VAT UPDATE JANUARY 2020

Covering material from October – December 2019

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1. INTRODUCTION

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

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

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

1.1 Appeals pending

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

The HMRC website section which reports the progress of appeals was updated on 8 October 2019 after a gap since 17 May.

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

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

- *Alan McCord*: HMRC granted leave to appeal against the FTT decision that a car dealer was entitled to input tax on cars purchased for domestic sales, but denied input tax on cars purchased for sale to customers in the Republic of Ireland.
- *Anna Cook*: HMRC granted leave to appeal against the FTT decision that classes in Ceroc dancing qualified for exemption as "educational".
- *Beigebell Ltd*: HMRC granted leave to appeal against the FTT decision a company's directors did not have the means of knowledge of the connection of their company's transactions to a missing trader fraud.
- *Blackrock Investment Management (UK) Ltd*: argument about application of reverse charge to software bought in for use in management of investment funds – UT dismissed HMRC's appeal on the "exemption" issue but referred the "apportionment" issue to the CJEU.
- *Cheshire Centre for Independent Living*: HMRC have been granted leave to appeal against the FTT's decision that a charity's operation

of PAYE for disabled people was sufficiently closely connected to welfare to qualify for exemption.

- *DCM (Optical) Ltd*: both sides have been granted leave to appeal to the Court of Session against the Upper Tribunal's decisions in relation to apportionment of sales between taxable and exempt supplies (not on HMRC's list).
- *Done Brothers (Cash Betting) Ltd and others*: HMRC have been granted leave to appeal against the FTT decision that the company was entitled to exemption of its gaming supplies on fiscal neutrality grounds.
- *Fortyseven Park Street Ltd*: company is applying for leave to appeal to the Supreme Court against the CA decision that their "high end timeshare" was covered by the "hotel exclusion" from exemption.
- *KE Entertainments Ltd*: the company's appeal against the Court of Session's decision on its adjustment for output tax in relation to bingo calculations will be heard by the Supreme Court on 28 and 29 April 2020.
- *LIFE Services Ltd/Learning Centre (Romford) Ltd*: the companies have been granted leave to appeal to the CA against UT's decision that their supplies did not qualify for the exemption for welfare (appeal to be heard 12 February 2020).
- *Lloyds Banking Group plc and others*: various parties in the long-running dispute about the correct claimant in group registration *Fleming* claims are seeking leave to appeal to the Supreme Court.
- *Newey (t/a Ocean Finance)*: HMRC describes the CA decision as a "partial win for HMRC". The case has been remitted to the FTT for further consideration in the light of the CJEU judgment (hearing June/July 2019 – decision awaited).
- *Northumbria Healthcare NHS Foundation Trust v HMRC*: CA to hear HMRC's appeal against UT decision that provision of cars under a salary sacrifice scheme could not be regarded as a supply of services, so the Trust was entitled to claim VAT on leasing in full under s.43 (not on HMRC's list).
- *Opodo Ltd*: HMRC seeking leave to appeal to the Upper Tribunal (against FTT decisions that do not appear to have been published yet – HMRC seeking a reference to the CJEU).
- *Pacific Computers Ltd*: MTIC case remitted by the UT to differently constituted FTT for rehearing (not on HMRC's list).
- *Privin Corporation Ltd*: the FTT found in favour of a MTIC appellant. HMRC were granted leave to appeal to the UT, but it was agreed that the case would be remitted to a differently constituted FTT for rehearing (not on HMRC's list).
- *Rank Group plc*: HMRC has been granted leave to appeal against the FTT decision that certain supplies qualified for exemption on fiscal neutrality grounds (hearing listed for January 2020).

- *Royal Opera House Covent Garden Foundation*: HMRC has been granted leave to appeal against the FTT decision on the partial exemption recovery percentage.
- *The Chancellor, Masters and Scholars of the University of Cambridge*: the CJEU found in favour of HMRC's position on management fees in relation to the endowment fund, but the Court of Appeal will have to apply the decision as it was the referring court.
- *The Core (Swindon) Ltd*: HMRC have been granted leave to appeal against the FTT decision that certain products were "liquid meal replacements" rather than "beverages".
- *The Ice Rink Co Ltd and another*: the UT remitted the case to the same FTT for reconsideration of whether the supply of children's ice skates was a separate zero-rated supply or part of a compound supply.
- *The Wellcome Trust Ltd*: HMRC granted leave to appeal against the FTT decision that the company was not subject to a reverse charge on investment management fees. The UT has agreed to refer questions to the CJEU.
- *Thorsteinn Gardarsson t/a Action Day A Islandi*: HMRC seeking leave to appeal against the FTT decision that a trader's products qualified as "books" rather than "stationery".
- *Tower Resources plc*: HMRC have been granted leave to appeal on two grounds, and are seeking leave to appeal on a third, against the FTT's decision that a holding company was entitled to recovery of input tax on some overhead costs.
- *Zipvit Ltd*: (not on HMRC's list) taxpayer has been granted leave to appeal to the Supreme Court against the CA confirmation of decisions below that the company could not claim input tax on the VAT element of payments to Royal Mail without a VAT invoice, even though it was clear that taxable supplies had been made.

1.2 Other points on appeals

- *Hastings Insurance Services Ltd*: HMRC have dropped their appeal against the FTT decision on place of establishment.
- *Jigsaw Medical Services Ltd*: company has withdrawn its appeal against UT's decision denying zero-rating of their ambulance services as "passenger transport".
- *Praesto Consulting UK Ltd*: HMRC's list still shows that they were seeking leave to appeal against the CA decision in favour of the company's deduction of input tax on legal costs, but the Supreme Court refused the application on 5 November 2019.
- *Volkswagen Financial Services Ltd*: HMRC have decided not to bring the CJEU judgment on partial exemption methods back to the Supreme Court.

HMRC are not appealing the UT decision in *Pertemps Ltd* about the VAT consequences of a salary sacrifice scheme.

2. OUTPUTS

2.1 Scope of VAT: linking supplies to consideration

Nothing to report.

2.2 Disbursements

2.2.1 Lawyers' disbursements

The Law Society has updated its guidance on when property search fees may be treated as disbursements for VAT purposes, or as part of the overall consideration given for legal services, taking account of the FTT decision in *Brabners LLP* and the Court of Appeal judgment in *British Airways v Prosser*. The guidance notes that the decisions suggest a "narrow interpretation of when disbursement treatment is available", and comments "Although we consider that there remains scope for criticism of such narrow interpretations, these judgments cannot be ignored."

The new guidance offers less detailed guidance than the previous version on specific areas of legal practice, due to the challenges resulting from these decisions. However, it provides some more detailed practical guidance on VAT and disbursements in a real estate context. Some of these are shown below.

Land Registry fees

Land Registry fees can be broadly divided into three categories:

- fees for registration applications
- fees for carrying out searches
- fees for obtaining copy documents

The Land Registry does not charge VAT on its fees.

It is our view that it should ordinarily be possible for registration fees to be treated as a disbursement.

Where searches are carried out or copy documents obtained, based on the *Brabners* and *BA v Prosser* decisions HMRC may argue that the fact that you have made use of the search results or copy documents to provide advice or give certifications means that the supply of the search results is a supply to you and therefore that the cost must be treated as part of your overall legal services and be subject to VAT at the standard rate, rather than treated as a disbursement.

Following agreement with HM Customs and Excise (HMCE – the predecessor to HMRC) in September 1994, when a seller's solicitor obtains an office copy entry (now known as an official copy) and recharges the exact fee to their client they may treat it as a disbursement and outside the scope of VAT. We believe that this exception will only still apply in limited circumstances, especially as it is now common practice for official copies to be obtained on behalf of any party to the transaction.

In relation to the historic agreement, where the seller's solicitor also uses the official copies as part of their advice (for example, to obtain the title number to insert in the transfer or to ascertain what restrictions are on title), then, based on the *Brabners* and *BA v Prosser* decisions HMRC may argue that the fact that you have made use of the official copies to provide advice means that the supply of the information is a supply to you and therefore that the cost must be treated as part of your overall legal services subject to VAT at the standard rate, rather than treated as a disbursement.

Local Land Charge Search Fees (LLC1)

Prior to 2017, the CON29, CON29O and LLC1 were ordered together from the local authority and known as the 'local search'. No VAT was charged on any of those searches.

Since March 2017, local authorities were required to charge VAT on the CON29 and CON29O elements of the search, but not the LLC1 which remains outside the scope of VAT. In addition, from 2018, provision of the LLC1 is being moved to the Land Registry.

HMRC's view is that fees for 'local authority' searches that you have used as part of your advice in a transaction are subject to VAT when you charge them to your client. But, historically **by concession**, HMRC has been prepared to allow solicitors to treat **postal** search fees as disbursements so that VAT will not be payable on the amount of the fee which should thus be shown separately on your invoice.

It is now very uncommon to obtain a LLC1 by post, and, in any event, following the *Brabners* and *BA v Prosser* decisions HMRC may argue that the fact that you have made use of the search results to advise your client or give certifications means that the supply of the search results is a supply to you and therefore that the cost must be treated as part of your overall legal services subject to VAT at the standard rate, rather than treated as a disbursement.

Enquiries of local authorities (CON29 and CON29O)

As mentioned above, from March 2017 local authorities were required to start charging VAT on CON29 and CON29O searches, so these no longer need to be considered in detail.

Since these changes have come into effect, you should be charging your clients VAT (output tax) and recovering the VAT paid on the CON29 and CON290 search fees (input tax).

Personal searches

Where a local authority search is carried out personally either by your firm or, as is more common, by a personal search agency, VAT must be charged on the fees. This is because the fee charged by the local authority for a personal search is for the supply of access to the official record and this is a supply that is made to you or the personal search agency, rather than your client.

Personal search agencies will charge you VAT on their fees and expenses for carrying out a personal search. The VAT element of the fee should be treated as an input for VAT purposes. The search fee (i.e. the net amount) should be treated as an item of expenditure (not as a disbursement) and

added to your invoice on which VAT is charged. The amount your client pays in total will be the same as that charged to you.

If you undertake a personal search without using an agency, the local authority's fee will be treated as part of your professional charges (although itemised separately on the invoice) and you should charge VAT on these fees at the standard rate.

Highways searches

Where these searches are requested directly from a highways authority, VAT may or may not be charged by the relevant highways authority.

If VAT is not charged, then based on the *Brabners* and *BA v Prosser* decisions HMRC may argue that the fact that you have made use of the search results or copy documents obtained to advise your client or give certifications means that the supply of the search results is a supply to you and therefore that the cost must be treated as part of your overall legal services subject to VAT at the standard rate, rather than treated as a disbursement.

Bank transfer fees

HMRC's views on the VAT treatment of telegraphic transfer fees (as bank transfer fees used to be called) were set out in a letter from the VAT Administration Directorate published in the Gazette on 18 November 1992. T his letter confirmed that telegraphic transfer fees are not disbursements for VAT purposes and must be subject to VAT when passed on to the client.

However, the letter also acknowledged that there had previously been uncertainties, and where HMRC staff had provided incorrect advice no action would be taken to recover VAT on past transactions.

In the tribunal case of *Shuttleworth & Co v Commissioners of Customs and Excise* (LON/94/986A) it was held that the transfer of funds by a solicitor was part of the overall conveyancing service provided by a solicitor to their client. Therefore, a CHAPS fee paid by a solicitor to the bank could not, for VAT purposes, be treated as a disbursement in the solicitor's invoice to their client.

www.lawsociety.org.uk/support-services/advice/articles/vat-treatment-of-disbursements-and-expenses/

2.3 Exemptions

2.3.1 Loan administration services

In TC06459, the First-Tier Tribunal considered a company that provided loan administration services to a UK bank. It asked for a non-statutory ruling in May 2015 in relation to the liability of its supplies, and appealed against HMRC's decision that it was making taxable supplies of management of loan accounts.

Both parties agreed that the supply was a complex compound supply. The appellant acted as undisclosed agent for the bank with limited discretion.

It dealt with the entire lifecycle of a loan, apart from the making of the loan. It did not set interest rates, and although it dealt with arrears, decisions on enforcement action were taken by the bank.

The company's appeal was based on the contention that it was exempt either under VATA 1994 Sch.9 Group 5 Item 1 (transactions concerning payments/debts) or Item 8 (the operation of a current or deposit account). The judge noted that both the PVD and Group 5 exempt "the granting and the negotiation of credit and the management of credit by the person granting it".

In relation to Item 1, the judge summarised the principles of the CJEU decision in *SKD* (Case C-2/95):

(1) In view of the linguistic differences between the various language versions of Article 13B(d)(3), the scope of the phrase "transactions … concerning" cannot be determined on the basis of an exclusively textual interpretation, and reference must be made to the context in which the phrase occurs and consideration given to the structure of the Sixth Directive (paragraph [22]);

(2) the transactions that are exempt under Article 13B(d)(3) are defined by the nature of the services provided, not by or to whom they are provided, except where they cover services which, by their nature, are provided to customers of financial institutions (paragraphs [32] and [48]);

(3) the manner in which a service is performed, whether electronically, automatically or manually, does not affect the application of the exemption (paragraph [37]);

(4) the services provided by SDC to customers of the banks (as opposed to its own customer, being the bank) are "significant only as descriptors and as part of the services provided" by it to the banks (paragraph [47]);

(5) the fact that a constituent element is essential for completing an exempt transaction does not warrant the conclusion that the service which that element represents is exempt: to be exempt, a package of services must "form a distinct whole, fulfilling in effect the specific, essential functions" of an exempt transaction (paragraphs [65] and [66]);

(6) a transfer involves a change in the legal and financial situation, and since a transfer is only a means of transmitting funds the functional aspects, rather than the cause of the transfer, are decisive (paragraphs [53] and [66]); and

(7) it is necessary to distinguish a "mere physical or technical supply, such as making a data-handling system available to a bank", or "technical and electronic assistance to the person performing the essential, specific functions": these are not exempt; in particular the court must examine the extent of the supplier's responsibility, and whether it is "restricted to technical aspects" or "extends to the specific, essential aspects of the transactions" (paragraphs [37] and [66]).

She noted the limitation placed on this by the later decision in *Nordea Pankki Suomi Oy* (Case C-350/10), in which the mere transmission of instructions was not enough to confer exemption. The question was whether the supplier's responsibility "is restricted to technical aspects or whether it extends to the specific, essential aspects of the transactions".

In *ATP Pension Service* (Case C-464/12), the CJEU concluded that the reference to payments and transfers in Article 13B(d)(3) covered services by means of which the rights of pension customers were established through the creation of accounts within the pension scheme system and the crediting of those accounts.

The processing of direct debits was held to be within "transactions concerning payments" in *Axa UK plc* (Case C-175/09), but subject to the exclusion from exemption of "debt collection and factoring". The principle of strict interpretation of exemptions required a broad interpretation of the exclusion from exemption.

