VAT UPDATE
APRIL 2023

Covering material from January – March 2023

Notes prepared by Mike Thexton MA FCA CTA (Fellow)

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VAT Update April 2023

Contents

1. INTRODUCTION ... 1
   - 1.1 Appeals pending ... 1
2. OUTPUTS ... 3
   - 2.1 Scope of VAT: linking supplies to consideration ... 3
   - 2.2 Disbursements ... 3
   - 2.3 Exemptions ... 4
   - 2.4 Zero-rating ... 4
   - 2.5 Lower rate ... 8
   - 2.6 Computational matters ... 15
   - 2.7 Discounts, rebates and gifts ... 18
   - 2.8 Compound and multiple ... 20
   - 2.9 Agency ... 22
   - 2.10 Second hand goods ... 26
   - 2.11 Charities and clubs ... 30
   - 2.12 Other supply problems ... 32
3. LAND AND PROPERTY ... 33
   - 3.1 Exemption ... 33
   - 3.2 Option to tax ... 33
   - 3.3 Developers and builders ... 33
   - 3.4 Input tax claims on land ... 36
   - 3.5 Other land problems ... 38
4. INTERNATIONAL SUPPLIES ... 40
   - 4.1 E-commerce ... 40
   - 4.2 Where is a supply of services? ... 40
   - 4.3 International supplies of goods ... 40
   - 4.4 European rules ... 42
   - 4.5 Foreign refund reclaims ... 50
5. INPUTS ... 57
   - 5.1 Economic activity ... 57
   - 5.2 Who receives the supply? ... 57
   - 5.3 Partial exemption ... 57
   - 5.4 Cars ... 57
   - 5.5 Business entertainment ... 60
   - 5.6 Non-business use of supplies ... 62
   - 5.7 Bad debt relief ... 62
   - 5.8 Other input tax problems ... 62
6. ADMINISTRATION AND PENALTIES ... 69
   - 6.1 Group registration ... 69
   - 6.2 Other registration rules ... 69
   - 6.3 Payments and returns ... 72
   - 6.4 Repayment claims ... 73
   - 6.5 Timing issues ... 75
   - 6.6 Records ... 80
   - 6.7 Assessments ... 80
   - 6.8 Penalties and appeals ... 80
   - 6.9 Other administration issues ... 81

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 latest update appeared on 10 March 2023.

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

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

- *Conservatory Roofing UK Ltd*: Upper Tribunal remitted case to FTT to consider further relevant information not taken into account when dismissing company's appeal.
- *Hippodrome Casino Ltd*: HMRC to appeal the FTT decision in the company's favour on partial exemption (listed for Upper Tribunal in October 2023).
- *Hotel La Tour Ltd*: HMRC have been granted permission to appeal the FTT decision in the company's favour on the deductibility of the incidental costs of selling a subsidiary (listed for Upper Tribunal in June 2023).
- *Innovative Bites Ltd*: HMRC have been granted permission to appeal the FTT decision in the company's favour to the Upper Tribunal.
- *Sintra Global Inc & Parul Malde*: HMRC have been granted leave to appeal to the Upper Tribunal against FTT's decision to allow appeals against various assessments and penalties relating to alleged inward diversion fraud.
- *Thorsteinn Gardarsson t/a Action Day A Islandi*: HMRC 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 (no longer on HMRC's list).

1.1.1 Decisions in this update

The following are cases mentioned on HMRC's list and covered in this update.

- *Gloucester Hospitals NHS Foundation Trust*: the UT allowed the Trust's judicial review application. HMRC are not seeking leave to appeal.
- *Gray & Farrar International LLP:* the Court of Appeal allowed HMRC's appeal on the basis that the trader was not supplying "consultancy services".
- *HBOS plc & Lloyds Banking Group plc*: the UT allowed the taxpayers' appeals in relation to interest on historic bad debt relief claims. HMRC are not seeking leave to appeal.
- *News Corp UK & Ireland Ltd*: the Supreme Court dismissed the company's appeal on the zero-rating of digital newspapers before May 2020.
- *The Prudential Assurance Company Ltd*::the UT allowed HMRC's appeal on the interaction of the time of supply and grouping rules.
- *Wm Morrison Supermarkets plc*: the company's appeal on the liability of cereal bars was allowed by the UT and remitted to the FTT for reconsideration.

1.1.2 Other points on appeals

The following note on the HMRC is relevant to this update but is not a new decision.

- *Mid-Ulster District Council*: HMRC now concluded this litigation and have issued Revenue & Customs Brief 3/2023 to set out their new policy on leisure facilities supplied by local authorities.

The following cases have not reached a published resolution, although they appeared to require a further decision when they were last in the update:

- *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.
- *Privin Corporation Ltd*: in 2015 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. Presumably this has now been settled and will no longer appear in this list.
- *Revive Corporation Ltd*: MTIC case remitted by the UT in November 2020 to the FTT for rehearing.

2. OUTPUTS

2.1 Scope of VAT: linking supplies to consideration

2.1.1 Uncertain consideration

A horse trainer operated a stable and contracted with owners to train their horses. The costs of maintenance, participation in competitions, transport, shoeing and veterinary care of the horses were borne by the owners, while the applicant in the main proceedings bore the costs linked to his own participation, as a rider, to competitions, namely transport, hotel and restaurant costs. When the contract was signed, the owner assigned half of all future winnings from competitions to the trainer.

The tax authority ruled that the share of winnings was VATable income and raised assessments. This was upheld by the German court and questions were referred to the CJEU.

The referring court had found that the appellant provided a single service comprising accommodation, training and the participation of the horses in competitions. He received in exchange from the owners, on the one hand, a reimbursement of the costs of maintenance, participation in competitions, transport, shoeing and veterinary care and, on the other hand, on the other hand, a participation, for half, in the gains resulting from the prizes obtained by the horses during competitions.

In *Bastova*, the CJEU had decided that winnings of horses in races could not constitute "consideration for a supply" and were therefore outside the scope (and did not justify input tax recovery). The question was whether the different arrangement in the present case, where the prize belonged to the owner of the horse and was paid to the trainer under a contract, was the same as that precedent. The referring court was not sure whether the *Bastova* judgment depended on the prize not being consideration, or the entry of the horse in the race not being a "service". In the present case, the service was not in doubt (involving the stabling and training) but the consideration was uncertain.

The CJ was bound by the findings of fact of the referring court that there was a single service. Although the amount of the remuneration for that service might vary according to the success or otherwise of individual horses in individual races, the contract provided the necessary legal link between what was supplied and what was paid for it. The share of prizes was VATable consideration.

CJEU (Case C-713/21): *AT v Finance X*

Lecture 1

2.1.2 Local authority leisure services

HMRC have published a new Brief following the FTT and UT decisions in *Chelmsford City Council*, *Midlothian Council* and *Mid-Ulster District Council*. HMRC had previously regarded supply of sporting facilities by local authorities as business activities that were either standard rated or, in appropriate circumstances, exempt (following the *Ealing Council* case). The councils in the recent appeals argued that they should be regarded as outside the scope of VAT, relying on their status as public bodies.

The Tribunals held in preliminary decisions that the services were provided under the special legal regime applicable to public authorities. It was still necessary for there to be no significant risk of distortion of competition, and this was left for further consideration (apart from in Northern Ireland, where the FTT was satisfied that there could be no distortion). HMRC have now concluded a detailed review of the leisure services sector, and have found that allowing local authorities to treat their supplies of leisure services as non-business would not significantly affect competition.

Where local authorities have previously regarded such activities as either standard rated or exempt, they may now revisit this position and apply the non-business treatment to their supplies of leisure services. They can also submit claims to HMRC.

Where a claim has already been submitted, the Brief states that they should review it and resubmit it with supporting evidence. This is “to reduce the delay in authorising repayments”. The Brief includes an e-mail address for the submission of claims.

Revenue & Customs Brief 3/2023

Lecture 2

2.2 Disbursements

Nothing to report.

2.3 Exemptions

2.3.1 Insurance business

A Portuguese insurance company, in the course of its business, purchased vehicle parts from written-off motor vehicles damaged in accidents involving its insurance customers and subsequently sold them to third parties, without accounting for VAT on those sales. Following an inspection of its 2007 accounts, the tax authority formed the view that these were taxable supplies of goods for consideration, and raised an assessment.

The company appealed, arguing that the exemption for “insurance transactions” applied (PVD art.135(1)(a)); or, in the alternative, that they were “transfers of goods which were used solely for an exempt activity, where those goods have not given rise to the right to deduction” and therefore exempt under a different heading (PVD art.136(a)). Because there was considerable debate about the correct application of these rules in academic circles in Portugal, the Portuguese court decided to refer questions to the CJEU.

The CJEU considered the meaning of “insurance transactions” and ruled, not surprisingly, that the sale of goods could not fall within the definition. The transactions in question were separate from the insurance policy in connection with which they arose, and were not subject to the same exemption. They were not so inseparably connected to the insurance policy that they had to be given the same treatment.

The second question related to the exemption for goods "used" in an exempt business and therefore not eligible for input tax deduction. In the present case, the car parts were not "used" for the insurance transaction, but rather were separately bought and sold, in an unaltered condition. That exemption therefore did not apply.

The referring court also asked whether the principle of fiscal neutrality could be used in such a case to reduce the VAT liability, given that it appeared that there would be output tax on the full selling price with no input tax deduction. The court ruled that the principle could not override the clear words of the law.

It is not clear whether the company might have succeeded in using the margin scheme for second-hand goods, which would at least have reduced the output tax liability. Cars bought for breaking up into spare parts were held to be within the scope of the second hand margin scheme in CJEU (Case C-471/15): *Sjelle Autogenbrug I/S v Skatteministeriet* (which was decided, of course, some years after the facts of this Portuguese case).

CJEU (Case C-42/22): *Generali Seguros SA v Autoridade Tributária e Aduaneira*

2.3.2 Fund management services

CIOT submitted a response to HMRC's consultation on the VAT treatment of fund management services. The consultation expresses the intention not to change the current VAT liability but to improve clarity and certainty, in particular in relation to the identification of special investment funds (SIFs).

The CIOT's response included the following main points:

CIOT welcomed the intention to embed the existing provisions from VATA 1994 Sch.9 Group 5 items 9 and 10 in any new legislation, as this provides certainty for affected taxpayers.

CIOT would like any terms in the proposed principles to be clearly defined. In particular, CIOT questions the inclusion of references to "Undertakings for Collective Investment in Transferable Securities", as this is defined by reference to EU law rather than UK law; and CIOT is concerned that the wording "the management of…" is critical to the application of the exemption, but the concept of "management" is not defined.

www.tax.org.uk/ref1065

The Budget Red Book included the statement that the government is considering the responses and continuing to discuss the proposals with interested stakeholders. The government will publish its response to the consultation in the coming months.

www.gov.uk/government/publications/spring-budget-2023 - Red Book 4.77

2.3.3 Closely related to education

A college claimed to have overpaid output tax from periods 07/11 to 04/15 on the basis that it had treated as VATable charges made to "customers" of the college's training facilities in catering, hairdressing

and the performing arts. In line with the decision in *Brockenhurst College*, the college claimed that these supplies were incidental to the education of the students on practical courses, and were therefore themselves exempt.

HMRC refused the claims on the basis of PVD art.134(b) – the purpose of the transactions was to obtain additional income for the body in question through transactions which are in direct competition with those of commercial enterprises subject to VAT. HMRC accepted in principle that the transactions satisfied the condition of art.134(a), in that they were essential for the training of the students.

The parties agreed that there were two basic issues for the Tribunal judge (Jonathan Cannan):

- whether the UK law had to be construed as importing the restriction in art.134(b), when the wording was not present in Sch.9;
- whether, as a matter of fact, the basic purpose of these activities fell within the exclusion in art.134(b).

There was a separate issue raised by HMRC: that, in their view, supplies to fully grant-funded students were outside the scope rather than exempt, and the "incidental" treatment could only apply if the education itself was exempt. The determination of that question was waiting for the Court of Appeal to consider a case that HMRC hoped would overturn the UT decision in *Colchester Institute Corporation*. The judge said he would consider the two questions above as preliminary issues, and the determination of the third issue would have to be taken into account later. He also noted that this was a lead appeal with a number of other claims dependent on it.

The judge set out a number of findings about how the restaurant and hairdressing salon operated. He then turned to the implication of art.134(b). He rejected a number of arguments put forward by the taxpayer's counsel and held that the *Marleasing* principle required the words to be read into the UK law.

Turning to the second question, the judge began by considering an argument from the taxpayer that the burden of proof should fall on HMRC, because it should not have to prove a negative – it should be for HMRC to demonstrate that the purpose of the transactions was to generate extra income. HMRC responded that the normal burden of proof should apply, and the taxpayer was in the best place to provide evidence about its purposes. The judge agreed with HMRC – it was for the appellant to show that the conditions of the *Brockenhurst* decision applied.

The reference in art.134(b) to the "basic purpose" of the transactions is the only use of this expression in the Directive, and the parties could not cite any authority on the meaning of that term. The judge accepted the taxpayer's straightforward interpretation: it requires identification of the single basic purpose of the taxpayer in making the supply. There was an overlap between (a) and (b): if the transaction had to be "essential" to the educational supply, it was likely that "a" basic purpose would be educational. However, it was also possible that extra income could be generated, and that might be the dominant purpose. Although the conditions were connected, they were separate.

In the judge's view, consistently operating at a loss, when overheads were taken into account, would indicate that obtaining income was not a basic purpose of the supplies. Consistently operating at a profit, or even raising prices to do so on a particular occasion, would be suggestive that obtaining income was a purpose, and might be the main purpose.

On the basis of the evidence, the judge was satisfied that the basic purpose of the training restaurant was to provide practical training to the students, and not to generate additional income. That meant that it was not strictly necessary to consider the competition question, but for completeness he did so: in spite of a number of factors (e.g. Tripadvisor ranking the restaurant 19th out of 181 in Fareham), he was satisfied that the customers would not regard it as directly comparable. They knew that its prices were low because it was being used for training.

The situation in the training salons was different. There was much less evidence about the way in which the trainees were involved in the supplies made to the public. The salons operated throughout the year, and there was no evidence about how prices were set in relation to costs. There was only an offer of a discount of 10% for work done by hair trainees. The absence of evidence meant that the judge could not conclude that the appellant did not have a basic purpose of obtaining additional income from relevant supplies in the salons. There was also insufficient evidence to conclude that the salons operated any differently from commercial enterprises, so the judge was not satisfied that they were not directly competing.

No submissions had been made about the performing arts centre, so the judge could not come to any conclusions on its supplies. In effect, the college conceded the point by not arguing it.

HMRC therefore succeeded on the interpretation of the exemption, but the college won the argument in relation to the restaurant. The quantum of the claim would have to be adjusted before awaiting the outcome of the Court of Appeal case on whether the transactions were "economic activity".

First-Tier Tribunal (TC08740): *Fareham College*

Lecture 3

2.3.4 Healthcare exemption

As announced in the Budget, *The Value Added Tax Act 1994 (Schedule 9) (Exemptions: Health and Welfare) (Amendment) Order 2023* extends exemption for healthcare services with effect from 1 May 2023. The current legislation provides for exemption from VAT for supplies of medical services made by certain registered health professionals and persons directly supervised by them, but does not include services carried out by non-registered persons directly supervised by pharmacists. This Order will bring the VAT treatment of registered pharmacists in line with other registered health professionals providing healthcare to the public; the explanatory note states that the purpose is to encourage pharmacies to offer a wider range of clinical services to the public and help ease pressure on general practitioners.

SI 2023/388

2.4 Zero-rating

2.4.1 Digital newspapers

The Supreme Court has confirmed the Court of Appeal's decision that digital newspapers did not qualify for zero-rating before the law was changed on 1 May 2020.

The publisher of The Times, The Sunday Times and The Sun had reclaimed output tax accounted for on sales of digital editions in the periods September 2010 to December 2016.

The FTT held that the products were "newspapers", but that zero-rating them would be an unacceptable breach of the "standstill clause" that prohibited extension of zero-rating after 1991. The Upper Tribunal applied the principle of "always speaking", and concluded that the law should be applied to technological advances in accordance with its purpose. As the products were "newspapers", the fact that those particular types of newspaper did not exist in 1991 did not engage the standstill clause.

The Court of Appeal considered that the legislative context of Sch.8 Group 3 supported HMRC's view that it only applied to physical items, not services. The Upper Tribunal had erred in law, and HMRC's appeal was allowed. The company appealed to the Supreme Court.

The judges considered the proper application of the "always speaking" principle. It had to be applied with care in the context of the standstill provision, given that zero-rating was an exception to the general rules of VAT, and was also a national law exception rather than a mandated EU exemption. The ordinary meaning of the word "newspapers" when the provision was enacted could not include digital editions, which were many years in the future. There were significant differences between digital editions and physical versions, not least the requirement for a device and connectivity. In the light of the requirement to interpret exceptions and exemptions strictly, the digital editions could not be treated as falling within the relief.

The company's appeal was dismissed.

Supreme Court: *News Corp UK & Ireland Ltd v HMRC*

Lecture 4

2.4.2 Cereal bars

In TC08087, A supermarket reclaimed £1m in respect of one cereal bar ("Organix") and nearly £100,000 in respect of another ("Nakd") that HMRC had ruled were standard rated. The case came before Judge Anne Redston in the FTT in 2021, who provided the following brief summary of how her decision was reached:

3. Morrison's submitted that the Nakd Bars and Organix Bars were not confectionery, or in the alternative, that they were zero-rated as cakes. I considered the following:

(1) whether I should follow the judgment of the VAT Tribunal in an earlier case which had decided the VAT status of three other Organix bars, and concluded I should not, see §165ff;

(2) whether there was binding authority as to the meaning of Note 5 to Group 1, which provides that "sweetened prepared food…normally eaten with the fingers" automatically falls within the meaning of "confectionery". HMRC's position was that R&C Commrs v Premier Foods Ltd [2007] EWHC 3134 (Ch) ("Premier") had decided that the meaning of "sweetened" in that statutory phrase includes items which are intrinsically sweet, such as dates. I decided that this was not the ratio of Premier, see §103ff;

(3) whether Parliament had intended, when it introduced Note 5 in 1988, that all cereal bars would be classified as confectionery. I found that this was their intention, see §146ff; and

(4) whether that intention could be taken into account in interpreting the meaning of Note 5, but found that it could not, see §162.

4. I went on to decide that the normal meaning of "sweetened" in Note 5 did not include sweetness which was intrinsic to the core ingredients, and that as a result neither the Organix Bars or Nakd Bars came within Note 5. Although they were sweet, they were not "sweetened".

5. As a result, a multi-factorial examination was required to decide whether they were confectionery. I made detailed factual findings about all the Products, and considered the parties' submissions. Having identified elements which are characteristic of confectionery, see §170ff, I carried out multi-factorial examinations and decided that the Bars and the Nakd Bars were confectionery.

6. I then considered whether they were cakes, taking into account in particular the similarity between the Organix Bars and flapjacks (which HMRC accept are cakes). However, I decided that none of the Products was a cake.

There were therefore some points of principle decided against HMRC, but they succeeded on the application to the facts.

The decision begins with a dispute about the admission of late witness statements and other evidence. The judge agreed with HMRC that she was bound by the *Denton* precedent to refuse to accept most of these submissions: they were late without good enough reasons.

The detailed examination of all the issues listed above is mainly of interest to students of cases about food. There is an interesting comment in the decision on whether the Organix bars were "cakes": "*Mr Watkinson compared the Organix Bars to 'the majority of cakes', and I agree that the Organix Bars do not share ingredients with the majority of cakes; they do not look like most cakes; they are not called 'cakes', but rather 'bars'; they are not held out for sale as cakes and they would not look 'in place' on a plate of cakes.*" In discussing whether they were "flapjacks", the judge agreed with an earlier Tribunal which noted that this was not a relevant question, even though it was HMRC policy that flapjacks were zero-rated: the only question the Tribunal could consider was the statutory one, whether the product was a cake.

It seems that Judge Redston had to taste samples of many of the products, and she concluded that they were nothing like cakes, even though the Nakd bars are given the names of cakes (e.g. "blueberry muffin", "lemon

drizzle"). In her view, they were all confectionery and not cakes, and the appeal was dismissed.

Upper Tribunal

The company appealed to the Upper Tribunal, arguing that the FTT had made errors of law in its analysis of whether the items were "confectionery". The alleged errors were treating certain factors as irrelevant, namely:

- the actual or perceived healthiness of the products and/or the products' marketing as healthy;
- the absence of cane sugar, butter and flour (ingredients associated with traditional confectionery).

HMRC counter-argued that the FTT had also incorrectly dismissed its argument that a product that was already sweet could be categorised as "sweetened", in line with the decision in *Premier Foods*.

The appeal only considered arguments about "confectionery". The separate question of whether the bars were "cakes" was not reconsidered. There was no challenge to the FTT's general approach or to its underlying findings of fact. The Upper Tribunal briefly summarised those findings and the multi-factorial assessment carried out by Judge Redston.

The UT started its discussion with a consideration of the effect of an error of law in the context of a multi-factorial assessment. HMRC argued that the error would have to be perverse (i.e. no Tribunal properly instructed would have left the factor out of account) to be an issue; in addition, to be material (so that the UT would set aside the decision), the UT would have to conclude that the error of law would have changed the outcome. The appellants argued for a lower threshold: there simply had to be an error of law, and it would be enough that it might have changed the outcome.

The UT went on to consider the need for caution when considering a multi-factorial assessment carried out by the FTT, because it should be slow to interfere with the exercise of judgement based on all the evidence. The appellants argued that this related to the overall balancing exercise which was the proper role of the FTT; there should be less caution where (as was claimed here) the FTT had taken an irrelevant factor into account or omitted a relevant factor in its assessment. After examining a number of precedent cases (not exclusively about VAT), the UT concluded that "perversity" was not required for there to be an error of law. The "might have" test of materiality was adopted by the Court of Appeal in the most recent authority on the matter (*Degorce*, a 2017 case about whether participation in a film scheme constituted a trade); the UT rejected a distinction HMRC tried to draw between errors of approach and omission of a factor from the multi-factorial assessment.

The taxpayer's counsel argued that the FTT had misinterpreted the decision in *Kalron* as supporting the proposition that "healthiness" was irrelevant. Although the UT did not accept all of counsel's arguments, it concluded that the FTT had made an error. Healthiness or otherwise was not a "trump card" that proved that something should be zero-rated, but it was potentially a relevant factor in deciding whether something fell within the ordinary understanding of the legislative term "confectionery".

The failure to consider the marketing of the products as healthy was not considered to be a separate error of law, but rather part of the same error.

Turning to the point about the relevance of the ingredients (or absence of them), the UT noted that the FTT had relied on the 2007 High Court decision in *Premier Foods*. However, that decision did not support the conclusion: the HC had concluded that the Tribunal in that case had made errors of law in its assessment of what was required to be confectionery, and remitted the matter to a differently constituted Tribunal for reconsideration. That did not establish a principle that the absence of particular ingredients was irrelevant to the question.

The UT emphasised that this did not elevate the importance of the ingredients to something that would be likely to determine the issue, but consideration of those ingredients would be part of the overall classification of the product.

The UT then rejected HMRC's argument based on *Premier Foods*: in the view of the judges, the case turned on the meaning of the word "confectionery", not the meaning of "sweetened". Other Tribunals that had relied on the case as supporting the proposition that inherently sweet items could be "sweetened" were, in the view of the UT (agreeing with the FTT) incorrect.

The UT went on to consider whether the errors of law were material to the FTT decision. It concluded that "healthiness" was a factor that could have a pervasive effect on the assessment of other factors in interpreting the word "confectionery"; excluding its relevance might have made a difference. That was the appropriate test, and it was necessary to set aside the FTT's decision.

As the required reevaluation might involve further findings of fact, it would not be appropriate for the UT to remake the decision. It should be remitted to a differently constituted FTT (to avoid any possible impression of the judge being influenced by her earlier decision), but the new decision should be based on the evidence presented to the first FTT (with the possibility of sampling the products as the first judge had done). A number of other directions were made.

Lastly, the UT noted that the FTT had declined to consider the question of quantum. HMRC had argued that the repayment to Morrisons, if successful, should be restricted by the input tax that it had claimed on purchases of the bars from manufacturers, as that would have been wrongly charged. The FTT had considered that an academic point, and the UT agreed that it should only be considered if it became necessary following the FTT's further consideration.

Upper Tribunal: *WM Morrisons Supermarkets plc v HMRC*

Lecture 5

2.4.3 Illegality and zero-rating

A company sold cannabinoid products, commonly referred to as CBD products. The EU Novel Food Catalogue listed these as a "Novel Food"; in February 2020, the company wrote to HMRC to claim that its products should be zero-rated on the basis of this categorisation.

Following further correspondence, HMRC issued an assessment for £430,000, and the company appealed. Judge John Brooks had to consider an application by HMRC to extend its statement of case. This had been filed on 5 May 2022 in accordance with Tribunal directions on 10 March; the application to bring forward an additional argument was made on 18 August. This was that "zero-rating does not apply to illegal supplies as the power to enact zero-rating could only be exercised for 'clearly defined social reasons' which would not include conferring a tax benefit on illegal acts. It is for the Appellant to demonstrate that its supplies are legal." The company objected.

The judge summarised the principles, derived from precedent cases. involved in considering a late application to amend a statement of case:

a) whether to allow an amendment is a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest importance. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted;

b) where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission;

c) a very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept;

d) lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done;

e) gone are the days when it was sufficient for the amending party to argue that no prejudice had been suffered, save as to costs. In the modern era it is more readily recognised that the payment of costs may not be adequate compensation;

f) it is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay;

g) a much stricter view is taken nowadays of non-compliance with the Civil Procedure Rules and directions of the Court. The achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations because those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within

> proportionate bounds but also the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the courts enable them to do so."

These principles applied equally to HMRC and an appellant.

HMRC argued that the application was promptly made, it did not prejudice the appellant where no hearing date had been set, and the issue was important. The appellant said the new argument did not have a real prospect of success; the application was late and prejudicial, and it should be dismissed with costs.

