesity. However, the same applied to exercise itself, because that is capable of limiting the occurrence of cardiovascular diseases. The court drew a distinction between a "health purpose" and a "therapeutic purpose". If there was no evidence of purpose directed at prevention, diagnosis, treatment of a condition or restoration of health, a nutrition monitoring service did not meet the public interest threshold of art.132.

That did not contravene the principle of fiscal neutrality, because the purpose underlying the provision of a nutritional advice service changed its nature: a therapeutic aim would fulfil a different need of the consumer, and would therefore not be identical to a non-therapeutic one.

Although that effectively decided the case against the appellant, because there was no part of the supply that could be exempt, the court went on to consider the question of compound and multiple supplies in case – contrary to the clear suggestion of the preceding paragraphs – the referring court decided that the supply did contain a therapeutic element.

The court did not bother with the "closely related activities" criterion considered by the A-G, because it could not possibly apply. It considered the main points that would indicate a compound supply to be first, the absence of a distinct purpose of the supply from the perspective of the average consumer, and second, the relative value of an element being minimal or even marginal in relation to the other.

The facts in the order for reference indicated that the two services could be supplied separately from one another, which suggested that supplying them together did not bring them within the category of "single supplies of a complex nature".

The nature of a nutritional advice service was different from the provision of fitness services, so it could not be regarded as "for the better enjoyment": it met different needs and aims of the consumer. The fact that the invoiced amount constituted 40% of the total suggested that it could not be regarded as minimal or marginal.

The court therefore gave the answer that the nutritional advice service was a separate and distinct supply, but it was not exempt.

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

2.8.2 Consultation

HMRC have launched a consultation on a proposed revision of the rules for apportioning consideration between supplies with mixed liabilities in a single transaction. They are concerned that the present rules (VATA 1994 s.19(4)) do not prescribe a method, allowing businesses to "value-shift" the consideration for a single supply from higher rated to lower rated outputs. The Upper Tribunal's decision in *Marks & Spencer plc*, concerning "free" wine supplied with zero-rated food, appears to have highlighted the problem and encouraged HMRC to address it.

The consultation sets out HMRC's current policy (which allows cost-based and market value-based apportionments – Notice 700 section 31). It notes that value shifting is a disclosable avoidance scheme (section 6.4 Notice 700/8), but that relies on an undefined "significant difference"

between the total consideration for the bundle and the consideration for the items sold separately.

The proposal is for legislation to introduce mandatory valuation methods. Cost-based apportionments will not be permitted where items sold in bundles are also sold separately, and therefore their individual sale prices are known. Estimates of market value will not be permitted at all and use of cost will be mandatory for items which are not sold separately and therefore their actual market value is not known.

Where each item in a bundle is also sold separately by the supplier, an apportionment based on the separate sale price of each item will be mandatory (i.e. mandatory market value-based apportionment).

Where one or more items in a bundle are also sold separately and one or more of the other items in the bundle are not sold separately, the consideration must be apportioned using a combination of sale price(s) where known and cost(s) where the sale price(s) is not known. However, where the difference between the total consideration for item(s) where the sale price is known and the total consideration for the item(s) where the sale price is not known (the remainder) is greater than the total consideration for item(s) where the cost is not known, the remainder must be used. This means that the consideration must therefore be apportioned between the known sale price(s) and the greater of:

- the remainder of the consideration and
- the cost of the item(s) not sold separately.

Where none of the items in a bundle are also sold separately, cost-based apportionments will be mandatory.

If for any reason a single consideration for multiple mixed supplies was not liable to be apportioned to items held out as “free” within the bundle, the provisions in VATA 1994 Sch.8 paras 6 – 8 would apply.

The consultation document recognises that the definition and calculation of “cost” can be difficult, and HMRC are seeking views for each of the following scenarios:

- where each item is bought in;
- where services are involved (as with opticians dispensing spectacles);
- where items are manufactured or developed in-house;
- a mix of the above.

The consultation closed on 30 March 2021.

www.gov.uk/government/consultations/vat-and-value-shifting

2.8.3 Insurance and taxis

A case about IPT registration liability contains an interesting VAT aspect. The appellant supplied drivers with a black cab on hire. It had a block policy with an insurance company, and charged the drivers for the benefit of being covered by that policy. Initially, the company accounted for VAT on the whole of what the drivers paid; in February 2017, its then adviser applied for a refund of VAT on the insurance element, on the basis that it should have been treated as a non-VATable disbursement.

HMRC rejected the claim in November 2017, but following further correspondence, changed their view. In April 2018, HMRC concluded that the company was supplying insurance and was therefore liable to be registered for IPT from June 2011, with a resulting liability for £58,000.

Judge Nigel Popplewell commented that the responses from the advisers to HMRC's questions were "somewhat confused (to put it at its most generous)"; this was apparently because, after making the claim for a repayment of VAT, they realised that the arguments they had raised to support that might lay the company open to an assessment to IPT.

The judge examined the contracts and considered the commercial and economic reality. In his view, the appellant was "carrying on a business which included the provision of insurance"; however, that was not enough to make it liable to IPT. It had also to enter into "contracts of insurance" as insurer. The agreements between the drivers and the appellant did not contain the essential elements of such a contract. They did not identify what the driver would become entitled to, nor the event which would trigger that entitlement. The examination of the law and the circumstances is long and detailed, but the conclusion appears to be that the drivers were indeed paying for insurance – which would be exempt from VAT – but that the only person liable for IPT was the insurance company. The appeal against registration and assessment was allowed.

Although the case was not about the VAT question, the implication is that the VAT repayment was validly claimed.

First-Tier Tribunal (TC07977): *GB Taxi Services Ltd*

2.9 Agency

2.9.1 Infringement proceedings

The Commission instituted proceedings against Austria with a letter of formal notice in July 2014, stating its view that Austria's version of the Tour Operators Margin Scheme did not comply with the PVD. Austria excluded from TOMS supplies that would otherwise fall within it, but were supplied to taxable persons for use in their business. Austria made amendments to its law in 2016, to take effect from 1 January 2017, following the 2013 CJEU judgment in *Commission v Spain* (Case C-189/11); the Commission stated in May 2016 that it did not consider the amendment remedied the non-compliance. While the argument continued, Austria postponed the implementation of the change to its law, while still maintaining that it was correct. Eventually the Commission brought the proceedings to the CJEU.

Austria argued that the Commission's action was inadmissible, because it covered legislation that was not in force. If the Commission wanted to object to the amended law, it would have to go through the whole pre-litigation procedure again. The Commission replied that its action was based solely on the existing version of the law, and any consequences for the amended version would be on a purely preventive and subsidiary basis. The court agreed that the Commission had not modified the

subject-matter of its complaint between pre-litigation and the court stage, and the action was admissible.

In *Commission v Spain* (Case C-189/11) and *Commission v Germany* (Case C-380/16), the CJEU found that the special regime would apply not only to services provided to end consumers, but also to those provided to taxable operators. Thus, according to the case-law of the Court, the concept of "traveller", appearing in particular in Articles 306 to 308 and 310 of the VAT Directive, should be interpreted broadly and include all types of customers. The directive was mandatory, and member states had no choice.

Austria regarded the inclusion of business customers within the margin scheme as contrary to the principle of proportionality, because it would prevent businesses involved in the supply chain from recovering VAT on upstream transactions. Austria was unable to use a transitional provision for pre-1978 rules available to some Member States under art.370, because it had acceded to the EU in 1995; but it argued that it should be allowed to take advantage of a similar procedure now, given that the case law of the CJEU clarified the position only after it had acceded to the EU and therefore it had missed the opportunity to implement such a transitional rule.

The CJEU effectively repeated the decisions in the *Spain* and *Germany* cases, which had gone over the same arguments. Whatever the Austrians thought about those decisions, they were binding. Art.370 was plainly not available.

The Commission also criticised Austria for allowing travel agents to calculate their margin on a global basis for a period, rather than on individual supplies. This had also been covered in the *Germany* case, and Austria's objections carried no weight.

The court granted the declaration sought by the Commission, and ordered Austria to pay the costs.

CJEU (Case C‑ 787/19): *Commission v Republic of Austria*

2.10 Second hand goods

2.10.1 Northern Ireland

One of the problems created by the special status of Northern Ireland following Brexit is that second-hand schemes cannot apply to imported vehicles, and cars moved from GB to NI could not therefore be sold using a margin scheme. Michael Gove announced in the House of Commons that a margin scheme would be "reinstated" to ensure that customers in Northern Ireland need pay no more than those in other parts of the UK; the Prime Minister also claimed to have "sorted" the problem with a compensation scheme. However, the details are not yet clear.

Hansard 13 January 2021

2.11 Charities and clubs

Nothing to report.

2.12 Other supply problems

Nothing to report.

3. LAND AND PROPERTY

3.1 Exemption

3.1.1 Clawback charge

The Supreme Court has overturned the decisions of the Upper Tribunal and the Court of Session in the Balhousie Holdings case, sparing the company from a "business-ending" liability – although the 8-year fight through the courts will not have helped.

Background, and FTT

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.

Upper Tribunal

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.

Court of Session

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.

Supreme Court

The case came before the Supreme Court in January 2021. Lord Briggs gave the leading judgment in favour of the company, which was agreed by

three of the other four judges; Lady Arden gave a different reason but also allowed the company's appeal.

The judgment begins with examples of some surprising consequences of HMRC's interpretation of the clawback provision applying where "the interest that gave rise to the zero-rated grant" has been disposed of. Lord Briggs described a situation in which there appeared to be no reason to claw back the relief but HMRC's view would lead to that result, and another where there would be good reason but, according to HMRC, there would be no relevant disposal.

The judge did not consider that CJEU precedents were particularly helpful, because zero-rating (and limitations on it) were UK rules that were not governed by the VAT Directive (except in the general principles that must be applied to such derogations under article 110 PVD). Rather, the principle of statutory interpretation from UK law should be followed: "The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically" (*Barclays Mercantile v Mawson*).

The purpose of the legislation was clearly to deny relief to someone who did not ensure the qualifying use (residential provision for final consumers) for the full ten-year period. In that context, a disposal of the original interest could take the form of a number of successive transactions; only the last, when the person who obtained the ZR supply no longer "had any skin in the game", would lead to a clawback (which would be proportional to the remainder of the ten year period after the disposal). If successive disposals were to be treated in this way, it made more sense of the provision also to take into account acquisitions of interests. The sale and leaseback were simultaneous: there never was a moment when the company did not have an interest in the property, and was therefore able to continue to ensure that the qualifying conditions were met.

A number of other arguments raised by HMRC were considered and dismissed. According to the purpose of the provision, the company should not be regarded as having disposed of its entire interest in the property, and the clawback was not triggered.

Lady Arden considered that EU law principles were engaged, and that the case of *Mydibel* (Case C-201/18) (which was not available to the Court of Session) was a relevant and convincing precedent. This suggested that a sale and leaseback should be regarded as a single transaction for VAT purposes: the economic reality was a financing transaction rather than a disposal. HMRC had raised a number of arguments to distinguish the facts of the Belgian case from that of Balhousie, but the judge was not persuaded that there was any significant difference. In her view, the two transactions should be regarded as a single composite whole, with the result that the company had not disposed of its entire interest. Once again, the clawback provisions were not engaged. The appeal was unanimously allowed.

Supreme Court: *Balhousie Holdings Ltd v HMRC*

3.1.2 Unusual land transactions

A holder of a "perpetual usufruct" used some land as if they were the owner, while the "formal owner" had the legal title under civil law. Fees paid by the holder of the usufruct to the owner were subject to Polish VAT. As part of a reform of the law on property, the previous owners of the land have now, by operation of law, lost their ownership to the holders of the right of perpetual usufruct. The latter are required to continue to pay annual instalments for perpetual usufruct for 20 years or to make a one-off payment in the same amount. The question of whether the payments required by operation of law were VATable was referred to the CJEU, and A-G Kokott gave the opinion. A further complication was that the land was owned by a public authority, so the question of the capacity of the owner as a taxable person also arose.

The property law reform had the effect that ownership changed hands on 1 January 2019. The perpetual usufructuaries became the legal owners; they were required to pay an annual sum for 20 years, identical to the previous usufruct payments, or else to pay a one-off sum.

The Polish law specifically provided that the transfer of land by a public authority by operation of law, and the leasing of land by perpetual usufruct, were both supplies of goods. The municipality of Wroclaw applied for a tax ruling, and the tax authority confirmed that the transactions would be subject to VAT in the same way as the previous annual payments.

The A-G commented that the referring court had framed the questions only in terms of a supply of goods. She pointed out that VAT liability could also arise if the transaction constituted a supply of services. In her view, whether the "transformation of ownership" was regarded as a transaction separate from the previous usufruct, or whether an economic overview was taken (in which case the situation afterwards was very similar to the situation before, at least for 20 years), there was a taxable supply. It was either a supply of goods or, if it was not, it had to be a supply of services. Although the payment arose as a result of the operation of law, nevertheless it met the conditions for a supply for consideration – there was a legal relationship between the parties and reciprocal performance. The usufructuary obtained a benefit in return for the payment – as legal owner, it would be able to transfer the land to others.

The A-G preferred the "economic overview" approach, in which case the payments after the transformation were simply a continuation of the supply of goods that existed beforehand. If the parties agreed to make a one-off payment instead of making annual payments, that only changed the timing of the consideration, not the nature of the supply.

She went on to consider the relationship between art.14(1) and art.14(2) PVD, and concluded that it was not particularly relevant in the context: there was in either case a taxable supply.

Turning to the question of whether the municipality was acting as a taxable person, the A-G noted that the property law reform might be directed mainly, or possibly even exclusively, at land owned by public authorities. Nevertheless, the capacity in which the authority owned the land and received these payments was not within the special legal regime

applicable to public authorities, but rather in its capacity as the previous owner of the land. The previous payments had been VATable, and so were the transformation payments.

The full court judgment describes in more detail the land ownership reform that led to the issue. Land developed for residential purposes, that had previously been owned by the state or public authorities and let on perpetual usufruct, was to be converted into private ownership by payment of a "transformation fee" over 20 years. The valuation and the procedure were set down in Polish law.

The court considered whether the transactions constituted supplies of goods within art.14(2)(a) PVD. This required three cumulative conditions: there has to be a transfer of a right to ownership; that transfer has to be by order made by, or in the name of, a public authority or in pursuance of the law; and there has to be payment of compensation. The first two conditions were clearly met; the only question was whether the payments in the transformation procedure fell within the term "compensation". This had to be given a uniform meaning throughout the Member States, and only required a direct link between the payment and the transfer of ownership. In the present case, it was clear that the obligation to pay the transformation fee arose from the wording of the law at the time of the transfer of the property into private ownership, and the amount was related to the value of the land. The transaction therefore constituted a supply of goods within art.14(2)(a).

The court turned to the question of whether the municipality was acting as a taxable person. The application of art.13 PVD (treating a public authority as not a taxable person) presupposed that the transaction was within art.9 (economic activity), or the question (and the need for an exception) would not arise. The fact that the transformation payments were to run for 20 years suggested that the transaction was economic, because it would generate income on a continuing basis. The fact that the public authority took no positive steps to market the property, because the transactions took place by operation of law, did not negate this conclusion. Art.14(2)(a) expressly contemplated this type of property transfer by a public authority as a transaction within the scope.

As art.13 was a derogation from the normal rules of VAT, it should be interpreted strictly. The role of the municipality in the transformation of the property ownership was limited: it was not "exercising powers" conferred by public law, as it had no power to decide on whether the transaction should take place or to determine the value. It was effectively only involved in an administrative capacity.

As the transaction was held to be economic within art.9, and not excepted within art.13, it must be taxable.

CJEU (Case C‑ 604/19): *Gmina Wrocław v Dyrektor Krajowej Informacji Skarbowej*

3.2 Option to tax

3.2.1 Time limit for notifying option

HMRC have further extended the longer time limit for notifying an option to tax while the pandemic persists. The normal 30-day limit has now been extended to 90 days for options made between 15 February 2020 and 30 June 2021 (previously the extension was set to expire on 31 March 2021).

Notifications can be e-mailed to optiontotaxnationalunit@hmrc.gov.uk.

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

3.3 Developers and builders

3.3.1 Domestic reverse charge

HMRC have updated their Notice *Domestic reverse charge procedure* to reflect the applicability of the domestic reverse charge to construction services from 1 March 2021.

In addition, the DRC provisions relating to Certified Emission Reductions (CERs) and Emission Reduction Units (ERUs) change with effect from 1 May 2021, following the introduction of a new UK Emissions Trading Scheme.

Notice 735; *SI 2021/369*

In an article in *Taxation*, Neil Warren discusses the reverse charge rules for the construction industry before their introduction on 1 March.

Taxation, 21 January 2021

3.3.2 Zero-rating certificate penalty

In TC07484, the FTT dismissed a reasonable excuse appeal against a penalty for issue of a zero-rating certificate. The Upper Tribunal has now overturned that decision and allowed the excuse.

A cricket club issued a zero-rating certificate to builders in 2013 to secure VAT relief on the construction of a new pavilion. HMRC subsequently ruled that this was wrong, and charged a penalty under VATA 1994 s.62. The club argued that it had a reasonable excuse, in that it had written to HMRC to ask for a ruling, and had a received a reply that suggested that the pavilion qualified.

The FTT noted guidance from the UT in *Perrin* [2018] in deciding what constituted a reasonable excuse. This included:

"...the tribunal should bear in mind all relevant circumstances; because the issue is whether the particular taxpayer has a reasonable excuse, the experience, knowledge and other attributes of the particular taxpayer should be taken into account, as well as the situation in which that taxpayer was at the relevant time or times..."

"When considering a 'reasonable excuse' defence, therefore, in our view the FTT can usefully approach matters in the following way:

(1) First, establish what facts the taxpayer asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or

any other person, the taxpayer's own experience or relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).

(2) Second, decide which of those facts are proven.

(3) Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased. In doing so, it should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. It might assist the FTT, in this context, to ask itself the question 'was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?'

(4) Fourth, having decided when any reasonable excuse ceased, decide whether the taxpayer remedied the failure without unreasonable delay after that time (unless, exceptionally, the failure was remedied before the reasonable excuse ceased). In doing so, the FTT should again decide the matter objectively, but taking into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times."

The club wrote to HMRC in March 2012, giving details about the club and the project and asking for guidance on the application of the zero-rate. HMRC replied, stating that departmental policy prevented the issue of a definitive ruling where the matter was covered by published guidance. The appellant was referred to Notice 708. However, the letter included the sentence: "Furthermore I would refer you to sub-paragraph 14.7.4 which covers what is classed as a village hall or similar building. Providing the new pavilion meets the conditions set out, and it appears to do so, the construction work will be zero-rated for VAT purposes."

The club's treasurer duly read Notice 708 and ticked the relevant box on the certificate. The judge accepted that he honestly believed that this was correct. However, he did not consider that it constituted an objectively reasonable excuse. The "advice" given by the officer in the letter was not definitive and was not intended to be; the Notice did state that a village hall had to be constructed by a charity, which the club was not. The letter, in trying to be helpful, had left the taxpayer in "no man's land".

Even if the letter had led to confusion, the treasurer should have realised on reading the certificate that it required use by a charity – that was explicit on the form beside the box that he had ticked. A reasonable course of action at that point would have been to ask for further clarification, which was not what the treasurer did.

The judge went on to consider whether the penalty breached Article 1, Protocol 1 of the European Convention on Human Rights, and decided "with some regret" that it was not. The judge recognised that, although a 100% penalty levied on someone who has not acted in any way dishonestly appears harsh, it is no more than the VAT that would have to be paid by any other club wishing to construct a similar building.

The appeal was dismissed by the FTT, and the club appealed to the Upper Tribunal (Judge Timothy Herrington and Judge Guy Brannan). The appeal was brought both on the issue of proportionality and the issue of reasonable excuse; because the judges decided in the club's favour on the

excuse, they decided to leave discussion of the proportionality issue to a case where it would be material to the outcome.

The judges summarised the law and the precedents, noting that the Upper Tribunal had considered similar issues in *Eynsham Cricket Club* (2019). There, the UT had overruled the FTT's decision that a CASC could be treated as a "charity" for the purposes of issuing certificates; but the UT had also disagreed with HMRC's guidance in Notice 708 that a CASC building was unlikely to be treated as "similar to a village hall".

The FTT's decision had been based on two separate strands of reasoning: that the HMRC letter was not intended as, and could not be read as, a definitive answer to the question; and the form explicitly stated that the box could only be ticked by a charity, which the CASC was not. The detailed grounds of appeal that related to reasonable excuse were:

Ground 1 – the FTT erred in law as to what could amount to a reasonable excuse because it circumscribed the notion of reasonable excuse by reference to the concept of legitimate expectation.

Ground 2 – the FTT erred in law by deciding that definitive advice was required in order to provide the basis for reasonable reliance.

Ground 3 – the FTT erred in interpreting the s.62 certificate as having no reasonable interpretation other than that CASC status was insufficient to satisfy the reference to a "charity" therein.

Ground 4 – The FTT erred in law by approaching the matter on the basis of considering what it believed was a reasonable thing to do, and concluded that because WCC did not do that, WCC behaved unreasonably.