The company placed significant reliance on the 2003 CA decision in *C&E v EDS Ltd*. EDS also provided administrative services to a bank in respect of loans. Its principal functions were to receive initial applications for loans and record details of applicants, validate the applications using the bank's credit rating system, produce and forward loan agreements (signed on behalf of the bank), direct debit mandates and other documents to borrowers who passed the validation process, verify documents received from borrowers, release funds to borrowers, and collect payments on behalf of the bank using the direct debit system. The interest rates and the maximum and minimum sums that could be lent to any one borrower were fixed by the bank (with EDS performing the necessary calculations to apply interest to loans), and the bank also retained the functions of advertising and dealing with arrears.

The judge examined the nature of the services and contracts involved, then summarised the company's arguments. HMRC contended that the company was either excluded from exemption under debt collection, or was managing credit without granting it. The correct approach was to analyse the elements comprising the company's supply and to ask whether any of those elements qualified for exemption. Only if they did so would it be necessary to go on to the next stage of determining which element was the principal service (*CPP*) or which element(s) predominated overall (*Levob* or *FDR*).

The judge reviewed precedents on this question of characterising a complex supply, in particular the recent Upper Tribunal decision in *Metropolitan International Schools*. She concluded:

I think it is clear that the starting point is to identify the individual elements of a single complex supply. Whether that supply falls to be treated as exempt will generally (but not necessarily exclusively) be determined by reference to predominance, but this might either be a single predominant element or in some cases a combination of elements. The test is an objective one, from the perspective of a typical consumer, and based on the contract and the economic realities. I agree with Mr Cordara that the reference by Advocate General Tizzano to "economic purpose", referred to by Jonathan Parker LJ in Tesco is relevant.

Turning to the question of whether the supply was "transactions concerning payments", the judge distinguished what the company did from the card processing services in *Bookit* and *NEC*. The CJEU held that where a service provider itself debits or credits an account directly, or intervenes by way of accounting entries on the accounts of the same account holder, that permits a finding that there is a transfer or payment within the exemption. The card processors simply made a demand or

request for payment, in essence an exchange of information, rather than anything that could constitute a payment or transfer.

The judge went on to examine at length, but dismiss, the possibility that the company operated current or deposit accounts. She considered that expression to be restricted to the traditional types of account that banks offer their customers, not the loan accounts in this case, which had much more limited functionality.

The key to the problem was then the question of whether the debt collection exclusion applied. The judge was satisfied that it did: she was bound by *Axa* to accept that the expression covered the collection of debts as they fell due, as well as overdue debts, and it was clear that this is what the company did for the banks. She was strengthened in this conclusion by the fact that the Directive was changed in 1991 to remove the possibility of exempting credit management without granting the credit; that was an apt description of what the company did, and although it sought to qualify for exemption under another heading, the fact that it was excluded under art.135(1)(b) was relevant.

The appeal was dismissed, and the company appealed to the Upper Tribunal. The judges agreed with the FTT that a loan account is not similar to a "current account or deposit account". Those have different functionality, in allowing the customer to pay in and draw money out again, and in the case of a current account, to pay third parties. The loan account was much less flexible, requiring fixed payments in and no withdrawals (except by varying the amount of the loan, but that was a different type of transaction).

The UT decided that it was appropriate to consider the application of the law on transactions concerning payments before examining the FTT's conclusion on debt collection. After considering all the precents (*SKD*, *FDR*, *EDS*, *AXA* and *DPAS*), the judge concluded that the FTT had come to the wrong decision. The only involvement of Target was the transmission of information that led to a movement of money, and it had no part in the actual movement of the money itself. According to settled case law, that was a standard rated service. It was therefore not necessary to consider whether it was subject to the "debt collection carve-out", because it was not within the provision in the first place.

The appeal was dismissed again.

Upper Tribunal: *Target Group Ltd v HMRC*

2.3.2 Financial services exemption

A German bank outsourced the operation of ATMs to another company. This involved operating and maintaining the ATMs, replenishing them, installing computer hardware and software in them to enable them to read bank card data, sending a withdrawal authorisation request to the bank that issued the bank card used and registering withdrawal transactions. The tax authority ruled that the supply by the outsource company to the bank was taxable; the company appealed, and questions were referred to the CJEU (the dispute started in 2007 in relation to transactions in 2005 – the dispute was stood over behind the *Bookit* case, which was decided in 2016). Advocate-General Bot gave an opinion earlier in 2019 which the full court has confirmed.

The referring court considered that the transactions were similar in principle to those that gave rise to the CJEU decision in *Bookit* – the company was providing technical and administrative services making it possible to withdraw cash from ATMs, simply giving technical effect to instructions contained in an authorisation code, rather than giving effect to the change in the financial and legal position as required for exemption. However, the court was not sure whether the presence of another transaction (the sale of cinema tickets) was crucial to the *Bookit* decision; in this case, there was only a transaction in money.

The A-G made a number of preliminary observations:

- The withdrawal of money from an ATM is a "payment";
- It was therefore possible that the exemption for "transactions concerning payments" would apply to transactions sufficiently connected with such ATM withdrawals;
- Exemptions must be interpreted and applied strictly and consistently across the EU.

The A-G went on to identify key reasons for the CJEU holding that Bookit did not supply an exempt service: the company did not itself directly debit or credit the accounts concerned, that it did not act by means of accounting entries, and that it did not instruct such debit or credit. The Court also held that the supplier of that service did not assume any liability as regards the achievement of the changes in the legal and financial situation that are characteristic of the existence of an exempted transfer or payment transaction.

The appellant in this case did not take ownership of the money. It arranged for the physical transfer of the banknotes, but they belonged first to the bank and then to the customer; the appellant was never a party to the transaction. Even though some of the company's services were essential to the transaction taking place, that was not enough to make them, or the whole package of services of which they comprised a part, exempt. The whole package constituted no more than technical and administrative services, and even though German banks have outsourced a great deal of their ATM operation, that did not make the ATM operator part of the financial system.

It was not enough to secure exemption that the services supplied by Cardpoint were "essential" for the financial transaction to take place. The exemption only applied to services that formed a separate whole, which has the effect of fulfilling the specific and essential functions of a payment and thereby has the effect of transferring funds and causing changes to the legal and financial position of the parties. It does not apply to the supply of a mere material or technical service.

The full court agreed with the A-G that exemption did not apply to these services.

CJEU (Case C-42/18): *Finanzamt Trier v Cardpoint GmbH*

2.3.3 Healthcare (1)

A case referred by Germany considered the scope of the exemptions for medical services, as set out in art.132(1) PVD:

(b) hospital and medical care and closely related activities undertaken by bodies governed by public law or, under social conditions comparable with those applicable to bodies governed by public law, by hospitals, centres for medical treatment or diagnosis and other duly recognised establishments of a similar nature;

(c) the provision of medical care in the exercise of the medical and paramedical professions as defined by the Member State concerned.

The court also noted the importance of the principle of fiscal neutrality in determining the scope of exemptions, as set out in recital 7 of the preamble to the PVD:

The common system of VAT should, even if rates and exemptions are not fully harmonised, result in neutrality in competition, such that within the territory of each Member State similar goods and services bear the same tax burden, whatever the length of the production and distribution chain.

The appellant in the case is a medical specialist in clinical chemistry and laboratory diagnostics. He provided medical care services to a laboratory company supplying laboratory services for doctors working in medical practices, rehabilitation clinics, public health services and hospitals. He treated his income as exempt.

The tax authority regarded him as taxable, because the German law required that a confidential relationship between the doctor and the person being treated exists, which is not the case for the services of clinical chemists and laboratory physicians. The German court was not sure whether the exemption in art.132(1)(b) or (c) was applicable, and if (c) was the relevant provision, whether the existence of a such a confidential relationship could be imposed as a condition.

The court noted that the concept of medical care in both provisions is intended to cover services that have as their aim the diagnosis, treatment and, in so far as possible, cure of diseases or health disorders. The distinction between the two provisions related less to the nature of the service but rather to where it took place: in a hospital or similar environment, or in some other place.

According to precedent (Case C-334/14 *De Fruytier*), a laboratory was capable of falling within "similar to a hospital". PVD art.133 allows Member States to impose extra conditions on the application of the exemption under art.132(1)(b), but this is not the case with 132(1)(c); it followed that a service tpartial hat failed to meet the conditions for (b) could still be exempt under (c).

The court commented on the apparent right of the Member State to "define the medical and paramedical professions" for the purposes of (c): "it would be contrary to the principle of fiscal neutrality to make medical tests prescribed by general practitioners subject to a different VAT scheme depending on where they are carried out when they are equivalent from a qualitative point of view in the light of the professional qualifications of the service providers in question".

Earlier cases that had referred to the significance of a confidential relationship between practitioner and patient (Case C-141/00 *Kugler* and Case 353/85 *United Kingdom*) had done so to distinguish (c) from (b) (in the Sixth Directive predecessor versions). They should not be interpreted as imposing a requirement for such a relationship, which was not referred to as a condition in the Directive itself.

The answer given was that the laboratory services were capable of falling within art.132(1)(c) if they did not fall within art.132(1)(b), and it was not permissible to impose a confidential relationship condition on exemption.

CJEU (Case C-700/17): *Finanzamt Kyritz v Wolf-Henning Peters*

2.3.4 Healthcare (2)

Chiropractors, osteopaths, plastic surgeons and certain professional associations brought an action before the Belgian national court, seeking to annul a provision of Belgian law that sought to restrict the medical and paramedical professions in a manner that excluded their services from exemption. The new law specifically excluded aesthetic interventions and treatments unless they were included in rules concerning compulsory sickness and disability insurance, and made similar restrictions in relation to "practitioners of a recognised and regulated paramedical profession". Chiropractors and osteopaths were not recognised as capable of being exempt by Belgian law, and they argued that the new law reserved the scope of the exemption to particular practitioners without justification.

There was a further dispute in relation to cosmetic procedures, in that the lower rate was available for medicinal products and devices provided in the context of therapeutic interventions but not in the context of aesthetic procedures.

Questions were referred to the CJEU to clarify whether a Member State could impose these restrictions on the scope of the exemption and the lower rate. The questions cite the relevance of the principle of equal treatment.

The court referred to the precedent cases of *Solleveld* and *van den Hout-van Eijnsbergen* (Cases C-443/04 and C-444/04). These established that Member States do have the power to define the qualifications that are required for the exercise of the medical and paramedical professions; however, that discretion is not unlimited, in that the Member States must take into account, on the one hand, the objective pursued by that provision, which is to ensure that the exemption applies only to benefit care provided by providers with the required professional qualifications, and on the other hand the principle of fiscal neutrality. The objective of the provision is to ensure that the exemption applies only to healthcare services of a sufficiently high standard of quality; the principle of fiscal neutrality prevents similar services, which are therefore in competition with one another, from being treated differently from the point of view of VAT.

The court reaffirmed the *Solleveld* decision, that it cannot be excluded, in a general and absolute manner, that practitioners who do not belong to such a profession may have the necessary qualifications to provide care of sufficient quality to be considered as similar to those supplied by the members of such a profession, in particular if they have followed training

offered by an educational institution recognised by that Member State. It follows from the case-law of the court that the regulatory framework of the Member State concerned is only one element among others that must be taken into account in order to determine whether a taxable person has the professional qualifications required to apply the exemption.

In relation to the restriction of the lower rate, the court observed that it was permissible to restrict lower rates to only part of the categories listed in Annex III, provided the principle of fiscal neutrality was not infringed. This meant that it was important that the criteria for exclusion were objective and precise, so that it was possible to say with certainty what was covered. The distinction between a purely aesthetic procedure and a therapeutic one was a sufficiently clear distinction to justify different treatment, because they did not meet the same needs from the point of view of the average consumer.

There was a further question about what should be done with the defective 2015 law – whether parts of it could be maintained in effect until it was corrected, or whether it had to be struck out in its entirety. The scope of this question is not clear from the decision, as the extent of the 2015 law change is not described in full (i.e. whether it only related to these medical matters, or was part of a wider reform). The court considered that it was not permissible for the referring court to maintain the effect of a defective law in the circumstances of the case.

CJEU (Case C-597/17): *Belgisch Syndicaat van Chiropraxie and Bart Vandendries, Belgische Unie van Osteopaten and Others, Plast.Surg. BVBA and others, Belgian Society for Private Clinics VZW ea v Ministerraad*

2.3.5 Welfare services

A company claimed repayment of output tax totalling £229,388 accounted from between 10/12 and 08/16. It contended that its supplies were exempt as related to welfare of children. The judge started by commenting that "*This is a very unusual case in that there is no dispute between the parties in relation to the proper construction of the relevant legislation or indeed the primary facts to which the relevant legislation is to be applied. Instead, the sole area of disagreement between the parties is in relation to whether, on a proper application of the relevant legislation to those primary facts, the supplies of services to which the Appellant's claim for repayment relates should have been exempt from VAT (as the Appellant asserts) or have correctly been treated as standard-rated taxable supplies (as the Respondents assert).*"

The company provides a number of services, including after-school clubs, supply teachers, pupil assessment, school holiday camps and childcare provided before and after school during term time. The dispute related to the liability of the supply of the holiday camps. The question was whether these were "services closely linked to the protection of children and young persons" within art.132(1)(h) PVD and "welfare services" within VATA 1994 Sch.9 Group 7 item 9. The parties agreed that there was no significant difference in the meaning of the words used in the two laws.

The Tribunal considered the evidence submitted in witness statements by members of the appellant's staff. They were not required to attend for

cross-examination. The most relevant precedent was the CJEU case *Mesto Zamberk*, in which the court emphasised a number of principles in applying art.132:

(1) the exemptions "are intended to encourage certain activities in the public interest";

(2) however, not every activity performed in the public interest falls within the ambit of the provision – only those actually listed;

(3) "the terms used to specify those exemptions are to be interpreted strictly, since the exemptions constitute exceptions to the general principle that VAT is to be levied on all services supplied for a consideration by a taxable person";

(4) however, "that requirement of strict interpretation does not mean that the terms used ... should be construed in such a way as to deprive them of their intended effect";

(5) accordingly, "those terms must be interpreted in the light of the context in which they are used and of the aims and the scheme of the PVD, having particular regard to the underlying purpose of the exemption in question";

(6) "where a transaction comprises a bundle of elements and acts, regard must be had to all the circumstances in which the transaction in question takes place in order to determine, firstly, if there are two or more distinct supplies or one single supply and, secondly, whether, in the latter case, that single supply falls within the exemption in question";

(7) "[there] is a single supply where two or more elements or acts supplied by the taxable person to the customer are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split… There is also a single supply where one or more elements are to be regarded as constituting the principal supply, while other elements are to be regarded, by contrast, as one or more ancillary supplies which share the tax treatment of the principal supply";

(8) "[in] order to determine whether a single complex supply must be categorised as a supply closely linked to [the relevant specified exempt activity] although that supply also includes elements not having such a link, all the circumstances in which the transaction takes place must be taken into account in order to ascertain its characteristic elements and its predominant elements must be identified";

(9) "the predominant element must be determined from the point of view of the typical consumer…and having regard, in an overall assessment, to the qualitative and not merely quantitative importance of the elements falling within the exemption …in relation to those not falling within [the] exemption"; and

(10) in looking at the point of view of the typical consumer, it is not appropriate to take into account the intentions of each consumer individually because that would be contrary to the objectives of the VAT system of ensuring legal certainty and a correct and straightforward application of the exemptions. Instead, save in exceptional cases, regard must be had to "the objective character of the transaction in question".