The judge considered all these issues. The strength of the new argument was "more than fanciful". On the other hand, the application was certainly late: it was after the provision of witness evidence by the appellant, although this was provided sooner than the case management directions required. HMRC said that the reason for the delay was the need to consult the Home Office to establish whether the supplies were illegal. The judge considered that this was not a good enough excuse: HMRC had only consulted the Home Office on 1 June 2022, when they could have done so before issuing the assessment in October 2021 or drafting the original statement of case.

The judge considered that the balancing exercise was in favour of not allowing the application, so HMRC will have to argue the substantive case without reference to the illegality issue. Even though he refused the application, he did not consider that it was unreasonable of HMRC to have made it, so he refused the appellant's claim for costs of the hearing.

First-Tier Tribunal (TC08724): *The CBD Flower Shop Ltd*

Lecture 6

2.4.4 Updated Notice

HMRC have updated their Notice *Animals and animal food* to include assistance dogs as a category of 'working dogs' in section 6.4. Food which is specially formulated, and is held out for sale exclusively for working dogs, will come within the scope of the VAT relief, unless it is biscuit or meal. The Notice discusses which breeds can be "working dogs" and explains the meaning of the various terms.

Notice 701/15

2.4.5 Updated Notice and Manual: energy-saving materials

HMRC have updated their Notice *Energy-saving materials and heating equipment* to reflect the changes to UK law which took effect on 1 April 2022. The social conditions and 60% materials test have been removed, and installation qualifies for zero-rating rather than reduced rating from that date until 31 March 2027. These changes apply to supplies in GB rather than in Northern Ireland, but the recently agreed Windsor Framework appears to envisage that the relief will be extended to NI as well.

The revised guidance notes that, where a supplier installs energy-saving materials in residential accommodation in Great Britain on a business-to-business basis before 31 March 2022, or in Northern Ireland from 1 October 2019, the 60% test may still need to be applied in deciding

whether the VAT reduced rate applies. This is because the supply is not being made to a "qualifying person".

Notice 708/6

HMRC have added two new pages to their Manual VAT energy saving materials and grant-funded heating supplies to note the history of the reliefs. The social conditions and 60% test, and some restrictions on the goods involved, were introduced with effect from 1 October 2019 following infringement proceedings brought against the UK by the Commission; they were then removed, and the reduced rate replaced by the temporary zero rate, with effect from 1 April 2022.

VENSAV2080 and *VENSAV3035*

2.4.6 Call for evidence

Following announcements in the 2022 Spring Statement and Autumn Statement about the government's commitment to support improvements in energy efficiency across the economy to bring down bills for households, businesses and the public sector, with an ambition to reduce the UK's final energy consumption from buildings and industry by 15 per cent by 2030 against 2021 levels, HMRC has published a "call for evidence" in relation to the VAT reliefs for installation of energy-saving materials. The reliefs have already been restored to their pre-2019 form by the removal of restrictions on some types of installation, the proportionate cost of the materials and the social purpose underlying the policy; the call for evidence seeks comments on the possibility of including further technologies, and on possibly restoring the relief that existed up to 2013 for installation in buildings used for relevant charitable purposes.

The consultation period runs until 31 May 2023.

www.gov.uk/government/consultations/vat-energy-saving-materials-relief-improving-energy-efficiency-and-reducing-carbon-emissions/call-for-evidence-vat-energy-saving-materials-relief-improving-energy-efficiency-and-reducing-carbon-emissions

2.4.7 Energy saving materials

As announced in the Budget, *The Value Added Tax (Installation of Energy-Saving Materials) Order 2023* extends to Northern Ireland the temporary VAT zero rate for installation of energy-saving materials (ESMs) that was introduced in Great Britain on 1 April 2022 and which applies until 31 March 2027. It also extends in Northern Ireland the reversal of legislation that was introduced in the UK in 2019 which narrowed the scope of the previous VAT relief for ESMs. This is allowed under the Windsor Framework and aligns the treatment of the supply of installation of ESMs in Northern Ireland with Great Britain. The extensions apply from 1 May 2023.

SI 2023/376

2.5 Lower rate

2.5.1 Insulated roofs again

In TC07828, the FTT had to consider an argument about the supply of insulated roofing panels. The company appealed against assessments for £2,581,092 in respect of supplies charged at 5%, when HMRC considered they were standard rated, from 12/17 to 12/19. By the time of the hearing, HMRC had accepted that some assessments for earlier periods were out of time, and a separate appeal for the 03/19 period had been added to the list, with a hardship application accepted by HMRC.

As the Tribunals have considered very similar supplies in *Pinevale Ltd* and *Wetheralds Construction Ltd*, the company had to show that its supplies were different from those of its predecessors. Judge Rachel Short was presented with examples of the product and a "*Pinevale*-type" roofing panel, as well as information about design and fitting from marketing material.

The company's managing director gave evidence that the roofing panels insulated an existing roof and did not replace the roof structure. He highlighted a number of differences between his company's products and installation procedures and those employed by Pinevale and Wetheralds. He regarded both of those companies as essentially providing a new roof, whereas this appellant's supply was only of insulation, fitted to the existing roof.

HMRC accepted that the supplies were different, but pointed out that the insulated panels replaced the existing panels; without them, there would be no roof. They therefore were "the roof itself" and had to be subject to VAT at the standard rate.

The FTT judge considered that HMRC's argument was stronger. The distinction was between the supply of "something for a roof" and "a roof". In her view, these roofing panels were "a roof". The attempts to distinguish the situation from *Pinevale* did not succeed. Although significant elements of the existing roof were not replaced, nevertheless what was supplied was "a better roof". Clearly the function of the product was to provide insulation, but that did not bring it within the legislation.

The appeal was dismissed. As the case had been categorised as complex and the company had not opted out of the costs regime, it was likely to have a further liability over and above the VAT.

The company appealed to the Upper Tribunal, where it came before Mr Justice Leech and Judge Jonathan Richards. The company argued that the FTT had failed to apply the legislation correctly, having regard to the relevant authorities. Both sides agreed that the critical distinction lay between "insulation for roofs" and "a roof".

The appellant put forward a detailed analysis of the precedent in *Pinevale Ltd*, where the UT had overturned a FTT decision that the reduced rate applied. The present judge concluded that it was difficult to tell, at this distance, exactly how the arguments had been put forward either to the FTT or the UT in that case, but agreed with the appellant's counsel that the following principles appeared to underly the earlier UT decision:

(1) There is a distinction between "insulation for roofs" and the "roof itself".

(2) The Upper Tribunal made no determination of law to the effect that roof panels are necessarily precluded from constituting "insulation for roofs".

(3) The Upper Tribunal gave no guidance in Pinevale itself how to apply the distinction between "insulation for roofs" and the "roof itself" in particular cases. The taxpayer in Pinevale was not represented and there is no record of any submissions being made to the effect that Pinevale's products, despite being "roof panels", nevertheless constituted "insulation for roofs".

(4) In the particular case before it, the Upper Tribunal must have concluded that Pinevale's products were not "insulation for roofs" as it allowed HMRC's appeal.

After examining the *Wetheralds* decision in similar detail, the UT derived the following principles in addition:

(1) The statutory question remains whether a particular supply is "insulation for… roofs" and in determining this question the Tribunal must follow Pinevale and draw a distinction between the supply of a roof and the supply of insulation for a roof.

(2) Considerations of the "extent" of a supply can, in principle help the FTT to determine whether a particular supply is of either a roof or of insulation for a roof.

(3) The question whether an item is "insulation for" a roof is not determined conclusively by considering whether it is "attached or applied" to the roof. Nor is it determined conclusively by asking whether the item is a "roof panel".

(4) Evidence of extraneous materials such as patents, LABCs and marketing literature may be of relevance in particular cases. But it is a matter for the FTT to assess the relevance and weight of such material.

The UT went on to consider the FTT's findings of fact, which covered the way in which the company made insulating panels to order to be attached to the existing roof framework. Although the panels replaced the existing glass panels, they were not self-supporting and were manufactured to cause as little disturbance as possible to the structure.

The company's counsel put forward again arguments that the supplies should be judged against a sliding scale, and fell towards the "insulation for a roof" end rather than the "new roof". She contended that the FTT had given insufficient reasons for rejecting this argument. The UT examined the FTT's reasoning in detail, before setting out the approach that the appellate Tribunal was required to take. As the FTT had made an "evaluative decision", the UT was not entitled to interfere with its view of the primary facts unless an error of principle could be identified – an "untenable view of the legislation or a plain misapplication of the law to the facts", as described by Mummery LJ in the 2009 CA decision on Pringles (*HMRC v Procter & Gamble UK*).

The UT rejected arguments based on earlier precedents suggested by the appellant's counsel, including *Marchday Holdings* (1996). Those cases

concerned the difference between construction and alteration, and involved a comparison of the situation before and after the work had been done. However, they had not been about the reduced rate as it applied to insulation for roofs: *Pinevale* and *Wetheralds* were the directly applicable binding precedents. The conclusion that the new panels provided the majority of the surface area of the roof, and was therefore "a new roof", could not be undermined by this argument.

An argument that the FTT had wrongly considered the state of the roof in the middle of the installation process was also rejected. This was a detail of the FTT decision: the FTT had concluded that there was no roof at all after the original panels had been removed, so it was not possible for the new panels to be "insulation for a roof". The UT considered that this was part of the FTT's overall evaluation and involved no error of law.

The third ground was that the FTT had wrongly assumed that the replacement panels were incapable of being "insulation for roofs" when they plainly fitted that description, and the precedent cases did not establish any principle that they could not be. The UT considered the alleged mistakes in the FTT decision and rejected the argument. The FTT was not considering the nature of the panels "in the back of the van": it was considering what the company had supplied. It was entitled to conclude that the end result was the entirety of the roof covering, and was therefore "a roof".

There were a number of other criticisms of the FTT decision, including the peculiar references to "exemption" rather than "reduced rate". These were not material to the decision, and other points were a valid part of the evaluation process.

The appeal was dismissed again, and the company appealed to the Court of Appeal. Lady Justice Whipple suggested that the approach of the FTT and UT had been wrong (in this and the earlier cases), but had nevertheless come to the right conclusion. The purpose of Note 1(a) was very simple: it was to list the items that qualified for the relief. The lower Tribunals had considered an unnecessary distinction between "insulation for roofs" and "supply of a roof": the second expression was irrelevant. The words of Note 1(a) were to be interpreted strictly but not restrictively, and as they were not defined they were to be given their natural meaning. If something was more than or different from "insulation for roofs", it did not fall within the relief. It was not necessary to say what else it was.

All three judges agreed with the general assessment of the products by the lower Tribunals – they were more than insulation for roofs, and the various arguments about purpose and injustice put forward by the appellants could not change that. The appeal was dismissed again.

Court of Appeal: *Greenspace (UK) Ltd v HMRC*

Lecture 7

2.5.2 Temporary reduced rate

A company appealed against assessments totalling over £130,000 for periods from 09/20 to 03/21. The company had applied the reduced rate of VAT to "driving experiences for under-17 year olds". The issue before the Tribunal was whether this fell within VATA 1994 Sch.7A Group 16.

The decision records efforts made by the company's advisors to establish whether HMRC accepted that the reduced rate applies. This included phone calls in July 2020 followed by a written enquiry, which was answered with a reference to the GOV.UK page on "admission charges to attractions". A repayment return for 03/21 led to an enquiry and correspondence in which HMRC ruled that the supplies did not qualify for the reduced rate. This was upheld on review and appealed to the Tribunal in August 2021.

Judge Geraint Williams examined the company's marketing material, which described the experiences as "driving lessons for 4 to 17 year olds". The appellant's representative argued that this was not what they actually were: the operation was more akin to a circus or a funfair, travelling around the country to different venues. HMRC responded that the supplies did not involve "rights of admission", and even if they did, they did not fall within Group 16.

The Tribunal followed the approach of the earlier case involving *Twycross Zoo* (VTD 20,439). "Animal experiences" did not involve a right of admission (that could have qualified for exemption); that expression should be given its plain meaning. In the present case, the customers did obtain admission to an area that was fenced off for safety reasons, but that was not what they were paying for. They would expect to be taught to drive the vehicle for most of the time that they were in that area.

In case the judge was wrong on that, he also considered HMRC's argument that the supplies were not sufficiently similar to those listed in Group 16: "shows, theatres, circuses, fairs, amusement parks, concerts, museums, zoos, cinemas and exhibitions and similar cultural events and facilities". He considered it "plainly evident" that they were not actually listed there, and did not agree with the appellant's contention that they were "similar to a circus or funfair". The dictionary definitions of those words suggested that there would be a range of amusements on offer, which was not the case here.

The company had also argued that it was placed at a disadvantage against its competitors who were eligible to use the reduced rate. The judge considered this argument briefly, but had to reject it: the existence of competition was not enough to engage the principle. The supplies had to be similar, which in the judge's view they were not.

The appeals were dismissed.

First-Tier Tribunal (TC08748): *The Young Driver Training Ltd*

Lecture 8

2.6 Computational matters

2.6.1 Value shifting consultation update

VATA 1994 s.19(4) states that 'Where a supply of any goods or services is not the only matter to which a consideration in money relates, the supply shall be deemed to be for such part of the consideration as is properly attributable to it.' Notice 700, section 31 sets out HMRC's view on how to determine what is 'properly attributable' to the consideration where a package of items is sold together. Amusingly (to me at least), it

carries what appears to be a 'trigger warning': 'This section contains calculations' sounds like the newsreader saying 'this report contains flashing images'.

The calculations show apportionments of a package using the selling prices of individual items and the costs of individual items; it also covers variations, for example where only one of the items has its own separate selling price.

Between January and March 2021, the government ran a consultation on 'VAT and value shifting'. It appeared that HMRC had concluded that allowing flexibility in the way in which output tax should be calculated was a 'loophole' that could be exploited. If a package included (say) zero-rated items that are normally sold at a high margin and standard rated items sold at a low margin, a selling price method would produce a lower amount of VAT; if the margins were reversed, a cost-based apportionment would produce a lower output tax charge.

The consultation proposed fixed rules for how the consideration must be apportioned when items with different VAT liabilities are supplied for a single price. However, HMRC has concluded that the most effective way to address valuation concerns is to provide businesses with practical guidance on apportionment methods, rather than via legislative changes, including the following:

- Guidelines for Compliance – HMRC has now published a new *Guideline for Compliance* entitled 'Help with VAT apportionment of consideration' outlining HMRC's recommended approach to apportionment and helping businesses understand approaches HMRC considers as increasing or lowering tax compliance risk.
- Amendments to other guidance – minor amendments are made to Notice 700 section 31. HMRC's VAT Valuation Manual VATVAL03000 'Apportionment of monetary consideration' has also been updated. These changes encourage businesses to first consider a selling price method, where appropriate and available, before considering a cost price method or any alternative.

The Brief says that the changes 'encourage' use of a selling price basis for apportionment before considering alternatives, but it is hard to see that 'encouragement' in the version of Notice 700 on the HMRC website two weeks after the date of the Brief. It still appears to offer alternative calculation methods without expressing a preference for one or the other.

It is also interesting that the Brief goes on to say 'If you determine that you should correct a submitted return, follow the error correction notice process…' Given that the Brief is very brief indeed, and does not actually say that anything has to change – it only refers to 'encouragement' – the only circumstance in which an error correction would be required appears to be where the trader reviews the way apportionments have been done (because the Brief has made it topical) and decides that it is so unfair that it is indefensible. As Notice 700 has not recommended one method or the other in the past, it is unlikely that using the cost-based method has constituted an error; the promised further guidance from HMRC may cast more light on whether using it constitutes an error in the future. There are several practical and technical arguments in favour of a cost-based

apportionment, not least that it uses objective figures from supplier invoices.

Revenue & Customs Brief 2/2023

Lecture 9

The “encouragement” to use selling price does appear in the “Guideline for Compliance”, which is mainly aimed at larger taxpayers. It is expressed as representing a lower compliance risk than other methods.

www.gov.uk/government/publications/gfc2-2023-guidelines-for-compliance-vat-apportionment-of-consideration

The VAT Valuation Manual has updated guidance on a number of points concerning apportionment:

VATVAL03700 – Apportionment of monetary consideration: methods of apportionment – general

VATVAL03800 – Apportionment of monetary consideration: apportionments based upon selling-prices

VATVAL03900 – Apportionment of monetary consideration: costs-based apportionments

VATVAL04000 – Apportionment of monetary consideration: costs-based apportionments where the costs of only one supply can be identified

VATVAL04100 – Apportionment of monetary consideration: examples of the "Thomas" and "Nexus" apportionment calculations

VATVAL04200 – Apportionment of monetary consideration: should "uplifted costs" include an element in respect of profits?

VATVAL03700, VATVAL03800, VATVAL03900, VATVAL04000, VATVAL04100 and VATVAL04200

2.6.2 Drink deposit return schemes

As announced in the Budget, HMRC have launched technical consultation on VAT provisions for drink deposit return schemes. The government intends to introduce a statutory scheme for drinks containers to be returnable against the refund of a deposit; the regulations will be amended to exclude the deposit amount from the taxable amount when qualifying sales are made and require that VAT is only accounted for on the deposits of drink containers that are not returned.

The consultation will close on 17 May 2023.

www.gov.uk/government/consultations/draft-regulations-vat-provisions-for-drink-deposit-return-schemes

2.7 Discounts, rebates and gifts

2.7.1 Prompt payment discounts

The 2014 March Budget included a surprise announcement changing the rules on the calculation of output tax where a prompt payment discount was offered. Up to that point, VAT was always calculated on the

discounted amount, whether or not the discount was eventually taken up; this was considered not to be significant, because most PPDs arose on transactions between traders. The change, which was introduced from 1 May 2014 for telecommunications and broadcasting supplies and from 1 April 2015 for other supplies, arose because HMRC suspected traders were trying to exploit the rule by offering PPDs to consumers. The rule change provided that output tax could only be reduced if the discount was actually taken up.

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

During that period, the company offered most of its retail customers the option of receiving a 15% discount if their monthly bills were paid within 24 hours, and calculated the output tax on the basis that this was a PPD. Around 3% of customers actually took up the offer. In February 2015, HMRC decided that this was not within the original PPD rules, and raised an assessment. The company appealed, disputing both HMRC's interpretation of the law and its application to the circumstances.

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

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

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

For services billed in arrears, the discount offer was made and accepted after the services had been delivered. That meant that the supplies had been made on the basis of the T&C on the website, and the offer was to make a post-supply rebate of consideration already due. It was not a

prompt payment discount; output tax would only be reduced where the offer was actually taken up, in accordance with art.90 PVD.

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

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

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

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

The rest of the decision relates to the operation of the old PPD rules and analysis of the contractual terms and their variation. The judge concluded that none of the supplies fell within para 4(1) for the reasons given above; if she was wrong on that, she rejected a separate argument from HMRC that the PPD rules were excluded by para 4(2) because the consideration was "paid by instalments".

The appeal was dismissed.

First-Tier Tribunal (TC08674): *TalkTalk Telecom Ltd*

Lecture 10

2.8 Compound and multiple

2.8.1 Contracted-out services

NHS Trusts are entitled to reclaim VAT on the purchase of certain contracted-out services under VATA 1994 s.41(3). This was introduced to avoid VAT being a disincentive to contracting out: NHS bodies are generally not in business, which means that incurring VAT on costs charged by outsource suppliers would increase the cost of their services compared to using in-house employees.

A Trust entered into a contract with a company for "management and administration of surgical facilities". This included the provision of

"managed surgical theatre facilities", which involved the supply of four types of goods:

(i) structural items, furniture and operating systems, such as operating tables; lights, generator machinery and heating and cooling equipment;

(ii) re-useable operating equipment and machinery, such as patient monitors, ultrasounds, anaesthetic machines, ventilators, microscopes and scalpels;

(iii) single use goods, which are used in the course of procedures on patients and include items such as sutures, bandages and gauze; and

(iv) protheses, such as hip and knee joints, which are provided to patients during the course of surgery.

HMRC accepted that (i) and (ii) were eligible for a claim under s.41(3), but ruled that (iii) and (iv) constituted separate supplies of goods that could not be claimed. The Trust applied for judicial review of this decision, as s.41(3) is not covered by the matters appealable to the FTT in VATA 1993 s.83. The UT noted that s.41 claims are a purely domestic rule with no equivalent in the PVD, so they have to be considered by reference purely to the domestic law; however, the interpretation of terms in the domestic VAT law is still governed by the body of EU precedent and UK precedent based on EU law.

The Trust put forward four grounds for judicial review:

Ground 1: It is entitled to a refund of VAT in respect of the Consumables on the basis that the supply falls within List 2, Heading 45 to the Contracted-Out Services Direction ('COSD 45'), which provides for refunds on the operation of healthcare facilities and the provision of any related services.

Ground 2: Title to the Consumables does not pass from Genmed to the Trust under the Agreement so that there is no supply of goods by Genmed to the Trust under the Agreement (the 'Title Issue'). But in any event the supply of the Consumables is an element of a single supply of managed theatre services under the Agreement which falls within the description in COSD 45, namely, the operation of healthcare facilities (the 'Single Supply Issue').

Ground 3: The supply of the Consumables is a supply of goods closely related to the supply of managed theatre services and qualifies for a refund under paragraph 2(c) of COSD.

Ground 4: HMRC have adopted differential and inconsistent treatment for contracted out theatre services such that its treatment of the Trust is unfair, irrational and an abuse of power.

The consideration of the issues is detailed, and what follows is a brief summary of the main points. In relation to Ground 1, the Trust's counsel argued that the use of the word "supply" in the COSD did not import all the meanings of that word in VAT law, and on the plain reading of the plain English text, the company made a "supply" of the description in the Direction. The judges examined this proposition carefully and rejected it. The whole context of the Direction was s.41(3); that was governed by the

definition of "supply" given in the Act. If the Direction was intended to be interpreted in a different way, it would surely have included express words to that effect.

Turning to Ground 2, the Trust advanced several arguments. The first was that there could not be a supply of goods to the Trust because the Trust never obtained title to those goods – at the moment they were "supplied", they were either consumed or they were implanted in a patient. The supplier remained responsible for defects in the implants afterwards. If title did not pass, it was argued, there could be no supply of goods, so there was nothing that could be disallowed for that reason.

The judges rejected this argument. The economic reality was that the Trust was free to dispose of the consumable items provided by the supplier as if it was their owner. There was a supply of the goods as part of the supply of a managed theatre facility, and that was capable of constituting a supply of goods for the purposes of VAT.

The main argument was whether the goods were part of a single supply that it would be artificial to divide. If the supply was composite and should be categorised as services, it clearly fell within the relevant provision of the COSD.

The UT considered a large amount of evidence from witnesses concerning the purpose of the contracting-out arrangement and the benefit to the Trust of the supplier's services. This included the complex logistical operation of making sure that all the required consumables were available to enable an operation to proceed. If this was done in-house, it required the detailed attention of clinical staff who would otherwise be able to care for patients.

The judges cited the well-known tests of compound and multiple supplies from *CPP*, *Levob* and *Honourable Society of Middle Temple*. They also noted the recent CJEU decision in *Frenetikexito* (Case C-581/19): that was decided after the end of the Brexit period, but the judges could still take it into account if they considered it helpful: "we consider it particularly useful to do so in circumstances where that judgment attempts to summarise principles from existing law by which we are bound."

In that case, the A-G had put forward four "indications" that should be considered from the point of view of a typical consumer:

(1) Indivisibility of the elements of the supply, i.e. do the individual elements of the supply merge into a new distinct supply such that, in the generally accepted view, there is only a single supply?

(2) Separate availability of the supplies, i.e. are the different elements that make up the supply available separately or must the customer take all the elements together?

(3) Indispensability of the elements of the supply for the aim of the supply, i.e. does the transaction have a single economic aim or is the combination of different elements important to the typical recipient of the supplies?

(4) Separate invoicing as an indication that supplies are divisible, i.e. is there a single invoice and price for all the elements or are they invoiced and/or charged separately?

The Court went further, regarding indivisibility and indispensability as "of decisive importance" rather than mere indications.

The UT then considered the application of these four principles to the present case. The "typical consumer" for this purpose was "a NHS Trust". HMRC's representative emphasised that the proportionate value of the goods element (some 70% of the annual contract charge) and the fact that the goods were separately itemised on the invoices were strongly indicative of supplies that should be treated as separate.

The judges preferred the Trust's view. The reasons are explained at length, but under each of the four indications given above, the judges were satisfied that the supply met the test. The fact that the goods could have been purchased separately was not relevant: they were purchased together with the services for good reasons, and they were indispensable to the benefit that the Trust sought from those services.

The judges noted that HMRC accepted that some goods supplied by the company were part of the service – (i) and (ii) on the list above. In the view of the judges, it was more artificial to split up the different types of goods and treat them differently, than it was to regard all the goods as part of a single supply of services.

The conclusion was stated as follows: "Even though we have found that title to the Consumables passes from Genmed to the Trust under the Agreement, we are satisfied on an objective basis and from the point of view of the typical consumer, namely an NHS trust, that the supply of the services and Consumables are so closely linked that they form a single, indivisible economic supply which it would be artificial to split. We would describe that single composite supply as the supply of a fully managed theatre facility and we are satisfied that it falls within paragraph 2(a) of COSD and COSD 45 either as the operation of a healthcare facility or as services related to the operation of healthcare facilities by the Trust itself."

Having reached this conclusion on Ground 2, it was not necessary to consider Ground 3 ("closely related") separately. On any reasonable construction of the expression, the findings on Ground 2 would support a similar conclusion on Ground 3.

On Ground 4, the Trust relied on a ruling given to a different Trust in June 2016 (and withdrawn in September 2022) as evidence that it was being unfairly treated. The UT considered whether it was irrational and unreasonable, in public law terms, for the officer making the decision on this Trust to be unaware of the other ruling and to give a decision without reading it. The officer had tried to find a copy within HMRC's internal systems without success; the Trust's accountants, who had obtained the other ruling, refused to provide a copy to HMRC on the grounds of confidentiality. The officer stated that in any case it was not HMRC's policy to take the circumstances of other taxpayers into account when reaching a decision, and each case must be decided on its own merits.