Ground 5 – the FTT erred by failing to ask itself the right question. WCC contends that the "right question" for the FTT to ask itself was: "whether the only reasonable course of action in circumstances where (i) HMRC have told the taxpayer that the project qualifies for zero-rating, (ii) CASC's are treated as charities for some tax purposes; and (iii) the taxpayer was a small cricket club with limited means run by unpaid volunteers, was to take further advice on the same question that HMRC have already answered".

The UT considered each ground against the tests from *Perrin*, as set out above in the FTT decision. This involved considering:

(1) The extent to which there were any errors approach on the part of the FTT in establishing the facts in the light of WCC's assertions as to the basis on which it contends that the reasonable excuse defence to the penalty can be established.

(2) The extent to which there was any error of approach on the part of the FTT in its assessment that those facts did not viewed objectively amount to a reasonable excuse for the error in the zero-rated certificate.

(3) Whether in making that assessment the FTT adequately took into account the experience and other relevant attributes of WCC and the situation in which WCC found itself at the relevant time or times.

The decision sets out HMRC's rebuttal of each of the club's grounds and their justification of the overall conclusion that the FTT drew. However, the judges go on to find an error in the FTT's approach, which was to

consider separately the significance of HMRC's letter and the completion of the form. Even if the letter had been treated as a reasonable excuse, the FTT appeared to consider that such an excuse would be overridden by the wording on the form.

In the view of the UT, there was only one question for the FTT to answer, namely whether the club had a reasonable excuse for completing the form as it did in the light of the terms of HMRC's letter and all the other relevant circumstances prevailing at the time the certificate was completed. This was not a case where there might have been a reasonable excuse at an earlier point which subsequently ceased to exist: the only relevant time was the signing of the certificate.

The UT rejected the club's criticism of the FTT's approach as "circumscribing the notion of reasonable excuse by reference to the concept of legitimate expectation". It had distinguished between the two. However, it had limited its consideration of HMRC's letter to the question of whether the advice it contained was definitive; it was HMRC's policy not to give definitive advice and to say so in letters, but that did not determine whether reliance on such a letter could be a reasonable excuse. The question was whether it was reasonable for someone in the position of the club to rely on what was said in the letter, in the light of all the other relevant circumstances.

The FTT had not considered why the club had completed the certificate by stating that it was a charity and putting in a CASC number. It had found the club's witness to be honest and straightforward, but had not made any findings about why he genuinely believed the club qualified for relief. The FTT had failed to consider that it might be reasonable for someone in the club's position to honestly believe that a CASC qualified as a charity for the purpose. In *Eynsham*, the FTT had concluded that it did so; it was not until the UT decided that case in 2019 that the matter was put beyond doubt.

Therefore, the fact that the FTT would have been bound to say if it had considered the point that a CASC was not a charity on the basis of the Upper Tribunal's decision in *Eynsham* did not determine the issue. The question was whether in all circumstances it was reasonable for WCC to proceed on the basis of its genuine belief that the works concerned qualified for zero-rating.

The failure to address the question in the right way was an error of law. The UT decided that the errors were so material that it was necessary to set aside the decision; it was then necessary to remit it to the FTT or to remake it. Although one of the errors involved a failure to make a factual finding, the UT was satisfied that it had enough information to remake the decision.

The judges considered that HMRC's letter was a reasonable basis to believe that the "similar to a village hall" condition was met; indeed, the description in the club's letter was very similar to that considered to qualify by the UT in *Eynsham*. The key question was whether it was reasonable for the club to complete the certificate as it did without seeking further guidance on the "charity" question.

The club had disclosed in its letter that it was a "non-profit making organisation", and HMRC had not commented on that. The advice given

in the letter was actually fuller than HMRC's policy normally allowed, but it did not address all of the conditions that the club needed to satisfy. Had the club taken further advice, at the time (years before the UT decision in *Eynsham*) it might have been told that a CASC qualified.

Proceeding on the basis that the works qualified for relief was within the reasonable range of decisions open to the club at that time. There was a reasonable excuse, and the penalty was discharged.

As a postscript, the UT commented on this statement by the FTT:

We think, on balance, if HMRC are to rely upon their policy of not providing a definitive response to queries where the point is covered by a public notice then it should simply point to the relevant notice and do no more. We realise that this might be seen as unhelpful in some quarters, but for HMRC to offer a view whilst at the same time maintaining that the point is adequately covered by a public notice is more unhelpful still. It can, potentially, leave the taxpayer in "no man's land". It might also be helpful if HMRC specified that the information that it provided was of generic applicability and that it did not provide advice to taxpayers.

The UT said:

We do not think HMRC should be criticised for deciding to answer WCC's queries and they are to be encouraged to answer similar requests in the future. It is unfortunate from their perspective that in this case the letter they wrote was not as comprehensive in its answers as it might have been.

Upper Tribunal: *Westow Cricket Club v HMRC*

3.3.3 CASC or charity?

In TC06047, the First-Tier Tribunal considered a cricket club that had incurred costs in constructing a new pavilion. The club appealed against a ruling by HMRC that the work could not qualify for zero-rating. The three issues for determination by the FTT were:

- whether the club, being a Community Amateur Sports Club, qualified as a "charity" for the purposes of Sch.8 Group 5 Note 6;
- if the club succeeded on that issue, whether the new pavilion was to be used by the club solely for purposes other than carrying on a business;
- alternatively, if the club succeeded on the charity argument, if the new pavilion was intended for use as a village hall or similarly in providing social and recreational facilities for a local community.

The Tribunal heard evidence about the history of the club, its constitution, and the circumstances leading to the construction of the new pavilion (the old one had been destroyed in a fire). A grant had been obtained from Sport England to help the project; the application emphasised the community benefit that would arise.

The Tribunal noted the various sources of funding obtained to finance the project. Unfortunately, once the contractor had concluded that VAT would have to be charged, there was not enough money to finish the job. Friends of the club lent money to enable the completed works to be paid for, but it is not clear whether there are still outstanding parts of the building project.

The FTT considered the definition of a "charity" for VAT purposes in some detail, noting that the club satisfied many of the features required by the law. HMRC argued that it could not be a charity, because the Charities Act 2011 explicitly excludes CASCs from its scope; they are treated in the same way as charities for most corporation tax purposes, but they are not charities, and are not required to be registered with the Charities Commission. However, the FTT considered that it was possible for a CASC to be a "Finance Act charity", as defined in FA 2010, because the Charities Act provision was a different definition made for a different purpose. In coming to this conclusion, it noted that it was "respectfully disagreeing" with the earlier Tribunal in *Witney Town Bowls Club*; but that Tribunal had not had the benefit of detailed submissions by counsel on the construction of the relevant provisions.

The club's purpose in promoting amateur sport was capable of being "for the public benefit" and therefore charitable within the meaning of the legislation. However, it was not the sole purpose of the club. It also existed to promote social activities, and this could not qualify as charitable.

That was enough to conclude the appeal against the taxpayer, but the FTT had heard argument on other issues, so it gave its conclusions. The club met the "registration condition" in FA 2010 Sch.6 para.3, because it was not required to be registered under the Charities Act. Although the legislation was strangely worded, it appeared only to require that the club had met any obligation it might have to be registered, and as it did not have one, it satisfied the condition.

The question of "relevant charitable purpose" was considered in the light of decisions from *Yarburgh Children's Trust* to *Longridge on the Thames*. Not surprisingly, following the recent Court of Appeal decision in *Longridge*, the FTT concluded that the receipt of income could only be "not economic activity" in exceptional circumstances, which did not apply here.

The consideration of whether the pavilion could be a "village hall or similar" was carried out in the light of precedents such as *Caithness Rugby Football Club*, *New Deer Community Association* and *Jubilee Hall Recreation Centre*. The test was the intention of use at the time the supplies were carried out, but the actual use of the pavilion was circumstantial evidence of that intention. The Tribunal was satisfied that the club would have succeeded on this issue.

The club also could not succeed with an argument based on fiscal neutrality. This would have had more force if the only UK law reason for denial of relief was a distinction between CASCs and "proper" charities; however, that was not the reason. Any charity acquiring a building for this mixture of activities would be denied relief, because it was not solely for charitable purposes.

The appeal was dismissed, and the club appealed to the Upper Tribunal. During the process of case management, HMRC conceded that the sole basis for the FTT's finding against the taxpayer (that it was not "established for charitable purposes only") was wrong in law. This meant that, in effect, the club had won in the FTT, and HMRC became in effect the appellant in respect of the FTT's other findings.

HMRC continued to maintain that Charities Act 2011 s.6 applied for tax as well as charity law purposes, and simply excluded CASCs from being treated as a charity for any purpose. They also argued that, if it did not operate in that way, then the registration condition could not be ignored – the club could not benefit from one without the other.

The judges set out a helpful review of the background to the current law on charities and CASCs, and how they are defined for general purposes and for VAT. HMRC pointed to background documents relating to the enactment of FA 2010; the charity responded that if that Act had been intended to exclude CASCs from being treated as charities for tax (which they could have been before then), it could easily have said so, which it did not.

HMRC's counsel put forward six rules of statutory interpretation, of which the sixth was "that the Tribunal may have regard to the views of official bodies charged with functions under the statute" – i.e. that HMRC's guidance should be followed. The Tribunal noted this, but rejected it: "*if the court or tribunal believes the reasoning in the guidance is wrong, it will not be followed and if it is consistent with the view that the court or tribunal is inclined to adopt, it may be of some reassurance. We have not found HMRC's guidance to be of any material assistance in this case.*"

In considering the detailed arguments put forward by both sides, the judges found many of HMRC's points unconvincing. However, there was an overriding consideration: the FA 2010 was intended to address some anomalies in the tax treatment of CASCs, and if it had the effect contended for by the taxpayer, the result would be even more anomalous. A CASC would be exempted by the Charities Act from the onerous requirements related to being a charity, but provided it was established for charitable purposes, it would nevertheless enjoy all the tax benefits of charitable status. That would put it in a better position than normal charities, and the judges did not consider that likely to have been the intention of Parliament. There was also a possibility (raised by the judges rather than by counsel) that it would also fail the jurisdiction condition, because it would not be subject to supervision by a UK court "in the exercise of its jurisdiction with respect to charities".

That was enough to decide the appeal against the taxpayer. However, the UT also considered the other grounds of dispute. The conclusion on the registration obligation point followed logically from the decision on charitable status: it clearly was not required to be registered, because it was deemed not to be established for charitable purposes. If the FTT had been correct on the status point, its decision on the registration obligation would also have been correct.

HMRC also argued that the FTT's conclusion on the "village hall" point was wrong. The FTT had found that club members using the facilities were using them in their capacity as members of the local community, even though it had found that the club's members were the primary intended users. This had not been included in the grounds of appeal, but the judges agreed to hear submissions and then decide whether to allow HMRC to run it (against the taxpayer's procedural objections). In the event, they decided that it was a pure point of law that could be decided on the basis of the FTT's existing findings of fact, and it was "at the end

of the spectrum where it is appropriate that permission should be granted".

Having done so, they rejected HMRC's argument. They did not think that there is any principle of law that use by a local sports club cannot be regarded as use by the local community. The club was established with the object of providing sporting facilities for members of the local community, and use by the members did not cease to be community use. The findings of fact that the FTT made were therefore open to it.

HMRC further contended that the predominant intended use as a cricket pavilion, with only secondary use as a village hall or similar, meant that the building could not be said to be used "solely" for the qualifying purpose. The UT examined a number of precedents on this question in detail, and preferred the submissions of the taxpayer's counsel. The FTT had correctly identified the relevant principles to be applied, and was entitled to come to the conclusion it did that the local community was the true consumer of the construction services, based on its findings of fact.

Lastly, the UT considered further argument by the club on the question of equal treatment. The judges accepted HMRC's contention that the principles of equal treatment and fiscal neutrality do not extent to recipients of supplies who, for social policy reasons, are treated differently for the purposes of some VAT reliefs by statute. A body which is a charity and a body which is not are not objectively in the same position, and there is no principle of EU law that requires them to be treated in the same way.

The appeal was determined by the Upper Tribunal in favour of HMRC on the grounds that a CASC is not a charity for tax purposes, and cannot benefit from the reliefs reserved to charities under VAT law.

The club appealed to the Court of Appeal, where the leading judgment was given by Lady Justice Simler, with whom Henderon LJ and Singh LJ agreed. She reviewed the law and the decisions below before setting out the club's grounds of appeal:

i) First, the club contended that the UT was wrong in law in its analysis of the relevant legislation and its effect: the definition of "charity" in Charities Act 2011 expressly excludes CASCs from being charities (s.6 CA 2011) but there is no equivalent exclusion in the definition of "charity" for tax purposes in Sch.6 FA 2010, and therefore, no bar preventing a CASC from being a "charity" for tax purposes within Sch.6 FA 2010.

ii) Secondly, the UT was wrong to conclude that the club failed to satisfy the "jurisdiction condition" in para.1(1)(b) and 2 Sch.6 FA 2010. Its finding was procedurally unfair in the circumstances and wrong as a matter of substantive law.

iii) Thirdly, if wrong on the question of construction, the club contended that the UT erred in law in concluding that there is no breach of the EU law principles of equal treatment and/or fiscal neutrality as those principles apply in the context of VAT, in a situation where the club was only prevented from qualifying as a "charity" for tax purposes, and thereby denied zero-rating, by the operation of the deeming provision in s.6 CA 2011. The club contended that another similarly situated local cricket club (such as Charlbury Cricket Club) also in fact established for

charitable purposes only but not registered as a CASC, would be entitled to zero-rating of the same construction services, and the two should have been treated in the same way by application of either or both principles.

The judge noted that the second ground was not truly independent of the others, as the point about the "jurisdiction condition" simply followed from other conclusions the UT had already drawn. HMRC agreed that the point did not provide any independent support for the UT's conclusion that a CASC could not be a charity for tax purposes, and it was accepted that HMRC had correctly conceded that issue. The other two grounds were therefore the "live" issues.

In relation to the first issue, the judge repeated the account of the history of the charity provisions from the UT decision. The club's counsel argued again that the definition of a charity for tax purposes in FA 2010 is not subject to the restriction in CA 2011, which only operates for charity law purposes; it was therefore possible for a CASC to be a charity for tax purposes, provided it met the other conditions to be so treated. HMRC's counsel responded that there was no reason why s.6 CA 2011 should not be regarded as a statement of the general law, and fully applicable to qualify Sch.6 FA 2010. The ordinary meaning of the words used in CA 2011 was clear and unambiguous: the deeming should apply for all purposes.

The judge considered the arguments in some detail. She did not agree with the textual analysis of the legislation in the UT decision, but she did agree with the conclusion: there was no reason to suppose that Parliament had intended to confer on CASCs, uniquely, the ability to claim charitable tax reliefs without having to register as a charity. That would be so surprising that it surely would have required express and clear language in the statute (e.g. in FA 2010) to disapply other statutory provisions. It was more natural to suppose that the deeming provision in s.6 CA 2011 applied for general purposes. The jurisdiction point was consistent with this.

Because the club lost on the first issue, it was necessary also to consider the argument based on the principle of equal treatment and fiscal neutrality. The problem was that this was a domestic relief (zero-rating) where Parliament had the right to make a domestic social policy choice, rather than a harmonised EU-wide exemption. The judge considered that there were material differences between the two types of body that justified the distinction drawn by the law. The choice to operate as a CASC rather than a charity was made for good administrative and tax reasons, and the consequences followed.

The club's appeal was dismissed.

Court of Appeal: *Eynsham Cricket Club v HMRC*

3.3.4 Student article

In an article mainly aimed at students, Edd Thompson explores the differences between the treatment of supplies in the course of construction of buildings and supplies of the buildings themselves.

Taxation, 11 March 2021

3.4 Input tax claims on land

3.4.1 Retrospective planning consent

A couple in their seventies decided to convert a former agricultural building into a bungalow. They obtained planning permission in 2017 and completed the work in early 2019. They submitted a DIY builders' claim for £18,958. This was refused on the basis that the original planning consent had given permission for the conversion of the building, but during the course of the project it had become necessary to demolish the building and construct a new one. HMRC therefore ruled that the project had not been completed in accordance with the planning consent. The fact that the couple had obtained retrospective permission for the finished property did not assist them.

The appellant pointed out that HMRC's case rested on a number of precedents concerning compliance with reg.201 SI 1995/2518 where the judges had expressed sympathy for the claimants but had found for HMRC. He argued that there must be something wrong with the law. The present judge (Robin Vos) also had sympathy, but the law was mandatory and the precedents (including the UT's 2014 decision in *Patel*) were binding: retrospective planning permission did not validate a DIY claim, because the correct planning permission must accompany the claim and must be made within the 3-month claims window. This was not possible for these claimants because they did not have the retrospective permission at that time.

The judge briefly considered the question of whether the project was "lawful" and whether it met the conditions for a "dwelling", both of which had been argued against by HMRC. He was not convinced by HMRC's arguments, but he made no detailed findings, because the appeal had already been decided on the failure to submit the correct permission with the claim.

He also considered the couple's allegations of unfairness. He agreed that some of the advice they had been given by HMRC was positively misleading, suggesting that they might succeed with a claim if they obtained retrospective permission. That could not change the decision of the Tribunal; it could only be relevant in judicial review proceedings (which he advised against) or a complaint, possibly to the Adjudicator.

The appeal was dismissed, with another expression of sympathy resulting from the strictness of reg.201.

First-Tier Tribunal (TC08011): *Martyn Long and Another*

3.5 Other land problems

Nothing to report.

4. INTERNATIONAL SUPPLIES

4.1 E-commerce

Nothing to report.

4.2 Where is a supply of services?

4.2.1 Investment management for charity

In TC06761, the Wellcome Trust (W), a charity, made reclaims totalling £13m for periods from 03/12 to 03/17. It had paid management fees to investment managers outside the EU, and had accounted for reverse charges on them. It subsequently argued that the place of supply was not the UK, so the reverse charges (that could not be recovered as input tax) should not have applied. HMRC had assessed W for reverse charges for the period 09/10; W did not appeal, and subsequently accounted for VAT in accordance with HMRC's view. It made the first reclaims in 2016.

The FTT judge (Phillip Gillett) cited articles 43 – 45 PVD and articles 17 – 19 of the Implementing Regulation, which deal with the status and capacity of a customer in determining the place of supply. He stated that the case turned in its entirety on the meaning of the words "acting as such" in art.44 PVD. W claimed that these words took it out of art.44 and therefore out of the requirement to account for VAT on investment management services supplied to it from outside the EU, whereas HMRC claimed that they did not.

The parties agreed that a taxable person's activities could be divided into three categories:

(1) Economic business activity,

(2) Non-economic business activity, and

(3) Private activity, which includes services supplied for use by a taxable person's staff.

In Case C-155/94, the CJEU confirmed that W's activities in relation to the flotation of Wellcome plc fell within (2). The *VNLTO* case (Case C-515/07) confirmed that (2) and (3) are not the same and have different consequences for VAT.

W's counsel argued that the words "acting as such" ought to be interpreted in the same way wherever they appear in the PVD, in particular in art.2 (taxable transactions) and art.44 (place of supply). The judge did not consider this an incontrovertible rule, and preferred to interpret the words according to their context.

Art.43 states:

For the purpose of applying the rules concerning the place of supply of services:

1. a taxable person who also carries out activities or transactions that are not considered to be taxable supplies of goods or services in accordance

with Article 2(1) shall be regarded as a taxable person in respect of all services rendered to him;

2. a non-taxable legal person who is identified for VAT purposes shall be regarded as a taxable person.

HMRC argued that this was a simple deeming provision that divided all taxpayers between art.44 (taxable persons, B2B) and art.45 (non-taxable persons, B2C). W's counsel argued that the Implementing Regulation drew a clear distinction between "status" and "capacity": status was determined by art.43, but it was still necessary to consider the capacity in which a taxable person was acting in order to allocate the supply to art.44 or art.45.

The judge noted that art.43 draws no distinction between supplies received for private purposes and supplies received for non-economic business purposes. However, IR art.19 explicitly states that a taxable person receiving supplies for private purposes (including use by staff) is to be regarded as a non-taxable person in respect of those supplies. That did not explicitly confirm that W's interpretation was correct, but it suggested that HMRC's interpretation was not correct.

The judge considered whether there could be a "gap" between articles 44 and 45 PVD. It was agreed that W did not fall within art.45, because it was a "taxable person" within art.43; the question was whether the words "acting as such" in art.44 meant that there was a separate treatment for "taxable persons not acting as such". The judge was persuaded by W's counsel that the rule in IR art.18 provided sufficient certainty: a supplier was entitled to assume that someone who provided a VAT number was a taxable person, and someone who did not was not a taxable person. As W had not provided a VAT number to investment managers belonging outside the EU, under the IR, they would be required to treat the supplies as made to a non-taxable person.

W's counsel referred to the "Travaux Preparatoires" – the reports of the working party that drew up the PVD. The words "acting as such" in art.44 were controversial, and had appeared in some drafts but not in others. He argued that the reports showed that the phrase was intentional and drew a distinction between taxable persons (within art.43) using supplies for economic ("acting as such") purposes and non-economic purposes; use for private purposes was covered by art.45, as required by IR art.19. If the words did not mean that, they did not mean anything. The judge agreed that this was the most logical interpretation of the words.