The parties also referred to two FTT decisions, *Planet Sport (Holdings) Ltd* (TC03024) and *Sport Academies Ltd* (TC05171). In both those cases, companies were held to be taxable in respect of sports camps for children. The judge commented that the decisions were not binding, and the second was more relevant to the facts of the present case. The earlier Tribunals had concluded that any child welfare elements of the supplies were incidental to a main supply of sports coaching, rather than the other way around.

Turning to the present case, the judge noted a number of points that were common ground, in particular that the company was regulated by OFSTED, and that some services were agreed to be taxable (the after-school clubs) and others that were agreed to be exempt (care before and after school). The point to be determined was whether the predominant element of the holiday camp services was childcare or was the provision of activities. This should be considered from the viewpoint of the typical consumer.

The company argued that the parents were particularly concerned with the childcare aspect, and the services were no different in nature from the before and after school care that HMRC had agreed was exempt. HMRC considered that the services were different, and that the activities were more important to the parents. The word “care” did not appear in the advertising material for the camps.

The judge (Tony Beare) set out a series of findings of fact, following each with a clearly stated “basis for the finding”. He found as a fact that there was a childcare element and an activities element in the service. The activities were important for marketing, but there was no coaching or teaching involved. The services were very similar to the before and after school care services.

The judge considered the arguments “finely balanced”. However, for reasons that he explained in some detail, he preferred the arguments of the appellant. In his view, the distinctions drawn by HMRC between the camps and the before and after school services were insignificant, and the principal concern of the customer parents was to obtain childcare, rather than to obtain sporting services.

The appeal was allowed.

First-Tier Tribunal (TC07453): *RSR Sports Ltd*

2.3.6 Abusive transactions?

HMRC issued decisions and assessments to two companies (SFL and SFTL) in November 2016, charging VAT of £40,281 for the period 11/14 and £382,074 for the periods 02/15 to 11/16. HMRC put forward two possible bases of liability:

- the preferred decision was that the arrangements between the two companies constituted “abuse of rights”, so in “commercial and economic reality” SFL was the (taxable) supplier rather than SFTL (exempt) in relation to the disputed transactions;
- the alternative decision was that SFTL did not qualify for exemption because it was not an eligible body within Note 1(e) Group 6 Sch.9 VATA 1994.

The companies argued that SFTL was an eligible body and the arrangements were not abusive.

Judge Anne Scott decided to start with the question of abuse and the issue of which company supplied tuition services. If that company was SFTL, it would then be necessary to consider whether that company was an eligible body.

The judge reviewed the history of the business. A company had operated since around 1999 providing a centre for mountaineers to learn a range of skills. From 2005, instructor-led activities were provided by a separate guarantee company, which charged no VAT on the basis that it was an eligible body. Following a reorganisation in 2010, the new holding company of the commercial side of this operation (which continued to charge VAT on the non-instruction supplies) acquired a company that operated the UK's longest indoor "real snow ski slope". The company was renamed Snow Factor Ltd (SFL). In May 2012, a guarantee company was established (SFTL) to provide the instructor-led services at the snow slope, using the same arrangement as had been in force at the climbing centre.

The judge examined the contracts between SFL and SFTL, and noted that SFTL was required to pay over 100% of the fees paid by customers for training services, together with an apportionment of costs incurred by SFL in relation to the services and the obtaining of equipment. The witness stated that the instructors were employed exclusively by SFTL, but the judge observed that this "is quite simply not the case". SFTL was not registered for PAYE. The premiums for public liability insurance were all paid by SFL. There were various recharges between SFL and SFTL, some of which were treated as VATable, but most of which were not.

When new tax advisers were appointed, the firm recommended the disclosure of "designated scheme 7" under the Disclosure of VAT Avoidance Scheme rules (VATA 1994 Sch.11A). Disclosure was duly made in April 2013 and was acknowledged to be late, as the scheme had been in use from the first VAT return in 2012.

Correspondence ensued, leading to the decision that this was an abusive arrangement. The judge reproduced the figures from the statutory accounts for SFTL's first four years, showing that the gross profit was simply stripped out by a recharge from SFL, leaving a net profit of nil. The judge tried to analyse the transactions between the companies in the accounts, but found them hard to follow and apparently inconsistent. The clearest conclusion was that the transactions were not at arm's length.

The companies argued that there were a number of benefits of the arrangement other than VAT, including reduction in insurance premiums, availability of non-domestic rates relief, and availability of grants. The judge dismissed each in turn. There was no persuasive evidence of a saving in either insurance or NDRR, and no grants had ever been applied for in relation to the snow dome (as opposed to the climbing centre).

The judge concluded that the VAT saving of approximately £400,000 was the most significant factor in setting up the arrangements. Advice had been taken from a number of specialists, although almost none of that advice was produced to the Tribunal. The judge concluded that SFTL was "a mere cipher" under the control of SFL; the economic reality was that

SFL provided the training services, as the contractual framework was wholly artificial and should be ignored.

It was still necessary to apply the *Halifax* tests, but they were in this case satisfied: objectively assessed, the arrangements were artificial and had been established with the primary intention of obtaining a VAT advantage that was contrary to the purpose of the legislation (that only eligible bodies should qualify for exemption).

In case she was wrong on that, the judge considered whether SFTL was an eligible body. In her view, it did not provide education, so it could not qualify; if that was wrong, even so it was clear that SFTL was part of an integrated operation with SFL, the aim of which was to enrich the shareholders of SFL. Although it had been incorporated with the clear intention that it should be an eligible body, it was not one.

The appeals were dismissed and the assessments were upheld.

First-Tier Tribunal (TC07439): *Snow Factor Ltd and another*

2.4 Zero-rating

2.4.1 Dispensing of medicines

HMRC carried out a consultation until 30 October 2019 on draft regulations to ensure that VAT zero-rating continues to be available for drugs dispensed by approved medical practitioners before and after Brexit. The regulations provide that the definition of ‘appropriate practitioner’ in UK VAT legislation will include ‘EEA health professionals’ in relation to supplies made before exit day, and ‘approved country health professionals’ in relation to supplies made on or after exit day. This is to reflect changes being made to definitions within the Human Medicines Regulations 2012 from exit day.

The original intention was that these rules would come into effect from 14 November 2019; they were delayed by the deferment of Brexit, but presumably now may be reintroduced.

www.gov.uk/government/consultations/draft-legislation-the-value-added-tax-drugs-and-medicines-order-2019

2.5 Lower rate

2.5.1 Objective criteria for limiting scope of lower rate

A dispute referred by the French court concerned the application of the reduced rate to “works of art”. PVD art.103 permits Member States to apply a reduced rate to the supply of “works of art, by their creator or his successors in title”; art.311 and Annex IX Part A point 7 include in the term “works of art” “photographs taken by the artist, printed by him or under his supervision, signed and numbered and limited to 30 copies, all sizes and mounts included.”

The French law incorporated this provision, but a Ministerial Directive of June 2003 stated that "only photographs demonstrating clear creative intent on the part of their creator may be regarded as works of art eligible for the reduced rate of VAT." The Directive explained how this should be determined, and sought to deny the lower rate to works which simply provided the "mechanical fixation of the memory of an event, trip or people".

The appellant in the case had applied the lower rate to certain portraits and wedding photographs. Questions were referred to the CJEU to clarify the conditions that a Member State may impose on a photograph being regarded as a "work of art".

The company and the Commission submitted that the conditions concerning printing, signing and limited editions were objective and also exhaustive. The additional condition of "artistic merit" or "creative intent" was subjective and therefore impossible to apply with the required legal certainty.

The court noted that the lower rate is an exception to the general rules of VAT, and should therefore be interpreted strictly. However, the rule of strict interpretation does not mean that the terms used to set out the cases in which that reduced rate is applied should be construed in such a way as to deprive it of its effects. The court essentially agreed with the appellant that it was not permissible for a Member State to make the application of the lower rate dependent on the artistic judgement of the tax authorities.

It was permissible for a Member State to apply the lower rate selectively to only part of a category. However, the excluded items must be objectively identifiable and clearly distinguishable from other items that qualified for the lower rate, in order to preserve fiscal neutrality. The French policy that identity photographs, school photographs and group photographs were in all cases to be regarded as excluded from "works of art" could be acceptable, but the referring court should consider whether such an exclusion lay within the confines of objective, clear and precise criteria set by that national legislation, making it possible to determine precisely the photographs to which that legislation reserves the application of the reduced rate of VAT, in such a way as to avoid infringing the principle of fiscal neutrality.

CJEU (Case C-145/18): *Regards Photographiques SARL v Ministre de l'Action et des Comptes publics*

2.5.2 More reduced rates

A German non-profit-making association existed to promote the sport of sailing and motorised water sports. It maintained approximately 300 boat moorings, roughly half of which were allocated during 2010 to 2012 to members of the association. Those members were obliged to tolerate the use of their moorings by guests in their absence. The remaining moorings may be used by guests without restriction. In those years, the appellant applied the reduced rate of VAT to payments received for making the moorings available to guests. This was thought to be in accordance with a provision of German law that allowed the lower rate (7% in Germany) for "the letting of living and sleeping areas which a trader keeps available for the short-term accommodation of visitors, and the short-term letting of

camping areas." The German authorities ruled that mooring of boats did not fall within this provision.

The trader appealed, arguing that mooring of boats was no different in principle to parking a camper van or caravan, which the authorities accepted was eligible for the lower rate. Questions were referred to the CJEU, which started by pointing out that the lower rate was an exception to the general rules of VAT and provisions applying it should therefore be interpreted strictly. The concept of "accommodation" within point 12 of Annex III PVD should not be "extended to services which are neither included in its wording nor intrinsically linked to that concept".

The court was satisfied that the principles of fiscal neutrality and equal treatment were not infringed. Boats and yachts do not serve principally as "accommodation", so the ability to moor a boat did not satisfy the same needs as the provision of accommodation. The social objective of point 12 was to facilitate wide access to the provision of the essential needs of travellers, and this did not apply to boat moorings.

The answer to the question referred was that point 12 did not confer a right to charge the lower rate on the letting of boat moorings, even if it was available to letting places on camping or caravan sites.

CJEU (Case C-715/18): *Segler-Vereinigung Cuxhaven eV v Finanzamt Cuxhaven*

2.6 Computational matters

2.6.1 Retail schemes

In a retail scheme, Daily Gross Takings must include the value of cheques presented as consideration for sales, but where cheques are dishonoured, DGT can be adjusted to exclude the value. This is effectively a form of bad debt relief, but it is part of the simplified retail scheme authorised by art.395 PVD, rather than the application of the bad debt rules in VATA 1994 s.36.

Dixons failed to adjust DGT for dishonoured cheques between December 1996 and February 2003. In the company's VAT return for the quarter to 01/2018, it made a one-off adjustment in relation to these cheques, reducing VAT payable by £1.876m. HMRC refused to accept the adjustment and the company appealed. The case came before Judge Barbara Mosedale.

The parties agreed that art.73 and art.90 PVD gave a trader a directly effective right to reduce taxable consideration where a debt was unpaid, but they also agreed that Member States were entitled to impose a reasonable time limit on the exercise of such rights. The question was how the adjustment should be made, and what time limit applied to it.

HMRC argued that the adjustment should have been made by reducing output tax in the periods in which the cheques were dishonoured; having failed to do that, the company would have to make a reclaim for overpaid output tax under s.80 VATA 1994, and it was clearly out of time to do that.

The company argued that the adjustment was made under its bespoke retail scheme, which provided for adjustments to DGT in respect of dishonoured cheques without specifying or implying a time limit. The company had, by the time of the hearing, accepted that reg.38 was not applicable, because there had been no adjustment of consideration; and reg.34 was also not relevant, because the financial limits were exceeded. The only question was whether the bespoke retail scheme was a self-contained and comprehensive set of rules for calculating the liability, or whether it had to be applied in the context of the rest of the VAT legislation.

The company had previously made a voluntary disclosure for the same amount in 2011; its appeal against HMRC's refusal of the claim had been stood over behind the *Leeds City Council* case, and was dropped when that case was decided in favour of HMRC. Judge Mosedale raised the question of whether the Tribunal had jurisdiction to consider the present appeal, when in effect the withdrawal of the earlier appeal could be argued to have determined the matter against the appellant. The taxpayer's counsel made submissions on jurisdiction; HMRC's counsel broadly agreed with it. Judge Mosedale commented on the possibility that there might be an "abuse of process estoppel", but concluded that she had jurisdiction to hear the appeal.

There was no relevant factual dispute between the parties. The amount was agreed; although HMRC did not accept that the company had a bespoke retail scheme before 1999 (as opposed to a standard one), the judge did not consider this relevant, as the decision would be made on a point of pure legal principle.

Retail schemes are authorised under VATA 1994 Sch.11 para.2(6) and SI 1995/2518 reg.67. There is no reference to time limits in either the primary or the secondary legislation, both of which are framed in very general terms. The judge agreed with HMRC rather than with the appellant on the implications of that: if the appellant failed to correctly calculate its DGT in any particular period, then it was outside the provisions of the retail scheme and dependant on other provisions of the VAT legislation to make an adjustment in a later period. This was because reg.69 only permitted a retail scheme to provide for the calculation of output tax. When utilising other provisions of the VAT legislation to make a late adjustment, it was subject to the applicable time-limits.

That was enough (very briefly, for Judge Mosedale) to dispose of the appeal, but she went on to consider the terms of the bespoke retail scheme that had been in force after 1999. Both the agreed scheme and the relevant Notices provided that dishonoured cheques were dealt with by exclusion from DGT, not by claiming bad debt relief. HMRC's case was that it was a necessary implication that adjustments should be made when the right to make them became known, so that the permitted adjustment for dishonoured cheques should be made when the cheques were (to the appellant's knowledge) dishonoured. The appellant's position was that there was no express nor implied time limit on its right to adjust for dishonoured cheques so an adjustment for dishonoured cheques could be made at any time.

The judge agreed with HMRC that there was an implication that an adjustment was available, and was therefore proper, in the first VAT period in which the retailer knew that the cheque had been dishonoured. It followed that the output tax for that period was overstated, and a claim to adjust it fell within s.80.

There was a separate argument based on the CA decision in the 2014 *British Telecommunications* case about bad debt relief. Although it was not directly applicable, the taxpayer's counsel argued that it was authority for the proposition that the Tribunal should not infer a "reasonable time limit" if the law did not contain one. BT had been allowed to claim BDR without time limit from a period when the UK law contained unlawful restrictions on the claim (relating to the debtor's insolvency). The problem for the taxpayer was that BDR leads to an input tax adjustment, and not to a s.80 claim. The time limit in dispute in that case was a different one.