The judges considered the threshold for unreasonableness and were satisfied that it had not been breached. They did comment that "We should not be taken to have approved the internal practice not to refer to other taxpayers' records unless there is an obvious 'business reason' to do so. It was common ground that HMRC had a duty to act fairly. This is not a matter of business efficacy or commercial judgment but of procedural fairness and equal treatment. However, we stress that we were not addressed in detail about the internal practice and Mr Thomas did not

submit that the adoption of this practice was irrational in itself. It may be that the practice encompassed wider considerations of fairness and we note that both officers attempted to obtain copies of the Epsom Ruling and the Epsom Agreement. A full consideration of the internal practice should await an appropriate case."

The application for judicial review was granted: the Trust was entitled to a refund of VAT pursuant to COSD 45 in respect of the outsourced supplies on the basis that they constituted a single, indivisible supply of services, rather than a supply of services with separable goods.

Upper Tribunal: *R (on the application of Gloucestershire Hospitals NHS Foundation Trust) v HMRC*

Lecture 11

2.9 Agency

2.9.1 Supplies through electronic platform

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

Art.9a IR provides:

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

The company applied to the FTT in late 2020 for a reference to the CJEU. After detailed consideration of the arguments about the validity and application of the EU law in this case, Judge Anne Scott agreed that a reference was necessary to determine the issue. The parties agreed the order for reference, summarising the facts and the issues as follows:

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

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

Fans can access uploaded content by making ad hoc payments or paying a monthly subscription in respect of each Creator whose content they wish to view and/or with whom they wish to interact. Fans can also pay

tips or donations known as "Fundraising" for which no content is supplied in return.

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

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

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

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

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

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

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

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

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

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

The question for reference was whether art.9a was invalid because it went beyond the implementing power or duty on the Council established by art.397 PVD. It was received by the CJEU on 22 December 2020, and was therefore in time to be considered under the Withdrawal Agreement.

The CJEU reviewed the recitals to the PVD and the Implementing Regulation as well as the law itself – an indication that the purpose of the provisions would be important in interpreting and applying them. In particular, paragraphs 61 – 64 of the PVD Preamble provide that implementing measures should be adopted by the Council to ensure uniform application of the VAT system and to address problems with different interpretations in Member States of the rules for cross-border

transactions. The history of the introduction of art.9a IR was set out – it was part of the introduction of new rules on place of supply of electronically delivered services on 1 January 2015

The FTT's uncertainty as to the validity of art.9a was expressed as follows: "the referring court submits that the presumption established in art.9a(1) IR could apply to all taxable persons involved in the supply of services, which constitutes not a technical measure but a radical change to the legal framework resulting from art.28 PVD. In addition, the presumption established in art.9a(1) IR, and more particularly that set out in the third subparagraph of that provision, appears to remove the obligation to examine specifically the economic and commercial position of the taxable person". This could be seen as amending or supplementing the legal provision rather than implementing it in accordance with its general aims.

After considering the legal basis of implementing powers afforded to the Commission and the Council by EU law, the CJ defined the issue as follows:

"In order to determine whether, in adopting art.9a(1) IR, the Council complied with the limits of the implementing powers conferred on it, pursuant to art.291(2) TFEU, by art.397 PVD, it is necessary to ascertain whether art.9a(1) IR merely clarifies the content of art.28 PVD, which entails examining whether, first, art.9a(1) IR respects the essential general objectives of that directive and, in particular, those of art.28 PVD, second, it is necessary or appropriate for the uniform implementation of art.28 PVD and, third, neither it supplements nor amends art.28 PVD in any way."

The CJ examined these three issues and concluded that there was nothing to support the claim that the Council had exceeded its powers. Art.9a was a proportionate and appropriate measure to ensure consistency of treatment of supplies through electronic platforms. In particular, the third paragraph meant that the operator of an electronic platform would always be regarded as the supplier where they authorise the charge to the customer or the delivery of the services, or set the general terms and conditions of the supply. The presumption that they are the supplier cannot be rebutted. This appeared to be a deliberate decision of the Council, and it was in accordance with the general purpose of art.28 PVD.

CJEU (Case C-695/20): *Fenix International Ltd v HMRC*

Lecture 12

2.9.2 Negative margins

A company supplied serviced accommodation predominantly in London to business and leisure travellers. It leased accommodation from property owners, often on extended terms that meant it was at risk of loss if it could not let the property for enough of the period. It also bought in other services and sold them on; the overall supply was within TOMS.

In January 2017, the company submitted an error correction notice in the sum of £272,894 for VAT considered to have been overpaid under the TOMS for the VAT prescribed accounting periods 03/16 – 09/16. The sum was calculated on the basis that the TOMS does not exclude the possibility of a negative margin, and, in that period, VAT had been

overpaid when the full cost of bought-in accommodation was taken into account.

After that it continued to account for VAT under TOMS on the basis that a negative margin was permissible; HMRC raised assessments on the basis that a zero margin is allowed, but a negative margin cannot generate a repayment due to the taxpayer. The company appealed against the refusal of the error correction and the assessments; the Tribunal was asked to rule in principle without considering the quantum of either dispute.

The company argued that there was nothing in the TOMS rules that prohibited a negative margin. HMRC responded that such a margin would be quite different from the situation of a repayment trader using normal VAT accounting – they would have paid out more input tax than the output tax they collected from customers. A negative margin, which would not necessarily involve paying VAT on the costs, should not generate a repayment in the same way. TOMS only related to output tax, and output tax could not be negative. As a special scheme, it should only be operated to the extent necessary to achieve its objectives.

The Tribunal was satisfied that the whole scheme of VAT, including the fundamental principle of the neutrality of the tax, counted against the taxpayer's position. TOMS was a simplification to determine the taxable amount of a supply: a negative taxable amount was not possible.

The Tribunal went on to consider whether a global calculation of the margin produced an incorrect result. For example, if accommodation was bought in for 52 weeks at a cost of £52,000, and 30 weeks were sold for £45,000, there is a loss of £12,000 – 12 unsold weeks at £1,000 each. The Tribunal considered that "unsold" inventory was different from "inventory sold at a loss" – for example, if all 52 weeks were sold for £45,000. In that case, there would be a loss, and the margin would be zero (not negative). HMRC's position was that a loss on one supply could be offset against a positive margin on another supply, but it could not produce an overall negative margin. The Tribunal agreed with this proposition.

Where a cost is incurred but not sold on at all, it should be excluded from the margin calculation. Any VAT incurred would not be blocked under the TOMS rules, but would be part of the general cost of doing business and would be recoverable. The Tribunal considered the situation where the company bought in (say) 52 weeks at a flat rate and only sold (say) 30 weeks (individually): this should be regarded as a single cost that would go into the global calculation, rather than individual weeks, some of which should be excluded as unsold.

The trader attempted to find support by reference to the provisions for a negative margin in the global accounting version of the second hand margin scheme. This could not help: it only provided for a negative margin to be carried forward where there was a timing mismatch between purchases and sales, and did not lead to a repayment.

The appeal was dismissed in principle, and the parties were left to agree the quantum.

First-Tier Tribunal (TC08700): *The Squa.re Ltd*

Lecture 13

2.10 Second hand goods

2.10.1 Margin scheme

In the late 2018 decision *Harry Mensing v Finanzamt Hamm* (Case C-264/17), the CJEU examined the relationship between the option for the margin scheme in some circumstances in art.316 PVD and the mandatory margin scheme in art.314. The CJEU ruled that the right to opt for the margin scheme in art.316 could not be made subject to art.314. It was clear and mandatory, and the German law did not comply.

In its further consideration of the consequences of that decision, the German court has referred further questions to the CJEU, and the same A-G (Szpunar) has given an opinion.

The appellant is a German art dealer who, in 2014, purchased a number of works of art as acquisitions from artists residing elsewhere in the EU and paid German acquisition tax on the purchases. He asked his local tax authority to apply the margin scheme to his sales, but this was refused. He declined to deduct input tax on the purchases, although it was noted that he could still do so, if his request for the margin scheme calculation of output tax failed.

Article 314 makes the margin scheme mandatory where a taxable dealer supplies something that has been supplied to him within the EU by a non-taxable person; or by a taxable person where the supply was exempt within art.136 (input tax blocked on purchase); or by a taxable person covered by the exemption for small enterprises; or on a supply also within the margin scheme. Article 316 allows taxable dealers to opt for the margin scheme in relation to works of art that the dealer has personally imported, or acquired from the creator, or acquired in circumstances where the reduced rate in art.103 applies. In each of these cases, application of the margin scheme is likely to be preferable to deduction of input tax and accounting for output tax on the full selling price.

The problem is that the transactions appear to fall within art.316, in that the supplies were purchased from the artists or their successors in title, but not within art.314, because the acquisition was effectively a taxable transaction (subject to acquisition tax). The question for the CJEU was whether the German law, which ruled out the margin scheme in these circumstances, was incompatible with the PVD; it concluded that it was, and also ruled that the trader could not have it both ways – he could not apply the margin scheme and deduct the acquisition tax as input tax.

Following that decision, the German court held that the margin should be calculated by adding the acquisition tax to the purchase price. The German tax authorities appealed against that decision, arguing that neither the German law nor the Directive permitted such a calculation of the margin. Further questions were referred to the CJEU, asking whether there was an unintended gap in the legislation that could only be solved by a change in the law, or whether the calculation could be determined by the court.

The A-G noted that the purpose of the profit margin was to avoid a double charge to VAT where the purchase price included VAT at an earlier stage for which the present trader could not obtain a deduction. The margin scheme provided for this when the purchase was made in the same

territory, and there was a specific rule relating to imports in art.317; however, the PVD did not explicitly deal with the situation where the purchase was exempt for the seller but taxable as an acquisition for the purchaser.

The A-G considered that the definitions of purchase price and selling price in art.312 were clear and unequivocal, and did not allow acquisition tax to be taken into account in calculating the margin. This was not a satisfactory outcome; the issue was how it could be resolved. The A-G considered that the only solution would be a change to the Directive: it was not possible for a judicial interpretation by the CJEU or the national court to make good such an omission in the EU legislation, where the words of the PVD were clear and unambiguous.

It appears that the only practical solution for the dealer in the case would be to deduct the acquisition tax as input tax, and not to apply the margin scheme at all.

CJEU (A-G) (Case C-180/22): *Finanzamt Hamm v Harry Mensing*

2.10.2 New guidance on VAT for second-hand motor vehicles

HMRC have published a series of new guides on the scheme that will, from 1 May 2023, replicate the effect of the second-hand scheme for second-hand vehicles that are bought in Great Britain and moved to Northern Ireland for resale. The guides include:

A general guide to the payment scheme and when it applies – because the output supply will be fully liable to output tax, the scheme allows the trader to claim the VAT fraction of the purchase price of a qualifying vehicle so that the net amount payable on the VAT return becomes the VAT on the margin achieved. The payment is claimed by entering it as input tax on the VAT return. Although the guidance does not explicitly state when the claim is made, the implication is that it falls in the period in which the vehicle is moved from GB to NI with the intention of selling it.

Cars that were purchased and moved to Northern Ireland before May 2023 will still be eligible for the normal margin scheme if they are sold by 31 October 2023. After that date they will be liable for output tax on the full selling price, but no payment can be claimed in respect of the purchase.

www.gov.uk/guidance/claim-a-vat-related-payment-if-you-buy-second-hand-motor-vehicles-in-great-britain-and-move-them-to-northern-ireland-for-resale

A guide to how the scheme also applies to vehicles bought in the UK and exported to the EU for second-hand sale in the EU or in Northern Ireland. A UK established business will make this claim through the VAT return, but a non-established business will use a different system that will be the subject of further guidance to be published in due course.

www.gov.uk/guidance/claim-a-vat-related-payment-if-you-buy-second-hand-motor-vehicles-in-great-britain-and-export-them-to-the-eu-for-resale

Lecture 14

A guide to which vehicles are eligible for the payment scheme.

www.gov.uk/guidance/check-which-motor-vehicles-are-eligible-for-the-second-hand-motor-vehicle-payment-scheme

A guide to working out the value for calculating the payment in various different circumstances, such as buying cars at auction or in an online auction.

www.gov.uk/guidance/how-to-work-out-the-value-of-a-vehicle-for-the-second-hand-motor-vehicle-payment-scheme

Separate guides for record keeping and invoicing in respect of vehicles moved to Northern Ireland and vehicles exported to the EU.

www.gov.uk/guidance/check-which-records-to-keep-for-second-hand-vehicles-you-move-to-northern-ireland-for-resale

www.gov.uk/guidance/check-which-records-to-keep-for-second-hand-vehicles-you-export-to-the-eu-for-resale

2.10.3 Legislation

The *Value Added Tax (Margin Schemes and Removal or Export of Goods: VAT-related Payments) Order* sets out the rules of the scheme. It will have effect for goods removed to Northern Ireland or exported to the EU on or after 1 May 2023.

SI 2023/68

The *Finance Act 2022, Section 71 (Margin Schemes and Removal or Export of Goods: Zero-rating) (Appointed Day and Transitional Provision) Regulations* disapply zero-rating for exports of cars affected by the scheme with effect from 1 May 2023. This puts second-hand dealers in the same position that they enjoyed before the end of the Brexit transitional period.

SI 2023/69

2.11 Charities and clubs

2.11.1 Budget submission

The Civil Society Group, a coalition of over fifty organisations supporting the UK charity and voluntary sector, published submissions to HM Treasury before the March Budget. This included a request to streamline and review the charity tax and compliance systems, address the issue of irrecoverable VAT, extend the exemption that allows charities to carry out primary purpose trades to all trades and bring in electronic filing for charities at Companies House.

Very little, if any, of this was included in the Budget. The only measures announced were a £100 million fund to support local charities, and the restriction of tax reliefs in the UK to UK charities.

www.civilsociety.co.uk/news/charity-sector-coalition-urges-hunt-to-overhaul-tax-system-in-budget-2023.html

2.12 Other supply problems

Nothing to report.

3. LAND AND PROPERTY

3.1 Exemption

Nothing to report.

3.2 Option to tax

3.2.1 Circularity

The Supreme Court has now ruled in the *Moulsdale* case, which has highlighted the apparent circularity of the rules on the disapplication of the option to tax. The taxpayer has lost at every stage of the appeal, but the judges have expressed dissatisfaction with the state of the law.

HMRC ruled that the sale of a property covered by an option to tax was taxable because the disapplication conditions of para.12 Sch.10 VATA 1994 were not met. The trader appealed. The facts were not in dispute: the property had been purchased for £1.14m in May 2001, and the purchaser (the present appellant) had opted to tax after the purchase. VAT had been paid to the vendor, who had also opted to tax, and it was reclaimed on the VAT return for the quarter to 06/2001.

The property was then leased to an optician's business that was connected to the purchaser. VAT was accounted for on the rentals; in 2007 following a VAT visit, the owner became aware that the rentals should have been exempt: the property was a capital item and was being used for exempt business by a connected party of the grantor. According to the FTT decision, HMRC appear to have allowed repayment of the previous three years' worth of output tax without revisiting the original recovery: the argument that the original over-recovery should be set against the overpaid output tax does not appear to have occurred to HMRC at the time (the *Birmingham Hippodrome* case which established this principle was decided by the FTT in early 2011 and settled in HMRC's favour by the Court of Appeal in 2014).

In September 2014, the owner sold the property to an unconnected person, subject to the lease to the optician (which remained connected to the seller, but not to the new purchaser). The price on sale was £1.149m. The purchaser was not VAT registered and did not notify HMRC of an option to tax.

The FTT judge (TC06539) pointed out that there is a potential circularity in the legislation: if the asset is not and is not expected to be a capital item, the OTT is not disapplied so the sale becomes taxable; but it then creates a capital item for the purchaser, which would require the option to be disapplied. On the other hand, if the option is disapplied and no VAT is charged, the property cannot become a capital item for the purchaser, and as it is outside the 10-year period for the vendor, there is no reason to disapply the option to tax. So VAT should be charged. This is noted in *Scammell on VAT on Construction, Land and Property* as a long-standing anomaly on which there is no consensus of the correct approach.

The judge also noted that the purpose of the law is hard to discern or apply. HMRC's internal guidance states that it is an anti-avoidance

provision, but its operation is mechanistic. The relevant law in para.12 states:

A supply is not, as a result of an option to tax, a taxable supply if:

a) the grant giving rise to the supply was made by a person ('the grantor') who was a developer of the land, and

b) the exempt land test is met.

"Developer" does not carry its usual everyday meaning and can include someone who has merely purchased the building. Para.13 defines a developer for the purposes of para.12 and the test is in fact whether the property is or will be a capital item in the hands of the grantor or of a person to whom the property is to be transferred.

This leads to the circularity. For the vendor, the CGS period had expired, so it was no longer a capital item. That would mean that the option would not be disapplied, and the transaction would be taxable. However, that would mean that a capital item would be created for the purchaser, which would potentially disapply the option again.

In the FTT, Judge Anne Scott analysed the legislation in line with the recent Tribunal decision in *PGPH Ltd*. She concluded that the "intention or expectation that the property will become a capital item in relation to any relevant transferee" was a subjective test, as to what would be a genuine or real, not a hypothetical, intention or expectation as at the time of the grant.

The taxpayer's counsel argued that the circularity could be avoided by "stopping" after considering the disapplication rules up to the point of the transaction. According to the words of the legislation, the trader knew that the property would be occupied for exempt purposes and would be a capital item in the hands of the purchaser. Therefore the option to tax should be disapplied.

The judge followed the circularity to its "logical" conclusion: "As a matter of fact, we find that at the date of the grant the appellant knew that the supply would not be, and could not be, taxable. Accordingly, given the terms of reg.113(1) of the VAT Regulations, and knowing that no other relevant expenditure was likely, the appellant could not have intended or expected that the property would become a capital item in the hands of the purchaser.... we find that the disapplication provisions are not engaged and we must therefore dismiss the appeal for the reasons given."

So, because the taxpayer knew that the supply would not be taxable, it was taxable.

The taxpayer appealed to the Upper Tribunal, where it came before Lord Ericht and Judge Dean. They reviewed the facts and the law, and examined the circularity of the law, in detail. They found no fault with the FTT's reasoning or decision: the FTT had applied the test (of the transferor's intention or expectation at the time of the grant) correctly, by reference to the appellant's knowledge of the facts of the transaction and not by reference to his knowledge of the statutory provisions. He had issued an invoice showing that the transaction was exempt, and could not therefore have intended or expected the land to become a capital item in the hands of the purchaser. The appeal was refused again.

The taxpayer appealed again to the Court of Session, where the decisions below was upheld by a majority of 2-1. The majority considered that the court should not interfere with decisions taken on a technical matter by specialist tribunals on a question of fact. The taxpayer had led no evidence to clarify his subjective intention, so the FTT was entitled to draw conclusions from the evidence before it – the absence of a VAT charge on the invoice – that he neither intended nor expected the building to become a capital item in the hands of the purchaser. A letter from his adviser in 2016, asking HMRC to review the decision and stating that he had expected the CGS to apply, carried little weight and had also not been adduced as evidence in the FTT.

Supreme Court

Lady Rose gave the leading judgment, with which the other four judges agreed. She summarised the facts and the law, and considered the anti-avoidance purpose of the disapplication provisions. She carried out a detailed analysis of the provisions themselves, identifying the elements that were agreed:

- Mr Moulsdale was “the grantor”;
- the 2014 sale by Mr Moulsdale was a “grant giving rise” to the supply of the property;
- the land was “exempt land” because a person connected with the grantor was in occupation of the property for purposes that were not wholly or substantially wholly “eligible”.

The key questions then was whether the grantor was a “developer of the land”. The definition of “developer” contained several elements, and once again only some of them were relevant: the case turned on whether, at the time of the 2014 sale, the property “was intended or expected to be” a capital item (given that it no longer was one from Mr Moulsdale’s point of view). This had to refer to an expectation that it would be a capital item from the point of view of the purchaser as “a relevant transferee”. The sale was made at an “eligible time” for the purchaser because the 10-year adjustment period had not yet started to run.

After going through the regulations and statutes in detail, Lady Rose summarised the issues as follows:

(i) Mr Moulsdale will be a “developer of the land” for the purposes of paras 12 and 13 if he intended or expected that the building he was selling to Cumbernauld SPV would become a relevant capital item in relation to Cumbernauld SPV; and

(ii) The building would become a relevant capital item in relation to Cumbernauld SPV if Cumbernauld SPV was intended or expected to pay VAT on the acquisition costs of more than £250,000 on the building.

The question of whether Mr Moulsdale intended or expected the property to be a capital item was then within his control, as he had to decide whether to charge VAT. That led to the “conundrum”, as the judge described it, that whichever decision he took, it would lead to the opposite result.

Before concluding, the judge summarised the decisions below, and noted the dissenting judgment of Lord Doherty in the Court of Session. She

commented that "With respect to the tribunals below and the majority of the Inner House, I do not agree that evidence - or the absence of evidence - from a taxpayer about how he or she thought that the statutory provisions would apply to the grant is the key to deciding this case. The taxpayer may have a good understanding of the law and may be well advised or may be unaware of the existence of Schedule 10. That does not affect how the provisions do apply or whether the grant is subject to VAT. I agree with Judge Falk's comments at para 123 of *PGPH* that such a factual inquiry leads to capricious results."

She decided that the way to resolve the circularity was to construe the intention or expectation as relating to expenditure that the purchaser might incur *other than* the transaction that was the subject of the possible disapplication, i.e. the acquisition cost. There were still problems with the wording of the regulations, but this removed a great deal of the apparent illogicality. It was also consistent with the anti-avoidance purpose of the law, given that the alternative would make it too easy for people to disapply the option. Anyone could effectively enjoy the benefits of the option for as long as they wished, then "switch it off" by intending to sell the property.

In the present case, there was no expectation or intention that the purchaser would spend significant amounts of money on the property after the purchase, so it would not be a capital item; there was therefore no reason to disapply the option.

The appeal was dismissed again, for reasons slightly different from those given by the Court of Session.

Supreme Court: *Moulsdale t/a Moulsdale Properties v HMRC*

Lecture 15

3.3 Developers and builders

3.3.1 Charitable building

The Zoological Society of Hertfordshire (ZSH) engaged a construction company to build three structures at its premises: a lion enclosure, an outside exhibition called "World of Dinosaurs", and a shop. The company zero-rated the work; HMRC ruled that standard rated VAT should have been charged. This was conceded in respect of the shop, but the liability of the other supplies was appealed to the FTT. Judge Mark Baldwin said that the main consideration was whether the structures were used wholly for a relevant charitable purpose; there was a secondary consideration in relation to the exhibition, which HMRC contended was not a "building".

ZSH was a charity, and it had given a certificate of relevant charitable purpose (RCP) to the builder. In many other cases, HMRC have charged a penalty on the charity under VATA 1994 s.62 (incorrect issue of zero-rating certificate); in this case, they assessed the builder.

The RCP question depended on whether the structures would be used for an economic activity. The judge reviewed the *Wakefield College* decision and derived the following principles:

(1) Firstly, it does not matter whether the entity is looking to make a profit or has some wider social/charitable purpose. What matters is how the entity operates.

(2) Charges which are calculated by reference to cost (even if they do not completely cover costs) rather than other factors (such as the payer's means) suggest an economic activity (and "consideration" for a supply, which is essential for there to be a business, rather than a fee).

(3) Charges which are significant in absolute terms or make a significant contribution to costs suggest an economic activity.

(4) If there is a market where similar services are supplied by others on a commercial basis and the entity operates like a typical participant in that market (rather than as a final consumer), this would suggest an economic activity.

(5) Is this activity part of the principal function of the entity? Is it set up to do this? If so, that would suggest an economic activity.

(6) Is the activity conducted seriously on a regular basis (i.e. in an organised, business-like manner over a period and with prudent financial management)? If it is, this would suggest an economic activity.

The assessing officer appears to have initially concentrated on the "building" issue. However, at the Tribunal the main argument was about economic activity. HMRC's argument was simply that admission to premises for consideration was deemed to be a business by VATA 1994 s.94; the "premises" of ZSH were all the structures within the curtilage of the park, including the lion's enclosure and the dinosaur exhibit. They were therefore used for its economic activity.

The appellant's representative argued that the buildings were constructed for the conservation purposes of the zoo, and the public did not have access to the lion's enclosure. He emphasised that the whole purpose and objective of ZSH was charitable.

The judge noted that HMRC regarded any admission to premises for consideration as economic activity. He was not convinced that this was consistent with the more recent authorities and EU law: it was still necessary to consider whether the charity was exploiting property with the intention of generating an income from it. However, it was not necessary to come to a conclusion on this point, because the Tribunal considered that ZSH was carrying on a business even without the deeming provision in s.94. In this case, admission charges were a substantial proportion of ZSH's income, and were related to the cost of the operation (even if they did not completely cover all costs).

The judge rejected the appellant's argument that the admission charge to the park did not taint all the structures within it. The business was admission to the park and everything within: it encompassed the full spectrum of activities it carries out in order to raise money to finance its charitable activities. The lion's enclosure might have purposes that were directed towards conservation, but it could not be said that it (or the exhibition) was intended solely for non-business purposes.

The judge then considered some precedent decisions on what constituted a "building". Without an enclosure, walls and a roof, no one looking at it would naturally describe it as a building.

The appeal was dismissed.

First-Tier Tribunal (TC08729): *Paradise Wildlife Park Ltd*

Lecture 16

3.3.2 Article

In an article in *Taxation*, Neil Warren reviews the operation of the construction industry reverse charge, two years after its introduction. This revises some of the basic, but still significant, quirks of the system:

- the fact that it is optional for end users to declare their status to their suppliers;
- the 5% disregard for low-value services;
- the exclusion of employment businesses;
- the reflection of the reverse charge in Box 1 but not in Box 6 for the purchaser (unlike the reverse charge on purchase of services from abroad);
- the importance of actual tax points for reverse charge accounting, even if either party is using the cash accounting scheme;
- the required wording for VAT invoices;
- the change of policy on scaffolding supplies that was brought in from November 2022 to its full effect on 1 February 2023.

Taxation, 16 March 2023

3.4 Input tax claims on land

3.4.1 DIY claim

An individual appealed against refusal of a DIY builder’s claim for £6,075. Planning permission had been granted for a “single storey rear extension” to an existing property, so HMRC disallowed the claim on the basis that the works had not resulted in a new dwelling.