The judge rejected a further argument based on equal treatment. W's counsel suggested that HMRC would not require an individual who was registered as a sole trader to account for a reverse charge on investment activities, even though the situation would be the same. The judge did not agree: an individual's investment activities would be private and within art.45, rather than "business non-economic".

Having decided that W fell outside the reverse charge provisions on the basis of the PVD, the judge considered the UK law. VATA s.7A(4)(d) transposes the Directive with the words "received by the person otherwise than for private purposes". That did not draw the distinction that he had concluded was required by the words "acting as such". W's counsel

suggested that a conforming construction could be achieved by interpolating the words “or non-economic” after “private”. The judge agreed with this approach, as it “went with the grain” of the legislation and did not “create a wholly different scheme from any scheme provided by the legislation” (principles of conforming construction established by the *Test Claimants in the FII Group Litigation* and *Vodafone* cases).

The appeal was allowed; HMRC appealed to the Upper Tribunal, which decided to refer the following questions to the CJEU:

(1) Is art.44 PVD to be interpreted as meaning that when a taxable person carrying on a non-economic activity consisting of the purchase and sale of shares and other securities in the course of the management of the assets of a charitable trust acquires a supply of investment management services from a person outside of the Community exclusively for the purposes of such activity, it is to be regarded as “a taxable person acting as such”?

(2) If Question 1 is answered in the negative and arts.46 to 49 PVD do not apply, does art.45 PVD apply to the supply or does neither art.45 nor art.45 apply to the supply?

Advocate-General

Advocate-General Hogan gave his opinion in June 2020. He noted that, in accordance with the Withdrawal Agreement, questions could still be referred within the jurisdiction of the court up to 31 December 2020, and the outcome would be binding on the UK.

The A-G confirmed that the CJEU decisions in *Wellcome Trust* and *EDM* showed that the simple sale of shares and securities did not constitute economic activities and was outside the scope of the VAT Directive. He cited the decision in *Srf konsulterna* (Case C-647/17) for the purpose underlying the introduction of the VAT package in 2010: it was to avoid conflicts of jurisdiction that may result in double taxable, and also to avoid non-taxation of otherwise taxable services.

He summarised the appellant’s argument that the UK had incorrectly transposed art.44 PVD in VATA 1994 s.7A, in that the UK applied a distinction between “business use and private use”, whereas the PVD applied a “capacity test”. The company argued that there was a difference between “status” of a taxable person (as referred to in art.43) and “capacity”, which involved “acting as such”. On its clear wording, art.44 did not apply to the appellant when buying services for a non-economic activity from outside the EU. It also argued that it would be unfair to “penalise” a charity by putting it in a worse position than a private investor: if it had to apply a reverse charge (which a private investor would not), and was in accordance with binding precedent not able to register and recover input tax, that would be a “uniquely invidious position”.

Submissions were made to the court by the UK, Irish and Spanish governments and the Commission, all of whom considered that art.44 should apply to the appellant. The A-G considered that the decision in *Srf konsulterna* suggested that either art.44 or art.45 had to apply, if none of the special provisions in the following articles did (as was agreed between the parties). As a general rule, an expression such as “a taxable person acting as such” should mean the same thing wherever it appeared (as in art.2 and art.44 PVD); however, it was also necessary to consider the

context. The taxpayer's argument focused on the words "acting as such" in art.44 in isolation from the surrounding words. The context included the purpose of the VAT Package reforms which were intended to modernise and simplify the rules on place of supply.

The A-G's view was that art.43 applied two deeming provisions that were specific to the place of supply provisions: a taxable person should be regarded "as such" in respect of all services received; and a non-taxable legal person who is identified for VAT (such as the appellant) should also be deemed to be a taxable person for the purposes of place of supply, even if not for anything else.

The Recitals to the VAT Package Directive (2008/8) stated that the rules on the place of supply of services "should not extend to supplies of services received by a taxable person for his own personal use or that of his staff". That was consistent with art.19 Implementing Regulation, which provided that a non-taxable legal person, deemed to be a taxable person, who receives services exclusively for private use, shall be regarded as a non-taxable person. The law therefore took receipt of services for private purposes out of art.44 into art.45, but receipt of services for non-economic business purposes was within art.44.

The inferences drawn by the appellant (and the FTT judge) from arts.18 and 19 Implementing Regulation did not persuade the A-G. They merely allow a supplier to draw certain inferences from the conduct of a customer, and they cannot alter or amend the terms of arts.43 to 45 PVD. There was no risk of double taxation, and the circumstances of a "non-economic business" were not the same as those of a private individual – the unfairness alleged by the appellant was not sufficient to breach the principle of fiscal neutrality. The result would be consistent with the recent CJEU decision in *University of Cambridge* (Case C-316/18).

The A-G formally recommended that the CJEU give an answer to the question that a person in the appellant's position should be regarded as a taxable person acting as such for the purposes of art.44 PVD.

Full court

The court has now agreed with the A-G's conclusions. The appellant was correct in arguing that it was not a "taxable person acting as such" within art.2 PVD; but it did not necessarily follow that it could not be regarded as a "taxable person acting as such" for art.44. The court explained that "Although, given the requirements of unity and consistency in the EU legal order, the terms used by the measures adopted in the same sector must be given the same meaning, that is not so where the EU legislature has expressed a different intention." In the view of the court, "It is apparent from [art.43 PVD] that the EU legislature wished to give the expression 'taxable person acting as such', within the meaning of [art.44], a different meaning from that which it has under [art.2]." That difference is derived from the clear intention expressed in art.43 to bring all activities of registered persons within art.44.

The court then draws a distinction between "acting as regards non-economic activities but in a business capacity" and "acting in a private capacity". The distinction between "non-economic" and "private" is borne out by the recitals to Directive 2008/8 which refer to services "received by a taxable person for his own personal use or that of his

staff'. The same distinction is expressed in recital 19 and art.19 of the Implementing Regulation.

The court dismissed the argument that the 1996 judgment meant that Wellcome should be treated in the same way as a private investor. Although those activities were similar to those carried out by a private investor, it did not follow that they were carried out on a private basis. The two positions were not comparable; Wellcome was a taxable person, covered by the VAT system.

The formal answer to the first question was "[Art.44 PVD] must be interpreted as meaning that, where a taxable person carrying on a non-economic activity in a business capacity acquires services for the purposes of that non-economic activity, those services must be regarded as being supplied to that taxable person 'acting as such', within the meaning of that article." It was not necessary to answer the second question.

CJEU (Case C–459/19): *HMRC v Wellcome Trust Ltd*

4.2.2 Scheme to avoid irrecoverable input tax

HMRC disallowed input tax claimed by a company for periods 11/00 and 02/01. Further decisions were made, and appeals were eventually consolidated to cover the periods from 11/00 to 08/09. The appeal was stayed pending the decision of the CJEU, and then the Court of Appeal, in *Newey*, which dealt with a similar avoidance arrangement. The case was finally heard over five days in September and November 2019. The quantum of the VAT at issue was not considered; only a decision in principle was to be made at this stage.

The appellant, W, had arranged with a Gibraltar company, K, to make supplies of loan broking services and to receive supplies of advertising, just as Mr Newey (trading as Ocean Finance) had established Alabaster in Jersey. HMRC argued, as they did in *Newey*, that:

- the loan broking supplies were in reality made in the UK by W;
- the advertising services were in reality received in the UK by W;
- the arrangement was an abuse of law, by virtue of being set up with the essential aim of obtaining a tax advantage which was contrary to the purpose of the VAT law, which was to tax consumption.

HMRC pointed out that important evidence had not been provided, and invited the Tribunal to draw adverse inferences from its absence. The company explained that this was because of non-cooperation by the officers of the company at the relevant time; the company submitted that HMRC had sought to cherry-pick the evidence, relying on some parts but not others as it suited them, and argued that no adverse inferences should be drawn.

Judge Jennifer Dean considered the precedents on absence of evidence. In her view, no adequate explanation had been given for the lack of cooperation, or of any efforts made to obtain the missing evidence. Although her decision was not made solely on the basis of adverse inferences, but her cumulative findings on the evidence as a whole took into account the possibility that adverse inferences might strengthen HMRC's evidence on an issue or weaken that of the appellant. She was

therefore careful to refrain from drawing adverse inferences, and made a careful consideration of the evidence available.

At the hearing the appellant sought to introduce a new ground of appeal: that the arrangements could not be abusive if domestic law could have legislated to allow the arrangements but that such legislation simply had not been passed. HMRC objected, and the judge agreed that there was no satisfactory explanation for not raising the point at an earlier stage. She therefore did not allow the extra ground; however, she considered that it would not have affected her decision.

The judge then went over the history of the business (which had changed its name several times – it is referred to here only by its current name, Wilmslow Financial Services plc, or "W"). W had been incorporated in 1983. It entered into the arrangement with K in May 1997. K was set up by the principal shareholder of W, through an Isle of Man nominee company, and he was the sole signatory on K's bank account. K engaged M, a UK advertising agency, which had previously supplied advertising to W. On 1 November 1999 the shareholder was removed as sole signatory and replaced by two new directors, who were partners in a Gibraltar accountancy firm. The shareholder then gifted his shares in K to a charitable trust; the nominee company resigned as director in August 2000, and in June 2003 the shares in K were sold to a company based in Luxembourg.

Up to 1 April 2002, K engaged M to place advertising for K in the UK media. After that, M acted as an intermediary which negotiated for advertisements on behalf of a Gibraltar media agent, ESP. The advertisements appeared in the UK under the name of W.

In 2008 HMRC made enquiries of the two main lenders for whom broking was carried out, and established that the lenders appeared to deal with W, with limited (if any) involvement of K.

The judge set out the principles of deciding who actually made and received supplies:

(1) To consider the overall circumstances, including all parties involved;

(2) Not to view individual elements of the arrangements in isolation;

(3) To consider the contracts as relevant factors to take into account but which are not conclusively determinative of the issue;

(4) To consider all relevant factors such as whether commercial value is added by a party to the supply.

The principles of deciding what was an abuse of law were derived from the *Halifax plc* case (Case C-255/02): "The application of Community legislation cannot be extended to cover abusive practices by economic operators, that is to say transactions carried out not in the context of normal commercial operations, but solely for the purpose of wrongfully obtaining advantages provided for by Community law." The sole or main purpose of the transactions must be to obtain a tax advantage that is contrary to the purpose of the law; it must be apparent from a number of objective factors that the essential aim of the transactions concerned was to obtain a tax advantage. The prohibition of abuse is not relevant where the economic activity carried out may have some explanation other than the mere attainment of tax advantages.

The judge also considered extended extracts from the *Newey* decision, *Weald Leasing* and *RBS Deutschland*, where the transactions were held not to be abusive, and *Pendragon*, where they were.

Turning to the evidence, it is clear from the outset that the judge did not consider this avoidance scheme to be acceptable. She does not criticise the final FTT decision in *Newey*, so it is not possible to know for sure whether she disagrees with it or simply believes the circumstances to be different. She comments that that decision has to be read in the context of all the judicial consideration of that case, and the final decision relied heavily on its finding that the activities of the parties reflected the terms of the Services Agreement. She found that the factual situation in the present case was different.

Her examination of the arrangements is detailed and exhaustive, and hard to summarise. She concluded that the contracts between W and K were uncommercial and not at arm's length; there were significant differences between the situations in *Newey* and the present case, including the way in which documents were passed between W and the lenders without giving K the chance to object, and the lack of relevant knowledge and experience in the people who acted as directors of K. She accepted that there were several factors that would be insufficient on their own to find that the commercial reality was that the loan broking was carried on by W, including the ownership of K and the fact that the arrangements were set up on the basis of accountancy advice; however, taking everything into account, she was satisfied that the commercial and economic reality was that the business was carried on by the appellant in the UK and it received the advertising services.

The judge also agreed with HMRC that the conditions for a finding of abuse were met. The existence of K added cost to the arrangements with no justification; on the basis of all the evidence, those arrangements were highly artificial, did not reflect the commercial and economic reality and had been contrived to result in a tax advantage. The essential aim had been to avoid irrecoverable VAT, and the structure was contrary to the purpose of VAT.

The appeal was dismissed; the result was that the abusive advantage must be eliminated with the result that the re-definition treats the Appellant as the supplier of loan broking services and recipient of advertising services at all material times.

As quantum of assessments was not considered in this appeal, it is unclear how this decision should be implemented. If the UK advertising agency did not charge output tax on its supplies to K, or to the Gibraltar advertising agency that supplied K in the later period, it would appear that it would be liable to be assessed rather than the appellant in the case.

First-Tier Tribunal (TC07990): *Wilmslow Financial Services plc (in administration)*

4.2.3 Place of education

A university based in Grenada, West Indies, offered four year medical degree courses. Students could complete parts of their course in the UK, including the first year at the University of Northumbria in Newcastle

(UNN), and their clinical training in the third and fourth years at various NHS teaching hospitals.

HMRC issued a ruling that the university was liable to be registered for VAT in the UK and should charge output tax on taxable supplies of education to its students for the academic years in which they studied in the UK. The university appealed to the FTT.

The parties agreed that the appeal raised the following issues:

(1) Who supplies the Global Scholars Programme (the first year course) and the UK Clinical Training Programme to the students for VAT purposes?

(2) If SGU is the supplier of the GSP and/or the UK Clinical Training Programme, where is the place of supply for VAT purposes?

(3) If the GSP and/or the UK Clinical Training Programme are supplied by SGU in the UK, are those supplies taxable or exempt for VAT purposes?

(4) If the supplies are taxable, what is the taxable amount of the supplies for VAT purposes?

The appellant's primary case was that the education in the UK was supplied by the University of Northumbria and the NHS teaching hospitals. HMRC argued that the contracts between the appellant and the students, and the commercial and economic realities, meant that it supplied the education.

The appellant further argued that, if it was supplying education, the place of supply was Grenada, where it was established. HMRC responded that the place of supply of educational activities was where they took place.

The third issue was whether the appellant could claim exemption as an eligible body. HMRC argued that the UK was entitled to exercise a discretion to define eligible bodies, and the appellant was not a UK university or a college thereof. As it was a for-profit institution, it was not exempt.

If it was unsuccessful on the first three grounds, the appellant argued that it should only have to account for output tax on the amounts that it paid directly to the University of Northumbria and to the NHS teaching hospitals for the training that happened in the UK. HMRC argued that it was the full amount of the students' fees received by the appellant for the academic terms during which the students studied in the UK.

Judge Greg Sinfield heard from six witnesses for the appellant at a live hearing in September 2019. He accepted that they were all credible and he accepted their factual evidence. He also viewed four video clips in which students described their experiences of the teaching programmes, which were clearly produced for marketing purposes, and found that they provided no assistance in determining the issues in the appeal.

The judge set out the main witness evidence on the relationship between the university in Grenada and the UK organisations with which it cooperated in delivering its programmes, and how those programmes were delivered. At the end of the hearing the judge presented a summary of his findings to both parties, who were unable to agree all of the points, but he summarised what did appear to be agreed as follows:

(1) SGU is established in Grenada for VAT purposes and does not have a fixed establishment in the UK. Specifically, SGISML (a UK subsidiary which provided SGU with a range of management and administrative services) is not a UK fixed establishment of SGU (HMRC agree this only for the purposes of this appeal).

(2) SGU provides the MD Course to students under a contract between SGU and the students.

(3) The four year MD Course is a single supply of services relating to educational and vocational activities.

(4) The consideration for the supply of the MD Course by SGU is the amounts invoiced and paid, i.e. the fees (reduced by scholarships and other credits where appropriate), for each term of the MD Course.

(5) The MD Course requires the completion of both a two year basic sciences programme and two years of clinical training. The SGU students can choose where they complete certain elements of the course. SGU students may choose to take their first year basic sciences in the UK at the UNN. SGU students may opt to complete some or all of their clinical training in the UK at one or more of the UK Teaching Hospitals.

(6) The first year basic sciences programme for SGU students studying at the UNN (but not in Grenada) is called the GSP.

(7) The face-to-face teaching on the GSP at the UNN and on the UK Clinical Training Programme at the UK Teaching Hospitals takes place in the UK.

(8) The UNN has a contract with SGU under which the UNN agrees to deliver the first year basic sciences programme and award a DipHE to the SGU students on successful completion of the course. The UNN programme is the GSP and is equivalent to the SGU first year basic sciences programme. The provision of the GSP (excluding certain supplies, such as accommodation) by the UNN is an exempt supply of education for VAT purposes.

(9) In return for delivering the GSP, SGU pays the UNN the fees specified in the 2015 Agreement. If SGU does not pay the fees, the SGU students do not have any entitlement to receive tuition from the UNN.

(10) The SGU students on the GSP enter into an agreement with the UNN and are also students of the UNN. The SGU students are not liable to and do not pay any fees to the UNN.

(11) The UK Teaching Hospitals provide the UK Clinical Training Programme to SGU students in the UK under agreements with SGISML. The provision of clinical training by the UK Teaching Hospitals is an exempt supply of vocational training.

(12) In return for providing the UK Clinical Training Programme, SGISML pays the fees charged by the UK Teaching Hospitals (i.e. the NHS Trusts). If the fees are not paid by SGISML, the SGU students do not have any entitlement to receive tuition from the UK Teaching Hospitals.

(13) The SGU students do not have any contract with the UK Teaching Hospitals and are not liable to and do not pay any fees to the UK Teaching Hospitals.

The judge started his discussion by stating that it was necessary to define the service being supplied before considering who was supplying what to whom. He considered the correct approach to determining this question was set out (by himself) in *American Express Services Europe Ltd* (TC07342), following on from the decisions of the UT in *Adecco UK Ltd* and the Supreme Court in *Airtours*. He examined the contractual position in relation to the training programmes that were delivered in the UK, then reviewed the position in relation to them in the light of the facts.

The first-year course at UNN was subject to three contracts: that between SGU and the students; the second was an agreement between UNN and the students; and there was an agreement between SGU and UNN. The clinical teaching programme was more straightforward: it was agreed that there was no contract between the teaching hospitals and the students, so the only contract entered into by the students was that with SGU. There were then agreements between SGISML (SGU's UK subsidiary) and the teaching hospitals.

The judge was satisfied that the supplier of education at all times was SGU. UNN delivered the training through its bricks and mortar and staff, but it did so on behalf of SGU, which alone had a contract to supply education to the students. The agreement between UNN and the students was different in nature, and was not made for consideration. This was even more "stark" in relation to the clinical teaching, where there was no agreement between the hospitals and the students. The judge concluded that, on a proper reading of the contracts and assessment of the economic reality of the arrangements, SGU supplied educational services to the students in return for the fees paid by those students. UNN and the teaching hospitals made supplies to SGU or to SGISML in return for consideration provided by SGU and its subsidiary.

The judge then turned to place of supply, where art.53 and 54 PVD govern the place of supply of educational services. Art.53 was not relevant because the course was not "an event" and SGU did not supply "admission". Art.54 provides:

"The place of supply of services and ancillary services, relating to … educational … or similar activities, … including the supply of services of the organisers of such activities, supplied to a non-taxable person shall be the place where those activities actually take place."

The judge considered that SGU's supplies did fall within art.54. He noted that there were no directly applicable precedent cases, in spite of the fact that the circumstances are likely to be common. HMRC's position was simple: the training happened in the UK, so the place of supply under art.54 was in the UK. Their representative cited *Trans Tirreno Express SpA* (Case 283/84), which concerned a transport service that took place partly in international waters on a journey between two parts of Italy, and *Aktiebolaget NN* (Case C-111/05), which concerned an undersea cable laid across the North Sea. The judge did not consider either case of material assistance: transport services were subject to different rules, and the decision on the cable was that it was a supply of goods, not services.

The appellant argued that it made a single supply of a four year course, and it would be artificial to split it up. A single supply could only have one location, and that had to be Grenada, not the UK. Their representative argued that art.54 was concerned with "events" in the same

way as art.53, and did not address a continuous supply of a course such as that at issue. He relied on the CJEU decision in *Gillan Beach Ltd* (Case C-114/05), which examined the 6th Directive predecessor provision; the court's comments on the rule contained comments that supported the view that the services listed were "usually provided for specific events".

The judge did not accept that *Gillan Beach* restricted art.54 in this way; the comments related to the fact that the case concerned an event, and did not rule out a wider application. The significant differences between the circumstances meant that the case was of little use: it concerned three-day events that took place in one country, whereas the present case concerned supplies (agreed to be single supplies) that took place over four years in two different countries.

The judge considered that the most useful precedent was *Geelen* (Case C-568/17), which concerned a Netherlands business supplying access to live interactive erotic webcam sessions to consumers in the Netherlands. The main question for the CJEU was whether the place of supply should be the Philippines, where the models "performed" the service. The court held that the supply was a complex service provided by the trader who organised the performances and provided the infrastructure to enable customers to view them, and it was therefore supplied where his business was established. The judge noted that the court commented on the fact that this was the same result as under the "basic rule", and he did not consider this particularly significant – it was just a recognition that two different rules could produce the same result.