Judge Mosedale concludes her decision with a summary of the way that retail schemes interact with the rest of the legislation, and how they should be regarded as operating, in particular in respect of correcting errors.

The appeal was dismissed.

First-Tier Tribunal (TC07486): *Dixons Retail plc*

2.7 Discounts, rebates and gifts

Nothing to report.

2.8 Compound and multiple

Nothing to report.

2.9 Agency

Nothing to report.

2.10 Second hand goods

Nothing to report.

2.11 Charities and clubs

Nothing to report.

2.12 *Other supply problems*

2.12.1 Single purpose vouchers

In TC06286, the FTT considered a company that raised £672,447 using a crowdfunding platform, "Kickstarter". People pledged money that would become contractually payable if the funding target of £600,000 was exceeded. This happened on 17 December 2014. It received this amount, net of fees, on 6 January 2015. HMRC ruled that this triggered the "forward look" registration test on 16 December 2014. Initially the company argued that it did not have an intention to make taxable supplies, but by the time of the hearing it had accepted that it did. The question before the FTT was whether the receipt of the crowdfunding money created a tax point. The FTT had to consider whether the receipts were consideration for a supply of services, or consideration for a supply of vouchers; and if they were consideration for a supply of vouchers, whether they were "single purpose vouchers".

The aim of the company was to send an unmanned robotic landing module to the South Pole of the moon and drill for moonrock. The company would also place a 21st century time capsule in the borehole, including information about the subscribers to the mission. This was eventually accepted as capable of being a taxable supply. Those who pledged at least £60 received a certificate that referred to itself as a "voucher for your digital memory box in the time capsule".

The FTT considered the precedent from the Court of Session in *Findmypast Ltd* in deciding what constituted a voucher. The judge set out the issues for determination in the present case as:

(1) To what services is a backer contractually entitled in return for a payment of £60?

(2) Does the £60 amount to a prepayment for the supply of those services?

(3) Does the backer receive a face value voucher?

(4) If so, is that face value voucher a single purpose voucher?

The company's representative submitted as follows:

(1) The principal benefits to a backer pledging at least £60 were as follows:

(a) The right to upload digital information to a digital memory box, and/or

(b) The right to include a strand of hair in the time capsule.

(2) Payment of the £60 is not a prepayment for a future supply of services. In particular it was not known at the time of payment what the backer would receive, either in terms of digital or physical space or in terms of the quantity of such space. Further, it was uncertain whether any supply at all would take place because of uncertainties inherent in the mission.

(3) The backer receives a face value voucher satisfying the requirements of paragraph 1(1) Schedule 10A.

(4) The face value voucher is not a single purpose voucher because it represents a right to receive more than one type of service, namely digital space and physical space.

HMRC responded in turn:

(1) Backers were contractually entitled to £60 worth of digital space in a digital memory box. There was no entitlement to physical space.

(2) The payment of £60 was a prepayment for a future supply of services.

(3) Backers do not receive a face value voucher because the conditions in paragraph 1(1) Schedule 10A are not satisfied.

(4) If there is a face value voucher, then it is a single purpose voucher. This is because the contractual entitlement is limited to digital space, or because digital space and physical space are properly to be regarded as one type of supply.

The judge considered each question in turn. In relation to the first, he was satisfied that the appellant was contractually obliged to provide digital space and/or physical space in the event that the project was completed. However, it was uncertain how much space of either kind would be provided for a pledge of £60.

The judge also accepted that there was significant uncertainty at the time the payment was made, including uncertainty about whether the project would ever go ahead so whether anything would be supplied. The payments therefore did not amount to prepayments for a supply.

The judge concluded that the rights acquired by the subscribers did satisfy the various conditions for a face value voucher. The company argued that this could not be a single purpose voucher because the subscriber could receive "physical space" (to send a strand of hair) or "digital space" (to send information). The judge did not consider this to be a relevant distinction, in accordance with the purpose of the legislation as explained in the *Lebara* decision. The question was whether the VAT chargeable could be determined with certainty at the time of the payment; as both types of supply would be SR, the voucher counted as "single purpose".

The appeal was therefore dismissed, and the company appealed to the Upper Tribunal. The question was the effect of VATA 1994 Sch.10A para.7A, introduced after the *Lebara* decision to exclude single purpose vouchers from the voucher rules in the schedule. It refers to "a face-value voucher that represents a right to receive goods or services of one type which are subject to a single rate of VAT". The UT considered that the mere issue of the voucher would create a tax point under the standard rules of VATA 1994 s.6(3). The company accepted that the vouchers fell within the definition of SPVs and were therefore within para.7A, but tried to convince the judges that there might be different types of SPV that could be treated differently.

The taxpayer's counsel tried to distinguish the company's vouchers from those in *Lebara* by emphasising the uncertainty about the actual supply being carried out; however, the judges considered that there is always uncertainty in relation to any supply that is based on vouchers, and this was not fundamentally different in nature. The supply is the supply of the voucher; there is no separate supply of "the right to receive the goods or services" or "the goods or services themselves".

The appeal was dismissed again.

Upper Tribunal: *Lunar Missions Ltd v HMRC*

2.12.2 Updated Notice

HMRC have updated the June 2019 version of their Notice *VAT domestic reverse charge procedure* with information on when the reverse charge does not apply to renewable energy certificates, such as where power and renewable energy certificates are supplied together.

Notice 735

2.12.3 Cryptoassets

HMRC have published guidance on potential liability to CGT, CT, IT, NICs, stamp duty, SDRT and VAT on transactions companies and other businesses may undertake involving cryptoasset exchange tokens such as Bitcoin. This guidance does not cover transactions involving security tokens and utility tokens, which they will address separately. HMRC published guidance for individuals on the treatment of cryptoassets in December 2018. The VAT section says the following:

VAT is due in the normal way on any goods or services sold in exchange for cryptoasset exchange tokens.

The value of the supply of goods or services on which VAT is due will be the pound sterling value of the exchange tokens at the point the transaction takes place.

Check VAT rates on different goods and services

For VAT purposes, bitcoin and similar cryptoassets are to be treated as follows:

- *exchange tokens received by miners for their exchange token mining activities will generally be outside the scope of VAT on the basis that:*
  - *the activity does not constitute an economic activity for VAT purposes because there is an insufficient link between any services provided and any consideration; and*
  - *there is no customer for the mining service.*
- *when exchange tokens are exchanged for goods and services, no VAT will be due on the supply of the token itself;*
- *charges (in whatever form) made over and above the value of the exchange tokens for arranging any transactions in exchange tokens that meet the conditions outlined in VAT Finance manual (VATFIN7200), will be exempt from VAT under Item 5, Schedule 9, Group 5 of the Value Added Tax Act 1994.*

The VAT treatments outlined above are provisional pending further developments; in particular, in respect of the regulatory and EU VAT positions.

Bitcoin exchanges

In 2014, HMRC decided that under Item 1, Group 5, Schedule 9 of the Value Added Tax Act 1994, the financial services supplied by bitcoin exchanges – exchanging bitcoin for legal tender and vice versa – are exempt from VAT.

This was confirmed in the Court of Justice of the EU (CJEU) in the Swedish case, David Hedqvist (C-264/14). Mr Hedqvist planned to set up a business which would exchange traditional currency for bitcoin and vice versa. Mr Hedqvist did not intend to charge a fee for this service but rather to derive a profit from the 'spread' (the difference between his purchase and sell price).

Questions were referred to the CJEU on whether such exchange transactions constitute a supply for VAT purposes and if so, would they be exempt.

The CJEU referred to the judgment in First National Bank of Chicago (C-172/96) (see VATFIN2740) and concluded that the exchange transactions would constitute a supply of services effected for consideration.

The Court also ruled that the exchange of traditional currencies for non-legal tender such as Bitcoin (and vice versa) are financial transactions and fall within the exemption under Article 135(1) (e) of the VAT Directive.

A supply of any services required to exchange exchange tokens for legal tender (or other exchange tokens) and vice versa, will be exempt from VAT under Item 1, Group 5, Schedule. 9, of the Value Added Tax Act 1994.

www.gov.uk/government/publications/tax-on-cryptoassets

3. LAND AND PROPERTY

3.1 Exemption

Nothing to report.

3.2 Option to tax

Nothing to report.

3.3 Developers and builders

3.3.1 CASC or charity?

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

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

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

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

The FTT considered the definition of a "charity" for VAT purposes in some detail, noting that the club satisfied many of the features required by the law. HMRC argued that it could not be a charity, because the Charities Act 2011 explicitly excludes CASCs from its scope; they are treated in the same way as charities for most corporation tax purposes, but they are not charities, and are not required to be registered with the Charities Commission. However, the FTT considered that it was possible for a CASC to be a "Finance Act charity", as defined in FA 2010, because the Charities Act provision was a different definition made for a different

purpose. In coming to this conclusion, it noted that it was "respectfully disagreeing" with the earlier Tribunal in *Witney Town Bowls Club*; but that Tribunal had not had the benefit of detailed submissions by counsel on the construction of the relevant provisions.

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

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

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

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

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

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

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

The judges set out a helpful review of the background to the current law on charities and CASCs, and how they are defined for general purposes and for VAT. HMRC pointed to background documents relating to the enactment of FA 2010; the charity responded that if that Act had been

intended to exclude CASCs from being treated as charities for tax (which they could have been before then), it could easily have said so, which it did not.

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

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

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

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

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

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

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

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

Upper Tribunal: *Eynsham Cricket Club v HMRC*

3.3.2 Zero-rating certificate penalty

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

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

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

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

(1) First, establish what facts the taxpayer asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or any other person, the taxpayer’s own experience or relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).

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

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

the question 'was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?'

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

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

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

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

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

The appeal was dismissed.

First-Tier Tribunal (TC07484): *Westow Cricket Club*

3.3.3 Annexe (1)

In December 2017 HMRC issued a decision that certain building work at a church did not qualify as an "annexe" and could not therefore be zero-rated. The church appealed, after unsuccessfully trying to resolve the matter through Alternative Dispute Resolution.

The dispute related to part of a larger project that included the renovation to a church hall and the construction of two flats above the hall. The project created an "annexe/extension" to the side of the church. This had been substantially revised from an original proposal because the budget would not cover the plan; the judge noted that a great deal of HMRC's

Statement of Case referred to the building as originally designed, not as actually constructed.

The judge described the building and its functions. It was used as a "comfortable and welcoming place for people to drop in and sit and chat. Drinks are served to make visitors feel welcome. Further additional activities that had not been envisioned also use this area, such as mental health and youth groups, and groups for autism and dementia." By contrast, the old hall was used for more active events such as dance and as a sports hall and mothers and toddlers groups. It was therefore a much noisier environment, which would be inappropriate for the activities envisaged for the new extension/annexe.

At the hearing, HMRC accepted that the actual construction had the following features:

(a) the new extension/annexe is capable of functioning independently from the existing building,

(b) the main access to the annexe is not via the existing building, and

(c) the main access to the existing building is not via the annexe.

HMRC also accepted that the new extension/annexe is intended for use solely for a relevant charitable purpose. The judge summarised these concessions: "In other words HMRC accepted that the conditions set out in Note 17 are fulfilled."

The only point at issue therefore was whether the new building is an annexe to or an enlargement or an extension of the existing buildings for the purposes of the legislation. The judge considered the precedents of *Macnamara* and *Cantrell (no.2)*, in particular the judgment of Lightman J:

"The two-stage test for determining whether the works carried out constituted an enlargement, extension or annexe to an existing building is well established. It requires an examination and comparison of the building as it was or (if more than one) the buildings as they were before the works were carried out and the building or buildings as they will be after the works are completed; and the question then to be asked is whether the completed works amount to the enlargement of or the extension or the construction of an annexe to the original building... the question is to be asked as at the date of the supply. It is necessary to examine the pre-existing building or buildings and the building or buildings in course of construction when the supply is made. What is in the course of construction at the date of supply is in any ordinary case (save for example in case of a dramatic change in the plans) the building subsequently constructed. Secondly the answer must be given after an objective examination of the physical characters of the building or buildings at the two points in time, having regard (inter alia) to similarities and differences in appearance, the layout, the uses for which they are physically capable of being put and the functions which they are physically capable of performing. The terms of planning permissions, the motives behind undertaking the works and the intended or subsequent actual uses are irrelevant, save possibly to illuminate the potential for use inherent in the building or buildings."

Taking these criteria in turn, the judge noted that:

- the appearance of the new structure was completely different (aluminium and glass) from the old-fashioned church to which it was attached;
- its layout was not suitable for use as a church;
- there was already an area within the existing church for welcoming people to services and serving coffee afterwards;
- overall, it lacked any ability to be used for any common activities with the existing buildings.

As a result, it was an annexe, not an extension, and the appeal was allowed.

First-Tier Tribunal (TC07384): *Immanuel Church*

3.3.4 Annexe (2)

The same legal point was at issue in an appeal by a residential Islamic faith school. Planning permission had been granted in 2016 for "Demolition of existing halls to rebuild new multi-functional examination & lecture hall with recreational facilities within and the erection of perimeter fencing." Planning conditions included restriction of use to the educational activities of the College and prohibition of use for general public worship, prayer or assembly; events where family and guests were invited (graduation ceremonies, induction days and open days) were limited to ten per annum.

In this case, the Tribunal had to decide two issues: whether the building was a qualifying annexe, and whether it was used solely for a relevant charitable purpose.

The school's representative argued that although the new building replaced a former structure, it was not intended to rehouse previous facilities but to provide a new facility. The school had continued to function successfully while the building was not complete. It had its own heating and electricity supplies, and the main access was not through the existing buildings.

He went on to distinguish the circumstances of the school from *Wakefield College*, which was essential to a finding that the building was constructed for a relevant charitable purpose. Emphasis was placed on a lack of commerciality: fees were set at a very low level, and did not cover the operating costs of the college. No effort was made to promote the college's offering: there was no website or prospectus. Fees were the same at age 11 or age 24, and were about 10% of the charges levied by other independent schools. The college emphasised the similarity to the recent case of *Yeshivas Lubavitch Manchester*, where the Tribunal had found there was a relevant charitable purpose.

In response, HMRC disputed all the points: they argued that the college carried on a business activity, that the building was an extension or alteration of an existing building, and that the conditions of Note 17 were not satisfied. They also commented that they would not repay the VAT to the appellant even if the appeal succeeded: it would be necessary for the supplier builders, who had charged the VAT, to make the claim.

The Tribunal agreed with HMRC that, following *Wakefield*, the fees charged were consideration for a supply within art.2 PVD. They were not a “contribution” or “donation” by the parents, as the school had argued. Also in comparison with *Wakefield*, the absolute amount of the fees was significant, as well as the proportion of the school’s income and expenditure. The level of fees was fixed by reference to the charges made by other residential Islamic faith schools, not by reference to the cost of providing the education, nor by reference to the means of the students and their families. All these factors pointed to the supply of education being made for the purpose of obtaining income.

The judge made a distinction between this case and that of *Yeshivas Lubavitch*: that case concerned the provision of a nursery school by a charity, and “HMRC appear to treat crèches and nurseries as a special case.”