The claimant explained that he had arranged for the new building so that his wife, who was terminally ill, would not have to move into a hospice. When the new building was complete he moved into it with his wife and sold the original building to family members. The original plan had been for the new building to be attached to the original, but this had changed during the course of construction. Having the change approved “would have taken two years, which his wife didn’t have”.

The judge confirmed that HMRC were right: it was not enough for the project to result in a standalone building. The planning permission was not for a new dwelling but for an extension, and that could not qualify for the relief.

The appeal was dismissed.

First-Tier Tribunal (TC08716): *Dunne*

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 Consultancy services

A company provided a well-established, exclusive matchmaking service to clients in many jurisdictions. It claimed that its services should be regarded as outside the scope of VAT where supplied to persons belonging outside the EU under the heading "services of consultants... as well as the provision of information" (PVD art.59(c)). HMRC issued a decision in 2016 that the supplies did not fall within the provision, and raised assessments on that basis covering the period from 2012 to 2016. The quantum of the assessments was not in dispute; the FTT (TC07457) only had to consider whether the supplies fell within art.59(c).

The FTT judge and side member agreed that the service supplied by the principal could be described as "consultancy", but disagreed over whether the service as a whole fell within the provision. The judge considered that other elements of the LLP's supply were significant and changed the nature of the overall supply. His casting vote overruled the opinion of the side member, who considered that the fundamental nature of the supply was what the principal provided. The other elements were incidental to that.

The company appealed to the Upper Tribunal, arguing that the FTT had erred in law in failing properly to characterise the supply in accordance with the "predominant element" test in *Levob*. HMRC countered by objecting to the FTT's conclusions that the service fell within "consultancy" and that "data provision and the provision of information" could be read as two separate types of supply rather than as a single composite phrase. The Upper Tribunal agreed with the approach of the FTT on "consultancy", and also agreed with the side member that the other parts of the service were ancillary. The company's appeal was allowed.

HMRC appealed to the Court of Appeal, where Lady Justice Simler gave the leading judgment. HMRC argued four grounds:

i) Ground 1: the UT was wrong to set aside the FTT's decision on the basis that the FTT had failed to consider the application of the predominant element test. There is no mandatory requirement to consider or apply this test.

ii) Ground 2: if there is a predominant element test, the UT failed to characterise G&F's supply for VAT purposes as an introductory service and not within article 59(c) of the Principal VAT Directive.

iii) Ground 3: the UT wrongly found that G&F provided "services of consultants" (or similar services) within the meaning of article 59(c) of the Principal VAT Directive.

iv) Ground 4: the UT wrongly found that it could read "data processing and provision of information" in article 59(c) disjunctively and that G&F benefited from that provision merely if it provided information but did not provide data processing.

HMRC argued that the "predominant element" test in *Mesto Zamberk* was not mandatory, and the Upper Tribunal was wrong to apply it. The domestic precedents such as College of Estate Management suggested the test should be of the "overarching supply". Further, even if the predominant element test was the right one, HMRC argued that the UT had applied it incorrectly – it failed to identify a predominant element; there was in fact no predominant element; and the only conclusion open to the UT in light of the economic purpose of the contract was that, properly characterised, the supply was a single service concerned with the provision of introductions., rather than the provision or advice or information.

HMRC also put forward the same arguments about the restricted meanings of "consultancy" (that it should be supplied by "members of the liberal professions") and "provision of information and data processing" (that this was a single expression rather than two separate possible types of supply) that had been rejected by the FTT and the UT.

The judge considered the precedents relied on by HMRC in relation to the correct test to be applied. Most of them predated *Mesto*; she concluded that in *Mesto* the CJEU gave authoritative guidance on the test for deciding how a single complex supply must be categorised for VAT purposes. The language used by the CJEU in setting out this test is mandatory. Where it is possible to do so, the predominant element must be determined. This is the primary test to be applied for this purpose.

She quoted and agreed with the approach of the judges 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.

The UT had therefore applied the correct test, and the first ground of appeal failed. However, the judge went on to find that the UT had not correctly characterised the supply. The UT had described the predominant element in different ways at different points: there was no clear statement that it was the advice. There was no reference at any point to the contract between the LLP and its clients, which ought to have been the starting point in determining what was supplied. It would then only be departed from if it was inconsistent with the economic and commercial reality.

The judge examined the standard contract issued by the LLP and concluded that the only obligation identified by the standard terms was the provision of introductions. The provision of information by both parties is incidental to that, and advice is not mentioned at all. The provision of a minimum number of introductions would have been the most important element of the supply in the eyes of the typical consumer, as the UT itself decided at one point. That, then, was the predominant element of the supply.

The approach of both the FTT and the UT had been to carry out the kind of artificial dissection of the supply that the CJEU had warned against. The judge drew an analogy between the division of the supply of introductions into "advice and information" and the division of the supply of education into "teaching and books".

The appeal was therefore allowed on ground 2. The judge said that she found grounds 3 and 4 "not straightforward" and, as it was not necessary to consider them in disposing of the appeal, she preferred to leave them for another case.

Newey and Lewison LJJ agreed, and HMRC's appeal was allowed.

Court of Appeal: *HMRC v Gray & Farrar International LLP*

Lecture 17

4.3 International supplies of goods

4.3.1 Zero rating conditions

A company appealed against an assessment for £70,652, raised by HMRC for its periods 12/18 and 01/19, on the basis that the company had failed to provide "evidence of export" within the appropriate time limit and was therefore not entitled to zero-rate certain exports of goods to customers in the USA in September and October 2018.

Judge Nigel Popplewell quoted the law on zero-rating and evidence, derived from VATA 1994 s.30 and Notice 703. He quoted from the 2013 Upper Tribunal decision in *Arkeley Ltd*: "in a case where bad faith is not alleged, and where it is not argued that the taxable person was a participant in fraud, whether an actual participant or a participant by virtue of knowledge or means of knowledge of the fraud … the only question is whether the documents received by the supplier are sufficient evidence of the export. That is the case whether or not the tax authority has itself accepted the evidence. If that evidence is sufficient, and that is a matter for the Tribunal in the case of dispute, the application of zero-rating will not be precluded even if it is later discovered that the goods have not been exported "

The judge reviewed the history of the export business and how it was carried on. The goods were syringes for medical fillers; they were purchased by the British company and repackaged for US regulatory requirements at the director's home before being despatched via the Post Office.

The officer gave evidence to explain the reasons for her decision that the goods did not qualify for zero-rating:

- There was no evidence of payment by the US customers;

- the goods were delivered to an address that was not the customers' principal place of business;
- supplier information was incomplete and disagreed with information held by HMRC;
- nor did it agree with customer information given on the sales invoices;
- the values stated on each parcel was significantly below the sales invoice value;
- goods were described as medical supplies which is inaccurate; and
- incorrect quantities were given.

Crucially, however, it was also clear from her witness statement and her oral evidence that in her view the requirement to obtain the relevant evidence of export, namely 3 months from the date of supply, is the time within which the taxpayer must provide the evidence to HMRC. She did not think that it was the time within which the appellant must have the evidence in its possession. She accepted that, if the director had provided the evidence that he claimed to have to HMRC within the time limit, she would have accepted that the supplies were zero-rated.

HMRC did not challenge the director's evidence that he had those documents for all the supplies within the time limit (presumably because the officer did not believe it was relevant, if he had not provided the documents to HMRC). Some of those documents had been mislaid while being sent to and from HMRC, but the judge found as a fact that the trader had them in his possession within the time limit, because his evidence was unchallenged.

The judge commented that there seemed to be "some confusion in the ranks of HMRC regarding our role, jurisdiction, and whether we can determine this appeal or whether it is for the appellant to take some further corrective action in light of the evidence which we have heard." He made it clear that it was his role to determine the appeal and decide whether the trader was entitled to zero-rating.

There was also significant confusion in that "It is clear from Officer Bains' evidence, as well as HMRC's statement of case and Mr Mackley's skeleton argument and his oral submissions, that HMRC's view of the law is that the evidence of export must be provided to HMRC within 3 months from the date of supply." The review decision contained a different requirement, that effectively inferred from the records not being "readily available" that they were not in the trader's possession. As the legal requirement of Notice 703 was that the trader should "obtain" the documentary evidence, HMRC's case was based on a mistake.

HMRC also failed to take into account the decision in *Arkeley* that the evidence could take different forms, and could be reviewed for adequacy by the Tribunal even if HMRC did not accept it. The judge did so, and declared himself at a loss to understand why HMRC were not satisfied. In his view, the records were exemplary, and readily understood when explained to the Tribunal by the taxpayer's representative: "If there was ever a counsel of perfection for the provision of export documentation, then this appellant has achieved it."

The judge's summing up makes uncomfortable reading for a number of different people involved in the case on HMRC's side: "So it seems to us the only reason that the appellant has had to bring an appeal was based on an erroneous view of the law set out in HMRC's own Notice 703 (as well as either overlooking or misconstruing the principles in *Arkeley*). This error was started by Officer Bains, perpetuated by the nonsense written by the review officer, and then compounded by HMRC's statement of case and skeleton argument."

The appeal was allowed. There is no mention of costs, although the language of the decision might suggest that HMRC could be argued to have acted unreasonably in the conduct of the appeal.

First-Tier Tribunal (TC08712): *Pavan Trading Ltd*

Lecture 18

4.3.2 Intra-community transactions

A Swiss company owned cosmetic products that were located in a warehouse in Slovenia. In 2017, it supplied some of these goods to customers established in Croatia and Romania. According to the company, the goods were handed over to someone acting on behalf of the customer and transported out of Slovenia. They were therefore treated as exempt intra-community despatches.

In February 2019, the Slovenian tax authorities asked the company to submit all the documentation to support the exemption. The company supplied some documents but said that it did not have them all; it was trying to obtain them. In April 2019, the authority issued an inspection report, in response to which the company provided further documents and explaining that the delay had arisen because of the closure of one of its offices in 2018. In May 2019, the authority issued an assessment for 2017, discounting the evidence provided after the issue of the tax inspection report.

The Slovenian Supreme Court noted that the PVD does not prescribe time limits for submitting evidence of despatch, but allows member states to set the conditions for application of exemptions. It referred questions to the CJEU to clarify whether the late submitted evidence should have been admitted.

The CJEU discussed the application of the principles of equivalence, effectiveness and fiscal neutrality. It would be contrary to the principle of legal certainty to allow further evidence to be produced by a taxpayer without time limit; on the other hand, the principles of effectiveness and neutrality required a good reason to justify refusal of the production of new evidence before a tax assessment had been issued. Such reasons could include a lack of justification for the delay or the fact that the delay resulted in a loss of tax revenue.

The answer was that the PVD did not preclude the refusal of admission of the evidence, but it was for the national court to consider whether the principles of equivalence, effectiveness and neutrality had been complied with.

CJEU (Case C-664/21): *NecPlus Ultra Cosmetics AG v Republika Slovenija*

4.3.3 Windsor framework

The "Windsor Framework" was announced on 27 February following agreement between the UK and the EU to make amendments to the Northern Ireland Protocol. The section on VAT and excise reads as follows:

30.Under the old Protocol, EU VAT and excise rules apply in Northern Ireland, strictly in relation to goods, in order to avoid a hard border in Northern Ireland. While UK authorities have ensured that this has avoided burdens on East-West movements in practice, those rules have prevented the Government from applying VAT and excise changes UK-wide, with future EU rule changes likely to increase that divergence further.

31.To address this, the agreement secures substantive, legally binding changes in the new arrangements, ensuring that Northern Ireland will benefit from the same VAT and alcohol taxes as apply in the rest of the United Kingdom. It specifically amends the legal text of the treaty to provide these critical freedoms and to lock in flexibility for the future.

Under these arrangements, the Government will restore the integrity of the UK internal market and UK VAT and excise area.

- This will mean that straight away, through changes to Annex 3 of the original Protocol, the Government can bring forward legislation to ensure that Northern Ireland will be able to apply zero rates of VAT to the installation of energy-saving materials such as heat pumps and solar panels – rectifying the disparity between Great Britain and Northern Ireland.
- And it ensures that reforms to alcohol duties, due to take effect this summer, will apply right across the UK from the outset – meaning cheaper pints in pubs and a clearer set of duties overall.

32.The agreement also makes further changes to permanently protect Northern Ireland's place in the UK's VAT area:

- It removes the limit on the number of reduced and zero rates in Northern Ireland, ensuring parity across the United Kingdom.
- It delivers full flexibility on rates in the future, by establishing new categories that can be applied for VAT purposes where goods are consumed in Northern Ireland.
- It protects Northern Ireland's second-hand car market into the future with a new scheme to take effect from 1 May 2023, ending two years of uncertainty for traders and consumers.
- It exempts Northern Ireland businesses from a range of bureaucratic EU rules: saving 2,000 Northern Ireland businesses from needing to register for VAT under a 2025 EU Directive; and avoiding a range of other new burdens on SMEs, and divergence with Great Britain.
- And it establishes a brand new mechanism, first proposed in the UK's 2021 Command Paper, enabling the UK and EU to look at future EU rule changes and make further legally binding changes to resolve any distortive impacts that new EU red tape could cause.

33.Overall these changes to the text of the original Protocol guarantee Northern Ireland's position within the UK's VAT and excise area, while still maintaining frictionless arrangements for those businesses trading with the EU - granting Northern Ireland businesses the ability to benefit from new UK changes, and ensuring that Northern Ireland households can benefit from the UK's Brexit freedoms.

assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1138989/The_Windsor_Framework_a_new_way_forward.pdf

The Office of the Prime Minister has published a number of "sector explainers" on the implications of the Windsor Framework, including for goods moving in either direction, parcels, and VAT and excise.

www.gov.uk/government/publications/the-windsor-framework-sector-explainer

The Institute for Government has published an "explainer" on the Framework. It gives details of the terms of the original Protocol, the problems this created, the UK and EU positions on changes to it, and the final terms of the deal for a long list of issues including customs, VAT and excise.

Customs

Original protocol: Customs declarations required on all goods moving GB-NI. The Trader Support Service (TSS) fills these out on behalf of businesses. A grace period exempts parcels from customs declarations.

UK-originating goods can qualify for tariff-free access under the Trade and Cooperation Agreement. Goods that do not qualify can still move GB–NI tariff-free if they are remaining in NI, and can prove they are not 'at risk' of moving into the EU. For goods that are deemed 'at risk', the UK government can pay tariffs on the trader's behalf or reimburse them.

Problem: Forms create additional bureaucracy and costs for businesses. Although the TSS reduces this burden, it may only be available for a limited period of time. If the grace periods end, customs declarations will be required on each individual parcel sent from GB–NI, which means GB-based businesses may be less willing to sell to customers in NI.

Most goods are able to move GB–NI tariff-free. However, those that are considered 'at risk' may have to pay tariffs and await reimbursement, causing cashflow problems. Traders wanting to have their goods classified as 'not at risk' have to meet certain criteria, meaning some traders are unable to access the scheme.

Customs formalities would also apply to anyone sending a parcel to Northern Ireland from Great Britain and to goods being supplied into NI by a GB-based online retailer.

EU position	UK position	What does the framework say?
The EU proposes expanding the definition of goods 'not at risk' to cover	The UK proposes that customs formalities should only apply to goods moving GB–NI	The agreement expands the definition of 'not at risk' to cover a wider range of businesses that will be able

EU position	UK position	What does the framework say?
more goods and reducing customs formalities, including declarations, for those goods. The arrangements would be subject to a termination clause for "non-compliance".	destined for the EU. Traders would be required to declare the destination of their goods and those staying in NI would not be subject to tariffs or customs declarations.	to use a 'green lane'. Trusted traders that can prove that their goods are remaining in the NI are subject to simplified customs paperwork – which can be submitted on a monthly basis – and will not be subject to checks unless smuggling is suspected. Parcels sent from GB to friends and family in NI will have no extra customs processes or costs for the sender or recipient. Online retailers will face no customs requirements when sending goods to NI consumers. These arrangements are conditional on UK–EU data sharing. The deal also creates special arrangements for steel tariffs and goods whose destination isn't clear and removes the need for any paperwork on goods moving NI–GB.

VAT and excise

Original protocol: The UK is part of the UK VAT area, but EU VAT and excise rules for goods generally apply in NI.

Problem: NI is no longer part of the EU VAT margin scheme. This means that those selling second hand goods in NI sourced from GB may have to pay more VAT, which could increase prices. This issue has particularly affected the second hand car market in NI, which relies heavily on vehicles sourced from GB. Online firms have also faced separate difficulties with the new VAT arrangements. The UK was constrained in what VAT changes could apply in Northern Ireland by the need to stay within the EU VAT rate structures. It also could not apply changes to excise duties that were not in line with EU structures for excise duties. This prevented some changes to UK tax made in recent budgets applying in Northern Ireland

EU position	UK position	What does the framework say?

EU position	UK position	What does the framework say?
The EU has not made any specific proposals in this area.	The UK government has called for a more "flexible settlement" on VAT, allowing the UK greater freedom to set VAT and excise rates and structures in NI, subject to safeguards in the event that UK tax changes introduce significant differences in tax rules between NI and the Republic.	The framework amends the protocol to exempt NI from certain VAT provisions. The UK will be able to apply reduced VAT rates on goods installed in immovable property, such as heat pumps. The UK will be able to apply a different, lower excise duty rate to alcoholic drinks served in hospitality venues than those sold in supermarkets. It will be able to set the tax structure based on alcoholic strength. The UK will have to respect EU minimum duty rates. The EU's new VAT scheme for small enterprises will not apply in NI. The UK will need to respect EU rules on the annual turnover threshold when applying its own VAT exemption scheme for small enterprises. A specialised committee (the 'Enhanced Coordination Mechanism') will review the application in NI of new EU VAT and excise laws.

www.instituteforgovernment.org.uk/explainer/windsor-framework#vat-and-excise

On 24 March, the EU-UK Joint Committee adopted a decision laying down the arrangements relating to the Windsor Framework. The decision covers, amongst other things, the arrangements for the movement of goods not at risk of entering the Single Market, the "Stormont Brake", and VAT and excise-related solutions, including the establishment of the Enhanced Coordination Mechanism for VAT and excise.

https://ec.europa.eu/commission/presscorner/detail/en/IP_23_1841

Lecture 19

4.3.4 Changes to excise rules in NI

The *Excise Duties and Value Added Tax (Northern Ireland) (Miscellaneous Modifications and Amendments) Regulations 2023* make amendments to the rules that apply in NI for the holding and movement of excise goods. The amendments implement changes made in EU excise

legislation to ensure domestic excise legislation applying in NI stays aligned with the EU, as required under the NI Protocol to the Withdrawal Agreement. The changes reform some administrative requirements for the movement of excise goods between NI and the EU, which were previously governed by the *Excise Duties (Northern Ireland Miscellaneous Modifications and Amendments) (EU Exit) Regulations 2020* (NIMMA).

This measure also introduces an exemption from excise duty and VAT for visiting forces of an EU Member State engaged in Common Security and Defence Policy. For the avoidance of doubt, these provisions are not relevant in Northern Ireland.

The regulations took effect on 13 February 2023.

SI 2023/64

4.3.5 Updated HMRC guidance

HMRC have updated the web pages giving guidance on accounting for import VAT. The new guidance says that statements of postponed import VAT will usually be available to view by the 8th working day of the month (previously was the 6th working day of the month). The guidance also points out that statements are only available to view on the HMRC system for six months – traders should download them and keep their own copies.

www.gov.uk/guidance/get-your-postponed-import-vat-statement

The guidance on completing the VAT return has been updated to reflect various problems with monthly statements, including a specific issue with filing on 30 December 2022 and technical issues with June 2022 statements, where replacement statements have been made available to replace the original faulty versions.

A further update in March deals with what to do if there are specific entries missing from monthly statements.

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

4.3.6 New guidance for online marketplaces and others

HMRC have published three new guidance notes on charging VAT on goods sold direct to customers in the UK. They cover:

- what VAT an online marketplace operator has to charge when selling goods through the marketplace

  www.gov.uk/guidance/charging-vat-when-goods-are-sold-if-youre-an-online-marketplace-operator?

- who needs to pay VAT when selling goods direct to customers in the UK, without the involvement of an online marketplace

  www.gov.uk/guidance/charging-vat-on-goods-sold-direct-to-customers-in-the-uk

- who needs to pay VAT when selling goods to customers in the UK using an online marketplace

  www.gov.uk/guidance/charging-vat-when-using-an-online-marketplace-to-sell-goods-to-customers-in-the-uk

4.4 European rules

4.4.1 UK response to EU regulation changes

The UK government has published an explanatory memorandum to set out the effect in the UK (in particular in Northern Ireland) of proposed changes to a number of EU regulations. It explains the impact of the *VAT in the Digital Age* initiative published by the EU on 8 December 2022. The proposal is for changes to the rules for online marketplaces, accounting systems and reporting and invoicing rules to be introduced on a staggered basis from 2024 to 2030. As NI remains aligned with EU legislation under the Protocol, it will be affected by these changes.

www.gov.uk/government/publications/em-on-eu-regulation-2822011-com2022704

This follows on from the Commission’s publication of an Explanatory Memorandum on 8 December 2022 entitled “VAT in the Digital Age”. This is a project that has been the subject of consultation and assessment of feedback, and will lead in due course to amendments to the Implementing Regulation. The Commission’s EM sums up its objectives as follows:

(1) Modernising VAT reporting obligations, by introducing Digital Reporting Requirements, which will standardise the information that needs to be submitted by taxable persons on each transaction to the tax authorities in an electronic format. At the same time it will impose the use of e-invoicing for cross-border transactions;

(2) Addressing the challenges of the platform economy [e.g. Uber and AirBnB]*, by updating the VAT rules applicable to the platform economy in order to address the issue of equal treatment, clarifying the place of supply rules applicable to these transactions and enhancing the role of the platforms in the collection of VAT when they facilitate the supply of short-term accommodation rental or passenger transport services; and*

(3) Avoiding the need for multiple VAT registrations in the EU and improving the functioning of the tool implemented to declare and pay the VAT due on distance sales of goods, by introducing Single VAT Registration (SVR). That is, improving and expanding the existing systems of One-Stop Shop (OSS)/Import One-Stop Shop (IOSS) and reverse charge in order to minimise the instances for which a taxable person is required to register in another Member State.

https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13186-VAT-in-the-digital-age_en

4.4.2 Involuntary supply

An individual was sued by his electricity provider for “theft” of electricity. He had consumed electricity at his private address after terminating one supply contract and without entering into another. The referring court in Belgium considered that this amounted to energy fraud. The energy distributor’s contract allows it to charge for such unauthorised use, and the bill rendered to the individual included VAT. The question

was raised of whether charging VAT in these circumstances was contrary to the PVD.

Although this may appear straightforward, the reason it is a legal issue is that electricity is treated as "goods" for VAT. Theft of goods does not involve the owner in making a supply; it is therefore possible that the owner of the electricity is being compensated for an unlawful act rather than being paid consideration for a supply in the course of business.

A-G Kokott noted that there was no precedent on transactions that were illegal from the point of view of the recipient of the supply. There were several precedents on illegal supplies, which followed the principle of fiscal neutrality: where transactions take place in the context of a commercial market, the fact that they contravene some legal provision should not take them outside the scope of VAT. That would give illegal transactions an unfair and unintended advantage over legal ones.

The concept of consideration required a legal relationship between the recipient and the payer. In most cases, that was a contractual relationship, but it could also be created by statute. In the present case, the electricity network had statutory rights to charge for the stolen electricity.

The A-G also considered the relevance of PVD art.14(2)(a), which provides that the transfer of property by order of a public authority in return for compensation is to be treated as a supply of goods. She did not agree with the Belgian authorities that the provision actually applied here; it dealt with compulsory purchase orders, not with theft. However, it implied that the circumstances of a transfer of ownership of goods should make no difference to the VAT treatment.

All of these considerations led the A-G to the conclusion that there should be no VAT advantage to a person who stole electricity. The compensation charged by the distribution network should be VATable in the same way as a normal charge for electricity.

The referring court also asked whether this transaction should be regarded as part of the economic activity of the network. The A-G considered that it was clearly an inherent part of the entrepreneurial risk that the network took on, and it was therefore part of its economic activity.

The A-G also rejected the idea that the transaction could be ignored under art.13. The referring court appeared to be confused by the successive conditions of art.13: while it was possible that the network was "another public body", subject to public law, it would still have to be treated as an economic operator in relation to supply of electricity because that is listed in Annex I. The exception for "negligible activities" could only apply if the result would be that the public body did not need to register at all. To put it another way, it would have to apply to all the supplies of electricity carried on by the network, not just the pursuit of people who had stolen electricity. As the network was clearly subject to VAT in general, art.13 was not a reason to exclude particular transactions.

CJEU (Case C-677/21) (A-G): *FluviusAntwerpen v MX*

4.4.3 Credit insurance

An insurance company compensated its customers when their debtors did not pay. It would typically pay out 90% of the value of the unpaid debt.

In 2019 it made a claim for repayment of approximately €800,000, representing what it claimed was the required adjustment to VAT under art.90. The VAT had been paid over to the authorities by the insured business, and had not been paid to them by their customers. Part of its claim related to non-compliance of Hungarian law with art.90 until it was corrected with effect from 1 January 2020.

The national court refused the repayment on the basis that the insurance company had not made the supply that gave rise to the output tax. It appealed further, arguing that it was the successor in title to the original supplier, and its claim should succeed on the basis of fiscal neutrality. Questions were referred to the CJEU. These referred to the general principles of proportionality, fiscal neutrality and effectiveness, and also questioned whether it made a difference if the debt was definitively known to be irrecoverable at the date it was assigned to the insurer, or was still possibly recoverable. The defect in the Hungarian law related to refusal of bad debt relief even where the debt could be shown to be definitively irrecoverable.

After rehearsing the purpose of art.90 and the findings of some precedent cases, the CJEU pointed out that the person who had made the supply – and who had therefore accounted for the output tax which might be subject to adjustment under art.90 – was the insured person. That person had received consideration for the supply in the form of the compensation, and the principle of proportionality required that the VAT fraction of the amount actually received should be accounted for to the authorities.

It was not possible to recognise an insurer as having the status of the taxable person entitled to a bad debt relief claim.