Finally, he decided on the place of supply by defining the nature of what was being supplied. The supply of the MD course was a complex supply by SGU, comprising the devising, organising and supervising of the various programmes. SGU offered students the opportunity to take part of their courses in the UK if they chose. In that case, its services were not the performance of the underlying educational activity but the provision to students of the opportunity to take part of the MD course in the UK and the organisation of the provision of education and training in the UK. As in *Geelen*, that supply was made where the taxpayer made all the necessary arrangements for the provision of the training – Grenada. It followed that its supplies were outside the scope of UK VAT.

It was therefore not strictly necessary to consider the other questions, but the judge commented on them as he had heard submissions, and gave his views in case he was found to be wrong on the place of supply. On the question of whether SGU was an eligible body, he examined the rules and issues in some detail, and agreed with HMRC that the UK was entitled to restrict the exemption to UK universities and colleges thereof; although SGU was a university and (if the decision on place of supply went the other way) was supplying university education in the UK, it was not a UK university, and its supplies would be taxable.

The consideration for the course was, as a matter of contract and reality, the termly fee paid by the student. If it was necessary to apportion the course into UK and non-UK segments, the fee would follow the same treatment. Even though some of a term's fee related to administration and other services that continued to be supplied in Grenada, what the student paid for was a single supply of education; if that took place in the UK, the whole of the term's fee would be taxable in the UK.

The appeal was allowed on the basis of place of supply. The judge apologised for the length of time taken to release the decision, which was partly complete when the country entered lockdown in March 2020. Other matters then occupied his attention (as president of the FTT) and the decision was not published until January 2021.

First-Tier Tribunal (TC07999): *St George's University Ltd*

4.2.4 Cars for employees

A Luxembourg-based fund management company made cars available to two members of its staff, who were resident in Germany but worked in Luxembourg. The cars were used for private and business purposes. One of the employees made no payment for the vehicle; the other had an annual deduction of €5,688 from his salary. Luxembourg operated a simplified VAT scheme under which the company was not charged to VAT on the supply of the cars, and could not deduct any input tax in respect of them either.

In November 2014, the company registered as a taxable person in Germany. It declared output tax in respect of making the cars available for both 2013 and 2014. The company then reclaimed the output tax; the reclaim was rejected by the German tax office, and an appellate court referred questions to the CJEU on the application of art.56 PVD ("place of supply of hiring of means of transport").

The question asked whether the transaction referred to in art.56 extended to the provision of a company car to an employee for no consideration other than the work done for the employer, in the absence of a salary sacrifice arrangement (such as was held to constitute consideration in *AstraZeneca* Case C-40/09).

The CJEU commented that art.56 presupposes a transaction within the scope of VAT. This was clearly not a supply of goods within art.14 PVD; it would only be a supply of services within art.24 if it was made for consideration. In accordance with precedents including *AstraZeneca* and *Fillibeck* (Case C-258/95), the employee's work for the employer on its own would not be consideration for the supply of a company car.

Turning to the possibility that a charge might arise under art.26 PVD (supply of services for no consideration), that required that the taxpayer had been entitled to deduct input tax in relation to the services provided. It was clear that no right of deduction had arisen in Luxembourg; however, it was not explicitly clear that a right did not exist in Germany, following registration there. It would be for the referring court to determine that.

However, even if such a right did exist so that the provision of the car was within the scope of VAT, it could not fall within art.56, which referred to "hiring of means of transport". Although it seems that no cases have been brought on this particular expression before, the CJEU referred to previous cases on letting of immovable property. According to those decisions, a "letting" requires several conditions to be satisfied: the landlord of property must have conferred on the tenant, in return for rent and for an agreed period, the right to occupy the property and to exclude any other person from enjoyment of such a right.

Any deemed consideration under art.26, and the fact that the employee might be charged to income tax on deemed remuneration as a benefit in kind, could not substitute for the "rent" that is required for a "letting".

The court commented that no reference had been made about the other car, that was supplied for a payment by the employee. Unusually, the court decided to add further clarification on that transaction, even though it had not been asked to do so. This appeared to fall within all the definitions of a supply for consideration of a means of transport for more

than 30 days, and was therefore within the first subparagraph of art.56(2). It made no difference that the employer was only the lessee of the vehicle rather than the owner, or that the "hiring" was for a period determined by the employment relationship rather than any specific rental term (provided that it exceeded 30 days). It would be for the referring court to determine whether there was a genuine agreement between the parties that the car would be permanently available for the employee's exclusive use, including private use, to the exclusion of other users.

The effect of that would be to make the supply of the car taxable in Germany, as art.56(2) provides that "The place of hiring, other than short-term hiring, of a means of transport to a non-taxable person shall be the place where the customer is established, has his permanent address or usually resides."

CJEU (Case C‑ 288/19): *QM v Finanzamt Saarbrücken*

4.2.5 Specified supplies

HMRC have published guidance on the change to the treatment of "specified supplies" that came into effect at 11pm on 31 December 2020. Up to that point, certain financial and insurance-related supplies (normally exempt) conferred the supplier the right to recover input tax where the customer belonged outside the EU; from that point onward, with the end of the Brexit transitional period, the customer simply has to belong outside the UK.

The guidance covers supplies that spanned the change of rate, and the effect on partial exemption methods both standard and special. HMRC recognise that an increase in recovery might be due, and a trader might therefore want to increase provisional recovery rates that are based on the previous year's actual recovery; this would require prior approval by HMRC.

This is relevant for the last quarter of the 2020/21 VAT longer period, and also for the provisional recovery in the 2021/22 longer period, when three-quarters of the "preceding year" will have been subject to the previous rules. HMRC say that a business on the standard method that uses the previous year's recovery rate to determine their recoverable residual input tax in each tax period may, at the beginning of their next tax year, choose to calculate their recoverable input tax by calculating separate recovery percentages for each VAT period so long as they apply this method consistently for the whole tax year.

www.gov.uk/guidance/transitional-guidance-for-vat-specified-supplies

4.3 International supplies of goods

4.3.1 Distance sales

In 2018, TC06474 concerned a company which sold non-prescription health products to retail customers, who placed their orders using the internet, phone and mail order. At that time, Judge Anne Redston did not consider that the outcome was 'acte clair', and referred questions to the CJEU. In February 2020, the CJEU stayed the case behind *KrakVet Marek Batko* (Case C-276/18). After that case was decided, the CJEU asked Judge Redston if she wanted to continue with the reference. She agreed with the parties that there was no need for a separate CJEU decision in this case. She reconsidered the matter and came to a decision in HMRC's favour. The following is a combination of the original decision, in which the judge made various findings of fact about the business, and the most recent decision, in which she applied the CJEU case law.

Between 1 April 2012 and 31 January 2016 ("the relevant period"), the overwhelming majority of the company's products were despatched from a warehouse in the Netherlands and delivered to customers in the UK. HMRC issued a ruling in May 2016 that the company should be registered in the UK under the distance selling rules with effect from 1 April 2012. The resulting assessment was for £27m.

The company appealed, arguing that it had contracted with a different company for delivery of the goods, and it was therefore not caught by the distance selling rules, because the delivery was not "by or on behalf of the supplier".

HMRC asked for a reference to the CJEU before the hearing of the substantive issue in the UK, but Judge Mosedale declined to make a reference in November 2017. In her view, it was necessary to find the facts before making a reference about the law. The case came before Judge Redston, who decided that she would make a reference in relation to goods supplied to internet and mail order customers by post. It was her view that they were delivered on behalf of the supplier as a matter of economic reality, but she required the guidance of the CJEU to be sure.

The goods had originally been sold from the Channel Islands under the Low Value Consignment Relief, but when this was withdrawn in 2011 the company relocated its operation to the Netherlands. At the time its representatives obtained confirmation from the Netherlands tax authorities that Dutch VAT would be due on the despatches (i.e. the distance selling rules would not apply); customers would be told that the company only sold goods, and if they were not willing to collect them from the Netherlands, they would have to make an arrangement for delivery with a separate company (a fulfilment house). It was clear that the main purpose of all the arrangements was to generate a VAT advantage, but HMRC did not seek to argue that they were abusive.

The particular arrangements were put to the EU VAT Committee in 2015 as an example of an arrangement intended to defeat the distance selling provisions in art.33 and 34 PVD. The VAT Committee published guidelines which agreed with the UK's position, either unanimously or almost unanimously. In January 2016, the Netherlands authorities wrote to the taxpayer's representatives saying that they had changed their view

in the light of the Committee's conclusions. VAT paid in the Netherlands would be refunded if the company paid output tax on the same supplies in the UK. From 1 February 2016, the operation was moved to the UK.

The judge considered the scripts used by agents for dealing with telephone enquiries. There was a dispute between HMRC and the taxpayer about the nature of the argument and possible late changes to the statements of case, with both sides claiming that they had been misled or given late notice of the other side's position; but the judge was satisfied that there was no unfairness in deciding that the telephone customers were invited to enter into a contract for delivered goods, and the delivery company acted as agent for the supplier. Delivery was incidental to the goods and art.33 PVD applied.

The situation was potentially different for internet sales. The delivery company's rates were displayed on the company's website, with detailed terms and conditions explaining that there would be a separate supply of delivery. However, the judge held that the detailed terms failed to create a separate contract between customers and the courier company; as a result, courier deliveries were also subject to art.33. The same analysis applied to mail order sales.

In relation to sales delivered by post, the judge accepted that a separate contract had been made between the postal company and the customer. However, there were difficulties in construing the contract terms which dealt with picking and packing, in relation to the point at which title in the goods was said to pass. In addition, the supplier itself had significant responsibilities in relation to problems with delivery, having the obligation to provide refunds of charges or replacement deliveries at its own cost.

The judge went on to consider the VAT Committee's discussion paper, which the company's counsel said was not binding but HMRC's counsel said was correct. The judge considered the contracts between all the parties and concluded that there were many factors that the appellant was heavily involved in the delivery of the goods. However, she could not be sure without a reference whether the role of the fulfilment house fell within the statutory words "on behalf of the supplier". There was a lack of case law precedent on these words either in the CJEU or the UK courts; there was also a new proposed Directive to cover this situation, which each side relied on to support their case, and the judge did not find any precedent about the role of a new Directive in interpreting an old one. The judge sent a draft question to the parties and asked for their comments.

The appeal was dismissed in relation to supplies to phone customers and all supplies sent by courier. This meant that HMRC's decision on registration had to be upheld. In relation to the resulting assessment, the decision would be stayed pending the answer to the reference to the CJEU in relation to mail order and online sales delivered by post.

The new decision, which followed further submissions by the parties on the *KrakVet* case, was made on the basis of the facts found in 2018 and the guidance from the CJEU. HMRC considered that the CJEU decision was clearly applicable and showed that the extent of the company's involvement in arranging the delivery was such that the distance selling rules operated.

Judge Redston was highly critical of PwC's submissions, which she considered to be fundamentally flawed: they assumed that there were undecided questions of fact in relation to the phone and courier sales, and applied for the appeal to be stayed until an appeal to the Upper Tribunal had been heard in respect of those matters. The judge pointed out that she had made full findings of fact about all the supplies, and although there was an appeal about the consequences of those findings, there were no further facts to be determined.

There was also a further FTT appeal in relation to a later HMRC decision and assessment, and PwC asked for this to be consolidated with the case. The judge considered that the later HMRC decision appeared to be based on the earlier FTT decision, so it would stand or fall with the Upper Tribunal appeal; in her view, it was not in the interests of justice to delay resolution of the matter.

The principle of *KrakVet* that was relevant in this case related to only one of the five questions in that case. It was that economic and commercial reality must be considered in deciding whether goods are delivered "by or on behalf of" the seller; in particular, the CJEU had said "it must be held that a supply of goods falls within the scope of art.33 PVD where the role of the supplier is predominant in terms of initiating and organising the essential stages of the dispatch or transport of the goods." It was for the referring court to decide whether that was the position in any particular case, and rejected the applicant's submission that art.33 could not apply where the customer had contracted with the delivery company. That was only one of the factors to take into account in assessing the commercial and economic reality.

The CJEU had set out four factors to be taken into account:

(1) the significance of delivery in the context of the supplies being made;

(2) the choices available to the customer;

(3) the burden of risk in relation to the delivery; and

(4) the payment arrangements.

Considering the findings about the way the business was conducted, with active marketing in the UK of goods that were despatched from the Netherlands directly to customers in the UK, the judge found that delivery was a very significant part of what customers wanted from the company.

Although the customer had a limited choice in relation to the delivery, in effect that was between PostDirect and the more expensive courier option, which had already been found to be "by or on behalf of" the supplier. The judge found that the customer merely acquiesced to the choices made by the supplier, and the choice of delivery company was to be attributed to the company.

The arrangements between PostDirect and the company were such that the company bore almost the entire economic risk relating to the delivery. For example, a 6% margin was guaranteed to PostDirect, and various other potential risks were all indemnified by the company.

The payment was made by the customer in a single amount to the company; taking a number of different factors into account, it was abundantly clear that the "amount of the dispatch or transport costs was

merely symbolic". There was "significant involvement" by the company in the delivery of the goods.

The overall conclusion was that the company met the "predominantly involved" test of *KrakVet*, and its appeal against the whole of the assessment was dismissed.

The decision concludes with some information about the appeal to the Upper Tribunal. Judge Redston gave permission in 2018 to appeal on three grounds but refused on a fourth, on the basis that it did not meet the criteria for an appeal on matters of fact (*Edwards v Bairstow*). That refusal was confirmed by Judge Berner of the Upper Tribunal. Judge Redston had not set a time limit for making an appeal to the Upper Tribunal, on the basis that the company might wish to wait for the CJEU decision before doing so; now that all the information was available, the normal 56 day time limit would apply, both to appealing the 2018 decision on phone and courier sales and the present decision on postal and online sales. The company should not attempt to appeal on the ground that had already been refused twice.

First-Tier Tribunal (TC07979): *Healthspan Ltd (2)*

4.3.2 Place of importation

An individual, who was resident in Germany, drove in a vehicle he owned from Turkey to Germany, passing through Bulgaria, Serbia, Hungary and Austria. The car was picked up by a police check on 26 February 2018, and the German tax authorities took the view that the individual had failed to declare an importation. He was assessed to customs duties of €1,589 and VAT of €3,021. In March 2018 he drove the car back to Turkey and sold it, and he appealed against the assessments. He argued that he had not really "imported" it: he had used the vehicle only for a short period of time and exclusively as a means of transport for private journeys.

The tax authority pointed out that an EU resident cannot use the customs procedure for temporary admission. It was common ground that the customs debt was incurred in Germany; although the car had already entered the EU territory at the Bulgarian border, it was the German authorities that had established that the customs debt had been incurred. It was then necessary to consider whether the VAT was subject to the same rule, in which case the VAT would also be due in Germany.

The CJEU considered the relationship between the chargeable event for customs duties and import VAT, and concluded that the car had really only entered the "economic network of the Union" in the Member State in which the failure to declare it had been identified. This was not affected by the fact that it had passed through other Member States on the way to Germany.

CJEU (Case C‑7/20): *VS v Hauptzollamt Münster*

4.3.3 Anti-fraud measures

Poland introduced a requirement to make early payment of VAT on intra-Community acquisitions of motor fuels, with the intention of combatting fraud. A trader objected on the grounds that this was contrary to EU law; it would have to pay the acquisition tax within five days of the goods

entering Poland, without the immediate right of deduction that normally applied.

The Advocate-General agreed with the appellant. Art.62 and art.69 fixed the tax points, and the Polish rules effectively required payment of the tax before it became due; it was not possible to interpret art.206, which provides for the possibility of requiring interim payments of VAT, to apply to this situation. That could only relate to the VAT due for a period as a whole, not to an individual transaction considered in isolation.

The A-G examined the issues in detail, and rejected an argument based on the EU principle of non-discrimination between domestic and cross-border transactions (TFEU art.110): the risk of fraud was greater with cross-border transactions, so the situations were not comparable. On the other hand, Poland could not rely on art.273 PVD, which permits Member States to introduce measures to prevent fraud and evasion, because such measures must still comply with the rest of the PVD.

The most generally applicable part of the discussion is probably the section in which the A-G considers the relationship between the "chargeable event" (art.62 and 69) and the "obligation to pay VAT" (art.206). The obligation to pay arises on the submission of the VAT return. The A-G states that "the chargeable event, chargeability and the obligation to pay represent three successive stages in the process culminating in the collection of VAT: for an obligation to pay to arise, the tax must become chargeable; for the tax to be chargeable, the chargeable event must have occurred beforehand." The chargeable event occurred when the obligation to pay VAT to the authorities arose; the problem was that the Polish law's fixing of that time at "five days after the entry into the national territory, regardless of the issue of an invoice" was completely different from the rules in the PVD. There was nothing in the PVD to permit Member States to derogate from art.69 and claim VAT earlier; the difference was therefore not permitted.

The opinion is long and the questions detailed, but the answer can be summed up as disapproving the Polish rules.

CJEU (A-G) (Case C‑855/19): *G. sp. z o.o. v Dyrektor Izby Administracji Skarbowej w Bydgoszczy*

4.3.4 Corrections of errors

A Polish company asked the tax authorities for a ruling on the procedure to be followed if it could not finalise the tax due on intra-Community acquisitions within three months from the end of the month in which the chargeable event arose. This could be the case in the event of late receipt of an invoice, incorrect classification of the transaction, or an error on the part of the person responsible for VAT registers and declarations. The company proposed to rectify its tax declarations when the information was available; it asked for confirmation that this was acceptable to the tax authority. The authorities responded that the Polish law imposed a three-month deadline within the scope of "formalities concerning the right to deduct" within the PVD, and the company would be denied a deduction for corrections outside that time limit. The company appealed against the ruling, and questions were referred to the CJEU.

The Polish law appears to require the filing of returns showing acquisitions within three months of the end of the month during which the acquisition occurred; if the figures are later found to be wrong, they have to be corrected, but the right to deduct the input tax has been lost. The trader would therefore have to bear the burden of the VAT. There were also different time limits for adjusting VAT payable (five years) and input tax (two years).

The CJ considered the issues of "formal and substantive conditions for deduction" in detail and cited a number of precedent cases that showed that tax that is effectively reverse charged (payable and deductible on the same return) cannot be subject to different requirements or time limits. If the acquisition was to be used for taxable purposes, it could not possibly give rise to a liability to the tax authority. The Polish law was therefore incompatible with the PVD.

CJEU (Case C‑895/19): *A.v Dyrektor Krajowej Informacji Skarbowej*

4.3.5 Brexit information

There has been a huge amount of information – guidance, commentary, and regulations – concerning the new arrangements with the EU. As this is a general update, it is not possible to cover this in detail.

https://www.gov.uk/transition; www.gov.uk/government/publications/guides-to-importing-and-exporting-goods-between-great-britain-and-the-eu

HMRC's guidance has been updated to confirm that the date by which a taxpayer must account for import VAT on their VAT return if they delay their customs declaration or use a simplified customs declaration has been changed from 30 June 2021 to 31 December 2021.

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

HMRC's guidance acknowledges that some importers are having difficulties when trying to access their statements. They say: "We are still looking into the problems some importers are having when trying to access their statements. In the meantime, if you do not have access to statements but need to complete your VAT Return, you can estimate your import VAT figures for those months. We are also aware of the issues with January 2021 and February 2021 statements. The cause has been identified and we can now give details on how to complete your VAT returns for the affected accounting periods. If you take reasonable care to follow the guidance about how to complete your VAT return if you have problems with your monthly statements, but make an error completing your VAT return, there will be no penalty."

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

HMRC have published new guidance for businesses to find withdrawn VAT Notices to check the rules for transactions that took place on or before 31 December 2020. Businesses may need to check the following VAT Notices which have been withdrawn and should not be used by businesses for transactions that take place from 1 January 2021:

- VAT Notice 702: *Imports*

- VAT Notice 704: *Retail Export Scheme*
- VAT Notice 704/1: *Claim VAT back on tax-free shopping in the UK*
- VAT Notice 723A: *Claim back VAT paid in the UK or EU if you're established elsewhere*
- VAT Notice 725: *The single market*
- VAT Notice 728: *New means of transport*

4.3.6 Northern Ireland

The special status of Northern Ireland makes it particularly important to study the rules that apply when moving goods between the rest of the UK and NI, and between NI and the EU, and between the UK and EU in either direction via NI. HMRC have published guidance online.

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

As Northern Ireland remains subject to EU rules, a Council Implementing Decision has been passed to authorise the continued use of the scale rates for private use of fuel in business cars. The authority runs from 1 January 2021 to 31 December 2023.

Council Implementing Decision (EU) 2021/512

HMRC have updated their guidance on parcel and post movements from Great Britain to Northern Ireland to give more time for customs declarations for traders and carriers beyond 1 April 2021. This temporary arrangement was due to change on 1 April 2021 for all movements (except B2B). However, this deadline has been extended by a further six months to give businesses and carriers additional time to prepare for new customs declarations.

www.gov.uk/guidance/sending-parcels-between-great-britain-and-northern-ireland

4.3.7 Article

There is a useful article by Jimmy Davies in *Taxation* magazine, explaining some of the Brexit changes in practical terms.