That was sufficient to dismiss the appeal, but as the other issues had been argued and the Tribunal’s fact-finding role would be important if there was an appeal, the judge gave his conclusions on them as well. After considering the physical features of the construction and the purposes for which it was used, the judge concluded that it did meet the conditions of Note 17. Nevertheless, the appeal was dismissed.

First-Tier Tribunal (TC07433): *Madinatul Uloom Al Islamiya*

3.3.5 Updated Notice

HMRC have updated their Notice *VAT on buildings and construction* to clarify the meaning of a ‘protected building’ in relation to zero-rating for approved alterations prior to 1 October 2012. As the zero-rating was abolished from that date, it is hard to see why they are doing this now.

Notice 708

3.4 Input tax claims on land

Nothing to report.

3.5 Other land problems

3.5.1 Article

In an article in *Taxation*, Neil Warren considers some planning tips and pitfalls in relation to the sale of land with permission for development. Points covered include joint ownership (deemed to be a partnership for VAT purposes), the need for an option to tax, the effect on the buyer and on SDLT, and the possibility that a sale to a housing association may disapply the option anyway.

Taxation, 21 November 2019

4. INTERNATIONAL SUPPLIES

4.1 E-commerce

4.1.1 MOSS exchange rates

HMRC have published the usual table of exchange rates to be used by traders registered for MOSS returns for the quarter to September 2019.

www.gov.uk/guidance/vat-moss-exchange-rates-for-2019

4.1.2 MOSS VAT rates

Slovenia has lowered its VAT rate on books, newspapers and a range of periodicals in both paper and electronic formats from 9.5% to 5% with effect from 1 January 2020. The list of items covered appears to be similar in scope to the UK's zero-rating rule.

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

4.2 Where is a supply of services?

4.2.1 Fixed establishments

A Korean company (LGK) commissioned a Polish company (DY) to carry out work on goods that belonged to LGK. LGK had a subsidiary established in Poland (LGP). The Polish authorities formed the view that DY's supply had been made to LGP (acting as a fixed establishment of LGK) rather than to the main Korean establishment of LGK, which would mean that Polish output tax was due from DY.

The Advocate-General began her opinion by pointing out that this should make no difference to overall Polish tax revenue, because there was no doubt that any VAT charged to LGP would be deductible as input tax. However, it would make a significant practical difference if, for example, DY was unable to collect the output tax from its customer but still had to pay the assessment to the authorities.

The A-G reviewed earlier decisions on the question of whether a subsidiary can be a fixed establishment of its holding company:

- in *C & E Commrs v DFDS A/S* (Case C-260/95), a UK subsidiary selling holidays on behalf of its Danish holding company was held to be acting as a "mere auxiliary organ" and was therefore a fixed establishment, making the holding company liable to registration in the UK and output tax on the supplies;
- in *Daimler AG and Widex A/S v Skatteverket* (Cases C-318/11 and 319/11), the fact that a German company had a Swedish subsidiary, which made supplies of testing services to its holding company, did not prevent the holding company making a cross-border refund claim for Swedish VAT;
- in *Welmory Sp. z o.o. v Dyrektor Izby Skarbowej w Gdansku* (Case C-605/12), a Cypriot company used the services of a Polish group

company to provide various services in relation to an auction website in Poland. The CJEU reasserted the principle that the Polish company would only count as a fixed establishment of the Cypriot company if it had the human and technical resources present on a permanent basis that enabled it to receive and use the services supplied to it for its own business. The implication was that the Polish company did not meet these conditions.

The A-G cited the relevant EU law, being PVD art.44 and articles 21 – 22 of the Implementing Regulation. The Implementing Regulation was particularly significant because it set out (and therefore defined and limited) the obligations of a supplier (such as DY) in determining whether it was making a supply to "another fixed establishment" of a foreign business, and in determining who should be regarded as the proper recipient of a supply. She also noted Polish laws that required foreign established companies to operate in Poland through certain types of subsidiary undertakings that had to be incorporated locally.

The transactions involved a contract between DY and LGK to carry out assembly of printed circuit boards in Poland. The PCBs belonged to LGK, but would be physically delivered to DY by LGP, to whom they were returned once the work was complete. LGP carried out further work for LGK on the goods, which were then sold by LGK to another Polish subsidiary for onward sale on the European market.

LGK was registered for VAT in Poland and had a tax representative (presumably because it owned and sold goods that were physically located in Poland), but it assured DY that it did not have a fixed establishment in Poland and it was therefore proper to treat the supplies of services as outside the scope of VAT.

On the company's appeal against the authorities' assessment of the services to output tax in Poland, the Polish court referred the following questions to the CJEU:

(1) Can it be inferred, from the mere fact that a company established outside the European Union has a subsidiary in the territory of Poland, that a fixed establishment exists in Poland within the meaning of Article 44 of the VAT Directive and Article 11(1) of the Implementing Regulation?

(2) If the first question is answered in the negative, is a third party required to examine contractual relationships between a company established outside the European Union and its subsidiary in order to determine whether the former company has a fixed establishment in Poland?

The A-G spent some time analysing the meaning of the questions. In summary, she answered the first with a clear "no": it cannot be the case that any holding company with a subsidiary in another country has, for that reason alone, a fixed establishment there. The concept of a main establishment and another fixed establishment presupposed that there was a single taxable person, but a holding company and subsidiary were in principle two persons. It was generally not permissible to regard as a single taxable person companies that were established in different countries.

The A-G went on to consider what the criteria might be for regarding a subsidiary as a FE of its holding company. This must be possible, because the CJEU had held it to be so in the *DFDS* case. She described a number of "fundamental reservations" about the idea. These included the difficulties that would be caused for suppliers, who would be unsure whether to charge VAT or not, and for group companies, that might find they became liable for reverse charges in circumstances in which they had no control over the transactions concerned. She concluded that an "independent subsidiary" cannot be regarded as a fixed establishment of its parent company.

The exception to the general rule would only arise if there was evidence of abusive practices. In the present case, there was no question of that: the commercial and economic reality was that the services were supplied to LGK, the owner of the goods, and there was no loss or avoidance of VAT, because the downstream transactions involved output tax. In *DFDS*, the use of a dependent subsidiary was intended to exploit an exemption for tour operator services in Denmark, and characterising the subsidiary as a fixed establishment defeated this avoidance.

The A-G also considered the obligations of DY and the need for legal certainty. It could not be relevant to consider the VAT treatment that ought to be, or was in fact, applied by LGK in Korea. That was not something that an independent contractor such as DY could know. The Implementing Regulation suggested that DY should be entitled to take at face value the assurances from LGK that it had no fixed establishment in Poland, given that there was no abusive practice and no loss of tax, and no evidence to the contrary in DY's knowledge. The following statements are useful:

72. In isolation, however, a taxable person – who merely acts as a tax collector on behalf of the State, as emphasised by the Court in established case-law – may impose certain, yet proportionate, due diligence obligations. In the case of specific indications which appear to point to tax evasion or abuse, the taxable person may be expected to obtain certain additional information regarding his supplier in order to ascertain the reliability of the latter. The same applies to the precise determination of the customer's place of establishment – see, inter alia, recital 20 of Implementing Regulation No 282/2011.

74. It follows from this that the impossible cannot in any event be asked of Dong Yang either. It is, however, subjectively impossible for Dong Yang to verify contractual relationships, which are inaccessible to it, between its contracting partner and the (possibly unknown) subsidiaries thereof. Such an obligation of verification and investigation would go beyond the level of diligence that can reasonably be required of it. Therefore, all parties rightly assume that Dong Yang did not have to analyse these contracts.

75. Therefore, unless there are indications to the contrary, a contracting partner can certainly rely on a written assurance from another contracting partner stating that it does not have a fixed establishment in the country concerned (here, in Poland). This is all the more so given that Polish law makes the activities of Korean undertakings via fixed establishments more difficult, such that there is no reasonable reason to doubt the statement of the contracting partner.

There was also an important distinction between the present situation and *DFDS*: that involved the use of a dependent subsidiary to sell services to third parties, while this involved (allegedly) the existence of a subsidiary to bring the purchase of services within the scope of the local VAT.

The A-G recommended the following formal answers to the questions referred:

1. In principle, a subsidiary of a company (from a third country) is not a permanent establishment of the latter within the meaning of the second sentence of Article 44 of Directive 2006/112/EC and Article 11(1) of Implementing Regulation (EU) No 282/2011.

2. A different conclusion is conceivable only if the contractual structure chosen by the customer were to infringe the prohibition of abusive practices. This assessment falls within the remit of the referring court.

3. Directive 2006/112 requires a taxable person to exercise a reasonable degree of care in determining the correct place of supply. However, this does not include seeking out and verifying inaccessible contractual relationships between his contracting partner and the subsidiaries thereof.

CJEU (Case C-547/18) (A-G): *Dong Yang Electronics sp. z.o.o. v Dyrektor Izby Administracji Skarbowej we Wrocławiu*

4.2.2 Matchmaking

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 Tribunal only had to consider whether the supplies fell within art.59(c).

The judge noted the main CJEU precedents on the place of supply of consultancy services: *Linthorst* (Case C-167/95) concerning veterinary services and *von Hoffman* (Case C-145/96) concerning the services of an arbitrator. The principle established in a number of cases on place of supply was that there was no precedence or assumption about the different categories in the law: it was simply a matter of finding the most apt description of the services in question.

It was uncontentious that the services were to be compared with services "principally and habitually" supplied by a consultant, and that similarity is achieved when both types of service serve the same purpose. There was also broad agreement that consultants give "advice based on a high degree of expertise or extensive experience or qualifications on the subject". The judge considered that the advice itself did not have to be specialist or expert, provided that it was given on the basis of experience or qualifications.

In *Banque Bruxelles Lambert SA* (Case C-9/03), the CJEU held that a service that goes substantially beyond that normally supplied by a consultant does not fall within the provision. In that case, the supply

included management, decision-making and administration as well as advice, and it was therefore not sufficiently similar to services habitually made by consultants.

The judge started by considering whether references in past cases to "liberal professions" provided an extra limitation on the scope of the law, as HMRC argued. The CJEU had defined "liberal professions" as "activities which involve a marked intellectual character, require a high-level qualification and are usually subject to clear and strict professional regulation" (*Christiane Urbing-Adam* Case C-267/99). The judge considered that the list in art.59(c) was not to be taken as limited to those which are liberal professions in the sense defined in *Christiane*, but that each of the activities had to be carried on in an "independent" manner. In particular, the vets in *Linthorst* had been held not to fall within the provision not because they were not members of a liberal profession, but because vets normally do more than give advice. It was not the status of the supplier that brought a supply within art.59(c), but rather the nature of the service supplied – something that was "habitually" done by an independent professional who is not dependent on, or integrated with, the client.

HMRC argued that "data processing and the provision of information" is a single composite phrase, and it is not possible to separate out "provision of information" as a category in its own right. This was based partly on the positioning of a comma in VATA 1994 Sch.4A para.16(2)(d) and other minor textual differences between the UK provision and the wording in the PVD. HMRC claimed that this had been accepted by the Tribunal in the 2008 case *Fairpay Ltd* (VTD 20,455).

The judge did not agree with this analysis. It was not clear that the Tribunal had adopted this interpretation in *Fairpay*, as the Tribunal had noted HMRC's submission on the point but had not used the same words in reaching its decision. The wording of art.59(c) had to inform the interpretation of the UK law, and there was an implication in "<u>as well as</u> data-processing and <u>the</u> provision of information" (underlined words omitted in Sch.4A) that the two items are separate. The judge said: "It seems to us that in the Directive the use of 'as well as' introduces a new list, and the use of the definite article before 'provision of information' separates that activity from data-processing. If the Directive envisages two unjoined (although potentially overlapping) activities, paragraph 16(2)(d) must be interpreted consistently." In conclusion, the judge held that transmission of the results of processing data will necessarily involve the provision of information, but the provision of information need not involve data processing.

The judge went on to summarise the evidence given by the director of the business concerning the way it was carried on. Clients were interviewed, and introductions would be made over a period of a year, including feedback and follow-up of introductions made. The judge carried out a mathematical analysis of the information provided, taking the number of clients, the length of time spent on various activities in relation to each one, and the amount of time the witness said she worked in a year. This appeared to reveal inconsistencies (the time required was greater than the time available), but the judge concluded that this did not undermine the main points of her evidence: she conducted the majority of the interviews, supervised the construction of a "brief" that would be the basis of

introductions, and carried out the matching process herself. Administrative support and liaison was carried out by other people.

The key issue turned out to be the significance of the role of the "liaison team" who offered follow-up contact, feedback and counselling. The judge and the wing-member of the Tribunal were agreed that the main service was "the provision of information" (the contact details of potential matches) together with the giving of independent advice within the matchmaker's sphere of expertise. However, the service was a composite one, and it had to be considered whether the follow-up liaison was incidental to the main (apparently qualifying) service, or was significant in its own right and enough to take the whole supply outside art.59(c).

The judge and wing-member disagreed on this point. The wing-member considered that the liaison team acted under the oversight of the main matchmaker, and what they did was ancillary to her expert advice; the judge (Charles Hellier) considered that the liaison team provided an important element of support in the developing of a relationship that went beyond the use of the information and advice provided, and was not inconsequential or merely ancillary.

On this basis, he used his casting vote to dismiss the appeal.

First-Tier Tribunal (TC07457): *Gray & Farrar International LLP*

4.3 International supplies of goods

4.3.1 Quick fixes

The Value Added Tax (Place of Supply of Goods) (Amendment) Order 2019 and *The Value Added Tax (Amendment) (No 2) Regulations 2019* implement the Commission's four "quick fixes" in the UK with effect from 1 January 2020. The main changes are to:

- amend SI 1995/2518, Pt 16 to make changes required by Council Directive 2018/1910/EU of 4 December 2018, which, among other things, amends art.138 PVD;
- amend SI 1995/2518 reg.134 to make it a requirement for exemption that the recipient of the supply is registered for VAT in another Member State and has provided the supplier with its VAT registration number;
- insert a new reg.134A into SI 1995/2518 to restrict the application of the exemption if the related Sales List is not properly submitted, unless there is a reasonable excuse;
- insert a new Part 4 into the VAT (Place of Supply of Goods) Order 2004 to specify which transaction in a chain will be treated as the intra-community despatch.

The chain rule is complex:

15. Article 16 applies where the same goods are—

(a) supplied successively thorough a chain, and

(b) dispatched or transported from one member State to another member State directly from the first supplier in the chain to the last customer in the chain.

16. Where this article applies—

(a) the intra-Community supply is to be treated as the supply that involves the removal of the goods from or to the United Kingdom; and

(b) all supplies made after the intra-Community supply are to be treated as supplied—

i) outside the United Kingdom in the case of goods removed or to be removed from the United Kingdom to a customer in another member State; or

ii) within the United Kingdom in the case of goods removed or to be removed from another member State to a customer in the United Kingdom.