CJEU (Case C-482/21): *Euler Hermes SA Magyarországi Fióktelepe v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága*

4.4.4 Taxable person

Two sisters co-owned land in Romania. In 2006, they entered into a contract relating to an association without legal personality with two other natural persons, with a view to the construction of a building complex consisting of eight residential properties with 56 apartments, intended for sale to third parties. The contract provided for the other two parties to bear the cost of building the complex; the sisters would each receive 1/6 of the profit, and the builders would each receive 1/3. Most of the apartments were sold in 2008. The land register showed some of them as sold by one sister, some sold by the other, and some sold jointly. No reference was made in the sale contracts to the other two parties to the building contract.

One of the sisters appealed, arguing that the two other parties should be liable for their share of the VAT. This was partially upheld by the Romanian court, leading to appeals both by the taxpayer and the tax authorities. Questions were referred to the CJEU.

The referring court noted that the involvement of the two other parties in the economic activity was substantial and essential. It questioned whether the tax authorities had relied on the contract between the parties in determining that the sisters were carrying on economic activity, but then ignored it in assessing only them. It also questioned whether, if the sister

was solely liable for the output tax, she should be entitled to deduction of input tax on costs incurred by the builders in carrying out the project.

The referring court asked for an "expedited procedure" because of the length of time the dispute had been going on. The CJEU rejected this application: "the interest, however important and legitimate, of individuals in having the scope of the rights that they derive from EU law determined as quickly as possible does not imply that the case in the main proceedings must be dealt with within a short time within the meaning of Article 105(1) of the Rules of Procedure."

The CJEU noted that the arrangement involved a number of different transactions by different people, which as a matter of principle should be given their own distinct VAT treatment. None of them appeared to be a principal transaction to which the other elements were ancillary.

It was first necessary to consider who had carried on the economic activity. To that end, it is necessary to examine whether the person concerned carries out an economic activity in his or her own name, on his or her own behalf and under his or her own responsibility, and whether he or she bears the economic risk associated with the carrying out of those activities. It was for the referring court to determine whether the building partners had acted "independently". However, in order to provide a useful answer, the CJ commented on the facts as represented in the order for reference. As the sale contracts did not mention the building partners, they should not be regarded as carrying on an economic activity in relation to those sales.

The next question was whether the parties to the contract should be regarded as a single taxable person. It appears that Romania had not enacted art.11 PVD, and it certainly had not been applied either by or to the parties to the building agreement. It was therefore not possible to regard the association as a taxable person separate from its members.

The translation of the decision about deduction of input tax appears to be missing a crucial negative. The court discusses the importance of objective evidence of incurring costs in order to prevent the possibility of a double deduction; the implication is that the sisters did not hold the required invoices and therefore could not claim input tax. However, the answer at the end of the judgment reads as follows:

"The VAT Directive, the principle of proportionality and the principle of fiscal neutrality must be interpreted as meaning that a taxable person, where it does not hold an invoice issued in its name, *must be granted the right to deduct* the input VAT paid by another party to an association without legal personality with a view to carrying out that association's economic activity, even if the taxable person is liable in respect of that activity, where there is no objective evidence that the goods and services at issue in the main proceedings were actually provided as inputs by taxable persons for the purposes of its own transactions subject to VAT."

The context surely requires the words in italics to mean the opposite: a person who does not hold the evidence *must not be granted the right* to deduct.

CJEU (Case C-519/21): *ASA v DGRFP Cluj*

4.4.5 Artificial split?

Two Belgian companies, I and P, entered into a cooperation agreement in 2008. I owned land on which a former college was established; the purpose of the agreement was for P to supervise the conversion of the building into apartments and offices and then to sell them.

The purchasers of the future apartments entered into separate contracts: one with I, for the sale of part of the former college building, and one with P for the works to be done to it. The Belgian authorities decided that this was an artificial split to turn "sale of new apartments" (21% VAT rate) into "sale of existing building and renovation" (exempt land and 6% VAT rate on the works).

The issue was whether the tax authority was entitled to classify the converted buildings as "new" within PVD art.12(1)(a), when there were no detailed rules in the Belgian law to define when a converted building had undergone such a comprehensive change that it could be regarded as "occupied for the first time". The Court of Cassation decided to refer questions to the CJEU.

The CJEU discussed the reason for the exemption of the sale of used buildings to final consumers, and said that the preparatory documents for the 6th Directive remained relevant in understanding the purpose of the provisions. They made it clear that the criterion of the 'first occupation' of a building must be understood as corresponding to the first use of the immovable property by its owner or tenant. In so far as the supply of an old building that has undergone a conversion generates, like the supply of a new building before its first occupation, added value, it fulfils the criterion of 'first occupation' referred to in art.12(1)(a) and gives rise to a transaction subject to taxation. Member States were entitled to set rules defining a new building, but not to alter the concept in a manner inconsistent with the purpose of the Directive.

The court considered the question of modification of an existing building in *Kozuba Premium Selection* (Case C-308/16). This confirmed that it was acceptable for a Member State to define a level of proportionate cost at which a converted building should be regarded as "new". Belgium did not have any such rule; the principle of legal certainty emphasised the importance of clear borderlines for taxpayers to know how their transactions would be treated.

The conclusion of the judgment is confusing. The following two paragraphs appear to me to come to opposite conclusions: the first suggests that the Belgian state would have the right to tax the transactions in the case, and the second (which is the formal answer to the question referred) suggests that the exemption should be applied.

31 In the light of the foregoing, the absence of a binding definition, in national law, of detailed rules for applying the criterion of first occupation to conversions of buildings, does not have a direct effect on the exemption of those converted buildings, even though an interpretation of national law in accordance with Article 135(1)(j) of the VAT Directive, read in conjunction with Article 12(1)(a) thereof, and the related case-law of the Court leads, on the contrary, to the refusal of the exemption demanded.

32 The answer to the question referred is therefore that Article 135(1)(j) of the VAT Directive, read in conjunction with Article 12(1) and (2) thereof, must be interpreted as meaning that the exemption provided for by that first provision for the supply of a building or a part of a building, and of the land on which the building stands, other than those which are supplied before their first occupation, also applies to the supply of a building which was first occupied before its conversion, even if the Member State concerned has not laid down, in national law, the detailed rules for applying the criterion of first occupation to conversions of buildings, as the second of those provisions authorised it to do.

CJEU (Case C-239/22): *État belge and Promo 54 v Promo 54 and État belge*

4.4.6 Public authorities and subsidies

Three municipal authorities and an urban community in Poland entered into a partnership to carry out a project for the installation of renewable energy sources (RES). The community, as project leader, received grants from the provincial authority and distributed them. The municipality of O received grants amounting to 75% of the costs that were eligible for subsidy.

Each authority was free to decide on the arrangements for financing the 25% cost it had to bear. The municipality of O decided to require contributions from the owners of properties that would benefit from the installation of RES. The RES would remain the property of O for the duration of the project (5 years), after which ownership would transfer to the property owner.

O applied for an advance ruling on the VAT treatment of the owners' contributions, and appealed against the tax authority's view that the receipts would be subject to VAT (on the basis that O was not entering into the activity in the capacity of a public authority). The Polish court decided to refer questions to the CJEU. The questions ask for clarification of the application of articles 2 (taxable transactions), 9 (taxable persons) and 13 (public authorities), and ask separately about the treatment of the owners' contribution and the possibility that the grant funding itself could be taxable.

The court considered the precedents on taxable transactions. It was not important that O did not supply the RES itself, because that can be done by subcontractors; it was also not significant that the price paid was higher or lower than the value obtained, as long as there was the necessary link to make it "consideration for a supply". It was clear that O made the RES available for five years (a supply of services) and then transferred them to the property owners (a supply of goods). Although it was for the referring court to decide whether there was a supply for consideration, the implication of the CJEU decision is that article 2 is satisfied.

Turning to article 9, the CJEU noted that O did not intend to engage in the installation of RES as a long-term venture. It neither employed nor planned to employ workers in this area. O would simply offer the benefit of the RES to residents; it would pay whoever won the tender for installation the full price, and would collect a 25% contribution from the resident. The court noted that O could not make a profit, as a commercial installer would do, but only ran the risk of loss. The court compared the

situation to *Gemeente Borsele*, where the amounts recovered as charges were a much lower percentage of the costs, and came to the same conclusion: this should not be regarded as an economic activity.

In the light of that conclusion, it was not necessary to consider the question of whether O was "acting as a public authority" to engage article 13.

CJEU (Case C-612/21): *Gmina O v Dyrektor Krajowej Informacji Skarbowej*

4.4.7 Asbestos removal

Similar issues arose in another Polish case. A local authority was responsible for organising the removal of asbestos from non-commercial properties. The owners of the properties did not have to pay anything; the authority was eligible for grant funding of between 40% and 100% of the cost paid out to contractors for doing the work. The contractors charged VAT to the authority, and it asked for a ruling on the VAT status of the activity. The tax authority ruled that it was taxable, and it was therefore able to deduct VAT on the costs; even though that appears to be beneficial (as the costs appear always to be at least as high as any revenue), the authority appealed, and questions were referred to the CJEU.

The tax authority appears to have concluded that the authority was acting as an agent, arranging a supply from the contractor to the property owner, and was therefore to be treated as both receiving and making the supply under art.28 PVD. The CJEU considered that the conditions for art.28 did not apply: there was no agreement for the authority to act in the name of the residents, and the residents had no influence over the provision of the services.

It was then necessary to consider whether the authority was a supplier of services in its own right. There were two supplies of services in the case. The first was made by the contractor to the authority, which was clearly within art.2. The second was the supply of a service made to the residents. The CEJU considered that this supply was made by the authority and was paid for by the subsidy. It would be for the referring court to determine whether there was a sufficient link between the supply and the payment to bring it within article 2.

If the referring court came to that conclusion, it would then be necessary to consider art.9. Here, the discussion was very similar to that in the case of O: the authority could only make a loss and was not entering into the activity to generate income. It was therefore very unlikely to be an economic activity (but it was still for the referring court to make a final decision).

CJEU (Case C-616/21): *Dyrektor Krajowej Informacji Skarbowej v Gmina L*

4.5 Foreign refund reclaims

Nothing to report.

5. INPUTS

5.1 Economic activity

5.1.1 Article

In an article in *Taxation*, Alex Millar discusses the recovery of input tax on corporate finance costs, including the difference between issuing shares and selling shares, and provides a number of practical points to be borne in mind to help maximise recovery. He considers the problem of whether a holding company is actually making supplies in return for management charges, and suggests evidence that may help to settle the question.

Taxation, 2 March 2023

5.2 Who receives the supply?

Nothing to report.

5.3 Partial exemption

5.3.1 Group input tax

A LLP appealed against assessments to disallow input tax for periods 10/17 (£69,241) and 01/18 (£3,997). This related to costs incurred in a "reverse takeover" and flotation on the Alternative Investment Market which also raised £20 million in new capital. There were some name changes in the parties involved, which makes the decision more confusing than it might otherwise be:

- the reverse takeover involved Work Group plc (WG) acquiring Gordon Dadds Group Ltd (GDG);
- GDG had previously been called, and was subsequently called, Culver Holdings Ltd;
- Culver was the acquired company and was the appellant;
- WG was the acquiring company and the company that incurred the input tax.

WG joined the Culver VAT group on the day the takeover was completed. It had incurred VAT in relation to costs of the takeover and sought to recover that VAT through the group VAT return. HMRC disallowed the claims on the basis that they did not relate to taxable supplies made by the group; the situation was similar to that in *BAA Ltd*.

Judge Rachel Perez reviewed a large number of precedents on economic activity and direct and immediate link, as well as overheads incurred by a holding company. A great deal of the decision is made up of extracts from decided cases, including *Frank A Smart Ltd* and *Hotel La Tour*.

The company argued that, in accordance with VATA 1994 s.43, the supplies were deemed to be made to Culver as the representative member

of the VAT group; the costs were overheads of the group; the funds raised were used in the business of the group.

HMRC responded that the situation was directly analogous to that in *BAA Ltd*. The costs had been incurred by WG, which did not carry on any economic activity in its own right (it had been dormant for about 20 months leading up to the reverse takeover); the funds raised were used for acquisitions, which did not involve the making of taxable supplies. There was no direct and immediate link with any taxable business. No supplies of management services were made by WG to Culver or any of its subsidiaries.

The judge listed the issues to be determined as follows:

1. Can Culver's current or intended taxable supplies, and current or intended economic activity, be relied on as "downstream" economic activity of WG and as "downstream" taxable supplies of WG? The answer depends in turn on the answers to the following questions—
2. does the principle in *BAA* apply in the present case?
3. did WG have an intention to join the VAT group of which Culver was a member and group representative?
4. Are the costs that were incurred for the purposes of the takeover by WG "overheads" within the meaning of the case law? The answer depends in turn on the answers to the following questions—
5. was fundraising a purpose of the takeover?
6. if so, was fundraising WG's purpose or (if at all) only Culver's purpose?
7. was fundraising a purpose for which the services were supplied to and received by WG?
8. what was the intended use of the funds to be raised?
9. what was the actual use of the funds raised?
10. does the way in which the funds were intended to be used and were actually used fall within the Supreme Court's reasoning in *Frank Smart*?
11. Does section 43 of the VAT Act 1994 mean that deemed supply to the VAT group representative member can be matched to that member's actual intentions in place of the intentions of the actual recipient of the supplies?

These questions were considered in turn and in detail. The judges concluded that the case could not be distinguished from *BAA*, but that the CA in the earlier case had accepted as a principle that the future supplies by the group (i.e. Culver in this case) could constitute "downstream economic activity" to which the holding company's (i.e. WG's) inputs could be linked. There had been an intention to join the VAT group at the time of the takeover, and fundraising was a purpose of the takeover and related issue. All of these answers were stated to support the appellant, even the fact that *BAA* was an indistinguishable precedent.

The key question was what the funds raised were intended to be used for. The evidence was not completely clear, so for an indication of purpose the

judges examined what the funds were actually used for. Again, the judges could not make findings in detail based on the evidence put before them. The issue was whether the use of the funds brought the situation within the Supreme Court's reasoning in *Frank A Smart Ltd*, where the fundraising and financial activities of the company was held to have a direct and immediate link to an intention to expand the taxable business.

The judges could not make a finding to that effect. They spelled out that it would have been enough to establish a link between the use of the funds raised and the expansion of Culver's taxable business (the downstream transactions being carried on by the group), but the funds were used to acquire further companies to which Culver would supply services. That was not enough to establish a link between the raising of the funds and the taxable supplies made by Culver. In the view of the judges, buying assets to which the group could make supplies was not the kind of expansion envisaged by the Supreme Court in *Frank A Smart*.

The judges commented that, had they accepted that there was a link in principle, they would have considered an apportionment based on the cost of WG's due diligence. The costs of that part of the transaction would have been, in the view of the judges, linked to protection of WG's position rather than linked to raising funds for expansion of the business.

The consideration of an argument based on VATA 1994 s.43 was quite brief. The question was whether the grouping rules could be relied on so that the inputs, deemed to be supplied to the representative member, could be attributed to the representative member's actual intentions for the use of those inputs. The judges ruled that it was instead necessary to deem the actual intentions of the member incurring the inputs to the representative member, which was subtly but crucially different. The two cases cited by the appellant in support of its argument (*Heating Plumbing Supplies* and *Hotel La Tour Ltd*) were FTT decisions and therefore not binding precedent; the judges disagreed with the reasoning in the first case (which did appear to relate the deemed supply to the representative member to the representative member's actual intentions), and they considered the second case to have dealt with a different situation (because the same company received the inputs and had the intention of making future supplies).

For the reasons given in relation to the use of the funds raised, the judges dismissed the appeal.

First-Tier Tribunal (TC08699): *Ince Gordon Dadds LLP*

Lecture 20

5.3.2 Insurance sector

HMRC have published guidance for businesses in the insurance sector that want to agree a partial exemption special method. The guidance has been developed jointly with the Association of British Insurers, and is intended to help insurers gain approval for a fair and reasonable partial exemption special method with the minimum of cost and delay.

The guidance is neither mandatory nor binding and HMRC will consider whether to approve any PESM that an insurer declares fair and reasonable. HMRC cannot approve a PESM unless accompanied by a declaration.

The guidance covers the following matters:

- Insurance definitions and activities
- Attribution of input tax
- Sectors
- Allocation of residual input tax to sectors of business
- Pro-rata calculations
- Run-off
- Annual adjustment
- Capital Goods Scheme
- Annex 1: the basic principles of partial exemption
- Annex 2: why a partial exemption special method is usually suitable for an insurance business.
- Annex 3: partial exemption special method examples for the insurance sector

www.gov.uk/guidance/insurance-sector-partial-exemption-framework

5.4 Cars

5.4.1 Input tax disallowed

A trader appealed against an assessment to disallow £9,052 of input tax claimed on the purchase of a car in its 08/2019 period, and a careless inaccuracy penalty of £1,357 based on that claim. The claim had been noticed by a control officer who was visiting the trader to discuss another matter in 2021, which was satisfactorily resolved without dispute.

The company argued that this car was used exclusively for business purposes: the director had another car for private use, as well as access to his wife's car. The company's accountant wrote to HMRC in disputing the matter: "*While there is nothing preventing the director from using the vehicle for personal reasons, he can categorically say that the vehicle was never used for personal reasons and that is indicated by the number of mileage done so far by the vehicle. Mr Cioara is adamant that he has never used the vehicle for personal reasons and it is up to HMRC to prove otherwise*." That is, of course, not the test or the burden of proof.

The trader asked for a statutory review, which upheld the disallowance of the input tax and the careless penalty, but remitted the officer's refusal to suspend the penalty for reconsideration. She had considered the penalty inappropriate for suspension because it was a one-off transaction and unlikely to recur. The reviewing officer suggested that HMRC can use other aspects of a taxpayer's VAT obligations to set suspension conditions. Nevertheless, the penalty was not suspended.

The matter proceeded to ADR, but this was not successful, and the trader's appeal was heard by the FTT in December 2022. Judge Jennifer Lee reviewed the *Upton* decision and its explanation of the proper legal test – "no intention to make available for private use". She noted that

HMRC had not included the Court of Appeal decision in Elm Milk Ltd in their bundle. He said "Its omission from the bundle and from HMRC's statement of case was slightly surprising, given that the Court of Appeal in *Elm Milk Ltd* had considered the judgement in *Upton* at some length and provided a comprehensive overview of the Courts' approach in relation to cases concerning the recovery of VAT on cars intended to be used for business purposes."

The judge set out a number of reasons for finding that the trader had not proved what had to be proved, even on the basis of his own case. It was admitted that there was nothing to prevent private use; the insurance policy had allowed social, domestic and leisure use, and the policy at the time of purchase (which is the material time for input tax recovery) had not been provided.

In response to questions from the Tribunal about what could be done by a company to establish that a car qualified for deduction, HMRC's representative said:

- The policy of insurance for the Audi Q5 could have been amended as soon as possible to permit business use only;
- It would have been open to the company to agree to restrict the use of the motor car by its directors/ employees to business use only, to be buttressed by a condition that any use otherwise than for business would be grounds for dismissal, and for this to be recorded in the company minutes.

In effect, this confirms that the approach in *Elm Milk* remains the accepted position.

The judge then considered whether a penalty should have been levied, and whether it should have been suspended. In her view it had been correctly charged: there was a careless error with prompted disclosure, maximum cooperation and no special circumstances. However, HMRC appeared to have ignored the review officer's suggestion that the question of suspension should be reconsidered. The officer who charged the penalty had left her role by the time the review was completed, and she did not know who would have reconsidered it.

The judge adjourned the hearing so that the HMRC officers could discuss what would constitute acceptable suspension conditions. They returned with the following:

- The Appellant should maintain yearly business mileage records for the Audi Q5 and ensure that there is evidence which cross references to the mileage records, e.g. MOT records or photos of the odometer reading, which co-relates with the mileage records;
- The Appellant should check the terms & conditions of its policy of insurance for the Audi Q5 annually and keep a note of these checks in its business file.
- The Appellant should check all relevant HMRC guidance and make a note of all its contacts with HMRC, any conversations with HMRC, and internet searches, and keep a record of these in its business file.

The penalty would be suspended for 12 months if the trader agreed to these conditions, which the trader was happy to do. It is not clear how

these conditions are in any way relevant to the VAT position of the car, which remains “available for private use”.

The appeal against assessment and penalty was dismissed, and the suspension of the penalty was noted.

First-Tier Tribunal (TC08671): *London Drylining Ltd*

Lecture 21

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 Historic claim

A company made a claim for retrospective bad debt relief relating to the period 1 April 1989 to 19 March 1997. After adjustment, the claim was for £584,655. It was refused by HMRC on the basis that the company could not provide evidence that it was a valid claim, nor that a claim to BDR had not already been made for the relevant period. HMRC had set out their views on the evidence they would accept in R&C Brief 01/2017 following the Court of Appeal’s judgments in *British Telecom* (2014) and *GMAC* (2016).

The company’s main witness was an individual who had joined the company as a trainee accountant in 1987 and had been continually employed by the company in different positions throughout the period. He was able to comment on a number of the issues, and the Tribunal noted that he was open concerning matters raised that he had no knowledge of. BDR had not been claimed at the time because the company used “retention of title” clauses, which under the non-compliant UK law prohibited a bad debt claim.

HMRC relied on precedents including *Saint-Gobain* and *Regency Factors* to support their argument that the onus was on the claimant to substantiate the claim with sufficient evidence, and could not do so. The main distinction that the appellant could draw with *Saint-Gobain* was the quality of the evidence of the employee, but he himself acknowledged that the basis of the claim was very similar.

The judge considered the various arguments and concluded that there was no difference. The appellant could not produce sufficient evidence to show that it had not made BDR claims in the past, nor that it was prevented from doing so by the existence of the retention of title clauses. The only documentary evidence before the Tribunal were a number of schedules that confirmed that the company had made BDR claims, and attempts to challenge or replace this in oral evidence were simply too late.

The appeal was rejected.

First-Tier Tribunal (TC08750): *Allegion (UK) Ltd*

Lecture 22

5.8 Other input tax problems

5.8.1 Missing traders

A company appealed against decisions to deny input tax on Kittel grounds for periods from 04/13 to 04/16. HMRC accepted that assessments for 5 periods from 07/13 to 10/15 had been raised out of time and would be withdrawn. The assessments for another 5 periods from 04/15 to 04/16 remained in dispute, with the total input tax involved amounting to £236,896. The subject of all the transactions was wholesale purchase of alcohol.

Judge Heidi Poon considered the evidence, and described the director – who represented the company because it could no longer afford the fees of the accountant who had been corresponding with HMRC during the appeal – as an unreliable witness. There were many features which led her to the conclusion that the deals were connected with fraudulent evasion of VAT, and the director both knew and ought to have known of that fact.

The appeal was dismissed.

First-Tier Tribunal (TC08702): *Everyday Wholesale Ltd*

HMRC refused deduction of £873,000 of input tax for a company's return periods 06/16 and 09/16 on *Kittel* grounds. The subject matter of the alleged MTIC fraud was hard drives, headphones and games consoles bought from three traders which went "missing" without paying output tax to HMRC. The purchases from each of the three suppliers were all sold on to particular traders established in the Netherlands and Greece.

The company had been warned about MTIC fraud at a visit in 2013. In HMRC's skeleton argument, served 11 days before the hearing was due to take place, it was alleged that 60% of the appellant's input tax from 2013 to 2015 was connected to the fraudulent evasion of VAT. Less than 48 hours before the hearing, the appellant sought to have sections of the officer's witness statement that referred to this struck out on the basis that these transactions were not the subject of the appeal. Judge Tony Beare had to consider this application as a preliminary matter.

The argument is of interest mainly to those involved in litigation. The judge's conclusion was that HMRC could not introduce the evidence based on their existing statement of case, but they should be permitted to revise that statement to particularise the allegations that were being made. The appellants accepted the revised statement but stated that they would put HMRC to strict proof of each and every allegation made. The hearing of the substantive appeal then ensued.

The judge examined the evidence relating to the historic transactions and concluded that, on the balance of probabilities, at least a significant number of those deals were connected with MTIC fraud. HMRC argued that this led to the only conceivable explanation of the 16 transactions that were the subject of appeal being that they were also connected with fraud. HMRC's argument put forward a very large number of indications of involvement in a pre-ordained scheme, only one of which was the very lax due diligence carried out. The company's representative replied to each of these arguments with explanations to show that the company was an "innocent dupe".

The judge set out in considerable detail his reasons for concluding that the director who was most involved in the goods trading (as opposed to two other directors who appeared as witnesses, who were not involved in the day-to-day deals) both knew and ought to have known of the connection with fraud.

The appeal was dismissed.

First-Tier Tribunal (TC08737): *Vortex Enterprises Ltd*

Another missing trader case involved disallowance of £83,000 of input tax on the purchase of soft drinks by one company in periods 07/18 and 01/19, and a further denial of over £250,000 in respect of various purchases by another company between 05/18 and 02/19. The same individual was the sole director and shareholder of both companies.

The individual represented himself. He claimed that his businesses had been conducted properly, and that "that allegations against him have been compiled on insinuations and accusations by a team of people within HMRC who seem to have limitless time and financial resources with no accountability for their actions". Judge John Brooks noted that the test was not only whether he knew, but whether he should have known of the connection to fraudulent evasion of VAT.

The judge commented that there was no single piece of evidence that was a "smoking gun" showing knowledge or means of knowledge. Rather, it was the overall circumstances: the companies entered into transactions that were outside the experience of the individual and the stated intended trades of the companies (in the construction industry and plant hire). There were features that ought to have "concerned a legitimate and reasonable businessman or trader but did not appear to have that effect" on the appellant.

There were enough factors that satisfied the tests of "means of knowledge"; the judge was satisfied that it was more likely than not that the individual actually knew of the connection to fraud. The appeals of both companies were dismissed, and as the case had been classified as "complex", HMRC were invited to submit an application for costs.

First-Tier Tribunal (TC08741): *Hillhead Ltd*

A different case about fraud involved a business importing contact lenses and selling them to UK customers. HMRC alleged that successive UK companies and their connected supplier, established in the Seychelles, had been established with the intention of defrauding HMRC.