Taxation, 25 February 2021

4.3.8 Updated Manual

HMRC have updated the *VAT Fraud Manual* with a new example of an acquisition fraud:

- Company A, a UK VAT registered taxable person, purchases goods from an entity in another EC Member State. It sells these goods on to Company B, another UK VAT registered taxable person, but does not declare or pay its VAT liability.
- Company B sells the goods to the general public, reclaiming the VAT charged to it by Company A and declaring the VAT it charges.

A diagram illustrates the chain of supply. The point is that use of a defaulting acquirer enables the purchase of goods without paying VAT, because the transaction is cross-border. The company should account for

and immediately deduct acquisition tax, and account for output tax on the onward sale, but it does none of these. The loss is therefore the whole amount of the output tax; on a domestic supply chain, it would only be the difference between the defaulter's output tax and the VAT that was charged on the upstream transaction.

Following Brexit, presumably this type of fraud is no longer available to UK (or maybe GB) traders.

VATF23530

4.4 European rules

4.4.1 Guide to One Stop Shop

The Commission has expanded the guidance available online covering the new rules for electronic interfaces and other suppliers applying from 1 July 2021. It is a long and detailed document, with plenty of examples of how the new rules are supposed to work. Anyone trading internationally, particularly those who use or run electronic marketplaces, will need to be familiar with it.

https://ec.europa.eu/taxation_customs/business/vat/ressources_en

There are dedicated pages for:

- The One Stop Shop (OSS)

https://ec.europa.eu/taxation_customs/business/vat/oss_en

- The Import One Stop Shop (IOSS)

https://ec.europa.eu/taxation_customs/business/vat/ioss_en

- Member States OSS Contacts (included in the above)

4.4.2 Consultation on financial services

The European Commission has opened a consultation on its plans to reform the VAT rules for financial and insurance services, following the closure of a “roadmap feedback period” in November 2020. The Commission states that the current rules are criticised for being complex, difficult to apply and for not having kept pace with the developments of new services in the sector, which has led to a lack of VAT neutrality, legal uncertainty and high administrative and regulatory costs. The consultation seeks to obtain the views of stakeholders on the functioning of the current VAT rules as well as on possible changes to these rules. It will run to 3 May 2021.

ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12671-Review-of-the-VAT-rules-for-financial-and-insurance-services/public-consultation

4.4.3 Liability on undeclared income

The Spanish court referred questions to the CJEU on the appropriate measures to take where a trader has concealed income. A self-employed individual acted as an agent for a group of undertakings, owned by the same person, which organised infrastructure and orchestras for religious and village festivals in the Galicia region of Spain. 10% of the group’s income was paid by the festival committees to the agent in cash, and was not declared for any tax nor recorded in invoices or accounting records.

Following an audit, the tax authorities decided that the agent had not declared VAT on his income from the group for 2010, 2011 and 2012, and had to decide on the appropriate taxable value. They considered that the total amount received by the agent was the base for both VAT and income tax.

The A-G noted that there is an important distinction between measures to collect the tax due and measures to punish wrongdoing. The questions

referred only to the calculation of the taxable amount, so he would restrict himself to that issue.

The taxpayer relied on the cases of *Tulica* and *Plavosin* (Cases C-249/12 and C-250/12) as supporting the principle that the gross amount received has to be considered as VAT-inclusive; the VAT assessed should therefore be the VAT fraction of that amount, rather than the VAT rate times that amount. The A-G considered that this was directly applicable only in the circumstances of those cases, which were that the parties were unaware that the transaction should have been VATable and there was therefore no deliberate intention to avoid or evade the tax; there was also no question of collecting the VAT after the event in addition to the consideration already paid. In cases of deliberate concealment, or where the authorities had no means of knowing what consideration had been paid, different principles might apply.

The A-G also noted that complications arose where the transaction that was suppressed was between two taxable persons, because the undeclared output tax on one side would equate to unclaimed input tax on the other. There was therefore an argument that no VAT should be paid. The A-G did not agree with this approach: his view was that "the question of what measures should be taken to remedy a situation is to be assessed solely in the light of the obligations that have not been respected by the person concerned."

The *Tulica* and *Plavosin* cases only established a principle to be applied where the parties were innocently unaware that the transaction should be subject to VAT. Where the parties colluded, as appeared to be the case here, it made more sense to suppose that they had agreed that the amounts did not include VAT. This could be rebutted if they could produce evidence to show that the price paid corresponded in substance to the price of the relevant market for such services including VAT. The A-G therefore appears to support an assessment at "VAT rate rather than VAT fraction", unless the trader can produce evidence to displace it.

CJEU (A-G) (Case C–521/19): *CB v Tribunal Económico Administrativo Regional de Galicia*

4.4.4 Third party liability

A Bulgarian company bought a combine harvester and other agricultural equipment from another Bulgarian company in 2014. The supplier had bought the combine from a supplier in the UK and had declared acquisition tax on it, but a tax audit in 2016 revealed that not all of the tax had been paid. Assessments were raised on the supplier, and under a provision of Bulgarian law, joint and several liability assessments were also raised on the customer, who had claimed the VAT charged as input tax. The customer was also declared to be jointly and severally liable for the supplier's default interest.

The company appealed, and questions were referred to the CJEU, where A-G Kokott has given an opinion. She starts by commenting that this is one of a series of cases where the CJEU has been asked to strike a balance between the effective collection of VAT by Member States and the fundamental rights of the persons concerned in conjunction with the principle of proportionality.

The Bulgarian law only imposes joint and several liability if the person concerned knew or should have known that the other party would not pay the VAT, which remained in dispute between the company and the tax authority. However, it also argued that it could not possibly owe default interest, because it had no primary liability for VAT that had been outstanding for any period. The questions referred related only to this point, and referred to art.205 PVD and to the principle of proportionality.

Art.205 states: "In the situations referred to in Articles 193 to 200 and Articles 202, 203 and 204, Member States may provide that a person other than the person liable for payment of VAT is to be held jointly and severally liable for payment of VAT."

Art.273 states: "Member States may impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion, subject to the requirement of equal treatment as between domestic transactions and transactions carried out between Member States by taxable persons and provided that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers." As the Bulgarian law imposed liability for default interest only in a case where the person charged "knew or ought to have known" of the intention to carry out a fraud, A-G Kokott considered whether this could be an "other obligation deemed necessary to prevent evasion".

In her view, art.205 itself only authorised transferring the liability for the VAT itself. However, in cases of VAT fraud, it was not inconceivable that charging the default interest on a party who "knew or ought to have known" would be a justifiable other measure within art.273.

However, it appeared that this was not a case of fraud – only of non-payment. According to the order for reference, the supplier had declared the output tax and acquisition tax, but had failed to pay it to the authorities. Even if the customer knew that this was the case, art.273 had no application. It might have been different if a person used another shell company as an intermediary and left it without assets, but in this case the customer had actually paid the supplier, putting it in a position to pay the VAT.

The A-G recommended that the court should answer the question by ruling out the inclusion of default interest in such a joint and several liability transfer under art.205.

CJEU (A-G) (Case C‑4/20): *'Alti' OOD v Direktor na Direktsia 'Obzhalvane i danachno-osiguritelna praktika' Plovdiv pri Tsentralno upravlenie na Natisonalnata agentsia za prihodite*

4.4.5 Interest on reclaim

A-G Kokott has considered the question of whether a trader should have a right to interest on a late repayment of VAT. The PVD does not confer any such right, and Austria had not provided for it in its domestic legislation; however, the question was raised whether such a right could be inferred by analogy from Directive 2008/9, the Refund Directive, which did create such a right in respect of cross-border claims.

Art.27 states: "Interest shall be calculated from the day following the last day for payment of the refund pursuant to Article 22(1) until the day the

refund is actually paid. Interest rates shall be equal to the interest rate applicable with respect to refunds of VAT to taxable persons established in the Member State of refund under the national law of that Member State. If no interest is payable under national law in respect of refunds to established taxable persons, the interest payable shall be equal to the interest or equivalent charge which is applied by the Member State of refund in respect of late payments of VAT by taxable persons."

There were two applicants in the case. One was a sole trader who had challenged a reduction of a VAT repayment return for August 2007, and had been paid out in full in May 2013. The other applicant claimed bad debt relief on 2003/04 transactions in its return for May 2005, which was eventually paid out after several appeals in May 2013. The tax office only awarded interest from January 2012 to April 2013.

The A-G considered that there was no explicit right to interest in the PVD. However, the principle of fiscal neutrality requires that the financial losses incurred by the taxable person owing to the unavailability of the sums of money at issue are compensated through the payment of default interest. The A-G considered that the principles applied equally to the two different claimants.

The Austrian government submitted that the wording of art.27 of the Refund Directive suggested that it was permissible for Member States not to award interest on repayments to established traders. The A-G disagreed. That was a catch-all provision to bind all Member States in an area where there had been significant divergence in national laws. It was not possible to extrapolate from that to the conclusion that the Austrian government drew. The principle of fiscal neutrality overrode it.

The A-G agreed with the Austrian government that there was nothing in art.183 and art.90 PVD that explicitly conferred a directly enforceable right to interest, nor was it permissible to apply a provision of a different directive by analogy. It was only the general principle of fiscal neutrality that required a rule that awarded interest.

The answer suggested by the A-G is:

Under EU law – in this instance art.183 and art.90 PVD in conjunction with the principle of neutrality – interest is to be paid, in principle, on excess VAT under art.183, just as on an entitlement to a refund resulting from the adjustment of the taxable amount under art.90 PVD, when the refund is not made within a reasonable period. However, there is no rule of the directive with direct effect concerning the specific application of interest to such entitlements. The referring court is therefore obliged to do everything within its power to produce a result in conformity with EU law, for example by means of an application by analogy or a broad interpretation of national law in conformity with EU law.

CJEU (A-G) (Case C‑844/19): *CS v Finanzamt Graz-Stadt*

4.4.6 Compatibility of banking tax

Andalusia imposed a tax on deposit-holders in respect of customer deposit balances. A Portuguese bank with a branch in Spain appealed against the levy on the basis that it was too similar to VAT, and was therefore prohibited by PVD art.135(1)(d) and art.401, as well as various provisions of the Treaty on the Functioning of the EU (TFEU). Questions were

referred to the CJEU on the free movement of capital and on the VAT rules.

The court reviewed the case law that set out the general characteristics of VAT: the general application of VAT to transactions relating to goods or services, the fixing of its amount in proportion to the price received by the taxable person in return for the goods and services that it provides, the collection of this tax at each stage of the production and distribution process, including retail sale, regardless of the number of transactions that have taken place previously, and the deduction of the VAT due by a taxable person from the amounts paid during the previous stages of the production and distribution process. The tax at issue in the present case did not have these essential characteristics. It was not, in its nature, a turnover tax.

Some of the details of the tax appear to have contravened the TFEU, but it was not incompatible with the PVD.

CJEU (Case C‑ 712/19): *Novo Banco, S. A v Junta de Andalucía*

4.4.7 Tax shown on invoices

A Lithuanian company issued fuel cards which enabled Lithuanian transport companies to buy fuel from Polish fuel stations. The company took the view that its commercial activity consisted of purchasing fuel from Polish service stations for the purpose of subsequently reselling it to Lithuanian transport companies; it therefore issued invoices for the supply of fuel to those transport companies, indicating an amount of VAT. It had registered for VAT in Poland on the grounds that it was supplying goods there.

The Polish authorities refused a claim for deduction of VAT incurred on the company's purchases of fuel. The Polish courts upheld the view that the Lithuanian company's activity was financial, and it did not buy or sell fuel in Poland. It merely financed a transaction that happened directly between the service station and the transport company, and it had no right to deduct input tax.

Nevertheless, as the company had issued invoices showing amounts of VAT, the tax authorities maintained that it was liable to pay that amount to them, with no deduction for input tax. It appeared from the order for reference that there was no evidence of fraud or abuse by the taxpayer: indeed, it had been the practice of the Polish tax authorities to treat the participants in this type of chain transaction as making successive supplies of goods, which encouraged the taxpayer to claim reliance on the protection of legitimate expectations.

The effect of the Polish provision would be to create double taxation. If the service station had correctly invoiced the supply of fuel to the transport business, it would have been entitled to recover the tax paid; because of the incorrect invoicing, it was not entitled to a refund, and yet the appellant in the case would have paid the VAT to the authorities.

The court ruled that the Polish law, which prevented a correction of the invoices to reverse the improper charge of VAT, was contrary to the Directive where the supplier had acted in good faith. It would breach the principle of the neutrality of the tax, because the taxable person would have to bear the cost of VAT within the system.

CJEU (Case C‑ 48/20): *UAB 'P.' v Dyrektor Izby Skarbowej w B*

4.5 Foreign refund reclaims

4.5.1 Claim conditions

A Spanish company incurred UK VAT of £8,546 in the period between 1 January and 30 September 2018 on the importation of food products to the UK, and applied to HMRC for a repayment (via the Spanish electronic portal) on 22 October 2018. HMRC refused on 9 May 2019, and the company appealed to the FTT. It argued that it was established in Spain, had no establishment of any kind in the UK, and the import VAT was incurred as a result of the goods arriving in the UK in transit on their way to Spain. All sales were made to Spanish customers.

HMRC accepted that the company did not have an establishment in the UK, but argued that it had made a deemed supply in the UK when it moved its own goods from the UK to Spain. It was therefore only entitled to recover the VAT by registering and entering it on a VAT return. They cited relevant passages of Notices 723A and 725 in support of this.

Judge Jeanette Zaman noted that in its first answers to questions raised by HMRC, the company had stated that it made supplies to UK customers, and concentrated on its lack of a UK establishment as justifying the cross-border reclaim. It appears that the company and HMRC were at cross purposes: they were considering different goods. The goods on which the claim was made were imported into Tilbury and then immediately removed to Spain without being supplied to a customer; there were separate sales of goods from Spain to the UK customers, but HMRC appear to have assumed that the imported goods were sold on.

Later in the review process, HMRC appeared to understand the difference, but maintained that the movement of own goods to Spain still constituted a deemed supply and that would be enough to disqualify a refund claim. The judge accepted the company's explanation for the goods being routed through the UK: the South American supplier was about to despatch a consignment to the UK, and quicker delivery to Spain could be achieved if the goods were included. The transit through the UK was not part of a supply.

On this basis, the judge concluded that the company did not make any supplies of goods or services that were deemed to have been supplied in the UK, and was therefore entitled to the refund; she allowed the appeal.

She does not appear to address the legal question of whether a movement of own goods is, in fact, a deemed UK supply. This is set out in VATA 1994 Sch.4 para.6; the refund scheme in VATA 1994 s.39 refers only to denying claims to those "carrying on business in the UK". SI 1995/2518 reg.173B(2)(c) states that "A claim for repayment may not be made in respect of VAT charged on a supply or importation of goods which the claimant has removed or intends to remove to another member State, or which the claimant has exported or intends to export to a place outside the member States." Because the decision does not appear to address these points, it is not clear whether the judge has concluded that the UK law does not comply with the Directive, or possibly has to be interpreted in a manner consistent with the Directive.

First-Tier Tribunal (TC08000): *Jota Jota Alimentos Global Sl*

4.5.2 Certificate of status

HMRC are changing the way a 'certificate of status of taxable person' is issued to UK businesses.

From 8 March 2021, requests for a certificate of status will be answered by e-mail, but only if HMRC already have the trader's permission to correspond with them electronically. Otherwise, they will send the certificate by post to the registered address. The trader can also specifically request that the certificate be sent by post.

Where HMRC are aware that a country requires a wet stamped certificate, they will continue to issue these by post regardless of whether consent has been granted to correspond by e-mail.

www.gov.uk/guidance/get-confirmation-from-hmrc-that-you-are-trading-in-the-uk

4.5.3 Cross-border claims after Brexit

HMRC have updated their guidance on foreign businesses claiming UK VAT refunds and UK businesses claiming EU VAT refunds, both of which procedures have changed following Brexit.

www.gov.uk/guidance/vat-eu-businesses-buying-in-the-uk-and-the-vat-refund-scheme; www.gov.uk/guidance/refunds-of-uk-vat-for-non-uk-businesses-or-eu-vat-for-uk-businesses; www.gov.uk/guidance/claim-vat-refunds-in-northern-ireland-or-the-eu-if-youre-established-in-northern-ireland-or-in-the-eu

5. INPUTS

5.1 Economic activity

5.1.1 Another holding company

A company appealed against decisions to disallow input tax claims of £102,205 for periods 06/12 to 06/15 and £82,609 for periods 12/15 to 03/17. The tax was incurred on costs used to make supplies to companies owned by the appellant or by its subsidiary. HMRC ruled that they were not incurred for the purpose of taxed output transactions.

There were several companies in a corporate group, two of which formed a VAT group in 2015. The group invested in projects which were originated in universities and research institutions. Companies would be incorporated to exploit intellectual property commercially and "spun out" of the institution, and the group would invest in the spin-out company (referred to as a "portfolio company"). The shareholdings in portfolio companies were registered in the name of the appellant's subsidiary L, which was not part of the VAT group.

The holding company provided management services to its portfolio companies, such as introductions to potential executives and other advisors, advice on how best to exploit the intellectual property, provision of office accommodation and contact points. Some of the agreements indicated that L would provide services, but L had no staff; any services therefore had to be provided by the appellant. The group also provided services to third parties such as universities.

The Tribunal examined the income generated over a number of years, going back before the financial crash of 2008, and noted that some of the portfolio companies appeared to pay only for the provision of a director. No income at all appeared to have been received between 2011 and 2015.

Judge Nicholas Aleksander referred to the precedents of *MVM* and *Larentia + Minerva* for the principles that an investing company's right to deduct was dependent on involvement in the management of its investments, which had to be supplied for consideration. This had to be directly linked to the provision, and not contingent on the ability to pay, according to precedents such as *Finland*, *Tolsma*, *Borsele* and *Norseman Gold*. The judge summarised "the present state of the law":

Whether there is a supply of goods or services for consideration for the purposes of article 2 and whether that supply constitutes economic activity within article 9 are separate questions. A supply for 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.

Having concluded that the supply is made for consideration within the meaning of article 2, the court must address whether the supply constitutes an economic activity for the purposes of the definition of

"taxable person" in article 9. The issue is whether the supply is made for the purposes of obtaining income therefrom on a continuing basis. For convenience, the CJEU has used the shorthand of asking whether the supply is made "for remuneration". The important point is that "remuneration" here is not the same as "consideration" in the article 2 sense.

The judge accepted the argument, raised in some previous cases, that a holding company that makes supplies for consideration is always carrying on an economic activity, and there is no separate test of whether the amount of the "remuneration" was so low that the activity was not within art.9. This was supported by *Cibo*, which overrode the principles considered in *Borsele* and *Finland*.

HMRC argued that the supplies by the holding company were not made for consideration, because:

- the agreements that it has with its portfolio companies was for a fixed fee, which was levied monthly, quarterly, or annually, and that the fee was unrelated to the amount or value of the services provided – rather it was set at a level that the portfolio company could afford;
- its practice was not to invoice a portfolio company for its fees unless and until the company was able to pay the fee. The existence of this contingency (that fees would not be charged if the portfolio company is unable to pay) broke the link between the supply and the payment necessary for the payment to constitute consideration.

HMRC also argued that the appellant did not intend to generate income on a continuing basis by providing the services. The principal purpose was to realise profits by selling the shares in due course. The level of income was very limited, and was nil for seven years to 2015. The fee income did not appear to cover the costs, and was not set by reference to those costs or to the value of the services.

HMRC also sought to distinguish the various precedents on holding companies on the grounds that, as regards its portfolio investments, the appellant was only a minority shareholder (typically 15%). They argued that the principle of "automatic satisfaction of article 9" only applied to a holding company with subsidiaries.

The judge analysed the main activities of the appellant. He commented that the fact it was regarded as a trading company for direct tax purposes was not relevant, because the legal basis for VAT was completely different. In relation to the portfolio companies, the judge concluded that the supplies made to them was not "for consideration", even if there was a commercial motive:

- there was no commercial decision to provide services for a negotiated fee – often there was no charge, or it was set only at a level that the other company could afford, and it was often deferred;
- the precedents of *Finland*, *Tolsma* and *African Consolidated* were all relevant to the portfolio companies, in that there was no direct link between the services provided and the payments received;
- the board minutes showed only vague intentions to raise fees, and a practice of deferring fees or cancel them;

- there was very little other evidence of any agreements to pay fees.

The activities in providing services to portfolio companies were therefore not economic activities, and the company was not a taxable person acting as such. The "automatic satisfaction condition" was not relevant.

There was more evidence of an economic objective in the company's agreement with its non-VAT grouped subsidiary, but the provision of the services was still not for consideration, on the same basis as in *Norseman Gold* – the fee would continue to be deferred until the subsidiary's cash flow was sufficient to support payment. Nothing was paid from 2010 to 2017, and only a reduced amount then, indicating that the payment was contingent on the ability to pay.

Although HMRC put the company to strict proof in relation to supplies to third party clients, there was no serious challenge to the contention that it made such supplies for consideration and was therefore carrying on an economic activity to that extent.