17. The "intra-Community supply" is—

(a) the supply in the chain that is made to the intermediary operator ("I"), or

(b) where I has provided its supplier with the VAT identification number issued to I by the member State from which the goods are dispatched or transported, the supply in the chain that is made by I.

18. "Intermediary operator" means a supplier within the chain other than the first supplier in the chain who dispatches or transports the goods either itself or through a third party acting on its behalf.

SI 2019/1507; SI 2019/1509

Draft legislation has been passed for the call-off stock rules. This will have an element of retrospective application from 1 January 2020. The government intends to include this measure in the next Finance Act.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/855571/Draft_legislation_for_call-off_stock_arrangements.pdf

HMRC have also published a guidance note giving more detail on some of the terms in the rules on chains, including what is meant by an "intermediary operator", the rules on triangulation, the conditions for zero-rating and the evidence of removal that should be collected.

www.gov.uk/government/publications/changes-to-vat-for-intra-eu-chain-transactions-and-zero-rated-goods?utm_source=fe0e36c1-47ee-4634-acf2-813838a07785&utm_medium=email&utm_campaign=govuk-notifications&utm_content=immediate

There is a discussion of practical problems with the Commission's four "quick fixes", operational from January 2020, in *Tax Adviser* magazine for December 2019.

Jeremy Woolf discusses practical problems with the:

- changes to the exemption in article 138 – if the supplier loses the exemption through failing to report on the Sales List, there appears to be double taxation, because the customer would still be liable for acquisition tax – it is not immediately apparent how this would be corrected;
- changes to the rules on call-off stock, with the introduction of a new art.17a – the difficulties of sales outside a call-off stock arrangement, which appear to lose the benefit of the exemption from registration in the country in which the call-off stock is located;
- new rules on chain transactions in new art.36a – it remains difficult to be sure which transaction in a chain is treated as the intra-Community despatch;
- the clarification of the requirement to provide proof of transport for the exemption in art.138 – there may be problems with connected party transactions, where the requirements are more onerous.

The article cross-refers to the following other sources of information:

- Commission Working Paper 968 of 15 May 2019 (bit.ly/2rDoqXH);
- draft Explanatory Notes discussed at the September meetings of the EC VAT Expert Group and the Group for the Future of VAT (bit.ly/2KeEC8g);
- minutes of the meeting of the Group for the Future of VAT (bit.ly/3703zxO);
- minutes of the 113th meeting of the VAT Committee, where the proposals were discussed (bit.ly/37gCbMh).

There was also an article outlining the changes, rather than Jeremy Woolf's issues, in *Tax Adviser* of July 2019.

4.3.2 Chargeable event

A dispute arose between a taxpayer and the German tax authorities about the application of art.2 PVD (which makes "importation" a chargeable event), art.30 (which defines importation as "the introduction into the Community of goods which are not in free circulation"), art.60 (which sets the place of importation as the country in which the goods are located at the moment they are introduced), and art.61, which defers the chargeable event where goods are entered into one of the procedures or regimes set out in art.156 (e.g. external transport).

During January 2008, FedEx sent goods from Israel, Mexico and the USA, subject to import duties, to different destinations in Greece, their final destination. The goods were transported by air in 18 consignments to Frankfurt am Main, where they were transferred to another aircraft for onward transport to Greece.

The problem was that the authorities ruled that 14 of the 18 consignments had not been properly cleared for customs in Germany, and had therefore been irregularly introduced into the EU. 3 of the consignments had been entered into temporary storage but removed from it for onward transport without the proper procedures; the last had been preceded by a duly cleared external transit procedure from Paris to Frankfurt, but it had then

been removed without authorisation. This led to a ruling that a customs debt had been incurred on importation on all 18 consignments. The tax authority considered that this also incurred a liability to import VAT.

FedEx paid the duties, but then reclaimed the VAT, arguing that they had been subjected to a double charge – once in Germany and once in Greece. The German authorities refused the reclaim, and questions were eventually referred to the CJEU. The questions asked whether import VAT was only charged if the goods actually entered free circulation in a country, or if it was sufficient that there was a risk of them doing so, or a breach of customs legislation and procedures.

The CJEU ruled the question about "risk" was inadmissible, because it was agreed that the goods had indeed entered free circulation – they were consumed in Greece. It was therefore a hypothetical question that would not be considered by the court.

The question, of course, was *where* the goods should be treated as entering free circulation. The CJEU noted that it was agreed as a matter of fact that the only thing that happened in Germany was a transfer between aircraft; the goods were definitely transported to Greece and consumed there. In that that case, the goods were only entered into the economy of the Union in the Member State of final destination, and that is where the VAT on importation should be due.

This appears to be another in the sequence of decisions in which the CJEU pays attention to the substantive conditions for a VAT charge rather than the formal conditions. The paperwork is there to prove the facts; if everyone has already agreed the facts, faulty paperwork should not create a charge that would not otherwise arrive. However, it may take 11 years and a long journey to Luxembourg to establish that.

CJEU (Case C-26/18): *Federal Express Corporation Deutsche Niederlassung v Hauptzollamt Frankfurt am Main*

4.3.3 Exemptions on exportation

Between January and May 2007, a Polish company sold mobile telephones to two Ukrainian entities. Following an audit, the authorities concluded that the goods had not been acquired by the entities identified on the invoices, and ruled that exemption for exports was therefore not available. The ruling was upheld by the Polish court, but in due course questions were referred to the CJEU.

The company argued that there was no dispute that the goods had left the EU; there should, in principle, therefore be no risk of avoidance or evasion of EU VAT. The possibility that the irregularities in invoicing were intended to conceal the identity of the purchaser from the Ukrainian authorities, and thereby might be connected to a tax fraud in that country, should not affect the EU VAT position. The questions referred to the CJEU included the issue of whether it was right to consider that no supply had taken place where the parties to the transaction were not properly identified in the paperwork, even if there was no dispute that the goods had left the EU.

The court once again referred to precedents on the substantive conditions for exemption. It was not sufficient for the tax authorities to rely purely on a defect in the paperwork: the VAT exemption provided for exports

must be refused if the failure to identify the person actually acquiring the goods prevents it from being proved that the transaction at issue constitutes a supply of goods (i.e. the formal conditions are required to prove the facts), or if it is established that that taxable person knew or ought to have known that that transaction was part of a fraud committed to the detriment of the common system of VAT, which appears only to relate to the EU.

However, in a brief answer to a third question, the court ruled that if the exemption was refused in the circumstances outlined in the first two questions (i.e. it has been decided that the defective paperwork is insufficient evidence that the conditions for exemption have been met), then there would be no taxable transaction and therefore no entitlement to deduction of input tax. At first sight, that appears to create a double problem (no exemption, no deduction); however, it appears that the denial of the exemption would not lead to an output tax charge – it would be based on the conclusion that there was no supply within the meaning of the law.

CJEU (Case C-653/18): *Unitel sp. z o.o. v Dyrektor Izby Skarbowej w Warszawie*

4.3.4 Chain of transactions

Another case has considered the question that has been referred several times to the CJEU: which transaction in a cross-border supply chain with multiple transactions is to be regarded as the exempt intra-Community supply if there is only one physical movement of goods. Because the applicant in the main proceedings was claiming deduction of input tax, it does not wish to have received an exempt intra-Community supply.

Although this question has been considered before, the A-G (Kokott) agreed with the referring court that there were aspects that remained uncertain, in particular the relevance of the transfer of the right of disposal. There was a further interesting point of "conforming construction": in the Czech Republic, if there were different possible interpretations of the law, they should always be construed in favour of the taxpayer. The referring court was not sure if this was consistent with EU legal principles.

The company used its own vehicles to transport fuel from other Member States to a destination in the Czech Republic. The goods were sold on in many cases, but were transported only once (by Herst) to the final purchaser in the Czech Republic. Sometimes it purchased fuel for its own use (and was therefore at the end of the supply chain); sometimes it sold it on to customers (in which case it was an intermediary in a supply chain). It purchased the fuel from suppliers registered for VAT in the Czech Republic, but often collected it directly from refineries in other Member States. Because the suppliers charged Czech VAT, it claimed this as input tax; the authorities ruled that it had received an intra-Community supply and could therefore not claim input tax.

The A-G noted that, if the tax authorities were correct, the company would have to institute proceedings against its suppliers for recovery of the VAT overcharged. She also pointed out that the CJEU has already ruled that the fact that the fuel was transported in a duty suspension arrangement was irrelevant in determining the proper VAT treatment.

The A-G described the transactions as "A to B to Herst" (and then sometimes to Herst's customers), where A was the manufacturer and B was the Czech-registered supplier. For Herst to be entitled to input tax deduction, the supply from A to B had to be the intra-community despatch, while the supply from B to Herst had to take place in the Czech Republic.

The A-G observed that, for there to be two supplies of goods, B must have "the right to dispose of the goods" for a moment of time. It must therefore receive that right, even if it does not take physical possession of the goods, and it must then transfer it to its customer (Herst). The right of disposal for the purposes of art.14(1) PVD is broader than ownership in civil law. Like ownership, it is not precluded by legal restrictions. Legal restrictions on disposal during customs transit arrangements have as little effect on the customer's acquisition of a right of disposal under art.14(1) as existing rights, such as those of a lessee, have on the owner's right of disposal. The time of acquisition of ownership under national law is therefore not decisive in ascribing the transport of one of the supplies under consideration and thus in determining the exempt intra-Community supply.

The A-G considered that the crucial question in determining which supply involved the transport was who bore the risk of accidental loss of the goods during transit. The person who already disposes of goods 'as owner' will generally also bear the risk for their accidental loss, as the right to dispose of property as one sees fit, to destroy or use it, for example, is a typical expression of ownership. The reverse side of this legal decision-making power, however, is that the holder bears the risk of accidental destruction of the object (of its legal decision-making power).

The A-G's recommendation on the main question was therefore: "In summary, it must be stated that in ascribing the single cross-border transport to a certain supply in a supply chain, the crucial factor is who bears the risk for accidental loss during the cross-border transport of the goods. That supply is the exempt intra-Community supply, the place for which is where transport began. It is not decisive, on the other hand, who is the owner under civil law during the transport or whether the goods are transported under a special customs procedure."

The A-G considered that the question of the place of supply of the goods would be determined solely by EU law; there should be nothing that was sufficiently uncertain to engage the principle of favouring the taxpayer in areas of doubt. If there was a genuine doubt, there was nothing in the VAT Directive to override the principle, provided that the taxpayer was not himself relying on EU law, and it was not possible to interpret the domestic law in conformity with EU law.

CJEU (Case C-401/18) (A-G): *Herst s.r.o. v Odvolací finanční ředitelství*

4.3.5 Article on Brexit

In an article in *Taxation*, Sally-Ann Galbraith reviews some of the issues that businesses should consider leading up to Brexit. Although the article was written with a 31 October exit date in view, the points raised remain relevant for whatever happens next. She suggests that businesses should be encouraged to examine their processes to identify the elements that are

important for VAT and which might be affected by the expected changes to paperwork and the incidence of charges.

Taxation, 24 October 2019

4.3.6 No-deal Brexit readiness report

On 8 October, the Government published a "no-deal readiness report" to summarise the UK's preparations for leaving the EU on 31 October. Events superseded the report, but some of the matters discussed in it may become relevant again as new deadlines are created. In the meantime, it is probably better to wait for updated announcements.

www.gov.uk/government/publications/no-deal-readiness-report

4.3.7 New Brexit deal

On 17 October, the previous Government and the EU announced a new "deal" for Brexit, which will probably be the basis for the UK actually leaving the EU in the near future under the new Government. The details may change before the actual exit, and the future trading relationship with the EU will then be the subject of negotiations. It is only at that point that the long-term effect of Brexit on UK VAT rules will start to become clear.

www.gov.uk/government/publications/new-protocol-on-irelandnorthern-ireland-and-political-declaration

4.3.8 Revocation

The *Cross-border Trade (Public Notices) (EU Exit) (Revocation) Regulations 2019* revoke SI 2019/1307, which would have given HM Treasury a temporary power, lasting for a period of six months from exit day, to make changes to customs, VAT, or excise law by issuing public notices. The government decided to withdraw the measure after a legal charity began moves to seek judicial review on grounds that the regulations went beyond the powers conferred by the *Taxation (Cross-Border Trade) Act 2018*. The revocation has effect from 25 October 2019. The Treasury and HMRC plan to introduce legislation if needed to make any changes after exit.

The original SI was laid in the first week of October, so it was very short-lived.

SI 2019/1307; SI 2019/1380

4.3.9 Customs declarations relying on authorisation

HMRC have further extended until 31 January 2020 the date from which it will cease to accept declarations to special procedures made indirectly on customers' behalf by agents using their own simplified procedures authorisations. The Union Customs Code now requires the holder of the procedure and authorisation to be the same person, or to be represented in a direct capacity by an agent. HMRC had previously extended this deadline from 1 April until 1 October 2019.

www.gov.uk/guidance/extension-to-implementation-date-of-the-change-in-approach-on-indirect-representation-for-some-customs-authorisations-holders-cip15

4.3.10 Brexit legislation

The Government continues to update the website that contains all the regulations relating to Brexit. This was effectively put on hold during the election, but the final legislation to deal with the actual impending exit will now become more certain.

www.gov.uk/government/publications/statutory-instruments-relating-to-eu-exit

4.3.11 Brexit guidance

HMRC continued through the last quarter to update their guidance related to Brexit. Although the eventual departure will not be under exactly the same conditions as those expected at the beginning of October 2019, nevertheless some of the guidance may remain relevant. This includes a guide for EU businesses not established in the UK on changes to customs, VAT and certain other key regulatory requirements affecting trade with the UK after a no-deal Brexit.

www.gov.uk/guidance/trading-with-the-uk-as-an-eu-business-after-brexit

The parallel guidance for UK businesses trading with the EU was also updated shortly before the planned date of 31 October.

www.gov.uk/topic/business-tax/import-export

4.3.12 Auto-enrolment

In October HMRC auto-enrolled a large number of businesses into the simplified import procedures scheme, known as Transitional Simplified Procedures (TSP), to keep trade flowing and minimise the potential for disruption after Brexit. As there will be a transitional period during 2020, this may not be necessary, but businesses dealing with EU counterparties will need to be aware of whatever procedures replace it.

www.gov.uk/government/news/hmrc-accelerates-95000-firms-onto-simplified-import-procedures

4.3.13 Impact assessment

HMRC published an impact assessment for movement of goods in a no-deal Brexit scenario. This included the estimate that businesses would incur costs of "between £15 and £56" per customs declaration. The latest static estimate for the annual administrative burden on UK businesses from additional import and export declarations is £7.5 billion (updated to reflect 2017 data), with import declarations accounting for around half of this figure. The £7.5 billion estimates the administrative burden of completing customs declarations for all EU trade in goods movements. "To help mitigate the impact, the Government has made available £24m to support training and IT costs for intermediaries and an additional £10m to support the costs of hiring new customs agents."

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

4.3.14 Updated Notices

HMRC have updated the July 2019 version of Notice |*Customs special procedures for the Union Customs Code* with amendments to Annex D on using outward processing relief for exporting and re-importing gold and jewellery.