Judge Ian Hyde reviewed the history of the business, which went back to the establishment of a UK company selling contact lenses online in around 2000. This business was transferred to the Seychelles company (CLL) in 2007; a UK company was then incorporated to provide logistics services to CLL. One UK company purchased contact lenses and sold them to CLL; another company provided the handling and delivery services; CLL sold the lenses to the public through a website. It was accepted that CLL should have accounted for output tax on these sales and did not.

The judge examined the structure and ownership of CLL. He concluded that one of the people from whom e-mails were "sent" did not exist. A

UK individual (L) was directly involved with running CLL, in spite of denying this to the Tribunal.

In 2011 the fulfilment company (S) made a reclaim for VAT previously charged to CLL from 1 January 2010 to 28 February 2011. This was on the basis that it was supplying "general B2B services" to a company established outside the EU. HMRC denied this reclaim on the basis that CLL had a fixed establishment in the UK, so the place of supply was the UK. S appealed to the Tribunal but withdrew the appeal in 2013 "as a commercial decision". It had received VAT advice that concluded with a warning that appealing to the Tribunal might lead HMRC to investigate CLL and insist on retrospective registration and penalties. The judge concluded that S ceased trading because of the VAT investigation into the reclaim.

When S stopped supplying fulfilment services, the present appellant was incorporated. Meanwhile, HMRC started investigating CLL, but received no response to letters. In 2019, assessments for nearly £5 million were issued, covering the period from 01/14 to 07/19, and penalties were issued in 2020 relating to this. CLL has never engaged with HMRC in relation to these assessments. The judge was satisfied that L was acting as finance manager of CLL and would have been aware of the correspondence.

In 2019 the HMRC officer investigating CLL became aware that the company had been prosecuted for tax fraud in the Seychelles in 2017 and 2018. The judge recited extracts from the evidence produced in that case, and extensively quoted its conclusion: CLL was exploiting a loophole in operating outside the oversight of regulatory authorities. The judge was clearly unsatisfied with the explanations given, but could not find that the company's income was "the proceeds of crime". Given that the case included an allegation that the company was evading tax in the UK, it is surprising that HMRC were not asked to comment at the time.

The investigation included examining the metadata attached to e-mails supposedly originating from the Seychelles individual who HMRC did not believe existed. HMRC concluded that L was in reality running the business and it had a fixed establishment in the UK. In 2019 HMRC issued decisions to deny the appellant input tax on the purchase of contact lenses in the UK (including imports), on the grounds that this was connected with fraudulent evasion by CLL, and the UK company ought to have known of that connection. HMRC also assessed for output tax that should have been charged to CLL on the basis that it had a FE in the UK. Those were the decisions and assessments that were the subject of the appeal.

Having examined all of the evidence, the judge concluded that CLL had been established in the Seychelles with the intention of evading VAT in the UK. In spite of his denying that he knew about the ownership of CLL, the judge concluded that L either knew or ought to have known the reasons for its establishment. He acted as its finance manager throughout, and he had taken VAT advice in relation to the matter in 2013.

The decision about the appellant's charging VAT to CLL is interesting because it deals with the question of whether CLL had a FE in the UK. Applying art.10 of the Implementing Regulation, CLL's establishment was in the Seychelles: it was incorporated there, and there was no evidence about where decisions were taken concerning the management of

the business. The company argued that CLL had no human and technical resources in the UK: it provided normal fulfilment services to CLL, and that could not make it into a FE of the foreign business.

The judge disagreed. The evidence from the prosecution in the Seychelles was that the business was not managed there, but was "wholly outsourced". L did not carry on the "general management" in the UK, but his role was sufficient to enable CLL to receive and use the services of the appellant for its own needs. That created a FE for B2B services in accordance with art.11 of the Implementing Regulation.

The judge went on to consider arguments about time limits and found that HMRC had not exceeded them. The conduct was deliberate, so HMRC had 20 years from the end of the accounting periods; the assessments had been raised within 12 months of the receipt of important evidence (the e-mails suggesting that the supposed "manager" in the Seychelles did not exist).

The appeals were dismissed on all the decisions.

First-Tier Tribunal (TC08736): *Fulfillment Logistics UK Ltd*

5.8.2 Input tax and output tax

A company appealed against HMRC decisions to deny input tax on *Kittel* grounds ("knew or ought to have known of connection to fraud") and to deny zero-rating for certain supplies made on *Mecsek Gabona* grounds (which are similar, but applied to zero-rating of despatches rather than claiming input tax on purchases, with the additional issue of whether the appellant took every reasonable step within its power to prevent its own participation in the fraud). There was a single decision to deny input tax relating to fraud by one supplier, and 89 decisions on zero-rating relating to five customers in the Republic of Ireland. The total tax involved was £826,000, relating to periods in 2014.

HMRC alleged that the company actually knew of the connection to fraud, as well as arguing that if it did not, it should have done. HMRC invited the Tribunal to draw adverse inferences from the appellant's failure to call evidence from its customers. The appellant submitted that it would be inappropriate to draw such inferences in this case; even if the appellant were able to locate the customers, there is nothing to be gained from calling evidence from persons the appellant has accepted have fraudulently evaded VAT. The Tribunal considered the guidance from precedent and concluded that it would not be appropriate to draw adverse inferences. It accepted that the other parties would probably be untraceable and would almost certainly not cooperate in giving evidence.

The Tribunal decision goes through the progress of a MTIC investigation, starting with the matter that alerted HMRC to the risk (a "known MTIC trader" checking the appellant's VRN), visits to the company and communications about MTIC risk, the issue of Notice 726, and warnings about its customers using cancelled VRNs.

The appellant had accepted HMRC's position on tax losses in most of its transaction chains, and the Tribunal accepted the connection to fraudulent losses on the ones the appellant disputed. The evidence about each counterparty and participant in the chains was examined in detail, leading to the conclusion that they were all involved in fraud. Several of the

vehicles were despatched but then immediately returned to the UK, as evidenced by the registered keepers being UK resident persons after the date of the sales by the appellant.

The decision is unusual in that it includes lengthy extracts from transcripts of the cross-examination of the company's witnesses, three directors and their accountant. One director and the accountant were found to be credible witnesses, but their evidence did not assist the Tribunal because they were not directly involved in the transactions. The director (M) who dealt with the transactions in detail claimed that he had not been told about the risk of fraud, which HMRC had communicated to the third director (R), but the Tribunal did not find this credible. R had complained about HMRC "harassing" him, and it was inconceivable that he would not have discussed this at board meetings. R also contradicted M and said that he had told him the reason for HMRC's involvement. Minimal due diligence was carried out, and the explanations given were inadequate.

After detailing the cross-examination in relation to each of the disputed transaction chains, the judge concluded that the company, through its directors, actually knew that it was participating in a contrived and fraudulent scheme; the evidence also supported the means of knowledge, and the company had not taken all reasonable steps to prevent its participation in the fraud. All the appeals were dismissed.

First-Tier Tribunal (TC08772): *Vanrooyen (Elite Prestige Supercars) Ltd*

5.8.3 S.33 VATA bodies

With effect from 9 February 2023, the four Corporate Joint Committees in Wales have been added to the list of bodies which can recover VAT incurred on their non-business activities under VATA 1994 s 33.

VATGPB4300, SI 2023/19

6. ADMINISTRATION AND PENALTIES

6.1 Group registration

6.1.1 Grouping and time of supply

A company made supplies of services to another company within the same group registration, but was paid for them after it had left the group registration. This raised the pure point of law: were the supplies outside the scope because they were actually made at a time when the VAT law "disregarded" them, or were they chargeable to VAT because the tax point rules placed them at a time when they were not disregarded? If they were chargeable, the VAT would not be fully recoverable by the recipient of the supplies.

First-Tier Tribunal

In the FTT (TC08036), Judge Malcolm Gammie set out the background to the dispute. The supplier company was an investment manager that supplied services for consideration that included performance fees payable if certain benchmark rates of return were exceeded. The company had been a part of the Prudential group up to November 2007 when it was the subject of a management buy-out. It received performance-related fees in 2015 and 2016 related to the services it had provided before 2007, and raised invoices for a total of £9.3m plus VAT.

The supplier charged VAT on the invoices and subsequently made a claim to recover it under s.80 VATA 1994. HMRC refused, and an appeal against that refusal was stood over behind the present appeal.

The judge noted that he had received detailed submissions on the law and on various precedents, but he considered that the legal point was a short one and he would not refer to all the arguments raised. It was not straightforward, and he noted that the parties would have an opportunity to argue their cases in more detail if the decision was appealed (which seems likely).

The services were "continuous supplies" within reg.90 SI 1995/2518, and therefore deemed to be successively supplied on the date of invoice or payment. This was in accordance with PVD art.64. This was the basis of HMRC's position. The taxpayer argued that s.43 applied before reg.90: there was no supply to which the tax point rules could apply, because the thing done by one group company for another was not to be treated as a supply.

Comparing the present situation with *B J Rice* (CA 1996), which was about continuous supplies made before a trader was registered but paid for after he had become a taxable person, the judge noted that the effect of the opening words of s.43(1) made it clear that the subsidiary was not a taxable person at the time the supplies were made: all its supplies were deemed to be made by the representative member.

He also considered the *Thorn Materials Resources* case, which directly concerned the grouping provisions. A VAT avoidance scheme depended on a transaction that was 90% paid for while companies were members of the same VAT group, then completed once they had ceased to be in the group. The idea was that only 10% of the transaction would be subject to

output tax (which the purchasing company could not recover), but the vendor company could recover all of its input tax because it was making a taxable supply. The House of Lords held that there was a taxable supply when the companies were not part of the same group, and s.43 did not prevent the whole consideration for that supply being taken into account.

Other precedents considered by the judge included *Svenska* and *Royal & Sun Alliance*. The parties cited a number of other authorities, but the judge did not consider that they "advanced matters to any significant extent". He also considered that arguments based on the principle of fiscal neutrality did not give a straightforward answer, so it was not of great assistance in determining the issue.

Judge Gammie started his decision by affirming that the time of supply rules are applied to determine when a supply takes place. This supported HMRC's case that the supplies should not be disregarded. However, he had to consider "the real world" in which the subsidiary made the supplies and the "VAT world" in which it was a member of a VAT group and therefore not a taxable person in its own right. The idea that a supply should be "lifted out of the VAT world to place them in an alternative VAT time of supply world" to give rise to a VAT charge "must give pause for thought". He did not think that any of the precedents gave clear authority for that result.

His overall conclusion was brief: he considered the situation directly analogous to that of *B J Rice*, where the Court of Appeal held that a supply made by a non-taxable person could not be made into a taxable supply by the operation of the tax point rules. That was the most directly applicable precedent as it dealt with a charge to output tax and the operation of reg.90. Although it did not deal with grouping, the position of a group member and an unregistered trader below the threshold were similar: they were not taxable persons in their own right at the time they provided the services.

The appeal was allowed.

Upper Tribunal

HMRC appealed to the Upper Tribunal, where it came before Mr Justice Edwin Johnson and Judge Thomas Scott. They noted that the facts were agreed, and rehearsed the applicable law (both UK and EU) on taxable supplies, time of supply and grouping. They commented that the conflict between reg.90 and s.43 appears to be a "chicken and egg" situation; none of the authorities dealt directly with the question of which should take precedence. However, in their view, the answer was to be found in the legislation. It was agreed that the UK regulations conformed to the EU law, so they concentrated on the UK wording and numbering.

The judges started with s.43: the "assumption" (that all supplies are deemed to be carried on by the representative member of the group) and the "disregard" (of supplies between group members). These were stated to apply only while the parties are members of the same VAT group. This was therefore the critical question: when did the supplies take place?

The term "supply" in s.43 must mean the same as it does in other parts of the legislation. It was therefore subject to the rules on time of supply, and subject to reg.90. The fact that the work was done at a different date did not mean that a "supply" had taken place. This overturned both of the

appellant's arguments – that the subsidiary was not a taxable person, and its supplies should be disregarded – because both of those propositions depended on it being a member of the VAT group when the supplies were made. According to the legislation, the supplies were only made after it had left the group.

Having come to that conclusion on the basis of the legislation, the judges considered the main precedents for any indication that the conclusion should be modified. These were:

(1) *B J Rice & Associates v Customs and Excise Commissioners* [1996] STC 581 ("B J Rice").

(2) *Customs and Excise Commissioners v Thorn Materials Supply Ltd & Anor* [1998] 1 WLR 1106 ("Thorn Materials").

(3) *Svenska International plc v Commissioners of Customs & Excise* [1999] 1 WLR 769 ("Svenska").

(4) *Royal & Sun Alliance Insurance Group plc v CCE* [2003] STC 832 ("RSA").

The UT decision summarises the facts and reasoning of each case before considering its application to the present situation. The FTT judge had erred in considering *B J Rice* to be "indistinguishable": that was concerned with a person who was entirely outside the scope of VAT (as an unregistered trader), rather than a person who was temporarily deemed to be part of a larger single taxable person (as a member of the group). That was a material difference between the situations.

The UT gave three reasons for regarding the FTT's application of *Rice* to this situation as inappropriate. First, the facts of *Rice* were unusual, and the CA judges had expressed concern about the possible injustice that would be caused to the taxpayer if the transactions were held to be taxable. Second, Lord Hoffmann in *Thorn* had disapproved of using "some kind or meta-rules, derived from fairness, common sense and other such concepts" to justify departing from the statutory rules. He had said that such an approach "cannot be right". Third, extending the decision in *Rice* more generally would be in conflict with the majority decisions of the HL in *Thorn* and *Svenska*. These were analysed in detail by the judges, and in their view confirmed that the grouping provisions could only be applied after the time of supply had been determined according to the rules for time of supply. The "real world time of supply" was not a legal concept.

The judges went on to consider further reasons put forward by the company's representative in support of affirming the FTT decision, based on the principles of fiscal neutrality and legal certainty. They did not consider either of these concepts to be of any assistance. There were real differences between a single company with two divisions on the one hand, and separate companies on the other, and in any case the EU legislation recognised the possibility that they would be treated differently by implementing art.11 on grouping as a permissive measure. Legal certainty was satisfied because someone supplying or receiving continuous services, "properly advised", would understand the risks involved in leaving a VAT group.

HMRC's appeal was allowed.

Upper Tribunal: *HMRC v The Prudential Assurance Company Ltd*

Lecture 23

6.1.2 Updated Notice

HMRC have updated their Notice *Group and divisional registration* to clarify two points. VATA 1994 s.43(2A) imposes a charge on services bought by a group member which is established outside the UK and supplied intra-group to a member belonging in the UK. The charge is not imposed if it is a “trifling” amount, which HMRC interprets as VAT due of less than £7,500 a year. The Notice has been updated in section 7.5 to make it clear that the amount of £7,500 relates to the output tax (not the value of the supply), and applies to the whole group.

Also, information about exempt financial or insurance supplies to customers outside the UK or the EU for businesses in Northern Ireland has been removed from section 2.5.

Notice 700/2

6.2 Other registration rules

6.2.1 Cancellation of registration

On 5 September 2022, HMRC issued a decision cancelling the registration of a company with immediate effect. The company applied for judicial review of that decision, and for an interim injunction which would have the effect of restoring its registration and its right to deduct input tax.

The claimant described itself as an employment business which, principally, provides industrial blue-collar type workers including warehouse staff, food processors and pickers to industries such as recycling, food, and logistics. Its clients are companies which, themselves, provide workers and recruitment services to businesses in areas such as retail, warehouse and food processing. Each worker is supplied by a recruiter to the claimant, supplied by the claimant to a provider and then supplied by the provider to an end-user. The recruiter charged VAT on its fee to the claimant, which was in effect VAT on the wages of the worker.

HMRC’s decision was based on the conclusion that the company’s business was principally or solely registered to abuse the VAT system by facilitating VAT fraud. This would be sufficient to justify compulsory deregistration (*Ablessio* Case C-527/11) or denial of input tax (*Kittel* Case C-439/04).

HMRC had a number of reasons to allege fraud: some of the payments made to its recruiters were unsustainably low (making it impossible for the recruiters to pay National Minimum Wage and also make a profit); a number of suppliers had been deregistered by HMRC because of fraud; over £8 million of input tax claimed since 09/18 had been traced back to VAT losses. In addition, the claimant company found the workers and supplied them to the recruiters in order to have them supplied back, which made no commercial sense.

The company appealed against the decision letter to the FTT, but applied for judicial review on the basis that a FTT appeal might take some time and it would be at risk of insolvency in the meantime if it could not claim input tax.

The judge reviewed the evidence about the financial position of the company, which included some witness statements that were submitted at the last minute and which the judge agreed to admit with some reservations. In his view, the company had failed to show that there was a significant risk of insolvency arising from HMRC's actions; he noted that the company had paid an interim dividend of £2.345 million in 2021. The claimant had also not complied with the requirement to provide detailed evidence of the attempt to secure an expedited FTT hearing; it was in fact possible at the time of the application hearing that the FTT would hear the matter in March 2023. The correspondence between the company's representatives and the FTT did not show the required urgency.

The judge dismissed the application for the interim injunction, and said that the application for judicial review had to fail as well. The matter should be settled by the FTT.

High Court: *The King (on the application of Nourish Training Ltd) v HMRC*

6.2.2 Sub-postmasters

HMRC's internal manual on *VAT Registration* has been updated to clarify that the majority of sub-postmasters are office holders and not employees. As office holders, they supply services to the Post Office in the course of business and the income received in respect of these services should be included when calculating the business turnover for VAT Registration purposes.

VATREG17200

6.3 Payments and returns

6.3.1 Reminder of new penalties

HMRC have provided resources for people to communicate with their members, clients and customers about changes to VAT interest charges, late submission and late payment penalties from January 2023. These include a sample newsletter, social media messaging and images, and links to webinars and videos.

www.gov.uk/government/publications/vat-penalties-and-vat-interest-charges-communications-resources

6.3.2 New interest rule

Under the previous VAT interest rules in VATA 1994, HMRC had powers to assess interest under s.76 and Parliament provided HMRC with statutory discretion over whether or not to do so. HMRC exercised this discretion to not charge default interest under s.74 where a taxpayer had under-declared an amount of VAT which would have been reclaimed as input tax by a third party. This policy (often referred to as commercial

restitution) does not apply under the new FA09 interest rules, as HMRC do not have statutory discretion to not charge this interest when it is legally due. This is confirmed by new guidance in the HMRC Compliance Handbook.

CH140295

6.3.3 Interest rates

Rates of interest on overdue and overpaid tax are linked to the Bank of England Base rate. As this has increased several times recently, the rates have gone up as follows:

From	Late payments	Repayments
11 October 2022	4.75%	1.25%
22 November 2022	5.5%	2.0%
6 January 2023	6.0%	2.5%
21 February 2023	6.5%	3.0%
13 April 2023	6.75%	3.25%

The new rules on late paid and overpaid VAT make these rates more relevant to VAT than they were before 31 December 2022, when they would only apply to:

- VAT paid late as a result of an assessment or voluntary disclosure;
- VAT repaid late as a result of an official error.

www.gov.uk/government/publications/rates-and-allowances-hmrc-interest-rates-for-late-and-early-payments/rates-and-allowances-hmrc-interest-rates#current-late-payment-and-repayment-interest-rates

In a representation ahead of the March Budget, the CIOT urged the Government to review “unfair” repayment interest rates, with taxpayers suffering a very substantial “turn” in the differential between late payment interest and interest credited on repayments.

The CIOT noted that HMRC generally charges interest on late payment at the Bank of England’s base rate, 4% at the time the representations were made, plus 2.5%. However, interest on repayment from HMRC is the base rate minus 1% resulting in a difference of 3.5 percentage points between the interest charged and that paid.

CIOT says the government should now hold a consultation on whether the current rates are suitable. The government last consulted on the rates of repayment and late payment interest in 2008 and 2009. At the time, CIOT recognised the need for differential interest rates, but stressed the need for repayment interest to provide sufficient recompense, particularly in cases of HMRC error or delay.

www.tax.org.uk/ref1078

6.4 Repayment claims

6.4.1 Repayment interest

The background to the *HBOS* appeal was neatly summarised by FTT Judge Zachary Citron at the beginning of his decision in 2021 (TC08249):

(1) until 1997, the UK legislation providing VAT refunds for bad debts contained a condition of entitlement (the transfer of property in goods sold under HP contracts or subject to retention of title) that, in a Court of Appeal decision in 2016, was found to be invalid under EU law principles;

(2) in 2007 and 2009, the appellants made claims for bad debt refunds on supplies made in the period 1989-1997 – the condition in question was not satisfied and for that reason HMRC initially rejected the claims;

(3) HMRC eventually paid those bad debt refunds to the appellants (£12.3 million), in 2019;

(4) HMRC also paid interest on those refunds from the dates the refunds were claimed, on the basis that there had been an error on HMRC's part in not paying the refunds upon the making of the claims;

(5) the issue in the hearing was whether HMRC should also have paid interest from earlier dates, being the dates when all conditions for the refunds, apart from the invalid condition, had been satisfied.

The entitlement to interest under the VATA depended on the delay arising from an error by HMRC (s.78). In this case, the error was in the law; the company had not claimed bad debt relief in the periods in which it was subsequently found to be due. The company argued that this was because of statements in VAT Notice 700/18 which, in its 1991, 1996 and 1997 editions, set out the conditions for a BDR claim including the one that was subsequently found not to comply with EU law. R&C Brief 1/2017 set out HMRC's changed policy on BDR and said that claims relating to supplies of goods in the relevant years would be paid subject to satisfactory evidence that the bad debts had occurred and that the VAT had not previously been reclaimed.

The FTT judge considered that the companies had failed to claim at the time not because they were persuaded by HMRC's published policy but because they thought that the condition was valid. When *GMAC* made its successful challenge to the law in 2005, the companies made their own claims, in spite of the continued incorrect statements of the position in HMRC's notices.

It was interesting that the FTT decision contained a specific reference to the parties' agreed position on the legal effect of Brexit:

(1) the appellants were permitted to invite the Tribunal to interpret the provisions of relevant UK legislation by reference to the general principles of EU law and by reference to retained EU case law on the basis that they began their appeals and pleaded their EU law rights prior to 31 December 2020;

(2) the Tribunal is bound by EU case law decided prior to that date;

(3) the Tribunal may have regard to relevant CJEU case law after that date but is not bound by it.

The FTT judge considered a number of precedent cases in some detail, and analysed the way in which s.78 operated. The fundamental question was whether the error in HMRC's notices was the cause of the appellants' failure to claim BDR at an earlier date, leading to a delay in them obtaining a repayment of tax. He answered this in the negative: in his view, the delay was "due to" the companies' belief that the condition was valid. They could have made claims and challenged the law, but they did not do so.

He went on to consider whether his interpretation and application of s.78 were in keeping with the relevant EU law principles of equivalence, effectiveness and fiscal neutrality, and decided that they were. The appeals against HMRC's decisions not to pay interest from dates earlier than the date of claim were dismissed.

The companies appealed to the Upper Tribunal, where the case was heard by Mrs Justice Bacon and Judge Swami Raghavan. The key issues to be decided were:

- whether an error which arises from a UK statute's incompatibility with EU law counts as an "error on the part of the Commissioners"; and
- the period over which interest arises.

The effect of the appellants' viewpoint was quantified: if interest was payable from the earlier dates (when they might have made the claim but for the invalid property condition), the interest would have been about £10 million instead of the £872,000 that HMRC had already paid.

HMRC also raised a secondary argument before the UT: that, if interest did run from earlier than the claims in 2007/2009, it should not start to run until uncertainties about the attribution of hire purchase instalments had been resolved (in 2002 or 2004). This had not been considered by the FTT because the case had already been decided for HMRC on other grounds.

The companies initially appealed on five grounds, of which one was dropped before the hearing. The judges retained the original numbering:

(1) Ground 1 is that the FTT erred by holding that the enactment of the property transfer condition, and its continued presence on the statute book up to 19 March 1997, was an error on the part of Parliament, not HMRC and that it was therefore not "an error on the part of the Commissioners" for the purposes of s.78(1).

(2) Ground 2 is that the FTT erred in concluding that its interpretation of s.78 was in keeping with the relevant EU law principles.

(3) Ground 3 is that the FTT erred in finding that the appellants did not have a right to repayment of interest from the earlier dates under s.78(1)(d).

(4) Ground 5 is the FTT wrongly discounted the evidence of Lloyds' senior VAT manager, Mr Plant, that the real cause of the delay was the HMRC guidance.

The judges discussed Ground 1 and simply came to the opposite conclusion to the FTT. It would lead to a number of absurdities if Parliament had meant an incorrect statute to be outside the scope of s.78.

There were indications in earlier guidance and in earlier cases that it was assumed to be covered. The Supreme Court had discussed the requirement to pay interest for breaches of EU law in the 2017 *Littlewoods* case; the reason that the Supreme Court eventually awarded simple interest under s.78, in preference to compound interest as a restitutionary claim, was that s.78 was the exclusive means by which interest could be claimed on an overpayment of VAT due to a breach of EU law.

Because of this conclusion, it was not necessary to consider Ground 2 on the EU legal principles.

Ground 3 concerned the question of whether interest ran from the date when the companies could have claimed, rather than when they did claim: when they satisfied the conditions that were held to comply with EU law (writing off and statutory waiting period), disregarding the condition that did not comply (the property condition). The UT considered whether the interest should run from when the taxpayers *could have* made a claim (i.e. when they satisfied the conditions) or when they *would have* made a claim (which required evidence to show the likelihood that a claim would have been made). The judges preferred "would have", but there was ample evidence before the FTT to conclude that the companies would have made the claim at the earlier date if the property condition had not existed. The UT therefore reached the same conclusion on this point as the FTT, but for a different reason.

Ground 5 was not necessary for the appeal, but was briefly considered. The UT did not fully agree with the FTT's reasons for rejecting the employee's evidence about the reasons for delaying the claim. However, the appeal had been decided on other grounds.

HMRC's alternative ground (the "attribution issue") appeared to have developed during the FTT hearing. The UT considered that, if it had been raised by HMRC earlier, the appellants would have had the opportunity to adduce more evidence about the negotiations over the matter. Because they had not had the opportunity to do so, the UT decided that it would not be in the interests of justice to allow HMRC to raise the argument on appeal.

The judges concluded by setting aside the FTT decision and remaking it: the delay fell within s.78, and the interest ran from the earlier dates.