The conclusion was that input tax would be deductible to the extent that it was used to make these supplies to third parties, and not otherwise. HMRC invited the judge to make findings about the categories of input tax that would be deductible, but he said that he had not heard evidence in this area and declined to make any findings. However, he noted that supplies had only been made to third parties in 2015, 2016 and 2017, which suggested that no input tax could be claimed in 2012 – 2014, unless it could be shown to be related to later third party supplies.

The appeal was therefore allowed in part, but it must only be a small part.

First-Tier Tribunal (TC08006): *Imprimatur Capital Holdings Ltd*

5.2 Who receives the supply?

5.2.1 Updated manual

HMRC have updated their internal manual guidance on import VAT and the deduction of input tax, including adding guidance on: businesses incorrectly deducting input tax, the meaning of ownership, toll operators, agents, customs warehousing, goods imported for onward leasing, customs special procedures, and postponed VAT accounting.

In addition to the points made in Revenue & Customs Brief 15/2020 (covered in the last update), the new guidance contains the following comment on the "meaning of ownership":

When we refer to the owner as having ownership of the goods, this needs to be seen specifically in the VAT context of ownership being 'the right to dispose of goods as owner'. It is accepted that, as long as the contract of ownership envisages that title will pass at some future date (usually on payment), title does not need to have passed at that earlier point. Typically, contractual arrangements will often allow the 'owner' to use and dispose of the goods as they see fit.

So, for example, where goods are imported into a customs warehouse, and 'ownership' passes in warehouse (subject to title typically passing later on payment), then the 'owner' of the goods will be in a position to dispose

of those goods as owner, to use and/or sell those goods. Any import VAT paid by the 'owner' of the goods in such circumstances can be deducted by them as input tax, subject to the normal rules, irrespective of whether title has passed at that point.

VIT13300

5.2.2 Using import agents

HMRC have updated their guidance on paying VAT or claiming VAT refunds for businesses which use someone to import goods on their behalf, or use a supplier who arranges such imports.

If a person or business imports goods on the trader's behalf, the trader must tell them how it wants them to account for import VAT on those imports. They will need this information to complete the customs declaration. This applies to freight forwarders, customs agents, brokers or fast parcel operators.

If the trader already has someone who completes the customs declaration on their behalf they still need to advise them if they want to account for import VAT on their VAT return for imported goods (postponed accounting). They should keep a written record of what has been agreed.

If a UK business receives goods through the post in consignments exceeding £135 using Royal Mail Group, it cannot account for import VAT on its VAT return. This includes Parcelforce where they are not acting as a fast parcel operator. This is because Royal Mail Group do not currently offer this facility. This is explained in more detail in the guide for international post users (Notice 143).

A UK business can buy goods from a supplier who arranges for a person or business (such as a fast parcel operator) to import and deliver the goods for it. The UK business must agree with the supplier how it wants to account for import VAT, so that they can tell the person/business who completes the customs declaration to make the appropriate entry on the customs declaration. Once again, the UK business should keep a written record of what has been agreed.

Unless the supplier specifically tells them not to, some fast parcel operators will select the option for the customer to account for import VAT on its VAT Return. The supplier should tell the customer about this when they ask for the customer's EORI or VAT registration number. The customer will need to tell the supplier if it does not want to account for import VAT on its VAT Return.

The import will appear on the customer's monthly statement in the normal way.

www.gov.uk/guidance/eu-business-taxes-and-tariffs

5.2.3 Evidence of purchase

A firm of accountants appealed against assessments raised to disallow input tax on three invoices for its return periods 04/17 and 01/18. The two invoices in 04/17 had a total of £62,666 in input tax and led to a repayment return, which led in turn to an enquiry. The third invoice only charged VAT of £1,033.

The first invoice related to the sale of a property which, according to the Land Registry, belonged to an associated company of the appellant. The second only carried the description "legal fees as agreed", which HMRC did not consider sufficient to show a connection to use in the taxable business; further explanations provided by the firm did not satisfy HMRC, and they disallowed the tax on the basis that the invoice did not comply with SI 1995/2518 reg.14. The third invoice did not show the name of the recipient, nor the nature of the supply, and therefore also did not provide sufficient evidence or comply with reg.14. HMRC considered that there was no alternative reliable evidence that could justify the exercise of discretion under reg.29. The firm appealed to the FTT, where it came before Judge Natsai Manyarara.

The firm argued that it was, in fact, the beneficial owner of the property, and it had made the mortgage application as well as using the property in its business. The lender had insisted that it should be registered in the name of the holding company, but this should not prevent recovery of input tax.

The legal services related to a dispute in which the appellant sourced and bought items for clients; some goods had been shipped to Guyana instead of to Ghana, and a legal dispute with the French carrier had involved solicitors, who invoiced the appellant. The firm claimed that there had been many previous discussions with HMRC about this part of their business.

The third invoice, according to the firm, was for the purchase of office equipment and VAT had been paid.

The summary of the parties' submissions at the hearing suggests that they simply repeated their starting positions. There also seems to have been some acrimony between the officer and the firm's manager, who claimed to have been "bullied". On the other hand, the responses he had made in e-mails to the officer's queries, reproduced in the decision, show a lack of cooperation, for example in response to a question about the relationship between the appellant and the registered owner of the property:

"Our relation? If we answer that what is next? What we had for dinner and how often we wash our clothing? Going forward I intend NOT to respond to questions not concerning what the notice state especially if we think the questions are intended to snoop on our business affairs unnecessarily."

The judge went through the principles of best judgement assessments to explain them to the manager, who he described as "indignant" about HMRC's questioning. He was satisfied that the manager had not provided the majority of the documents requested by the officer after the meeting, and the fact that he had provided more information a week before the hearing could not negate the "best judgement" nature of the assessments that she raised on the basis of the information she had at the time. Until a week before the hearing, there had been no allegation or mention of bullying, which appeared only to relate to "failing to respond to emails and not emailing her questions in advance of the inspection visit".

The judge was satisfied that the officer had not acted capriciously or vindictively. Her performance at the hearing appears to have impressed the judge more than the manager's, who was described as having "a

tendency to give evidence in a long-winded manner, often with little or no regard to the question actually put, before coming back to the point when reminded to do so."

Nevertheless, the judge examined the manager's justification for the claim on the property invoice, which was based on an extract from Notice 708 relating to beneficial owners of land and buildings. The judge explained that the passage described HMRC's interpretation of VATA 1994 Sch.10 para.40, which deals with a situation where a person makes a grant of an interest in a building, for consideration, the benefit of which accrues to another person and, if the conditions are met, the input tax incurred by the person actually making the grant is treated as input tax of the beneficiary of the grant. In this case, the requirements were not met, because there was no evidence of the registered owner making a supply to anyone else for consideration; there was also no option to tax in place, and evidence that the property was effectively let to associated businesses for exempt consideration. The judge found that the invoice relating to the property represented supplies made to the registered owner, not the appellant; no evidence had been produced to show that the appellant was in fact the beneficial owner, and the VAT was therefore not recoverable.

The invoice from the lawyers could not be reconciled to bank statements, nor was there any correspondence to explain the nature of the legal dispute to which it related. The judge agreed with HMRC that there was insufficient evidence to overcome the basic lack of information on the VAT invoice. Similarly, the auction invoice did not meet the requirements.

The judge concluded that HMRC had been justified at the time to disallow all the input tax, and "taking the appellant's case at its highest", the manager had been unable to provide any evidence of sufficient reliability or cogency to displace HMRC's conclusions.

Legal arguments based on legitimate expectations and estoppel were considered and dismissed. The first was not within the FTT's jurisdiction; the second appeared to be misconceived, because there were no unappealed judicial decisions in relation to the matters before the Tribunal that might have prevented HMRC taking the same point again. The appeal against the disallowance of all three invoices was dismissed.

First-Tier Tribunal (TC08026): *Knightsbridge Accountants Ltd*

5.3 Partial exemption

5.3.1 Updated Notice

HMRC have updated their Notice *Partial exemption* to reflect the temporary email address for sending partial exemption special method (PESM) request forms to HMRC. Temporary changes have been put in place to stop the spread of coronavirus. HMRC are reducing paper contact and asking businesses to submit their completed PESM request forms electronically by emailing PESMcovid19@hmrc.gov.uk.

Notice 706

5.3.2 Results of call for evidence

HMRC have published a summary of responses to their consultation on possible simplification of partial exemption and the capital goods scheme. It appears that very little will change as a result; in particular, the CGS threshold of £250,000 for buildings, set in 1990, remains the same. The "next steps" listed are:

Centralised application point

There will be a centralised application point for PESM applications set up shortly. This means that all PESMs will go to the same HMRC team in the first instance and they can be recorded promptly. This will provide clarity for taxpayers as to the correct place to submit their PESM application. Additionally, this will reduce the time taken for HMRC to begin reviewing a PESM application.

Clearer application process

In order to apply for a PESM, there will be an accompanying application form to complete. The form will guide applicants through the steps of applying and make it clear what information is required. This will minimise the need for ongoing information requests from HMRC and should reduce the time needed for HMRC to process an application. A PESM will only be processed once all the information required has been provided.

Sectoral Frameworks

The review of all current frameworks is ongoing, with some now completed. An internal review to identify the need for new frameworks is also being carried out and we intend to engage with relevant stakeholders in taking this forward. HMRC are also in the process of reviewing and updating our existing PE and CGS guidance.

HMRC also say they will "engage further with stakeholders to better understand the impact of any potential threshold and process changes which could be made in the future."

www.gov.uk/government/consultations/call-for-evidence-simplification-of-partial-exemption-and-the-capital-goods-scheme

5.3.3 Covid and partial exemption

HMRC have issued a Brief to publicise an "accelerated process" for partially exempt businesses to change their partial exemption methods where the business has been affected by the pandemic. All PESM requests should be sent to the email address: PESMcovid19@hmrc.gov.uk with the declaration that the method proposed is fair and reasonable. The same accelerated process will be available to businesses who use the CGS to calculate input tax recoverable on capital items they use for taxable and exempt purposes.

Where HMRC are satisfied that the aim of the proposal is to address coronavirus issues only, in order to facilitate a quick decision, HMRC will restrict their enquiries to how that proposal addresses those issues. HMRC will apply normal scrutiny to method requests where there is a risk the accelerated process is being used to increase recovery for businesses whose activities have not been directly affected by coronavirus.

Revenue & Customs Brief 04/2021

5.3.4 Updated Notice

HMRC have updated their Notice *Capital Goods Scheme* from the October 2011 version. The main change is to section 7.1, which gives

details of the calculations necessary to work out how much input tax can be reclaimed initially. This now reads as follows:

7.1 Work out how much input tax you can initially reclaim

You can initially reclaim VAT that's used or to be used to make taxable supplies. This involves the following steps:

Step 1 requires you to select your own business non business (BNB) calculation. Step 2 is to determine recoverable VAT in accordance with a partial exemption method. If you're partly exempt, you must use the turnover-based standard method which is set out in legislation or a special method which must be approved by HMRC. If the asset is used:

- only to make taxable supplies, all of the input tax is deductible
- only to make exempt supplies, none of the input tax is deductible
- to make taxable and exempt supplies, you'll need to carry out a partial exemption calculation – partial exemption calculation is normally carried out in accordance with a partial exemption method and, unlike the BNB calculation, is normally subject to an annual adjustment (see *VAT Notice 706: partial exemption*)

Example

Following on from the example at paragraphs 4.2 and 4.4 (building cost £1 million and 60% business use intended), the building has 60% business use involving only the making of taxable supplies in the year of acquisition (the first interval under the CGS).

Initially the business needs to calculate how much of the VAT incurred on the building is deductible following the steps above. As the building will be used for 60% business purposes, £120,000 VAT can be treated as input tax. As the business activities involve only making taxable supplies, all of this input tax is deductible.

The default position for determining how much VAT is deductible on costs is as set out above.

However, for VAT incurred on or after 1 January 2011, HMRC is now able to approve a method covering BNB calculations. Where you're also required to carry out partial exemption calculations, HMRC can also approve use of one single agreement covering the business's BNB and partial exemption calculations. This is known as the combined method. For more information see VAT Notice 706: partial exemption.

7.2 The 'baseline' recovery of VAT established at the end of the first interval

With effect from 1 January 2011, you need to calculate the amount of deductible VAT on the asset following the 2 steps in paragraph 7.1 (or your approved combined method). The baseline recovery percentage is the amount of deductible input tax on the asset expressed as a percentage of the total VAT on the asset, in this instance input tax and non-business VAT.

Before 1 January 2011, you were required to calculate an amount of input tax that was deductible on a capital item following the 2 steps in paragraph 7.1. However, the baseline recovery percentage for the CGS

was established by the amount of deductible Input Tax, expressed as a percentage of the total input tax on the capital item.

7.3 Amending an incorrect initial claim for VAT in the first interval

The 'baseline' recovery of VAT on a capital item is the amount that's deductible in the tax year or years that it was incurred in. This is then adjusted up or down with changes of use in subsequent intervals. If there were errors in the initial deduction then:

- they can be corrected only by adjustments to that initial deduction, not by making adjustments under the CGS that treat that initial deduction as if it had been correct
- if they're outside the capping limits, they cannot be corrected at all

For more information on capping, see section 14 of *VAT Notice 706: partial exemption*.

Whether or not any errors in the initial deduction can actually be corrected, subsequent interval adjustments will always refer back to the corrected baseline. This may lead to situations where adjustments are due that common sense would say should not be. It should be considered however, that adjustments should not be made or allowed where they would result in the claiming of more than all, or less than none of the input tax effectively adjusted in that interval.

Example

A business buys a capital item and recovers 70% of the VAT incurred. More than 4 years later it's found that this deduction is in error and only 30% should have been recovered. This error cannot be corrected as it's capped. In interval 6 the business uses the asset 50% for taxable purposes. Despite the fact that it has already recovered 70% of the VAT on the item it's still entitled to use an adjustment percentage of plus 20% in the interval 6 adjustment.

The Notice continues with further illustrations of the necessary calculations.

Notice 706/2

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 Cross border bad debts

A Netherlands pharmacy delivered medicinal products on prescription to customers in Germany. The recipients qualified for an amount described as "compensation" by completing a questionnaire about their medical conditions.

When the pharmacy delivered drugs on medical prescription to people covered by private health insurance, it considered that it was making distance sales directly to the customer, and these sales were taxable in Germany. It also considered that the "compensation" reduced its taxable amount.

When it delivered medicinal products to people covered by compulsory health insurance, it treated these supplies as exempt despatches from the Netherlands, with the compulsory sickness insurance fund in Germany being responsible for acquisition tax. The adjustment made for the compensation is not clearly described in the CJEU judgment, but it appears that the company claimed a reduction in German output tax in respect of compensation paid in relation to these supplies as well.

The German tax authority decided that it was not permissible to reduce the tax base by virtue of compensation payable in respect of non-taxable supplies, and this decision was upheld by the German court. On appeal, questions were referred to the CJEU to clarify the application of the *Elida Gibbs* principle on refunds to someone further down the supply chain. A German pharmacy making a similar payment to a German customer would have been able to apply *Elida Gibbs*; there was therefore a question of equal treatment between domestic and cross-border supplies.

Both sides argued that the questions referred to the CJEU were inadmissible: the German government claimed that they were hypothetical, and the company claimed that the questions did not deal with the point of the dispute, which was the relationship between the pharmacy and the customers who were covered by compulsory insurance. The CJEU disagreed with both: there was a presumption that the questions ought to be answered, and there was a genuine doubt about the application of art.90 PVD; and the order for reference said that the referring court was in no doubt about the matter that the company argued should be the subject of the question. The questions were therefore admissible.

The CJEU agreed with the German government on the claim to reduce the tax base. The pharmacy could not obtain relief under art.90 when it was not liable to any output tax on the supplies in relation to which the compensation was paid; it could not use that compensation, which arose on supplies to one set of customers, to reduce its tax base on a different set of supplies to a different set of customers.

CJEU (Case C–802/19): *Firma Z v Finanzamt Y*

5.8 Other input tax problems

5.8.1 Claim too late

In a long and convoluted decision, Judge Jane Bailey dismissed an appeal by a sole trader against the refusal of an "error correction" by a trader who had voluntarily registered for a short period in 2014/15. It appears that he had very limited understanding of how the VAT system was supposed to work, and should probably never have been registered. In November 2019 he made a claim for repayment in relation to 46 payments that he had made before December 2015; the technical reasons for refusing his claim were that most of the payments were made more than four years before the claim, and the only two that were in time were not supported by evidence that they related to taxable supplies.

Most of the decision, however, is taken up with a detailed account of a long-running argument between the taxpayer and HMRC. He appears to have believed throughout that he was entitled to various repayments, interest and compensation for mistreatment. The judge did her best to explain to him why the appeals process took a long time, and why his appeal was unsuccessful. The decision runs to 152 paragraphs on what is, essentially, a case that never had any prospect of success.

First-Tier Tribunal (TC08024): *Ryan Flood*

5.8.2 Carbon credits

In TC07026, 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 FTT hearing to £7.7m.

The FTT 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 FTT 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.

The company appealed to the UT, where it came before Mr Justice Fancourt and Judge Timothy Herrington. The issues were twofold:

- whether the problems with the VAT invoices were a sufficient reason under EU law to deny input tax credit;
- whether HMRC had been entitled not to exercise their discretion to allow the input tax on the basis of alternative evidence.

The company argued that the detailed contents of a VAT invoice were only formal requirements, whereas the right to deduct depended on the substantive conditions. HMRC argued that the conditions for a VAT invoice were a mandatory requirement in art.178 PVD, and the absence of a VAT number and the customer's name were critical elements to enable them to monitor compliance.

The company argued that HMRC had taken irrelevant factors into account in deciding not to exercise discretion. Given that the substantive conditions for deduction were met (a taxable input used for a taxable output), the factors that HMRC took into account were all irrelevant: (i) the invoices were invalid; (ii) the supplier was not registered for VAT (iii) the transactions were connected with fraud; and (iv) the taxpayer did not

carry out a reasonable level of due diligence. HMRC argued that these were all highly relevant factors.

The judges carried out an extensive review of the precedent cases on the right to deduct and the distinction between formal and substantive conditions, and summarised the principles as follows:

(1) The substantive conditions which must be met in order for the right to deduct to arise require that (i) the person seeking deduction is a taxable person and (ii) the goods or services must be used by the purchaser for the purpose of his own taxable transactions and supplied to him by another taxable person (Senatex).

(2) In order to exercise the right to deduct it is mandatory for the taxable person to hold an invoice drawn up in accordance with the formal requirements of the specified Articles of the PVD and the relevant domestic requirements, so long as those requirements go no further than the express requirements laid down by the PVD (Jeunehomme, Reisdorf, Polski Trawertyn, Barlis and Zipvit).

(3) However, the taxable person cannot be deprived of the right to deduct simply because the invoice which he holds does not comply in some respects with the formal requirements for a VAT invoice. Member States have a discretion to accept alternative evidence which establishes that the substantive conditions for the right to deduct have arisen and the formal requirements in domestic law for the exercise of the right have been sufficiently satisfied. The burden is on the taxable person in that regard, but strict application of the substantive requirements to produce compliant invoices would disproportionately prevent the taxable person from benefiting from fiscal neutrality (Albert Collée, Ecotrade, Polski Trawertyn, Barlis and Vadan).

(4) Nevertheless, the taxable person can be denied the right to deduct in circumstances where he has not subsequently corrected invoices which are non-compliant or provided sufficient alternative evidence of the requirements in question. That can be the case even where the substantive conditions giving rise to the right to deduct have arisen because the invoice serves not only to demonstrate satisfaction of the substantive conditions but also has an "insurance function" because of the need to counter irregularity and fraud; the invoice assists the tax authority in carrying out its verification and monitoring duties and ensure that the tax due is paid (Reisdorf, Barlis, Zipvit).

(5) Thus, where the compliance failures are technical, have subsequently been corrected or otherwise established by satisfactory evidence, have resulted in no loss of tax and have not impaired the exercise by the tax authority of its monitoring function it would be disproportionate to deny the right to deduct (Albert Collée, Polski Trawertyn, Barlis, Senatex).

(6) However, not all compliance failures are capable of being excused. That will be the case where there is a failure to comply with those requirements which are essential to the proper performance by the tax authority of their monitoring functions and are needed as evidence that the supplier has duly paid or accounted for the tax (Petroma, Zipvit, Geissel).

(7) That is not to say that evidence of payment of the tax is necessarily required before the right to deduct can be exercised; nor can it be denied

simply because the transactions are connected to fraud in circumstances where the taxable person did not and could not know of the connection to fraud (Kittel). But it may be appropriate to require evidence of proper accounting for the charge to tax before a discretion in favour of the taxpayer can be exercised (Zipvit).

The judges went on to discuss the application of these principles to the arguments put forward by the parties. They concluded that the precedents did not support the company's "broad proposition" that the right to deduct can be exercised provided only that evidence of the substantive right is adduced. The absence of the VRN and customer name were not mere technical failures on the invoice, but significant matters that increased the risk of fraud.