Notice 3001

HMRC updated the Notice *VAT on imports* in October 2019 with a link to guidance on accounting for import VAT after Brexit, including when postponed accounting is available.

Notice 702

HMRC have updated the March 2019 version of their Notice *Customs freight simplified procedures* to reflect the transitional simplified procedures that will be in place in after Brexit, allowing customs agents and intermediaries to use their own simplified authorisations on behalf of importers who do not have authorisation. HMRC will give 12 months' notice before making any changes to transitional simplified procedures.

Notice 760

4.3.15 Brexit regulations

The Taxation (Cross-border Trade) (Miscellaneous Provisions) (EU Exit) (No 2) Regulations 2019 made changes to various Brexit secondary legislation and covered matters including: customs rules for goods sent by post; international agreements for temporary admission of goods and the use of ATA carnets; unaccompanied goods sent by train via St Pancras station; and other changes relating to customs approvals, import duty, excise duty and VAT.

Most of the changes were intended to come into force on a date to be appointed by the Treasury in regulations, although provisions permitting HMRC to auto-enrol traders for transitional simplified procedures came into force on 16 October 2019. A group of provisions correcting other legislation in relation to trade remedies were intended to come into force on 31 October 2019, but as Brexit did not happen on that day they have been deferred.

SI 2019/1346

4.3.16 Isle of Man review

HM Treasury's review of the VAT treatment of imported aircraft and yachts in the Isle of Man has found the law being correctly implemented and administered in the Crown dependency, although it has recommended introduction of additional post-registration compliance procedures. The review was carried out at the invitation of the Isle of Man government following a series of allegations of VAT avoidance in late 2017.

www.gov.uk/government/news/treasury-publishes-isle-of-man-vat-review

4.4 *European rules*

4.4.1 Supplies facilitated by electronic interfaces

Amendments to Implementing Regulation 282/2011 will take effect on 1 January 2021, changing the treatment of supplies of goods or services facilitated by electronic interfaces. The detail should be reviewed by anyone directly affected, but in summary the changes are:

- Chapter IV is amended (mainly with new articles 5a to 5d defining when an online marketplace is deemed to have facilitated a supply of goods);
- Article 14 is deleted (it concerned the distance selling thresholds);
- Chapter Va is inserted (providing a timing rule for the application of art.66a PVD on chargeable events);
- Section 1b (Accounting) is inserted in Chapter X (detailing the records that the interface has to retain);
- Section 2 of Chapter XI is replaced (long and detailed requirements for the operation of the special scheme);
- Section 3 (Special arrangements for declaration and payment of import VAT) is inserted in Chapter XI.

The overall effect is that the online marketplace will be treated as the seller responsible for accounting for VAT on supplies with a value of up to €150 supplied via their platforms to customers in the EU by non-EU businesses. The directive sets out rules for determining the place and time of supply, and the information platforms must collect and report in connection with suppliers and sales made.

Council Implementing Regulation (EU) 2019/2026

4.4.2 Changes agreed by ECOFIN

In October, the European Parliament’s ECON Committee published a draft report on the Commission’s proposed VAT amending directive covering payment service providers. The Parliament recommended:

- that the Commission should keep the status of virtual currencies exchange platforms under review (not currently regarded as PSPs under the Directive);
- PSPs should retain records of information in relation to cross-border payment transactions for a period of three (rather than two) years from the end of the year during which the payment transaction was executed;
- the directive should be implemented by 2023 (rather than 2021).

The report also commented on the new administrative cooperation regulation, which introduces measures to tackle VAT fraud through enhanced sharing of information between EU tax administrations and law enforcement bodies from January 2020.

www.europarl.europa.eu/doceo/document/ECON-PR-641419_EN.pdf

In November 2019, ECOFIN reached political agreement on:

- new anti-fraud rules for record-keeping by payment service providers (to take effect in January 2024);
- simplified VAT rules for SMEs trading across borders (to take effect in January 2025);
- exemption from VAT and excise duty for supplies to armed forces deployed within the EU (to take effect in July 2022).

These measures are all subject to approval by the European Parliament.

The anti-fraud measures will require payment service providers to keep records of cross-border payments related to e-commerce for three years, and will strengthen the administrative cooperation rules to enable tax authorities to share and use this information.

The simplified VAT regime will ensure that the domestic registration threshold in individual member states cannot exceed €85,000, and will allow businesses established in other member states who make cross-border supplies to benefit from that threshold and other simplifications where their EU-wide annual turnover does not exceed €100,000. This is effectively a reversal of the CJEU decision in *Ingrid Schmelz*.

europa.eu/rapid/press-release_IP-19-6232_en.htm

MEPs have voted in the plenary session of the EU Parliament to approve an amending regulation on the above-mentioned enhanced administrative measures to tackle VAT fraud, together with an amending directive requiring payment service providers to keep records of cross-border e-commerce transactions from January 2024. The Parliament's ECON Committee published a report suggesting that PSPs should only be required to record commercial transactions, imposing a threshold of 25 payments to the same payee in a quarter or single payments of at least €2,500 before the record-keeping requirements would apply.

www.europarl.europa.eu/news

4.4.3 Anti-fraud operation

Europol has announced the success of two operations to take down cross-border VAT fraud schemes. In Operation Chemist, the Hungarian National Tax and Customer Administration seized €2.3m in assets following the arrest of seven individuals accused of defrauding the European Union of €3m. In Operation Apple, the Hungarian National Tax and Customer Administration seized €6m in assets following the arrest of six individuals accused of defrauding the European Union of €12m.

www.europol.europa.eu/newsroom/news/carousel-of-vat-abuse-dozens-arrested-in-connection-multi-million-tax-evasion-schemes

4.4.4 Assignment of security for a debt

A Portuguese real estate agent was engaged to sell some agricultural land. It found a purchaser, but the client refused to go through with the sale, and refused to pay the agent's fee. The agent made a claim for the fee and was awarded judgement by a court; the debtor still did not pay, so a further action for execution of the debt was pursued. A property belonging to the debtor was seized to secure payment. Nearly four years

after the original supply, the agency assigned its rights in the enforcement proceedings to another company for payment of a capital sum.

The original debt had been €125,000, plus VAT of €26,250; the capital sum received on assignment was €200,000 more than that. The award of the attached property by the court had been valued at €606,200, stated to be about 70% of the property's market value. The agency accounted for output tax on €125,000, but described the balance as an "other unspecified profit" and did not pay any VAT on it. The Portuguese authorities assessed the agency for VAT on the whole €351,620 received, without apparently making any reduction for the VAT already accounted for on €151,250, holding that the two transactions were quite separate – the assignment of the seized property was another taxable transaction.

A question was referred to the CJEU, asking whether the "transfer of a procedural position" such as this fell within the exemption for "granting, negotiating or managing credit" within art.135(1)(b) PVD. The Advocate-General gave an opinion, and extended the question to consider whether art.135(1)(d) might apply as well or instead ("transactions, including trading, in respect of deposits of funds, current accounts, payments, transfers, claims, checks and other negotiable instruments, other than the recovery of debt").

The company argued that the assignment of the claim did not involve a supply of goods or services for consideration, and it was therefore outside the scope of VAT. The Portuguese government considered that it was the assignment of a tangible good (the seized property). The Commission argued that there were two taxable services, the assignment of a receivable and the transfer of the claim rights or "procedural position".

The A-G's opinion was that there was a single, unitary but complex transaction, which comprised the transfer of immovable property; that might be exempt under the provisions applicable to such transfers. The company relied on *GFKL Financial Services AG* (Case C-93/10), in which the CJEU held that a company buying defaulted debts at below their face value was not making a supply of services for consideration. The situation was completely different: there was property involved as security, and the value of the property appeared to be substantially higher than the face value of the original debt. Further, the appellant agency was not in the position of GFKL – it was making the assignment, not receiving it.

Next, the A-G noted that the parties had described the transaction as an "assignment of debt"; however, that could not determine the matter, when it was clear that the economic reality was the transfer of rights and obligations relating to the property that had been awarded to the agency. The A-G rejected the Commission's split of the transaction into two parts: in his view, there was no transfer of a debt, but a single, complex transaction. The economic reality was that the purchaser had been attracted by the right to dispose of the property as owner: that suggested that there was a supply of goods, as described in PVD art.14. If for some reason it was not a supply of goods (e.g. the referring court determined that the facts as represented to the CJEU had misled the A-G), then it would still fall to be taxed as a supply of services.

The taxpayer also argued that the transaction was not in the context of its "economic activity" because the transfer was a one-off transaction outside

its normal estate agency business. The Commission, the Portuguese government, the Advocate-General and the full court all rejected this suggestion. An exceptional transaction is still within the scope of VAT if it is carried out by a taxable person in the context of his taxable activity, as this was. This was consistent with the precedent decision in *Kostov* (Case C-62/12). It would also be artificial to attempt to divide up the single transaction into separate parts, one of which related to the original debt and the other to the enforcement position.

The A-G went on to consider whether exemption should apply under art.135(1)(b), as asked by the referring court, or under art.135(1)(d), which he added in order to provide a helpful answer. The referring court appears to have believed that (b) was relevant because the word for "debt" in the Portuguese law version of (d) is the same as that used for "credit" in (b). It was necessary to apply the exemptions consistently throughout the EU and to interpret the terms strictly, in order to harmonise the treatment of similar transactions as much as possible. The company had based part of its argument on Portuguese law, which could not determine the issue.

The Advocate-General agreed with the Commission and the Portuguese tax authority that the transaction did not fall within the "granting of credit" or any of the other terms of art.135(1)(b). Because the asset transferred was a right over immovable property, rather than a pure debt, it did not fall within art.135(1)(d) either.

Although the A-G considered that the proper classification of the transaction was as a transfer of immovable property, which could be exempt under art.135(1)(j) or (k), there was insufficient information in the order for reference about the nature of the property for a proper consideration of that issue. The A-G recommended that the court should answer the question by stating that the financial exemptions did not apply to this type of transaction.

The full court essentially agreed with the A-G's opinion, although the judgment is more restricted – it only answers the question referred, rather than considering the other possible applicable exemptions. The answer was that the assignment of "all the rights and obligations deriving from the taxable person's position in enforcement proceedings for recovery of a debt recognised by a judgment, a debt the payment of which was secured by a right over immovable property awarded to that taxable person and made the subject of attachment" did not fall within art.135(1)(b).

CJEU (Case C-692/17): *Paulo Nascimento Consulting — Mediação Imobiliária Lda v Autoridade Tributária e Aduaneira*

4.4.5 Building land

In general, transactions in land may be exempt; however, the supply of new buildings and "building land" are to be taxable under art.135(1)(j) and (k). Member States are allowed to define what is meant by "building land".

A Danish property development and construction company purchased some land with a warehouse on it. It then sold the land, with the warehouse still in place, to a low-rent housing body, subject to a contract to build and provide, on a turnkey basis, social housing units for young persons on that land. The housing body undertook to carry out a partial

demolition of the warehouse. On both transfer dates, the warehouse was still in operation.

The tax authorities ruled that the transactions were taxable. The land was "building land" even though it already had a building on it, because it was intended that the building should be partially demolished and a new building constructed. The company argued that land with a building on it could only be regarded as building land in the precise circumstances of *Don Bosco* (Case C-461/08), where the demolition had commenced at the time of the transaction and the property transfer and the demolition should be regarded as a single economic whole.

There were three different views of the two transactions:

- the company argued that both were transfers of an existing building, and therefore exempt;
- the Danish government argued that they were both transfers of building land and were taxable;
- the Commission argued that the company's purchase was of an existing building, but its sale to the housing body was within the *Don Bosco* principle and taxable.

The court referred to the long-standing principles that a transaction that is a single event from an economic point of view should not be artificially divided, but that each supply should be regarded as independent unless there was a good reason to treat it otherwise. All the circumstances should be taken into account, and there is no absolute rule that will determine the outcome.

Those objective factors confirmed that the first transaction was of land with an existing building. There was nothing to link the subsequent demolition of that fully operational warehouse with the development company or this transaction; the demolition was carried out after a further transaction, by a different company. This was in spite of the fact that the intention had already been discussed with the local authority and the intention of the parties to the first transaction was that the second transaction should follow.

The court considered that the circumstances of the second transaction were not similar to those of *Don Bosco*. The demolition had not yet started, and was carried out at the expense of, and at the risk of, the purchaser, not the vendor. The objective nature of the tax required that this should be treated as the sale of land with an existing building on it, not building land.

CJEU (Case C-71/18): *Skatteministeriet v KPC Herning*

4.4.6 Postal services

Two companies operated in Germany, with one of their business lines being the formal service of legal documents. They treated their charges for this service as exempt; the tax authorities disagreed and raised assessments. Both companies were in liquidation by the time the matter reached the CJEU. The question was whether the exemption under PVD art.132(1)(a) for "the public postal services" applied.

The court had to consider whether the businesses fell within the definition of a "universal service provider" (Case C-357/07 *TNT Post UK*). Although the users of the service were not the general population, but were rather public bodies such as courts and administrative offices, nevertheless the obligations imposed by their licences required the businesses to carry the documents throughout the territory for fixed prices, which was similar to the obligations of the public postal operators. The fact that they were not regarded as USPs by the German law, and the fact that they had not been notified as such to the EU authorities as required by rules on postal operators, could not affect the VAT position.

The court considered that the nature of the service was such that it must fall within the exemption.

CJEU (Case C-4/18): *Michael Winterhoff, acting as liquidator of DIREKTexpress Holding AG v Finanzamt Ulm*

4.4.7 Subsidies and taxable amount

Two producer organisations (one a limited company and one a cooperative) sold fruit and vegetables grown by their members. They operated a special purpose fund to finance investment by their members; the money came half from member contributions and half from EU grants. In each case, the organisation purchased capital goods; the suppliers invoiced the organisations, and the organisations reclaimed the input tax on the purchase of the equipment. The organisations then invoiced the member producers for a proportion (50% to 75%) of the cost of the goods, with the balance being met from the fund.

Producers were required to use the capital goods for a set period, and to pay a financial contribution for their use. This amount (1.75% or 3% of sales) financed the special purpose fund. At the end of the set period, the organisations transferred their co-ownership rights in the assets to the producer members.

In respect of the capital goods, the organisations only accounted for output tax on the reduced amounts invoiced to producers. They did not consider the amounts paid for the equipment from the operational funds as compensation for making the goods at issue available to producers, in so far as they came from the financial assistance.

The tax authorities decided that the agreements with the producers amounted to a supply of goods, because there was a commitment to transfer the ownership after a period in which payments were made. Questions were referred to the CJEU to determine whether the rules on "subsidies linked to the price of supplies" were relevant.

The court ruled that there was a link between the amounts paid by the fund to obtain the capital goods, and the provision of the capital goods at below cost to the producer members. It was therefore a subsidy directly linked to the supply, and was subject to output tax in the hands of the organisations.