Upper Tribunal: *HBOS plc and another v HMRC*

Lecture 24

6.4.2 More interest

A company sought interest under s.78 for years before 1986 in respect of repayments of input tax made on rebates on demonstrator vehicles. Judge Cannan's decision goes back through some very ancient history, and is unlikely to be of relevance to current disputes. He concluded that there was insufficient evidence to show that the delay in the repayments to the company arose from an error on the part of the Commissioners: the treatment of demonstrator bonuses had been a matter of importance to the industry as a whole, and it was possible that the company had followed other guidance rather than being led into error by HMRC.

The appeal against the refusal to pay additional interest was dismissed.

First-Tier Tribunal (TC08668): *Pye Motors Ltd*

6.4.3 Domestic fuel

A shopkeeper in Northern Ireland sold coal, fuel, household items and confectionery. He registered for VAT from 1 December 2015 and was visited for the first time in February 2019. The officer discovered that he had very basic records, with no till rolls, sales or stock records. In their discussion, the officer told the trader that he could apply the reduced rate to sales of coal of up to one tonne; he had been applying the standard rate.

HMRC demanded improvements in record-keeping and issued a penalty, which was later withdrawn after discussions about suspension conditions. The trader's representative asked HMRC to allow the reduced rate to be applied to sales of coal in earlier periods; this was refused on the basis that there were inadequate records to support an adjustment. In September 2020, the trader submitted error correction notices totalling £61,000 for the periods from 01/16 to 12/19. These were appealed, and following an unsuccessful ADR, the matter came before Judge Anne Fairpo in the FTT.

The trader argued that he should be allowed to exercise best judgement in working out the overpayment, just as HMRC would have done if he had wrongly applied the reduced rate to something standard rated. The judge did not accept that this provision could be applied to a taxpayer – its use by HMRC was a power explicitly conferred by statute.

The judge considered the evidence that the trader offered, and concluded that the lack of records disqualified him from gaining relief from the standard rate of VAT. The decision was not based on a conclusion that he sold coal in consignments of more than a tonne: there simply was not enough evidence to know what was sold. The judge noted that HMRC had been fair to the trader in pointing out that he was accounting for too much output tax, but that he needed to maintain proper records to prove the amounts.

The appeal against the refusal of the repayment claim was dismissed.

First-Tier Tribunal (TC08713): *Adrian Mckiernan (trading as AMK Fuels)*

6.4.4 Updated Manual

HMRC's *VAT Refunds* Manual has been updated to reflect the Supreme Court decision in NHS Lothian in respect of evidence required to support claims for historic overpayments of VAT. The updated guidance summarises the Supreme Court's decision as follows:

1. Taxpayers must either provide specified documents showing the amount of Input Tax incurred or devise a credible alternative method which allows that amount to be estimated with reasonable certainty.
2. The right to deduct Input Tax is not separate from the obligation to quantify a claim. It is not enough for a claimant to prove they have incurred 'some' Input Tax without being able to identify an amount.

3. It is not the Tribunal's role to function as a 'forensic accountant' to calculate a figure.
4. The principle of effectiveness did not require courts or tribunals to set aside their ordinary procedural rules.

VRM9300

6.5 Timing issues

Nothing to report.

6.6 Records

6.6.1 Updated HMRC guidance on Making Tax Digital

HMRC have updated their guidance for agents on MTDfV with the following reminder:

All VAT registered businesses should now be signed up for Making Tax Digital for VAT. You no longer need to sign up clients.

HMRC will sign up all remaining businesses to Making Tax Digital for VAT automatically unless they are exempt or have applied for exemption.

Naturally, if the agent has not signed the client up for MTD and HMRC migrate them automatically, the agent may struggle to submit the next tax return.

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

6.7 Assessments

6.7.1 Updated Manual

HMRC have updated the *VAT Assessments and Error Correction* Manual to note that the principles of *Pegasus Birds Ltd* (1999) relating to when HMRC had "evidence sufficient to raise the assessment" were reaffirmed by the Supreme Court in 2022 in *DCM (Optical Holdings) Ltd*. These are summarised in the manual as follows:

- The "Commissioners' opinion" referred to in Section 73(6)(b) is an opinion as to whether they have evidence of facts sufficient to justify the making of the assessment. Evidence is the means by which facts are proved.
- The evidence in question must be sufficient to justify the making of the assessment in question.
- The knowledge referred to in Section 73(6)(b) is actual, and not constructive knowledge. In this context, constructive knowledge means knowledge of evidence which the Commissioners do not in fact have, but which they could and would have if they had taken the necessary steps to acquire it.
- The correct approach for a Tribunal to adopt is
  - to decide what were the facts which, in the opinion of the officer making the assessment on behalf of the Commissioners, justified the making of the assessment, and
  - to determine when the last piece of evidence of these facts of sufficient weight to justify the making of the assessment was communicated to the Commissioners. The period of one year runs from that date.
- An officer's decision that the evidence of which he has knowledge is insufficient to justify making an assessment, and accordingly, his

failure to make an earlier assessment, can only be challenged on Wednesbury principles, or principles analogous to Wednesbury.

- The burden is on the taxpayer to show that the assessment was made outside the time limit specified in Section 73(6)(b) of VATA.

VAEC1341

6.8 Penalties and appeals

6.8.1 HMRC guidance

HMRC have published several sets of new guidance on VAT penalties and interest following the change of rules on 1 January 2023. The subjects covered are:

- Late payment interest if you do not pay VAT or penalties on time

www.gov.uk/guidance/late-payment-interest-if-you-do-not-pay-vat-or-penalties-on-time

- How late payment penalties work if you pay VAT late

www.gov.uk/guidance/how-late-payment-penalties-work-if-you-pay-vat-late

- Repayment interest on VAT credits or overpayment

www.gov.uk/guidance/repayment-interest-on-vat-credits-or-overpayments

- Penalty points and penalties if you submit your VAT Return late

www.gov.uk/guidance/penalty-points-and-penalties-if-you-submit-your-vat-return-late

- Remove penalty points you've received after submitting your VAT Return late

www.gov.uk/guidance/remove-penalty-points-youve-received-after-submitting-your-vat-return-late

HMRC have also made available a number of detailed examples and explanations of the practical procedures involved in dealing with penalties and interest under the new system. These include:

- What traders will see on their Business Tax Account pages if they receive a penalty

www.att.org.uk/sites/default/files/1.%20VAT%20trader%20penalty%20pages%20NOV22.pdf

- What traders will see on their Business Tax Account pages if they ask HMRC for a review of a penalty

www.att.org.uk/sites/default/files/2.%20VAT%20trader%20appeal%20pages%20NOV22.pdf

- What agents will see on their screens if their clients receive a penalty

www.att.org.uk/sites/default/files/3.%20Agent%20penalty%20pages%20NOV22.pdf

- What agents will see if they ask for a review

www.att.org.uk/sites/default/files/4.%20Agent%20appeal%20pages%20NOV22.pdf

6.8.2 Default surcharge

A company appealed against surcharges that it had incurred during the pandemic period. Curiously, the summary of the situation at the start of the decision lists the periods affected as 04/20, 01/21 and 04/21; however, the detailed discussion refers to 04/21, 07/21 and 10/21, which seem more likely to be affected by Covid-related problems.

HMRC refused a review request because the excuse was "insufficiency of funds". The company's director argued the case before the Tribunal, contending that this was not the excuse he had offered: he had explained that Covid, and in particular the "pingemic" when customers might have to self-isolate at short notice and unpredictably, had caused exceptional delays in billing and receiving income from clients.

The judge noted the director's explanation that invoices were produced by the company's software, and automatically therefore reported on VAT returns, when a job was substantially completed; however, they might not be sent to the client until some time later, when the job was complete. The judge was not convinced that this was in compliance with the law, and it certainly exacerbated the company's cash flow problems. However, he did not consider that it was relevant to the issue of reasonable excuse.

The director presented detailed evidence of the effect of the pandemic on particular jobs and the resulting cash flow. The judge noted that use of the cash accounting scheme would have avoided the problem, but commented that the company would not have been able to join the scheme once it had fallen behind with its VAT payments; in any case, the existence of another "more reasonable" course of action did not necessarily make the actual course of action unreasonable.

The judge considered the "question in *Perrin* – was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?" In his view, the answer was that the company had a reasonable excuse. He was satisfied that the significant interruptions due to COVID-19 rendered the company's actions in seeking to keep the business going and make payments were objectively reasonable.

The appeal was allowed.

First-Tier Tribunal (TC08675): *Bicester Property Interiors Ltd*

A company appealed against a 10% surcharge for its 10/21 period. The payment had been made 2 days late on 9 December 2021. The return had been submitted online on 5 December. The trader claimed a reasonable excuse on the basis that the online banking "fob" used by the company to make online payments had stopped working; a new one had to be sent in the post, and the payment was made as soon as it arrived. She was also struggling with long Covid, and the business (car repair) had been badly affected by the pandemic. The director had not taken advantage of the VAT holidays during the pandemic. It appeared that the director had not considered discussing the late payment with HMRC.

Judge Anne Fairpo considered that it was more likely than not that no thought had been given to alternative ways of paying the liability without the fob. The excuse was not objectively reasonable, as a reasonable trader would have tried other ways of complying with the obligation.

The judge expressed sympathy with the director's health issues, but noted that payment was made as soon as the fob arrived. Those health issues therefore did not appear to be relevant to the late payment, and could not be an excuse.

The director also argued that the penalty was unfair, which the judge took to be an argument based on disproportionality. She was bound by the Upper Tribunal decision in *Trinity Mirror* to hold that this was not the case. There were no exceptional circumstances that could change the normal conclusion.

The appeal was dismissed.

First-Tier Tribunal (TC08722): *Diamond Bodycraft Ltd*

A company appealed against a surcharge of £946 imposed for its period 10/21. The trader had been late with payments for periods 10/20, 01/21, 04/21 and 07/21 – in respect of the first three periods, months late. The payment for 10/21 was only one day late (although the trader disputed this). The surcharge had reached 15% by that point.

The trader claimed that he had been told on a phone call that the surcharge had been wrongly issued and would be cancelled. HMRC's records showed the call but there was no reference to the possibility of cancellation. The record showed that the system showed the payment arriving a day late.

The appellant provided no evidence that payment had been made earlier; HMRC provided a ledger entry showing the credit to the trader's account on 8 December. On that basis, the Tribunal found that the payment had been made late. That was the only ground of appeal – there was no reasonable excuse.

The appeal was dismissed.

First-Tier Tribunal (TC08727): *Godavari Consultancy Services Ltd*

A company appealed against a surcharge of £64,119 for its 06/21 period. It contended that the surcharge liability notice had not been properly served, that it had a reasonable excuse, and that the penalty was disproportionate.

The company had been in default for the first time in period 09/20; it had defaulted again in 12/20, 03/21 and 06/21. The company claimed that it had not received the SLN for 09/20. The company's VAT correspondence was directed to its accountant. The judge reviewed a number of precedents on the burden of proving non-receipt of a document that had been duly addressed and posted: there was a presumption that it would have been delivered, but that is rebuttable.

The company's witness stated that the first SLN would have arrived when the company's accountants were not working in their office because of Covid. The second and third SLNs were received and the surcharges had been paid; the witness said that no one had picked this up because of the difficulties of catching up after Covid. No witness was called from the

accountants to give evidence about the post opening procedures. In the absence of any evidence to disprove the statutory presumption, the judge concluded that it was more likely than not that it had been properly served on the company's accountants.

The proffered excuse was essentially "shortage of funds" arising from the impact of Covid. The company had already had one Time To Pay arrangement and could not therefore have another one. The judge noted that the witness had offered to provide HMRC with evidence of lost contracts and the company's financial position in the form of bank statements, but had never done so; there was no evidence of these matters before the Tribunal, apart from her statements. In the absence of evidence, it was not possible to conclude that the underlying reason for the shortage of funds constituted a reasonable excuse.

The disproportionality issue was briefly discussed. The judge noted that the company was unfortunate to hit the 10% surcharge level when its VAT liability had risen to six times the amount of the previous quarter. However, it arose after a sustained period of non-compliance, and the payment was two months late rather than a few days. In accordance with the well-known precedents, the Tribunal could not find that the surcharge system as a whole was disproportionate.

The appeal was dismissed.

First-Tier Tribunal (TC08757): *Mareel Ltd*

In an appeal that was concerned with a number of PAYE and NIC matters, the company also appealed against surcharges totalling £11,250 for its periods 06/16 to 06/17 on the grounds of reasonable excuse. After 145 paragraphs, Judge Marilyn McKeever allowed the appeals on direct tax and ordered HMRC to make a repayment to the company. Turning to VAT, she noted that the company had been in the surcharge regime since 09/15, and the disputed surcharges were levied at 10% and 15%. In each quarter, the company had paid some, and often most, of the VAT by the due date. Part of the argument was that the company's shortage of funds arose because it was being required to pay more PAYE and NIC than was due, as demonstrated by the earlier part of the decision.

The judge did not accept this. The PAYE was being settled by instalments that were smaller than the VAT shortfall in nearly every quarter. The cash shortage was more likely to be the normal hazards of trade, which could not be a reasonable excuse. The appeal against the surcharges was dismissed.

First-Tier Tribunal (TC08762): *Prisma Recruitment Ltd*

6.8.3 Penalties

In TC08318, the FTT dismissed an appeal by a company against penalties of £58,340 for periods between 08/12 and 10/15 after HMRC had formed the view that it did not have the required evidence to support zero-rating of despatches of commercial vehicles to the Republic of Ireland. During the course of the enquiry a notice to produce statutory records had been issued, and penalties were levied for failure to comply. The notice and the penalties had been challenged and upheld on review.

In the FTT, the company's director argued that he had provided sufficient evidence, and it would be disproportionate to charge VAT. HMRC responded that they had received none of the documents required by Notice 725 and the company had provided no evidence that the vehicles had been removed from the UK within three months from the date of supply. In relation to the penalties, HMRC supported the use of the "deliberate" scale on the basis of previous contact with the appellant in which it had been warned about the need to comply with the requirements of Notice 725. Some discounts had been allowed for telling, helping and giving access, so the penalty was charged at 52.5% of the PLR on one assessment, and at 64.75% on another.

Judge Anne Fairpo examined the evidence put forward by the company, and found it all insufficient. She was satisfied that the requirements of the Notice, and the penalties, were not disproportionate. There was no reason to reduce any of the charges, and the appeal was dismissed.

The company appealed to the Upper Tribunal, where the case came before Mr Justice Miles and Judge Greg Sinfield. The appeal was only against the "deliberate" scale being used for the penalties: the FTT had described the conduct as "reckless", but the appellant argued that this was not enough to make them deliberate. HMRC argued that, properly analysed, the FTT's findings of fact confirmed that the company had actual, or at least "blind-eye", knowledge of the inaccuracies, and this was enough to satisfy the deliberate conduct condition. HMRC agreed that recklessness on its own was not enough.

The issues, then, were:

(1) does "deliberate inaccuracy" for the purposes of paragraph 1 of Schedule 24 FA 2007 include blind eye knowledge;

(2) did the FTT interpret and apply "deliberate inaccuracy" correctly in the Decision; and

(3) do the FTT's findings in the Decision support a conclusion that there was a deliberate inaccuracy on the part of CPR?

The judges examined the statutes and the case law precedents, including *Auxilium Project Management*, *Tooth* and *CF Booth Ltd*. These suggested that the test for deliberate inaccuracy in Sch.24 FA 2007 is a subjective one which requires proof that the taxpayer knowingly provided HMRC with a document which contained an inaccuracy, intending that HMRC would rely on it as accurate.

HMRC contended that this extended to "blind-eye" knowledge; the company did not disagree, but argued that the FTT had made no such finding in its case. The UT noted that the FTT decision did not say very much about the law or the reasoning in relation to the penalties: it had held that the company could not reasonably have concluded that it had sufficient evidence to justify zero-rating, and the conduct was "deliberate as the returns had been submitted when CPR was at least reckless as to whether it had the required evidence to zero-rate."

After detailed discussion, the UT concluded that the FTT had made an error of law. It had not applied the correct test for "deliberate inaccuracy", and its findings of fact did not justify the penalty that it had

confirmed. The decision was set aside and the UT remade it, imposing a careless penalty in its place.

Upper Tribunal: *CPR Commercials Ltd v HMRC*

A company appealed against assessments and penalties dating from 2012 and 2015, totalling £280,000. Judge Redston starts the decision with a history of two previous attempts to hold a hearing which had been adjourned, and repeated failures of the taxpayer's representative to comply with Tribunal directions. The representative e-mailed the Tribunal on the day of this third hearing to say that she had a virus, and to ask for a further adjournment. HMRC's representative objected, arguing that it was in the interests of justice to proceed. and the judge agreed. This would mean that the representative could not expand her case from the inadequate skeleton argument she had submitted for the first hearing, but she had been given ample opportunity to do so (and was in breach of directions for failing to submit a better skeleton). Had she attended, the Tribunal might have refused to allow her to expand on the earlier skeleton because she had been issued with an "unless order" which she had not complied with.

The rest of the decision goes through the history of the dispute, which started with an enquiry into input tax claimed and proceeded with repeated promises to provide information which were then not fulfilled. The grounds of appeal were in effect "that the information had been provided", but the judge saw no reason to change either the assessments or the penalties. These were confirmed as arising from deliberate behaviour: the accountant knew when she submitted the claims that they were inaccurate. The appeals were dismissed.

First-Tier Tribunal (TC08689): *ATN Marketing Ltd*

HMRC raised assessments on a company for VAT (£47,000), corporation tax (£51,000) and penalties (£37,500 and £40,800), and also issued PLNs to a director. The company ran a Chinese buffet-style restaurant. Judge Mark Baldwin reviewed the records of the enquiry and dismissed the appeals, noting that the company's representative had made allegations of dishonesty against one of the HMRC officers without any evidence to contradict what the officer had said. The officer had recorded notes of a meeting at which the director of the company had confessed to suppressing purchases and therefore related sales. On that basis, the officers produced best judgement assessments that the company had done nothing to displace.

First-Tier Tribunal (TC08709): *WJE Ltd and another*

An individual appealed against PLNs issued to her in respect of penalties imposed on a company of which she had been a director. The company had gone into liquidation owing HMRC the penalties, which had been levied in respect of *Kittel* disallowance of input tax on transactions which the company knew, or ought to have known, were connected to fraudulent evasion of VAT. The PLNs were initially issued in the amount of £1,177,423, but by the time of the hearing this had been reduced to £928,551.

The trader operated a cash and carry business in Birmingham. The disputed deals related to purchases of alcoholic beverages from "hijacked" traders. The company appealed, but the appeal was withdrawn when the

company went into liquidation. The penalty was subsequently levied and allocated 100% to the appellant by the PLN. As she was the sole director of the company throughout, HMRC were satisfied that the company's deliberate inaccuracy was entirely due to her dishonesty.

The decision goes through the usual examination of transaction chains. As the company was in liquidation, its records were in the hands of the liquidators, and neither party had requested access to them. Much of the findings of fact therefore related to the background and establishment of the company and the due diligence conducted in respect of its suppliers.

HMRC established a link to fraud in 332 supplies over a 3 year period. The decision includes a table showing this as a percentage of the input tax claimed in each period, which in one period is as low as 8% but in most is between 30% and 70%. The overall percentage linked to fraud was 48%. HMRC's representative argued that this was indicative of knowing involvement; the director claimed that she had been unlucky. The judge noted that it was possible that fraudulent traders were attracted to the business because they knew its due diligence was poor, rather than because it was actively involved.

After considering the history, the quality of the director's evidence, the nature of the various transactions, and the level of due diligence, the judge was satisfied that the director ought to have known of the connection with fraud. That was enough to conclude that the input tax was not allowable and the returns were inaccurate.

However, it was necessary for HMRC to justify the PLNs on the basis of dishonesty by the director. The judge considered this question to be finely balanced. There were indications that suggested actual knowledge, but even HMRC accepted that there was no "smoking gun" – the evidence was circumstantial.

The judge concluded that "should have known" was enough to disallow the input tax and lead to an inaccuracy, but did not satisfy the test of dishonesty or "deliberate conduct". Accordingly, the appeal against the PLN was allowed. Had the Tribunal concluded that the director did know of the connection to fraud, it would have confirmed the PLN.

First-Tier Tribunal (TC08719): *Bachra*

An individual appealed against PLNs for penalties relating to both VAT for periods from 09/15 to 06/19 (£139,903) and corporation tax for the calendar year accounting periods 2015, 2016 and 2017 (£41,702). The underlying assessments and penalties had not been appealed by the company, which had been liquidated. On returning to the office after the Covid pandemic, the officer reviewed the file and reduced the penalties to £45,507 and £8,522, which were the sums before the Tribunal on appeal.

Judge Anne Scott reviewed the history of the enquiry, which mainly related to disputes about the operation of tills in a diner. She was satisfied that the conduct of the director constituted deliberate concealment; HMRC's assessment was very fair in taking into account factors that might reduce the liabilities. Given the strong comments about deliberate inaccuracy by the judge, it is possible that she considered that HMRC had been too generous.

The appeals were dismissed.

First-Tier Tribunal (TC08720): *Colm Brendan Malone*

HMRC issued a PLN to the director of a company after denying £576,000 in input tax for periods from 10/14 to 07/15. The PLN was in the amount of £383,000. The appeal hearing had started in January 2021, but had to be adjourned and it was not possible for all the parties to resume the hearing until July 2022. Judge Rachel Perez heard evidence about the business, which was an alcohol wholesaler and cash and carry. Her decision, over 392 paragraphs, includes a great deal of the cross-examination of the appellant, who had also filed five separate witness statements. The judge decided that he knew of the connection to fraud, and his conduct was therefore dishonest. She considered the 123 deal chains that had given rise to the assessment and the penalty, and concluded that HMRC had not discharged the burden of proof on 3 of them. The penalty was therefore reduced to that extent. Had the onus been on the appellant, the appeal would have been dismissed in relation to these as well.

First-Tier Tribunal (TC08739): *Jabble*

A company appealed against a penalty of £90,753 issued under VATA 1994 s.60 for dishonestly evading VAT by not submitting returns for the periods from 2010 to 2016. The company paid centrally issued assessments which substantially understated its liability. HMRC issued a PLN to the director for the same amount.

Judge Nigel Popplewell set out the test for dishonesty according to precedent: "The knowledge of the person alleged to be dishonest that has to be established if such an allegation is to be proved is knowledge of the transaction sufficient to render his participation dishonest according to normally acceptable standards of honest conduct. In essence the test is objective – it does not require the person alleged to be dishonest to have known what normally accepted standards of honest conduct were".

The judge also commented on the relevance of the subjective state of mind of the person alleged to be dishonest, and noted that "'Nor does an honest person in such a case deliberately close his eyes and ears, or deliberately not ask questions, lest he learn something he would rather not know, and then proceed regardless."

The history of the case shows the surprising fact that, after occasional contacts, HMRC realised in 2016 that the last VAT return filed by the company was for the period 11/09. Computer-generated central assessments had been raised and paid for each subsequent VAT quarter and, in December 2016, the company's VAT account was in credit by £36,000.70. On 1 June 2017 the accountants and the director sent a disclosure e-mail to the investigating officer which included a letter explaining that the VAT outstanding was £306,585 and offering to pay this at £60,000 a year for five years. The company went into a creditors' voluntary arrangement on 25 September 2017. HMRC issued a s.60 penalty in March 2018, confirmed on review in March 2019 and appealed to the Tribunal.

The company's financial statements showed a large and increasing amount owing to HMRC as "other taxes and social security". The director said he had not noticed them at the time; although he signed the

accounts, he did not understand them, and the accountants had never discussed them with him.

The competing arguments of HMRC and the appellant are set out in the decision. The judge noted that the director's approach to the VAT regime was clearly careless and probably reckless. However, that was not the test for a s.60 penalty. The judge accepted that the director was an honest witness who had simply accepted and paid the central assessments that arrived, without giving any thought to whether they were adequate. Had he considered them, he would have realised that they significantly understated the liability, but the Tribunal accepted that he did not do so. Other cases involving non-submission of returns involved deliberate decisions to withhold information in order to protect cash flow; that was not the case here.

The appeals were allowed.

First-Tier Tribunal (TC08756): *Universal Flooring (Contractors) Ltd*

In 2020, the FTT held in (TC07708): *CCA Distribution Ltd* that MTIC decisions from 2006, denying input tax claims of over £9 million, were valid on the grounds that the director knew, as well as ought to have known, of a connection with fraud. As the company went into liquidation without the means to pay the associated evasion penalty, HMRC issued a Director's Liability Notice for almost £2 million to the "controlling mind" of the company. He appealed, arguing that the FTT had not found him to be "dishonest"; his grounds of appeal included the assertion that he did not know of a connection with fraud.

HMRC applied to have that part of the grounds of appeal struck out on the basis that it would be an abuse of process to allow him to relitigate something that had already been decided. HMRC also applied for the 2020 decision to be admitted as evidence in the current appeal.

Judge Anne Redston summarised the history of the dispute. The company had succeeded in a first FTT appeal in 2012, although that was only on the casting vote of the judge. The Upper Tribunal upheld HMRC's appeal in 2015; in 2017 the Court of Appeal upheld that decision and ordered the case to be remitted to a differently constituted FTT. That new hearing took place over 12 days in 2019, and the decision against the company was finally delivered in May 2020. The company did not appeal. It had entered administration in August 2009 and was dissolved in November 2022.

She went on to summarise the FTT's findings of fact, which were emphatic in holding that the director knew that he was participating in a fraud. A long list of reasons for this conclusion were given; the judges said that any of them individually would have been enough, but the combination led them to certainty.

The individual's appeal against the DLN asserted again that "I was unknowingly the victim of a very sophisticated fraudulent operation". The grounds set out over five pages a number of findings of fact by the Tribunal with which the appellant took issue.

HMRC applied to have these parts of the grounds struck out. The judge examined a number of precedents on the issue of "abuse of process". She agreed with HMRC that the issues in the two appeals were substantially

the same: the DLN related to the same transactions, and the current appellant had been the controlling mind of the company. The FTT had not merely found that he "ought to have known", but had unequivocally decided that he did know.