The UT did accept that the FTT had been wrong to place the emphasis it did on the fact that the supplier had not paid the VAT to HMRC. The VAT invoice enabled HMRC to monitor the payment of the tax; the question of whether the tax had actually been paid was a subsidiary issue to the validity of the invoice itself.

Nevertheless, the UT fully endorsed the overall conclusions of the FTT on the European law issue. HMRC were entitled to deny a deduction on the basis of invalid invoices; the company could only enjoy a deduction in those circumstances if HMRC exercised discretion in the company's favour.

The discussion of the discretion issue is much briefer. The company argued that the words of reg.29 only require "documentary evidence of the charge to VAT" – that is, evidence that there has been a taxable transaction. The judges disagreed, relying heavily on the Court of Appeal's decision in *Zipvit*. In that case, the Supreme Court subsequently decided to refer questions to the CJEU (while that was still possible), but the UT declined to do so in this case.

The key point was that the alternative evidence could not make good the flaws in the VAT invoices, which were necessary for HMRC properly to monitor the payment of the tax. The absence of VRNs meant that HMRC could not track the supplier before it defaulted. The points that the company argued were irrelevant, were all significant to the exercise of discretion. There was no error of law in the FTT's reasoning.

The appeal was dismissed.

Upper Tribunal: *Tower Bridge GP Ltd v HMRC*

6. ADMINISTRATION AND PENALTIES

6.1 Group registration

6.1.1 *Skandia* applied in reverse

A Danish bank was established in Denmark, where it had registered as a VAT group with subsidiaries in the country. The holding company also had a branch in Sweden, which was not part of a VAT group there. The holding company provided software to the branch, which contributed to the cost of that software.

Following the *Skandia* decision (Case C-7/13), the Swedish branch requested a ruling from the Swedish authorities as to whether a reverse charge was due on the recharge of the software costs. The ruling was that a charge was due; the company appealed, and questions were referred to the CJEU.

The company argued that the situation was different from *Skandia*, because that concerned a Swedish branch that was grouped with Swedish subsidiaries, and a recharge from a group company in America. In the present case, the Swedish branch was not grouped with any other company. It was therefore argued that the principles of *FCE Bank* (Case C-201/04) should apply instead: there should be no reverse charge on transactions between a head office and a branch, because they were part of the same entity. There could therefore be no supply. The company also argued that the rule restricting VAT grouping to establishments within the territory (i.e. in this case Denmark) meant that the consequences of that grouping could not extend across borders.

The CJEU rejected these arguments. The logic of the *Skandia* decision applied exactly. Although art.11 PVD restricted membership of a VAT group to persons established within a single territory, nevertheless the consequence of grouping had to be followed through: in this case, the head office was deemed to be part of a different VATable entity, being the Danish VAT group. It was therefore no longer to be regarded as “the same entity” as its Swedish branch, and the transactions could not be ignored.

The CJEU also rejected an argument based on the principle of fiscal neutrality. The situation of a branch and a head office where there was no VAT grouping, and the situation where either the branch or the head office were members of a VAT group, were objectively different. There was therefore no reason for them to be taxed in the same way.

CJEU (Case C–812/19): *Danske Bank A/S, Danmark, Sverige Filial v Skatteverket*

6.2 Other registration rules

6.2.1 Registration thresholds

The VAT registration and deregistration thresholds, which were fixed at £85,000 and £83,000 until 31 March 2022, will now not change until 31 March 2024.

Budget Red Book 2.91

6.2.2 Agricultural Flat Rate Scheme

A farming partnership appealed against HMRC's refusal of admission to the Agricultural Flat Rate Scheme. The application had been made on 24 December 2018 and refused on 18 January 2019 on the basis that the firm would benefit by more than £3,000 under the scheme (the likely excess of Flat Rate Addition over input tax forgone). Its turnover would generate FRA of about £114,000, compared to input tax for the previous year of £71,165. At the time, the £3,000 limit was set down in SI 1995/2518 reg.204(d); there was no dispute that the refusal was in accordance with the UK law, but the firm appealed to the FTT on the basis that the UK law was ultra vires the PVD, as shown by the 2017 CJEU decision in *Shields*. The refusal would then breach the principle of fiscal neutrality, because the firm would be in a disadvantageous position compared to farmers such as the successful appellant in that case, as well as local competitors that it believed were being allowed to use the scheme.

Judge Rupert Jones considered the precedent case law in some detail before turning to the arguments. He noted that there was a crucial difference between Shields and the present appellant: Shields had been registered under the AFRS before its certification was cancelled "for the protection of the revenue"; that was a quite different situation from that of a farmer that had been using the normal rules of VAT for some years before an unsuccessful application to join it.

This made two differences. Shields was excluded from the scheme under a different regulation, which held that "the protection of the revenue" would apply where the farmer would "recover substantially more". The CJEU held that this was insufficiently precise for farmers to know with certainty whether they fell in or out of the category. By contrast, the regulation on refusing admission contained the precise figure, £3,000, which did not create the same uncertainty.

Secondly, the purpose of the AFRS was to reduce administrative burdens rather than to generate a financial benefit. There was no evidence that the appellant had any difficulties with the administration of the normal rules of VAT, given that it had been filing returns for many years.

The judge rejected HMRC's argument that finding reg.204(d) to be ultra vires would "open the floodgates" – he had to decide the question purely on the basis of the principles of Community law. He considered a range of arguments in some detail and concluded that the regulation was a lawful mechanism to effect the objective of art.296(1) and (2) PVD, that of administrative simplification of VAT arrangements for farmers. The regulation's purpose and consequence were to exclude farmers from the AFRS who were likely to have no administrative difficulty in operating the normal VAT scheme. Member States were entitled pursuant to

art.296(3) to set rules and conditions for certification to the AFRS and to apply those rules and conditions.

That disposed of the first ground of appeal, but the judge went on to make some further comments about the lawfulness of the regulation in giving effect to the exclusion of "certain categories of farmers". He did not have to come to any concluded view on this point given his early conclusion that reducing the financial benefit from operation of the AFRS was not the sole nor primary purpose and effect of reg.204(d).

The second ground of appeal failed for two reasons. First, the judge did not accept that *Shields* was a valid comparator for equal treatment, mainly for the reason set out above – it had been accepted onto the scheme and then removed, rather than being refused admission. Second, the CJEU had concluded that art.299 required a macroeconomic neutrality of the AFRS – the overall tax collected from flat-rate farmers should not be significantly impacted. That did not require individual farmers to be in a comparable position. The way in which the UK's rules operated was justified by the Directive's objectives to provide administrative simplification and offset the costs of VAT charged. The regulation was a lawful, reasonable and proportionate response to those objectives.

The appeal was dismissed.

First-Tier Tribunal (TC08004): *Messrs Harrison*

6.2.3 Updated Notice

HMRC have updated their Notice *Agricultural Flat Rate Scheme* to include new information on the entry and exit criteria. For entry into the AFRS: farmers must have an annual turnover for farming activities below £150,000, but can then remain in the scheme until their annual turnover is more than £230,000.

HMRC have also introduced new guidance on how the flat rate scheme interacts with sales to customers outside the UK and, for farmers in Northern Ireland, to the EU.

Farmers who are members of the scheme must tell HMRC when they no longer meet the eligibility criteria for the scheme and need to be deregistered. This must be done within 30 days of the certification anniversary when they become ineligible. This notification must be sent in writing to the VAT Registration Service.

Notice 700/46

6.2.4 Registration delays

The CIOT has shared an update from HMRC on VAT registration delays. HMRC are currently dealing with a high volume of VAT registration applications and are processing around 70% of these applications within 30 days. They are prioritising this work and expected to be processing 95% within 30 days by the end of March 2021.

HMRC are encouraging agents and traders to use the online VAT registration service wherever possible. It is generally quicker than applying by paper and can be considerably quicker if the application can be fully processed straightaway.

HMRC have also provided a list of common errors that can cause delays in VAT registration. They say:

"*When submitting your application please check the following to avoid common errors that cause delays:*

- Addresses provided on the application must match the business's principal place of business;
- Notification of a trade classification must match up with the work that the business itself carries out;
- The VAT liability of trading should be correctly identified;
- Invalid signatory for the application – e.g. for a corporate body it must be a director, company secretary or authorised signatory or an authorised agent;
- Invalid dates on the application – e.g. does the effective date of registration requested match up to the circumstances that have been outlined for requesting registration elsewhere in the application?;
- The bank account details provided must be in the name of the taxable person."

www.tax.org.uk/policy-technical/technical-news/vat-registration-delays

6.2.5 Compassionate circumstances?

An individual worked as a courier for DHL. The company registered him for VAT, enabling him to claim back input tax on his petrol and his franchise fees. Although he traded below the registration threshold, his only customer was a taxable person, so this was advantageous. It appears that DHL must have operated self-billing and may even have submitted his VAT returns.

When he left DHL in 2013, he became a driving instructor, still trading below the registration threshold. He did not cancel his registration, and he did not charge VAT to his customers. He went on claiming VAT on his petrol costs, and HMRC continued to repay it until 2018 when he had a control visit. HMRC then issued assessments covering periods from 07/14 to 01/18 totalling £20,021.

By the time the appeal came before Judge Anne Redston in December 2020, the taxpayer was seriously ill: he was on daily dialysis for chronic kidney disease, he had lost the use of one of his legs, he was no longer able to work, and he had been in hospital for two months with Covid. His mental health was obviously affected by the stress of the proceedings.

The judge noted that he paid franchise fees to driving schools which would be VATable; these were paid by direct debit from his bank statements, which had been provided to HMRC. She decided to set aside the assessments for the periods from 07/14 to 04/16 on the basis that HMRC had not apparently exercised their discretion to consider whether there was alternative evidence to support input tax deduction. HMRC would be in time to reissue assessments after considering the alternative evidence; the judge said that she had no power to tell them how to exercise their discretion, but she drew their attention to all the circumstances and clearly hoped that they would not attempt to do so.

HMRC had accepted alternative evidence for the later periods, so there was no reason for the judge to displace the assessments for 07/16 to 04/17, which totalled £3,408. The appeal was allowed in part.

First-Tier Tribunal (TC07988): *Harry Edebiri T/A Tt Trading*

6.2.6 Appealing the reasons for a favourable decision

A self-employed gas engineer exceeded the registration threshold at the end of June 2015. He did not apply for exception from registration under VATA 1994 Sch.1 para.1(3) until January 2018. HMRC initially refused this application on the grounds that they were not convinced that his taxable supplies for the 12 months starting in July 2015 would be below the deregistration threshold; however, his appeal to the FTT was allowed in May 2019 on the grounds that HMRC had taken irrelevant matters into account in coming to the decision. The result was that HMRC were required to make a new decision.

They did so, and once again refused the application for exception by a decision of 24 May 2019. The taxpayer appealed the second decision, and ADR followed. In January 2020, HMRC accepted that the wording of the May 2019 letter gave the inference that HMRC had considered information arising after the breach of the threshold, which they should not have done. They acknowledged the error and agreed to grant the appellant exception from registration with effect from 1 August 2015.

The trader's representative was not satisfied, and insisted that HMRC should remake the decision on the basis that his client was truly eligible for exception. As a result, there was a further ADR meeting in February 2020, and HMRC issued a third decision, accepting the request to be exempt from registration under para.1(3).

Nevertheless, the trader did not withdraw the appeal against the May 2019 decision. HMRC applied for strike-out on the basis that the decision appealed against had been withdrawn, so the Tribunal had no jurisdiction to hear an appeal against it. Judge Michael Connell conducted an online video hearing on 7 October 2020 and agreed with the application. The decision records that the representative was "present" on the call, but does not record any contribution that he made, so it is not clear why he continued to want to argue the point.

First-Tier Tribunal (TC07967): *Robert Patten*

6.3 Payments and returns

6.3.1 Deferral and errors

HMRC have updated their guidance on the deferral of VAT from the period March to June 2020. There is a new section on correcting errors relating to the deferred periods. This should be done in the normal way, by sending Form 652 to the error correction team; the taxpayer should then wait until HMRC have processed the error correction and issued a statement of account confirming the balance or an assessment, before contacting the Covid-19 helpline to include extra payments arising from the error correction in their deferred VAT balance.

New details of the instalment payment option were also added in early February. This was opened from 23 February and will close on 21 June. The guidance states that:

If you're on the VAT Annual Accounting Scheme or the VAT Payment on Account Scheme, you'll be invited to join the new payment scheme later in March 2021.

The new scheme lets you:

- pay your deferred VAT in equal instalments, interest free
- choose the number of instalments, from 2 to 11 (depending on when you join)

To use the online service, you must:

- join the scheme yourself, your agent cannot do this for you
- still have deferred VAT to pay
- be up to date with your VAT returns
- join by 21 June 2021
- pay the first instalment when you join
- pay your instalments by Direct Debit (if want to use the scheme but cannot pay by Direct Debit, there's an alternative entry route for you)

If you join the scheme, you can still have a Time to Pay arrangement for other HMRC debts and outstanding tax.

Instalment options available to you

The month you decide to join the scheme will determine the maximum number of instalments that are available to you. If you join the scheme in March, you'll be able to pay your deferred VAT in 11 instalments or fewer.

The table below sets out the monthly joining deadlines (to allow for Direct Debit processing) and the corresponding number of maximum instalments (including the first payment):

If you join by:	Number of instalments available to you:
19 March 2021	11
21 April 2021	10

If you join by:	Number of instalments available to you:
19 May 2021	9
21 June 2021	8

Before you join the scheme

Before joining, you must:

- create your own Government Gateway account (if you do not already have one)
- submit any outstanding VAT returns from the last 4 years – otherwise you'll not be able to join the scheme
- correct errors on your VAT returns as soon as possible
- make sure you know how much you owe, including the amount you originally deferred and how much you may have already paid

If you cannot use the online service

There may be circumstances where you cannot use the online service, for example if you:

- do not have a UK bank account
- cannot pay by Direct Debit
- have dual signatories on your account

If you want to join the new payment scheme, but cannot use the online service, contact the COVID-19 helpline when the scheme opens on Telephone: 0800 024 1222. An adviser will help you join.

www.gov.uk/guidance/deferral-of-vat-payments-due-to-coronavirus-covid-19; *Budget Red Book 2.45*

6.4 Repayment claims

6.4.1 Taxi complications

A company was registered for VAT on 1 March 2011. It provided services to three other companies comprising car rental, telephony and fuel; they operated taxi services. It accounted for output tax on these supplies. Subsequently it was involved in a dispute with HMRC in which HMRC argued that it was providing taxi services as a principal. The company eventually accepted that, but reclaimed the output tax charged to the other companies, claiming that HMRC's own argument meant that they were effectively a VAT group. Credit notes were issued to the other companies, but HMRC refused the s.80 claim.

There had been an earlier appeal against an assessment on the service company for output tax on all the supplies made by the three taxi companies, none of which was registered for VAT. The judge noted the apparent inconsistency between the reasons given for upholding these two decisions on review:

The two decisions by HMRC appear contradictory in that it concludes that, on the one hand, all of the turnover of the Fife Companies from the provision of taxi services was in fact attributable to CTS, which provided these services as a principal, whilst, on the other hand, concluding that CTS supplied cars, fuel and telephony to the Fife Companies. It is clear from the submission of the parties that the cars, fuel and telephony were only provided to the Fife Companies so as to enable the Fife Companies to provide taxi services. If CTS were providing those taxi services itself as principal, then it is difficult to accept that it was providing the cars, fuel and telephony with which the taxi services were provided to the Fife Companies. The effect would be that the Fife Companies bore most of the expense of providing the taxi services but received no income for this activity.

Judge Peter Hinchcliffe noted that the parties were agreed that CTS acted as principal in providing taxi services. It was therefore logically impossible for it to have separately supplied services to the taxi companies as their agent. Although it was not in accordance with the position advanced by either of the parties, he concluded that no services had been supplied, and output tax therefore could not have been due. Although HMRC claimed that the error correction notice was not in the right format to validate a claim, in his view it was sufficient. It identified periods of six months rather than the three month return periods, but it was easy to identify the return periods to which the claim related.

The appeal was allowed.

First-Tier Tribunal (TC08030): *Cowdenbeath Taxi Services Ltd*

6.5 Timing issues

Nothing to report.

6.6 Records

Nothing to report.

6.7 Assessments

Nothing to report.

6.8 Penalties and appeals

6.8.1 Reform of late payment and filing penalties

The Budget included the announcement that the penalty regimes for VAT and income tax self-assessment (ITSA) will be reformed to make them fairer and more consistent. The new late submission regime will be points-based, and a financial penalty will only be issued when the relevant threshold is reached. The new late payment regime will introduce penalties proportionate to the amount of tax owed and how late the tax

due is. The government will also introduce a new approach to interest charges and repayment interest to align VAT with other tax regimes. These reforms will come into effect for VAT taxpayers from periods starting on or after 1 April 2022; for taxpayers in ITSA with business or property income over £10,000 per year, from accounting periods beginning on or after 6 April 2023; and for all other taxpayers in ITSA, from accounting periods beginning on or after 6 April 2024.

Under the new system for late filing, when a taxpayer misses a submission deadline they will "incur a point". Points accrue separately for VAT and for ITSA. A taxpayer becomes liable to a fixed penalty of £200 upon reaching the points threshold. The points threshold depends on the taxpayer's submission frequency:

- annual returns: 2 points;
- quarterly returns: 4 points;
- monthly returns: 5 points.

Penalty points accrued will automatically expire after 24 months provided the taxpayer remains below the threshold. After the threshold has been reached, all points will expire after the taxpayer has met their return obligations for a set period of time based on their submission frequency:

- annual returns: 24 months;
- quarterly returns: 12 months;
- monthly returns: 6 months.

If the taxpayer continues to miss deadlines after they have reached the points threshold and have been issued with a penalty, they will become liable for a further fixed rate penalty for each additional missed obligation. A taxpayer will not be liable to a point or penalty if they had a reasonable excuse for not submitting on time and will have a right of appeal against both points and penalties.

Under the new system for late payment, there will be no penalty at all if the taxpayer pays the tax late but within 15 days of the due date. The first penalty will be set at 2% of the outstanding amount if payment is made between 16 days and 30 days after the due date. It will be set at 4% of the outstanding amount if there is tax left unpaid 30 days after the due date. A second late payment penalty is then chargeable at 4% per annum, calculated on a daily basis on the total unpaid tax from day 31.

To avoid or reduce penalties, the taxpayer can approach HMRC to agree a Time to Pay Arrangement.

At the same time, the VAT late payment interest rules will change, and will be similar to those that already apply for ITSA. When an amount is not paid by the due date, late payment interest will be charged from the due date to the date the payment is received. Late payment interest will apply in relation to VAT returns, VAT amendments and assessments and VAT payments on account. HMRC will normally pay repayment interest either from the last day the payment was due to be received or the day it was received, whichever is later, until the date the repayment to the taxpayer is authorised or offset.

The replacement of default surcharge with daily interest for payments up to 15 days late will presumably remove most of the appeals based on the unfairness of the surcharge.

Budget Red Book 2.95; FB 2021 clauses 112 – 113, 116; Sch.23, Sch.25

HMRC have added guidance on how the penalty points system will affect VAT groups:

Where a VAT group has incurred penalty points and the representative member of that group is replaced, the new member will be treated as having the same number of penalty points as the previous member.

Where a VAT group has incurred penalty points and a new group member joins, the penalty points for that group will continue unchanged.

Where a group member leaves a VAT group which has incurred penalty points and registers as a separate taxable person with a new VAT registration number, they will start with zero points. The previously incurred penalty points will remain with the original VAT group.

Where a new VAT group is formed, there will be a new taxable person with a new VAT registration number and any penalty points previously incurred by group members will not be transferred to the new group.

www.gov.uk/government/publications/penalties-for-late-submission/penalties-for-late-submission

6.8.2 Default surcharge

A company appealed against a 10% surcharge of £829 for its 09/19 return period. It had entered the surcharge regime after the 12/18 period; the surcharges at 2% and 5% for the next two periods were both below £400, so they were not collected. The payment for 09/19 was 3 days late.

The company claimed that it had not received any correspondence about late payments until that charging the penalty. The payment for 09/19 was late because of computer problems that meant it had no access to online banking for a period; previous late payments were due to illness.

The judge did not find it credible that a succession of documents would have failed to arrive at the trader's address which, it was agreed, had been correctly recorded on HMRC's system. A claimed belief that "minor delays were acceptable" was not objectively reasonable.

There was no evidence to show that the trader had attempted to make the payment on time, even if it was accepted that there were computer problems around the due date for that payment. There were discrepancies in the trader's appeal documents about the date on which it was claimed that payment had been attempted; the problems certainly existed on 2 November, but the original appeal letter referred to payment being attempted on 5 November. The judge considered that would already have been late, if payment by bank transfer took 3 days.

The trader had not shown a reasonable excuse, and the appeal was dismissed.

First-Tier Tribunal (TC07975): *St James Marketing Ltd*

A barrister appealed against income tax late payment surcharges and default surcharges arising between 2007 and 2017, amounting in total to

£37,568. There were 21 default surcharges totalling £13,209. His main argument was that the reason for his late payments was the slowness with which government agencies paid him his fees; he contended that it was unfair that one branch of government should penalise him for defaults that arose because of the conduct of another branch.

Not surprisingly, given the appellant, the case was argued in considerable detail and with considerable force. The financial difficulties caused by the slow payment are set out in detail in the decision, and precedents of *Steptoe*, *Perrin* and *Raggatt* (an income tax surcharge case) considered. The barrister's tax adviser bore witness to difficulties in resolving the tax position with HMRC, adding to the delay; it was argued that HMRC had not allocated payments correctly, and that had added to the problem.

After an unusually lengthy consideration of the facts and arguments (the decision runs to 228 paragraphs), Judge Rupert Jones concluded that the surcharges had been properly issued on the facts. The only question was whether the appellant had established a reasonable excuse. There was a difference between excuses for income tax and VAT, as set out by the Upper Tribunal in *Raggatt*:

We agree that a prudent trader accounting for VAT under the cash accounting scheme would earmark amounts he or she receives in respect of VAT as payable to HMRC and if he fails to do so we would agree that he or she would normally struggle to establish a reasonable excuse defence on the grounds of delays in payment by customers which led to an insufficiency of funds. But that is very different to the present case. Mr Raggatt did not account for income tax on a cash basis. In common with many self-employed individuals, he paid tax by reference to profits shown in his accounts for the period after allowing for deductible expenses. His tax payments in respect of a particular item of income could fall due some time after he had actually received the amount in question or, in some cases, before he had received it.

The judge went through the history in detail, and expressed sympathy for the financial difficulties suffered and commendation for the efforts made by the trader to resolve them. However, he had not made out an objectively reasonable excuse for any of the periods, apart from one income tax late payment penalty – the first he suffered, when his aged debtors hit a peak. Apart from that single surcharge, the appeal was dismissed.

First-Tier Tribunal (TC08014): *Robin St John Sellers*

6.8.3 Late registration penalty

HMRC decided that the owner of a small garage should have been registered between 1 September 2013 and 1 February 2018. They assessed him for VAT of £60,813 (which he did not appeal) and a penalty for non-deliberate failure to notify of £17,332 (reduced to that figure after the assessment was also reduced). He appealed against the penalty.

The Tribunal had no jurisdiction to consider an appeal against the VAT, because the trader had not filed a return. However, it did consider whether the trader was liable to be registered for the period covered by the assessment, whether HMRC had correctly raised and notified the penalty, and whether the trader had a reasonable excuse for failure to notify. In

effect, the excuse offered by the trader was that he had not traded above the threshold.

The trader had been in business for some 12 years when he was visited by HMRC officers in August 2017. They noted his ownership of several properties, and although he had explanations for the source of the funds to buy them (loans, inheritance), they considered that there was evidence of suppression of cash takings in a number of discrepancies and apparently missing invoices in the records. The income tax returns also suggested that he had exceeded the threshold in 2014/15 and 2016/17 on declared income.

The judge considered schedules and analyses prepared by the HMRC officer and by the taxpayer's accountant, and decided that the accountant's figures were more likely to be accurate. There was a close match between the accountant's reconciliations and the self-assessment returns, with any differences being de minimis; "it was not safe to rely on HMRC's calculations". The logic for applying a 30% uplift to declared turnover was flawed, because it was based on the proportion of cash income in 2012/13: a credit card machine had been installed in April 2013, and the trader said that afterwards he preferred that method of payment. The accountant also produced a business model of the garage as a "sanity check", showing that HMRC's figures were unreasonable.

After examining a great deal of information and analysis in a hearing that lasted two days (including an interruption for a fire alarm at HMRC's premises), the judge concluded that the trader should have been registered for VAT during 2014/15, even on the accountant's figures, and a penalty for that period was therefore correct in principle. The penalties for other periods were discharged.

The decision does not direct HMRC to reduce the assessment to the VAT, but presumably the comments about the reliability of their figures should lead to such a reduction. It may be that the accountant will now submit a VAT return using the approved figures, for the period during which the judge considered that the trader should have been registered.

First-Tier Tribunal (TC08001): *Paul Baldwin T/A Baldwin Motor Services*

6.8.4 Costs

An individual who was a director of a company that ran an Indian restaurant was issued with personal liability notices for over £500,000 in relation to corporation tax and VAT inaccuracy penalties based on "concealed deliberate inaccuracies" in the company's returns. The individual appealed to the Tribunal on 6 July 2018; HMRC notified the Tribunal on 11 March 2020 that they were no longer defending the PLNs and withdrew from the proceedings. The appellant applied for costs of £12,638.

HMRC had been persuaded to withdraw on the basis of new evidence that the individual was rarely present in the restaurant, and other people had access to the tills. So although the company might have deliberately understated its VAT, it would be hard to show to the necessary standard that this was due to the dishonesty of that particular individual.

His solicitors argued for costs on the basis that his initial witness statement must have disclosed significant weaknesses in HMRC's case,

and was accompanied by a "statement of truth". According to them, it was unreasonable conduct for HMRC not to have accepted that it was true. The new statements by other witnesses, proving that he was elsewhere for most of the time, "did not provide new information" but rather only represented "a marginal shift in the weight of the evidence".

HMRC disagreed on the importance of the new information, and argued that it was wholly reasonable to test a witness statement under cross-examination when the basis of the appeal was an allegation of the witness's dishonesty. The witness had made statements at a meeting that were contradicted by his witness statement.

Judge Anne Redston considered the principles from the Upper Tribunal decision in *Tarafdar*, which required her to take into account:

(1) What was the reason for the withdrawal of that party from the appeal?

(2) Having regard to that reason, could that party have withdrawn at an earlier stage in the proceedings?

(3) Was it unreasonable for that party not to have withdrawn at an earlier stage?

The judge agreed with HMRC on all points. She had no hesitation in accepting the need to cross-examine the witness in a case where dishonesty is alleged, and she agreed that the new witness statements were a material alteration in the evidence available. She rejected a suggestion by the solicitors that HMRC should have withdrawn simply because the solicitors said that new evidence would be provided.

Had she awarded costs, she would have found that the applicant had not provided a schedule of those costs as required by the Tribunals Rules. However, as she did not award costs, the point was academic. The application was dismissed.

First-Tier Tribunal (TC07960): *Davey Parekh*

6.8.5 Strike-out

HMRC assessed a trader on the basis that it did not have sufficient evidence to support zero-rating of despatches to the Republic of Ireland. In a subsequent decision, they also assessed to deny input tax of £214,386 on *Kittel* grounds. The trader appealed both decisions on 22 February 2017, and in accordance with directions issued by the Tribunal, on 10 August 2018 HMRC filed their evidence on 10 August 2018, including 4 witness statements and about 890 pages of supporting exhibits. The appellant filed 3 witness statements comprising 17 pages of evidence, together with some bank statements.

On 17 July 2019, HMRC applied to have the appeal against the *Kittel* decision struck out on the grounds that the evidence did not meet HMRC's case and there was therefore no reasonable prospect of success. There was no challenge to the tax loss, the existence of fraud or the connection of the transactions to that fraudulent tax loss. According to HMRC, there was no challenge to the objective factors that they alleged indicated knowledge or means of knowledge.

Judge Guy Brannan heard the application remotely in December 2020. He reviewed the procedural history of the dispute, noting that it appeared

that HMRC had not complied with some of the Tribunal's directions. He then considered the nature of each party's case and the evidence that had been presented, as well as arguments that included the taxpayer's protest that the application invited the FTT to conduct a "mini-trial" of the case that was inappropriate.

The judge agreed. The key question would be "knowledge or means of knowledge", which it was for HMRC to prove. That required the FTT carefully to weigh all the evidence and consider all the relevant circumstances. It was therefore unlikely to be suitable in most cases to be determined in summary proceedings and without the benefit of hearing all the evidence at a full hearing. He therefore refused the application, but he also refused an application made during the hearing by the appellant to adduce further evidence. He commented that FTT directions should be complied with in full: if the appellant had further evidence to adduce, it should have done so in 2018.

First-Tier Tribunal (TC08012): *Tasca Tankers Ltd*

6.8.6 Application for barring

A sole trader sought a barring order in an appeal about disallowance of £8,000 of input tax in his 12/16 return period. The dispute had been running since May 2017, with unsuccessful ADR in the second half of that year; a statement of case sent by HMRC to the Tribunal in November 2017 was "corrupted", and replaced by a legible version in January 2018. An application was made to bar HMRC from the proceedings on 11 February 2018. This led to a case management hearing on 23 July 2018 at which the application was refused, and various directions were made requiring HMRC to submit a corrected statement of case and other documents during August 2018. HMRC complied, but the trader requested a number of further documents, which HMRC claimed were privileged. Further proceedings followed, and after some delay the documents were disclosed in December 2018. The trader made another application for the appeal to be summarily decided in his favour; on 16 April 2019 the Tribunal directed that there should be an oral hearing to consider this.

The hearing finally took place in January 2020, where Judge Zachary Citron considered detailed arguments put forward by the taxpayer. HMRC's representative responded to all the arguments, contending that HMRC had complied with Tribunal directions apart from a misunderstanding about the privilege issue, and on taking further advice had corrected that in a way that meant the Tribunal would not be prevented from dealing with the matter fairly.

The judge went through the points raised and dismissed the application. Although the delay caused by the officer's misunderstanding was unfortunate and "below the standards expected of HMRC", it was not deliberate and was corrected quickly once the better advice was available. The various rules sections of Tribunals Rule 8 were not engaged, and the judge said that further case management directions should be issued to advance the matter to a substantive hearing.

First-Tier Tribunal (TC07978): *Daniel Bussau*

6.8.7 Amending grounds

A company applied to the Tribunal for permission to amend its grounds of appeal. The subject matter is clearly complex (the hearing bundle ran to 517 pages) and concerns the exemption for financial transactions: the requested amendment is simply the insertion of the words "In particular, Silverdoor does not acquire, transmit or retransmit credit card data from the Customer or authorisation codes from the merchant acquirer or card issuer." The appeal is against an assessment for VAT of £109,305 and a penalty of £29,890.

HMRC objected to the amendment on the grounds that it did not clarify the company's argument, was simply a blanket denial that the company did what HMRC's case was based on, and contradicted a witness statement on which HMRC had based their statement of case in January 2020.

The substantive appeal is against assessments raised following the CJEU decision in *Bookit*, and relates to periods from 01/15 to 10/18. The company is engaged in parallel judicial review proceedings, arguing that it was simply following the policy set out in R&C Brief 18/06. Those proceedings have been stayed pending the outcome of the technical appeal to the FTT. The finance director's witness statements for the two cases appear to differ in certain key respects.

Judge Philip Gillett described the background to the dispute, but noted that it was not appropriate to make any findings of fact in such a procedural hearing. It was normal to allow amendments to grounds of appeal unless there was some prejudice to the other side; HMRC accepted that this was not the case, but proposed directions to ensure that the arguments would be properly clarified by the company going forward. The judge duly made a series of directions about filing amended grounds, allowing HMRC to revise their statement of case, and disclosure of evidence on which each party will rely. The hearing window is set for 1 September 2021 to 1 April 2022.

First-Tier Tribunal (TC07984): *Silverdoor Ltd*

6.8.8 Procedure

A company appealed against refusal of a VAT repayment claim on *Kittel* grounds. The Tribunal issued "*Fairford* directions", which are designed to require a MTIC appellant to identify the matters that it disputes, with the objective of identifying and narrowing the scope of cross-examination required at the final hearing. The validity and scope of such directions were refined by the Upper Tribunal in the 2019 case of *Elbrook Cash & Carry Ltd*. The UT considered that such directions should be judged in all the circumstances of a particular MTIC trial, including, for example, the number and scope of witness statements to which the directions would apply and the likelihood that compliance with the directions would have a material impact on the efficiency of the proceedings. Second, in relation to HMRC witnesses dealing only with the issue of VAT loss, where the appellant does not advance a positive case and does not serve evidence challenging the evidence of the relevant witnesses, the form of direction that may be given in appropriate cases is one requiring the appellant to identify *the passages* in the relevant witness statements *which it does not*

accept. If the appellant responded that it did not accept any of a statement, but produced no proper cross-examination at the hearing, a costs sanction would be appropriate; if no such passages were identified, it would not be necessary to call the witness to the hearing.

In the present case, the appellant responded to the *Fairford* directions, but followed with a list of 15 questions to HMRC, which HMRC refused to answer. The appellant then applied for a direction requiring HMRC to answer the questions. It claimed that they were simply a "mirror" of the *Fairford* directions, requiring HMRC to set out their case in advance, and allowing the appellant to be confident that it had understood the basis of HMRC's case.

Judge Anne Redston considered the questions and the arguments of each party. She did not agree that the questions were merely a mirror of *Fairford*: the purpose of the directions was, as set out in *Elbrook*, to limit the scope of cross-examination so that HMRC witnesses did not have to be needlessly summoned to the hearing. It was not intended to force the appellant to make a detailed advance disclosure of its position, but simply to increase the efficiency of case management.

The questions went beyond what was required for "laying cards face up on the table"; nor was it necessary for the parties to agree facts in advance, where those facts were central to the dispute between the parties. The judge dismissed the application, and issued further directions on case management going forward.

First-Tier Tribunal (TC08015): *Everyday Wholesale Ltd*

6.8.9 Application to join the party

In TC07879, the FTT allowed an application by applicants in the HSBC corporate group for certain issues to be determined by a preliminary hearing, but that such a hearing should be held by the Upper Tribunal, because an appeal was inevitable whichever side might win in the FTT. The dispute concerns a decision of HMRC to remove certain subsidiaries from a VAT group.

Following this decision, another bank applied to the Tribunal to be added to the hearing as interested parties, and to be permitted to make written and oral submissions. Submissions were invited from HMRC and HSBC; HMRC argued that the UT had no jurisdiction to make such an order. Following further submissions from all the parties, Judge Thomas Scott issued a decision.

He noted that the question of jurisdiction turned on the interpretation of detailed provisions of the Tribunals Rules; detailed arguments had been submitted by all the parties, but there were no precedents that dealt directly with the issue. He therefore had to determine the question as a matter of legal construction, based on the normal principles.

The rule in question was 1(3)(a), which defined "interested party" (among other things) as "a person who is directly affected by the outcome sought in judicial review proceedings, and has been named as an interested party under rule 28 or 29 (judicial review), or has been substituted or added as an interested party under rule 9 (addition, substitution and removal of parties)." The judge did not agree with the applicants that the "or"

created a freestanding power to add anyone at all as an interested party. He agreed with HMRC that he did not have the jurisdiction to do so.

In case he was wrong on that, he also considered whether he would have granted the application on its merits, if he did have jurisdiction. The point of the application was that Barclays have appeals before the FTT on similar issues, but with (in their view) significantly different factual matrices. They are concerned that a decision of the UT on the preliminary issues in the *HSBC* case will create a binding precedent for the FTT in their disputes, and they consider that they should be allowed to make submissions to the UT in order to be able to influence a decision that will affect them.

The judge examined the arguments raised by the applicant, and also by HMRC and HSBC, both of whom opposed the application. In his view, the applicant's emphasis on the different factual matrix suggested that it could argue its case in the FTT on its own merits; the need to be involved in a hearing about a different situation was not made out. It would also not further the overriding objective of the Tribunal to grant the application, because it would complicate the timetable for a hearing whose case management was already well advanced (even though the hearing is not scheduled until October 2021).

After considering further arguments in which Barclays suggested that the UT should "of its own motion" allow the submission of documents, information and evidence, and noting that a great deal of Barclays' submission appeared to involve criticism of the process by which the *HSBC* hearing had been transferred to the UT, the judge refused the application.

Upper Tribunal: *HSBC Electronic Data Processing (Guangdong) Ltd and others v HMRC*

6.9 Other administration issues

6.9.1 Budget and Finance Bill

The Chancellor delivered the Budget on 3 March. The main VAT measures are covered in the following sections of these notes:

- extension of reduced rate for hospitality etc. – 2.5.1;
- freezing the registration thresholds until 31 March 2024 – 6.2.1;
- confirmation of scheme for payment of deferred VAT – 6.3.1;
- reform of interest and late filing and payment penalties from April 2022 – 6.8.1.

In an article in *Taxation*, Andrew Hubbard considers the impact of the March Budget.

Taxation, 11 March 2021

The Finance (No. 2) Bill 2021 was published on 11 March and given its first reading.

www.gov.uk/government/collections/finance-bill-2021

6.9.2 Tax Day 23 March 2021

The Treasury and HMRC published a number of consultations on what was called "Tax Day"; the intention appeared to be to separate longer-term planning from the Budget. The matters relevant to VAT include:

- Notification of uncertain tax treatment by large businesses (second consultation, to run until 1 June 2021);
- Reform of partial exemption and the capital goods scheme (see 5.3);
- Raising standards in the tax advice market;
- The tax administration framework: supporting a 21st century tax system;
- Clamping down on promoters of tax avoidance;
- Exploring the costs and benefits of Making Tax Digital for VAT experienced by smaller businesses (see 6.6).

www.gov.uk/government/collections/tax-policies-and-consultations-spring-2021

6.9.3 VAT and the Sharing Economy

The CIOT has published its response to the HM Treasury call for evidence on VAT and the sharing economy which was open until 3 March 2021. In summary, the main points of the CIOT response include:

- the CIOT recommends that a Working Group be set up to include representatives from the relevant governmental departments and stakeholders from industry, practice, and representative bodies, so there is regular engagement throughout the consultation process;
- the CIOT would like to see the changes in the VAT rules that are implemented for the protection of the revenue or diminished VAT receipts to be measured and targeted for such a diverse sector, so that intended taxpayers are captured rather than creating unintended consequences that will impact existing compliant business models;
- the CIOT would like this consultation to include a review of the agency and principal guidance published on gov.uk to increase certainty, simplicity, and clarity for taxpayers. If there is any interaction with taxes other than VAT, this should also be highlighted.

www.tax.org.uk/policy-technical/submissions/vat-and-sharing-economy

6.9.4 Costs order included VAT

Following litigation, the Court of Appeal ordered the Secretary of State to pay the appellant's costs, subject to detailed assessment and with a cap of £35,000 at each of two levels of appeal. The appellant argued that it should be paid VAT on top of the £70,000 total cap. The Court of Appeal considered various principles of law and concluded that the statement of an absolute amount, without qualification, should be taken as VAT-inclusive. The application for the addition of VAT was refused.

Court of Appeal: *R (on the application of Friends of the Earth Ltd) v Secretary of State for Transport*

6.9.5 Promoters of tax avoidance

HMRC carried out a consultation entitled "Tackling promoters of tax avoidance" which closed on 15 September 2020. The summary of responses was published on 3 March. HMRC have assessed the responses as broadly supportive of taking strong action against the promoters of tax avoidance schemes; when they have considered the feedback in detail, legislation on the basis of the proposals (as amended following the outcome of the consultation) is in clause 117 and Sch.29 Finance Bill 2021.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment

6.9.6 Proceeds of crime

A company was struck off the register, which would in the circumstances lead to its assets (a bank account containing over £500,000) being forfeit to the Treasury. The National Crime Agency had commenced proceedings against the company, claiming the money as the proceeds of crime or money laundering, and continued its claim against the Treasury Solicitor in place of the company.

The court accepted that the activities of the company and its group had been dishonest and amounted to fraud, so the money in its bank account was recoverable by the Agency as the proceeds of unlawful conduct.

High Court: *National Crime Agency v The Solicitor for the Affairs of Her Majesty's Treasury*

6.9.7 Banning orders

The sole director of an administration services company has been banned from acting as a director for ten years for failing to carry out due diligence and as a result claiming input tax on supplies that she ought to have known were connected with VAT evasion. She had been warned in 2017 that she needed to carry out checks on suppliers, but failed to do so, ending up owing £373,000 in VAT. The name of the company (CIS UK PAY Ltd) suggests that it is involved in the construction industry, where the new domestic reverse charge is supposed to help reduce the risk of evasion.

www.gov.uk/government/news/administration-services-firm-boss-banned-for-vat-fraud

The Insolvency Service has banned an individual from acting as a director for five years following the insolvent liquidation of his restaurant business owing more than £266,000 in various taxes. An investigation showed that he had understated the company's takings and submitted inaccurate returns.

www.gov.uk/government/news/restaurant-boss-banned-for-hiding-takings-to-avoid-tax

6.9.8 Environmental recommendations

The Parliamentary Environmental Audit Committee (EAC) has published a report on 17 February 2021 providing recommendations on how to "grow back better" post coronavirus (COVID-19), and guidance on how to create a "greener, healthier and more resilient" economy. These recommendations include VAT reductions, the use of recycled materials and repair services. The report says, in particular: "*The Government should use the latitude it enjoys following the UK's exit from the European Union to reduce rates of VAT on repair services and products containing reused or recycled materials to increase the circularity of the UK economy. The Government should also adopt a VAT reduction on home upgrades to incentivise installation of low-carbon domestic technologies and improve energy efficiency of homes.*" The EAC hoped that the Budget on 3 March would include some of these measures.

https://committees.parliament.uk/committee/62/environmental-audit-committee/news/139275/eac-calls-for-climate-and-nature-investment-to-be-prioritised-in-the-economic-recovery/