The judge acknowledged that the individual was allowed to appeal, because the DLN depended on a finding specifically of "dishonesty" which the FTT had not included in its decision on the company. However, he would have to appeal on the basis that it was not dishonest to enter into transactions knowing that they were connected with fraud, because the new hearing would have the 2020 decision in front of it.

HMRC's application was allowed.

First-Tier Tribunal (TC08773): *Ashley Charles Trees*

Lecture 25

6.8.4 Appealable decision

HMRC applied to the Tribunal to have a series of related appeals struck out on the basis that HMRC had not made an appealable decision. In all the appeals the appellants were either NHS Trusts, Health Boards or CICs (Community Interest Companies).

The substantive issue was described in the appellants' skeleton argument as: "whether past supplies to [the NHS Trusts] of locums as deputies for doctors who are registered with the General Medical Council ("GMC"), being a supply of staff, are exempt from VAT under the Value Added Tax Act 1994 Schedule 9 Group 7 Item 5." Between 30 August 2021 and 3 October 2021, 15 appellants lodged related appeals. They were divided into 3 categories for the purpose of the appeal, but the distinctions will not be considered further in this brief summary.

A VAT consultancy had gathered a group of interested parties to dispute the consequences of the *Rapid Sequence* decision in 2013. In that case, it was held that the apparent exemption of supplies of locums under Group 7 item 5 was contrary to the PVD; in order to adopt a conforming construction, the judge effectively read the UK law as if the words were not there. The case was not appealed further at that time.

The consultancy wrote to HMRC on behalf of 13 NHS and other bodies on 30 June 2021, asking for a review of the matter and indicating that s.80 claims would follow. The letter was accompanied by a technical submission setting out reasons for exempting the supply of locum doctors.

HMRC responded by letter on 3 August 2022. This simply reiterated HMRC's view of the law as set out in Notice 701/57 and HMRC Manuals, and pointed out that it was normally the supplier that had to make a s.80 claim. If a customer believed that VAT had been overcharged, that was initially a commercial matter between the customer and the supplier.

The consultancy wrote to HMRC to express surprise that there had been no offer of a statutory review of the decision or explanation of the right of appeal to a Tribunal. The letter cited authority for s.83(1)(b) encompassing a right of a customer to appeal to the Tribunal on a question of the liability of a supply, even if the customer cannot ordinarily make a s.80 claim. Appeals were lodged by some of the appellants at the end of August.

HMRC applied for strike-out, claiming that the Tribunal does not have jurisdiction to hear an appeal. They considered that they had simply issued a letter responding to what HMRC viewed as a speculative, theoretical and general enquiry rather than an appealable decision. No decision had been made on any specific supply or specific taxpayer.

Judge Anne Scott noted that there was some confusion about what the substantive issue would be if the Tribunal decided not to strike out the appeals. On the one hand, the letters referred to past supplies received by the NHS Trusts, and it appeared that they wanted to recover VAT paid on

those supplies; however, that would require s.80 claims, which they could not make.

According to precedent, for a decision to be appealable there had to be "an issue between the party which has been sufficiently crystallised to constitute a decision within one of the paragraphs of s.83." HMRC argued that this required identification of specific supplies and claims or specific instances. The taxpayer argued that it only required a clear understanding of the area of dispute between the parties, namely in this case whether a supply of locum doctors is exempt within item 5.

The judge then discussed in detail whether HMRC had made a decision, or merely expressed a view. The crucial words, in the judge's view, were "For the avoidance of doubt, HMRC does not share the views set out in your letter/report." Taken in its context, this made it clear that the technical submission had been considered and rejected. This was a concluded view and did not invite further dialogue.

The judge also noted that two points had not been considered as having any weight. The first was the assertion by the Trusts that this was a matter of considerable public interest: that was not a matter within the jurisdiction of the Tribunal. The second was HMRC's claim that they had not intended to make a decision: the question was whether they had done so, whether they had intended to or not.

The judge also rejected an argument by HMRC that allowing this appeal to proceed would "open the floodgates". Group appeals were not unknown; further appellants would have to show that they had a financial interest in the matter.

For all these reasons, the judge concluded that the HMRC reply was an appealable decision and the applications for strike-out were dismissed.

First-Tier Tribunal (TC08682): *Isle of Wight NHS Trust and others*

6.8.5 Late appeals

In January 2018, a trader's representative filed a notice of appeal against HMRC's refusal to accept an error notification of £35,000. This was later reduced to £9,525, but he withdrew the appeal in May 2019. In January 2020, a further notice was filed in relation to the same matter. The Tribunal wrote to the representative asking for an explanation of how it differed from the earlier appeal, or else an application for late reinstatement. No reply was received, and the file was closed in October 2020.

A further appeal in relation to the same matter was filed in December 2021. This notice also referred to other matters not previously appealed, including penalties and a statutory review decision from January 2016. HMRC objected on the basis that it was in reality a late application to reinstate the first appeal, and should be struck out. Judge Redston agreed with HMRC's application, and the appellant asked for a full decision. The judge has set out a detailed examination of the law in relation to late applications for reinstatement, and identifies provisions and related case law which were neither referred to by the parties nor considered in the summary decision. The judge noted that overlooking those provisions and the related case law was an error of law, and that this full decision

therefore constituted a review of that earlier summary decision under Rule 41 the Tribunal Rules.

The full statement of the law is presumably to discourage the trader from trying a fourth time. In brief summary, the delay was extremely serious and without any good reason, both for the application to reinstate and the extra matters added in the third appeal. The applications were refused.

First-Tier Tribunal (TC08695): *Hussain (trading as Nisa Local)*

In February 2017, HMRC assessed a trader to £58,310 for periods from 04/13 to 01/16. The trader notified an appeal to the Tribunal on 22 September 2021. This was clearly seriously and significantly late. The judge noted the reasons given for the lateness, which included the trader's reliance on the agent who, it was claimed, had assured him that an appeal had been lodged. The judge was not satisfied that there was sufficient evidence to conclude that the agent had made such a representation; in any case, it was the taxpayer's responsibility to at least read HMRC's letters, which made it clear that no such step had been taken.

Applying the principles of *Martland*, the judge dismissed the application to have the appeal heard out of time.

First-Tier Tribunal (TC08698): *Singh & Kainth (trading as Western News)*

A registered charity was assessed to £92,644 on the basis that VAT incurred on constructing a café and toilets was not recoverable as input tax. The assessment was raised in February 2019; the trust's accountant only notified a formal appeal on 17 September 2021 online. He gave evidence that he had sent a paper notice of appeal at an earlier date and it had been lost in the post, or lost by the Tribunal, and he had contacted the Tribunal to chase it up, but the judge found that his evidence lacked credibility. The judge found as a fact that no such notice had been posted, nor had the accountant contacted the Tribunal.

The judge applied the *Martland* tests and concluded that the reason for the lateness was the accountant's failure to file the notice by the statutory time limits. There was no good reason; although the accountant had primary responsibility, the trust shared some of the blame, and had to suffer the consequence. The trustees had become aware by May 2021 that it appeared that no appeal had been filed, and they did not act promptly enough to investigate. They had therefore contributed to the delay from May 2021 to September 2021.

The decision goes through the history and the evidence in detail, and must be uncomfortable reading for the accountant, who is head of a mid-tier firm's VAT practice. It appears that problems were caused by the first lockdown being declared at around the time that the appeal should have been filed, but the judge did not accept that was an excuse for the inconsistencies in the accountant's evidence.

After carrying out the required balancing exercise, Judge Redston concluded that the prejudice to the trust of not being able to pursue its appeal could not outweigh the substantial delay without good reason. The application was dismissed.

First-Tier Tribunal (TC08686): *Golden Grove Trust*

An individual sought leave to appeal out of time against a PLN issued in October 2017 in respect of an inaccuracy penalty of £874,234 imposed on a company of which he had been the director. The PLN had been confirmed on review in November 2018, and the appeal was notified to the Tribunal in February 2022, just over 38 months late.

As in the other cases, the judge examined the history of the dispute. It appeared that there was a dispute between HMRC and the individual and his representatives over the deduction of invoices by a company (which subsequently went into liquidation) or by the individual personally (he was also VAT-registered in his own right). At an earlier stage, it appeared that HMRC had accepted that this could be regularised, and the individual's counsel argued that HMRC had therefore created a "muddle" that was at least partly to blame for the delay in making a formal appeal.

Judge Kevin Poole did not accept this. By the time of the review decision, HMRC's position was clear, and the failure to take action was entirely the fault of the trader and the trader's representatives. The *Martland* exercise led inevitably to the conclusion that the appeal should not be allowed to proceed.

First-Tier Tribunal (TC08714): *Tajinder Singh Pawar*

On 23 March 2022, the FTT received notices of appeal in relation to PLNs issued to an individual concerning penalties levied on two companies of which he had been a director. The PLNs had been issued in March 2021, November 2021 and March 2022. Two of the appeals were therefore very late. The individual's advisor explained that the delay was due to trying to clarify the basis of levying the penalties with HMRC, which had been unsuccessful. He suggested that the basis for all the PLNs was the same, so the fact that the third appeal was in time should be a reason to allow the other two to proceed.

The penalties related to *Kittel* disallowances in the two companies. HMRC raised no objection to the November PLN being appealed late, because it related to the same company and therefore the same issues as the March 2022 "in time" appeal; however, they objected to the March 2021 appeal being heard out of time.

The March 2021 PLN related to a company that had gone into liquidation in 2020. HMRC had issued its decision to the liquidator, who did not appeal against it or against the penalty that followed. HMRC had written to the individual in September 2020, warning him of his potential liability to a PLN. Following the actual issue of the PLN, the advisor wrote to HMRC on 28 April 2021, within 30 days of the issue of the notice, asking for information about the company's suppliers. HMRC said that this was prohibited by their duty of confidentiality; the advisor did not contact them again until September 2021, when he again asked for further information. He was told that the individual was now out of time to appeal, but a request for the appeal to be admitted late could be made. From 27 October 2021 onwards, the advisor was also in correspondence with HMRC about the penalties levied on the second company and covered by the second and third PLNs. However, no formal appeal was made until 23 March 2022.

Judge Greg Sinfield noted that the appeal was brought 327 days late. The advisor's reason for the delay was that the individual "could not appeal

until HMRC had provided explanations and evidence in relation to their allegation". He also noted that the director had submitted further reasons for the delay by e-mail the day after the video hearing; as HMRC had no opportunity to consider or cross-examine this new evidence, the judge refused to admit it. In any case, the fact that these assertions were made for the first time after the hearing, and had not been mentioned at any point up to then, would have led the judge to discount them as not credible.

The delay was serious and significant, being over 10 times the statutory limit. The reason given was inadequate, given that an appeal could have been submitted while the advisor negotiated with HMRC for further information. If he had appealed, the burden would have been on HMRC to produce some evidence; the director could have appealed by simply stating that he did not know of any connection with fraud, and then applied for further and better particulars of HMRC's case. Alternatively, if HMRC had asked for further particulars of the grounds of appeal given, the director could have responded by saying he needed the information from HMRC in order to answer.

More seriously, though, there seemed to be no expedition in the correspondence entered into by the advisor: the first letter was sent 28 days after the PLN was issued, and there was no further contact for five months. On being told he was out of time to appeal, the advisor took no further action for another two months, when he asked for an independent review. HMRC responded the same day, refusing a review because it was requested out of time, and the advisor took no further action for a further four months until March 2022. After HMRC's refusal of a review, the only possible course of action was to appeal to the Tribunal, so there was no possible good reason to delay doing that. No explanation had been offered.

The prejudice to HMRC would be considerable, because although the legal basis of both sets of penalties was the same (*Kittel* denials), the facts and the compliance teams involved related to different companies: HMRC would have to do twice as much work. Balancing everything together, the judge concluded that this was not a case in which permission should be given to admit the appeal out of time.

First-Tier Tribunal (TC08766): *Rizwan Butt*

An individual applied for permission to appeal late against VAT assessments for a number periods from 06/12 to 12/15 and income tax penalties for the years from 2012 to 2017. He claimed that the assessments were not received, and he appealed as soon as he became aware of them.

The individual traded as a builder. He claimed that he believed he was due VAT repayments because most of his supplies were zero rated. The decision records attempts by HMRC officers (one of whom retired and was replaced by another) to inspect the records and elicit VAT returns; this appeared to have started in May 2014 and continued to the issue of a number of assessments in June and October 2016. The trader had appointed a firm of accountants to represent him in February 2016; they submitted an appeal against a Statutory Demand (which is not appealable) in February 2018. The judge took this as the date on which an appeal had been made because the trader claimed not to have received the

assessments, so this was "the only document available and he wanted to appeal as quickly as possible."

The judge did not simply apply the Interpretation Act and assume that the assessments had been delivered. He set out a range of reasons for rejecting the trader's explanation, which included an assertion in written and oral testimony that he had not seen certain letters until much later, when the accountants had told HMRC in March 2016 that these letters had been provided to them by the trader.

For all these reasons, as well as the fact that the accountants were in correspondence with HMRC and knew that HMRC were trying to obtain information in order to raise assessments, the judge concluded that the reasons given for the delay were weak. After carrying out the required balancing exercise, the judge concluded that this was not a case in which permission for a late appeal should be granted.

The income tax penalty appeal was likewise struck out for the slightly different reason that the advisors and the trader had not given a clear list of the penalties that were appealed against or the reasons for which they should be reduced.

The appellant also attempted to have three more VAT assessments added to the appeal, but this was contrary to specific case management directions and the trader had given no good reason for the change. This too was refused. As those assessments were issued in April 2018, it seems likely that an appeal against them is also out of time.

First-Tier Tribunal (TC08767): *Bharat Patel*

6.8.6 Lost opportunity

In (TC08108): *Kingston Maurward College*, the FTT considered an appeal about the operation of a partial exemption scheme. The appellant, a Further Education College, was appealing against HMRC's refusal of a claim for input tax not previously credited. It argued that the inputs were overheads of an economic activity, and the special method that had been agreed with HMRC entitled it to greater recovery. It occupied a rural site and specialised in agricultural and other rural subjects.

The judge agreed with the college's proposition that grant-funded education was "supplied for consideration", considering herself bound by the UT decision in *Colchester Institute Corporation*. However, she rejected the contention that the VAT claimed was "residual" for the purposes of the college's agreed PESM, holding rather that it was attributable exclusively to exempt supplies. The appeal was dismissed.

The college appealed to the Upper Tribunal on two grounds. Firstly, it argued that the FTT should not have found against it on a ground that was not properly raised or particularised in HMRC's statement of case (the extent to which the claimed input tax was residual). Secondly, it claimed that the FTT should not have determined that no input tax was recoverable at all, but should have invited the parties to go away and agree the amount of residual input tax that was recoverable, to be settled by returning to the FTT if that could not be agreed.

The UT noted that "The FTT Decision was a carefully considered and detailed decision running to 68 pages." The appeal was on procedural

matters only, but the issues before the FTT and its decision were briefly summarised. The judges considered that the criticism of HMRC's statement of case was misplaced: the appellant's grounds of appeal only relied on the argument that all the educational activities were incidental to its commercial activities, and in that context it was appropriate that HMRC only responded to that. There would be no point in HMRC dealing with an argument that had not been raised by the appellant. As the appellant had not put forward an alternative ground, to be considered if its first ground were to be rejected, HMRC did not need to address it and nor did the Tribunal. In effect, the appellant's argument was "all or nothing", and its failure led to "nothing".

HMRC's counsel put forward further arguments that the appellant did not object to the statement of case before the FTT or seek further and better particulars, but these did not need to be considered because the main ground of appeal was rejected.

The second ground asserted that the FTT should have made a decision in principle only, leaving the quantum to be agreed between the parties. The appellant relied on a passage from the Supreme Court's judgment in NHS Lothian Health Board, in which the judge said that it was not the case that "the figure determined by the FTT must be either the taxpayer's claim or zero". HMRC objected, arguing that the appellant wanted to relitigate matters that had been determined by the FTT.

The UT agreed that the FTT has a duty to find the "right" or "true" figure, which may not correspond to the figures advanced by the parties. However, this did not the appellant in showing the FTT in the present case erred in law. The precedents showed that the Tribunal's figures must be grounded in the facts, on the basis of evidence. As no evidence had been presented to the Tribunal on the links between particular inputs and particular outputs, the FTT would have been reduced to guesswork.

It appeared that the appellant had requested that the FTT should make a decision in principle only; it also appeared that the FTT had exercised its discretion to refuse that application, not explicitly, but in the terms in which its decision had been given. The UT judges emphasised the importance of putting everything before the FTT: "*First, the FTT will normally be expected to deal with all of the appeal before it at the substantive hearing unless otherwise agreed or directed. Second, the tribunal will only be able to decide the issues within the scope of that appeal on the evidence before it. Parties will be well aware of this, and if they are not, then they ought to be. If the relevance of the evidence depends on the outcome of certain issues then the party should adduce the evidence so they are covered, should the alternative arise, and not assume the tribunal will put the matter back to the parties for agreement or hold a further hearing. By not putting in evidence to cover off decisions in the alternative, the party runs the risk of an adverse decision being made due to an insufficiency of relevant evidence. Alternatively, if the party considers it makes sense to have a more restricted scope of hearing, the party should broach the scope of the hearing with the other side and the tribunal at a suitably early stage, so the more limited scope of the hearing can be settled in good time before the hearing takes place.*"

HMRC had put in the respondents' notice that they maintain the view that *Colchester Institute Corporation* was wrongly decided, but this was not

argued before the UT and was not material to the decision. The college's appeal was dismissed.

Upper Tribunal: *Kingston Maurward College v HMRC*

6.8.7 Strike-out

On 12 August 2021, HMRC issued a review decision to a company, confirming an earlier decision to change the company's effective date of registration from 1 May 2019 (the date it determined on an application to register in July 2019) to 1 July 2017. The company appealed in September 2021. Its first filing was incomplete as it did not include a copy of the HMRC decision, but this was rectified on 24 September 2021. HMRC did not object to the slight lateness.

In March 2022 HMRC applied for strike-out on the basis of non-payment of VAT, in the absence of a hardship application. In September 2022 a Tribunal caseworker e-mailed the parties to say that this was inappropriate as no VAT had been assessed; the parties were directed to clarify what was under appeal.

In October 2022 HMRC contacted the Tribunal to say that hardship was no longer an issue. They confirmed that an assessment had been issued on 8 September 2021, but it was not part of the appeal, which was solely against the change of the EDR. They applied for a direction that the appellant file further and better grounds of appeal, and they should not have to file a Statement of Case until 60 days after those additional grounds had been filed.

A Tribunal caseworker e-mailed the parties on 21 October 2022 to point out that HMRC must already understand the appellant's arguments, having carried out a detailed review; there were also two further pages of information with the filed appeal. HMRC were directed to provide their statement of case no later than 20 December 2022.

On that date, HMRC applied for the appeal to be struck out on the basis that the appellant had kept insufficient records and could not therefore support their position. Judge Jane Bailey commented that this fell under rule 8(3)(c): the onus was on HMRC to show that the appellant's case has no reasonable prospect of success.

She went on to point out that, in spite of the time that had passed, the appeal was still at an early stage: no directions had been issued requiring the parties to provide lists of documents or names of witnesses. At the substantive hearing, the onus would be on the appellant to produce evidence to displace HMRC's decision; but at this point, it was not possible to predict what evidence might be produced. The judge was not persuaded that this was an appeal that was not fit for a full hearing.

HMRC also argued that the company had no prospect of success because its own figures suggested an EDR of 1 February 2018. The judge said she was "bemused": from the figures provided, it appeared to her that the company maintained its position that it had only exceeded the threshold in May 2019. Even if that were not the case, the difference between 1 February 2018 and 1 July 2017 was an important issue to be settled by the Tribunal.

The judge dismissed HMRC's application for strike-out and directed them to produce a statement of case no later than 28 days from the release of the decision.

First-Tier Tribunal (TC08745): *Phu Hung Ltd*

In (TC07990): *Wilmslow Financial Services plc (in administration)*, the FTT ruled against the effectiveness of a VAT planning scheme similar to that which had been found to work in *Newey t/a Ocean Finance*. A UK-based loan broker (Wilmslow) had set up a Gibraltar company (Karacus) to provide financial intermediary services. The appellant in the present case claimed that it was supplying advertising services to Karacus, which would therefore be outside the scope of UK VAT.

In the earlier case, the FTT had found that the reality of the situation was that it was W, not K, that provided the loan broking services to UK lenders, and it was W, not K, that received the supplies of advertising services. The arrangements were abusive, having the essential aim of avoiding irrecoverable VAT by establishing an artificial structure.

That case dealt with W's situation; Mediability brought a separate appeal, arguing that it was not necessarily involved in abuse just because W and K were. HMRC argued that the W decision had already completely analysed all the issues relevant to the current appeal, and to rehear it would stand no realistic prospect of success.

Dr Christopher McNall considered the available evidence and the competing arguments in some detail, while trying to avoid conducting a "mini-trial" of the substantive issues. In his view, the earlier decision showed conclusively that the arrangements were an abuse of rights, and there was no realistic prospect of any other result in the present case. In addition, he considered that relitigating the same arguments would be an abuse of process. He struck out the appeals.

First-Tier Tribunal (TC08775): *Mediability Ltd*

6.9 Other administration issues

6.9.1 HMRC performance

In the Treasury Minutes for March 2023, the government has responded to the Public Accounts Committee's (PAC) report from session 2022-23 on HMRC's performance in 2021-22. The matters discussed include:

- the extent to which HMRC targets and investment in compliance teams should be published;
- the calculation and reporting of an uncertainty range for the tax gap estimate;
- further recovery action on Covid-19 support schemes;
- engaging with international counterparts to understand what lessons it can learn in preventing fraudulent VAT registrations and minimising the impact on honest taxpayers;

- setting out a plan to improve HMRC "customer service" to adequate levels within three months.

www.gov.uk/government/publications/treasury-minutes-march-2023

6.9.2 Finance Bill published

The Finance (No. 2) Bill 2023 was published on 23 March. It has 352 sections and 24 schedules, but the only provision on VAT is clause 314 setting up the scheme for deposit return schemes by inserting new sections 55B to 55D in the VAT Act 1994.

https://bills.parliament.uk/bills/3435

6.9.3 Carbon credit fraud

The Court of Appeal has heard an appeal in a case arising out of the MTIC variation involving carbon emissions allowances trading that came to wide attention in 2009. The liquidators of several companies brought actions against a number of companies that they claimed had facilitated fraudulent trading, resulting in them suffering substantial losses (because HMRC refused deduction of input tax).

Several of the claims had been settled, but there were two issues remaining in dispute following a High Court decision. One concerned the limitation period for bringing an action, where the judge had found that the claims were time-barred; the other related to the scope of s.213 Insolvency Act 1986, where the judge had held that the claims were within that section. The claimants appealed against the first decision and the defendants appealed against the second; the Court of Appeal upheld both decisions of the judge below.

Court of Appeal: *Tradition Financial Services Ltd v Bilta (UK) Ltd and others*

6.9.4 New Litigation and Settlement Strategy Manual

HMRC have published a new Litigation and Settlement Strategy Manual to set out how they approach resolving disputes with taxpayers through civil law processes and procedures. It applies whether the dispute is settled by agreement or through litigation.

The new manual includes sections on:

- The purpose and scope of the Litigation and Settlement Strategy
- What a dispute is
- Resolving a dispute
- When to concede a dispute
- Range of non-connected specific outcomes
- Minimising the scope for a dispute
- Deciding whether to engage in a dispute

www.gov.uk/hmrc-internal-manuals/litigation-and-settlement-strategy

6.9.5 Confiscation order

The Court of Appeal has allowed a defendant's appeal against a confiscation order for over £5 million that arose from a VAT and PAYE fraud. The defendant had consented to the confiscation order because his counsel had refused to argue that there was a separation between the benefit obtained by the companies of which he was a director, and his own personal benefit. His son, a solicitor, had argued vigorously that this was an arguable defence, but the representative in court had declined to put the point forward.

The Court of Appeal held that it would be unfair not to allow the appeal where the defendant had been deprived of the ability to advance a point that had been reasonably arguable. The question of measuring the defendant's actual benefit, for determination of the proper confiscation order, was remitted to the Crown Court.

The judgment involves a detailed consideration of the difference between identifying a person's criminality and identifying the benefit to that person of the criminality in accordance with the Proceeds of Crime Act 2002. The Court of Appeal could not remake the decision, and did not criticise the judge below, but found that the exceptional circumstances of the case required a reconsideration.

Court of Appeal: *R v Miller*

6.9.6 Imprisonment

The CPS has announced that an individual who submitted 8 false repayment claims totalling £100,000 has been imprisoned for 28 months for VAT fraud. The claims were based on invoices for goods that were never bought or were not VATable. The false invoices were identified by administrators after the company went into administration in June 2020. The director pleaded guilty in October 2022 and was sentenced in February 2023.

www.cps.gov.uk/mersey-cheshire/news/horse-trader-jailed-tax-fraud

A businessman has been jailed for stealing over £2 million of taxpayers' money while he was in control of multiple failing companies in the construction industry. He pleaded guilty to multiple tax evasion offences, including being knowingly concerned in the fraudulent evasion of value added tax to the sum of nearly £1.8 million. Other offences he admitted included fraudulently evading income tax, fraudulently evading National Insurance contributions, and failing to disclose Construction Industry Scheme returns, resulting in an additional sum of nearly £380,000. On 3 March he was sentenced to 6 years' imprisonment.

www.cps.gov.uk/cps/news/company-director-jailed-defrauding-taxpayer-more-ps2-million

6.9.7 DOTAS

The FTT has considered the rules on Disclosure of Tax Avoidance Schemes in the context of a direct tax scheme. HMRC applied for a declaration that the company concerned had been a promoter of discloseable schemes within the FA 2004 rules. The FTT examined the way in which the schemes operated and concluded that the arrangements

were notifiable and the company (which is in liquidation) was a promoter for the purposes of the legislation.

First-Tier Tribunal (TC08721): *Hamilton Bradbury Ltd in liquidation*

6.9.8 Private Member's Bill

Amy Callaghan of the SNP has put forward a *Sun Protection Products (Value Added Tax) Bill* in an attempt to gain VAT exemption for sun protection products above a certain protection factor. It has received its first reading in the Commons but is unlikely to become law.

https://bills.parliament.uk/bills/3418