CJEU (Case C-573/18): *C GmbH & Co. KG v Finanzamt Z* and (Case C-574/18): *C-eG v Finanzamt Z*

4.5 Foreign refund reclaims

4.5.1 Refunds for EU traders

In early October, HMRC published new guidance on how EU businesses can check how to claim VAT refunds on goods and services sold in the UK. This was intended to help foreign businesses to prepare for the UK leaving the EU without a deal in place; as with so much of the Brexit guidance, the principles remain important, but the details will have to be examined again in the light of how the actual exit takes place.

The very significant point is that claims will move from the electronic refund procedure that operates within the EU to the paper-based 13th Directive system, with a 31 December deadline for filing claims relating to the year to 30 June. How the transitional period will be dealt with (e.g. claims for the 2019 calendar year made after 31 January 2020, when the UK is supposed no longer to be in the EU) is not yet clear.

www.gov.uk/guidance/claim-vat-refunds-after-brexit-if-youre-an-eu-business

5. INPUTS

5.1 Economic activity

5.1.1 Article

In an article in *Taxation*, Waqar Shah discusses the Supreme Court decision in *Frank A Smart Ltd* and its implications for entities that carry out charitable fundraising activities. The ruling that the purpose of the taxpayer in carrying out a fundraising activity is relevant, and is a question of fact to be determined by the FTT, could affect the way disputes are argued in the future.

Taxation, 5 December 2019

5.2 Who receives the supply?

5.2.1 Incurring costs for another

A company was established in Romania to carry out agricultural activities. It entered into a contract to buy some land for that purpose; however, some of the legal requirements for a valid purchase under Romanian law were not met, as the land was not entered in the Land Register with the vendor recorded as the owner. The purchaser therefore acquired various legal services to complete those formalities, including the first registration in the Land Register.

The Romanian tax authorities took the view that the purchaser had supplied a service to the vendor of registering the land, and raised an assessment for output tax. This was based on the application of art.28 PVD, which provides that someone who purchases services (i.e. the purchaser acquiring the legal services) on behalf of someone else (i.e. the vendor) is treated as both acquiring and supplying those services.

The taxpayer responded that it had incurred the costs as essential for its own purposes with the intention of carrying out taxable transactions, and it was therefore entitled to deduct the VAT it had incurred. Questions were referred to the CJEU, including the interesting issue of whether costs that “must necessarily be borne by the vendor” could nevertheless be incurred by the purchaser or by someone else, and yet give rise to a right of deduction of the input tax.

The court ruled that there was nothing to stop the parties to a transaction agreeing that the purchaser would incur costs that were normally the responsibility of the vendor. However, that did not necessarily entitle the person incurring the cost to deduct the input tax.

As there was a statutory obligation on the vendor to register the land, art.28 was engaged: the purchaser had done something that the vendor was required to do. The facts that it had not charged a consideration for this, and that the parties had agreed that the sale price of the property did not include the value of the registration, were irrelevant.

The end result appears to be that the VAT incurred on the legal services must be deductible because it was used for a deemed supply under art.28; however, there would then be output tax on the art.28 supply, which would have the same effect as disallowing the VAT incurred as an input.

CJEU (Case C-707/18): *Amărăşti Land Investment SRL v Direcţia Generală Regională a Finanţelor Publice Timişoara, Administraţia Judeţeană a Finanţelor Publice Timiş*

5.3 Partial exemption

5.3.1 Survey on Partial Exemption

The CIOT and ATT carried out a survey of members on partial exemption and the capital goods scheme as part of a response to a call for evidence issued by HMRC in July 2019. The responses are intended to influence any simplification of the rules that HMRC may implement in future.

Regarding simplification of PESMs, the recurring key messages from CIOT and ATT were to:

- reduce the timescales involved with the approval process (which can take anywhere between three months and two years);
- adequately resource HMRC's tax avoidance and partial exemption (TAPE) team to deliver responses to timescales; and
- improve the technical level of the staff in the TAPE team.

There was limited support for allowing PESMs to be applied without prior approval from HMRC, a key concern being the lack of certainty that would result. There was more support for the increased use of sectoral frameworks, though it was noted that these may not be appropriate for all businesses, and should therefore only ever be optional.

There was strong support for increasing the monetary limits, both for partial exemption de minimis (£7,500pa since the 1990s) and for the CGS (land and buildings £250,000 since inception nearly 30 years ago). The summary of the survey points out that increasing the de minimis level will not necessarily simplify compliance, because the same calculation should be carried out to make sure that the limit is satisfied; however, if it is satisfied more often, presumably compliance is a little simpler.

www.tax.org.uk/policy-technical/submissions/simplification-partial-exemption-and-capital-goods-scheme

5.3.2 Manual Updates

HMRC's partial exemption manual has been updated to remove references to the "Special Methods Unit" (SMU) and replace them with "Partial Exemption Senior Officer" (PESO).

PE51500 – PE51600

5.4 Cars

5.4.1 Derogation extended

The European Commission has published its proposal for extension of the UK's VAT directive derogation permitting a 50% input tax deduction for leased cars not used entirely for business purposes. The current derogation expires on 31 December 2019. The Commission's proposal for a Council implementing decision provides for an extension until 31 December 2022, or until the effective date of the UK's withdrawal from the EU, if sooner.

COM/2019/547 final

5.5 Business entertainment

Nothing to report.

5.6 Non-business use of supplies

5.6.1 Income tax advice

In 2012, a fully taxable trading company decided to reward its three directors with bonuses. It engaged tax advisers to suggest tax efficient methods of doing this, and followed the advice in issuing a new class of shares with contingent dividend rights. A different firm was engaged the following year and a similar transaction resulted. The company deducted the VAT charged by the tax advisers. After a check of the records in 2016, HMRC raised an assessment to disallow the claim, ruling that the VAT was not incurred in connection with the company's business. The company appealed. The judge noted that there were separate appeals pending in relation to decisions on PAYE and NIC matters.

HMRC's argument was based on three propositions:

(1) The supply of advice was a supply used for the purposes of an exempt transaction, i.e. the issue of shares;

(2) The supply of advice should not be classed as an overhead; and

(3) There was no direct and immediate link between the supply of the advice and the economic activity of the business.

HMRC withdrew the first argument during the course of the hearing, but the judge had heard argument on it and therefore expressed an opinion. HMRC had sought to distinguish the situation from *Kretztechnik* on the grounds that this issue of share capital did not involve the raising of share capital; however, the main reasoning still applied, in that the ultimate objective of the transaction should be considered rather than the issuing of the shares in isolation. The judge referred to the summary of the law in this area in the recent Supreme Court decision in *Frank Smart*. From this, he was satisfied that he should look through any initial transaction to ascertain objectively the overall purpose of the arrangements, considering

all the circumstances. In his view, the ultimate purpose was to incentivise the company's employees in a tax efficient manner, from the perspective of both the company and the employee.

That led on to the consideration of whether that was a business purpose. The judge considered that there were two clear benefits to the advice: a saving for the company in Class 1 NIC, and a saving of income tax for the directors. HMRC argued that the incentivisation of employees through tax-efficient remuneration "does not fulfil the condition of having a direct and immediate link between the supply of services and the taxable person's economic activity. In other words, HMRC argued that the incentivisation of employees did not have a direct and immediate link with the purposes of the business." The judge dismissed this in striking terms: "I do not consider that this argument has any merit whatsoever and do not understand why HMRC put it forward. This concerns me."

The judge noted that the facts were very similar to the recent Tribunal decision in favour of the appellant in *Doran Bros Ltd* (TC05554), which HMRC had not appealed. The judge quoted the reasoning of the Tribunal in that case and agreed with it: "the incentivisation of employees, even though in this case they were directors and shareholders of the company, has a direct and immediate link to the purposes of the business."

The appeal was allowed.

First-Tier Tribunal (TC07464): *Taylor Pearson (Construction) Ltd*

5.7 Bad debt relief

5.7.1 Termination of a finance lease

In February 2006 a company concluded a lease agreement with a purchase option in relation to some land. The lessor undertook to purchase land designated by the lessee in order to construct a building on that land and put it at the disposal of the customer. The contract was to run for 11 years, and the lessor could terminate the contract early in the event of non-payment of three successive monthly rental instalments; in that case, the lessor was entitled to "compensation" amounting to all the outstanding instalments, less the residual value of the asset and an adjustment for the interest in the remainder of the lease period.

In 2008, the Bulgarian tax authorities ruled that this created a tax point for all the rentals at the time of the initial supply, and an assessment was raised. In 2011, the lessee ceased to pay the instalments due, and the lessor terminated the contract in 2015. The lessor then applied for a repayment of some of the assessed tax. By the time the case came before the courts, another company had taken over the business of the original lessor, and took the case to the CJEU.

The referring court was not sure how PVD art.90 should apply to the circumstances. The first question asked whether it could apply to an assessment which had become final (as opposed to the trader's self-assessment); the second question was concerned with the different dates in the situation, because the payments stopped some time before the

contract was terminated. The third question asked whether this was "cancellation of a supply" or "total or partial non-payment" (in which case Member States are allowed, in some circumstances, to derogate from the provisions of art.90(1)). The fourth question asked whether it was truly a "cancellation" if the lessor was entitled under the contract to demand compensation equal to the consideration not paid.

These transactions commenced before Bulgaria joined the EU, but they continued until after it was a Member State. The CJEU therefore considered that the questions were admissible.

The CJEU reiterated that the adjustment under art.90 is a fundamental part of VAT law, because the trader should only have to account for output tax on the amount of consideration actually received from the recipient of the supply. That should not be changed by the fact that the tax was collected initially by assessment rather than by the trader's own declaration. The tax authority ought to issue a further amending statement to give the relief.

The court went on to explain that the unpaid instalments due up to the termination of the contract were "partial non-payment" and subject to the derogation in art.90(2). That was itself subject to the overriding principle that Member States could only derogate if the non-payment was uncertain or temporary. Until the contract was terminated, in theory the lessor could still make a claim in law for the outstanding amounts.

In this case, Bulgaria appeared to have exercised the derogation, because the national law only provided for relief in cases of "non-payment or cancellation" (not "partial"). However, the principles of fiscal neutrality and proportionality required the authorities to consider the high likelihood that the debt would not be honoured, and give relief subject to the possibility of revision if the money was in due course received.

The Bulgarian government and the Commission argued that the terms of the contract, in requiring "compensation" of all the outstanding instalments (less adjustments for residual value and interest), actually provided for the supply to be made for full consideration. Everything payable under the contract was therefore taxable consideration. It therefore appears that the adjustments for residual value and interest would fall within a price adjustment on cancellation (no derogation allowed), but the rest of the amounts payable (before or after cancellation of the contract) would be taxable consideration that was subject to art.90(1) and the possibility of the derogation in the case of non-payment under art.90(2).

Overall, the CJEU considered that the extended period of non-payment meant that the derogation should not apply. The company was due its bad debt relief, although it was for the referring court to confirm that the debt (arising both before and on termination) was very unlikely to be honoured.

CJEU (Case C-242/18): *UniCredit Leasing v Direktor na Direktsia "Obzhalvane i danachno-osiguritelna praktika"– Sofia pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite*

5.7.2 Aged creditors

A group of four appellants are involved in a dispute with HMRC over the disallowance of input tax on a bill that, in HMRC's view, could not be

adequately shown to have been paid by the claimant within 6 months of making the supply. The input tax should therefore have been reversed; as this should also have been obvious from the company's accounting records, HMRC also added a penalty, and raised a personal liability notice on a director. The transactions took place in the period 05/13; the disputed decisions were made in 2015; the appeal had gone through several stages of case management during 2018, which appears to reflect the difficulty of having a group of four appellants, one of which was in liquidation.

The company that had suffered the disallowance (Richmond Luxury Living Ltd) applied for part of HMRC's case to be struck out summarily. The other appellants were not involved in this argument. The judge noted the guidance of the Upper Tribunal in *Fairford Group plc* that strike-out required a consideration of whether there was a realistic, as opposed to a fanciful, prospect of succeeding on the issue at a full hearing, which meant one that carried some degree of conviction rather than being merely arguable; however, the Tribunal should avoid carrying out a "mini-trial". The judge considered that he should not make an attempt to evaluate disputed evidence or rival versions of events, but he was permitted to examine how the parties put their cases and the material they relied on in support of them to see whether they had any prospect of success.

The judge considered the various arguments put forward by the company in turn, and concluded that none of them were so clear-cut that they could be decided without a full hearing. He directed that the parties should agree how that full hearing could be arranged as quickly as possible, as the personal liability notice for £168,000 "should not be left hanging over" the individual appellant.

First-Tier Tribunal (TC07394): *Cafe Brio (Liverpool) Ltd and others*

5.8 Other input tax problems

5.8.1 Fraud

Yet another case has been heard by the CJEU on the conditions that a Member State is allowed to impose under PVD art.273 to prevent fraud, in particular in relation to the deduction of input tax. This case was referred by Latvia, where the tax authorities sought to disallow input tax on a purchase of rapeseed. The authorities had concluded, after an audit, that the purchase transactions did not take place.

It was not in dispute that the goods in question had been received by a warehouse where they were held on behalf of the claimant company; the claimant had acted in good faith and had relied on the ability of the suppliers to deliver the contracted goods, which it was not responsible for verifying. The tax authorities did not specify what the claimant should have done by way of verification that it did not in fact do.

The problem was that the claimant had failed to carry out the due diligence required by food safety regulations, such as confirming that the suppliers were registered with the Latvian Food and Veterinary Agency. The authorities considered that this was evidence that the company knew

that it was involved in a misuse of the VAT system. There was evidence that the supposed suppliers were fictitious entities, and the origin of the goods could not be confirmed.

The court reaffirmed that deduction of input tax is a fundamental part of the VAT system, and can only be denied where the trader knew or ought to have known that the transactions were connected with a VAT fraud. To impose an automatic denial solely on the grounds of a failure to comply with a non-VAT law on due diligence, as in this case, could not be justified. However, such non-compliance could be one element among others which, taken together and in a consistent manner, tends to show that the taxable person knew or should have known that he was involved in a transaction involving VAT fraud. That was for the referring court to assess.

Consistent with an earlier decision concerning the tracing of bovine eartags (*Evita*, Case C-78/12), the VAT authorities could not impose an obligation on a purchaser to check that suppliers have complied with regulations on foodstuffs. The company's failure to check that the suppliers were registered was therefore not relevant to the question of its right to deduct VAT, unless it was part of a combination of factors that indicated knowledge or means of knowledge of fraud.

CJEU (Case C-329/18): *Valsts ieņēmumu dienests v 'Altic' SIA*

An individual appealed against a personal liability notice issued to him for a 95% "deliberate and concealed" penalty in relation to disallowance of input tax on fraud-connected transactions in alcoholic drinks carried out by a company of which he was a director. The transactions were inputs and outputs in periods in 2014; the penalty was £379,865.

The Tribunal adopted the meaning of "deliberate" from the 2019 CA decision in *Tooth*: a deliberate inaccuracy is one which the taxpayer knew was an inaccuracy when the relevant document was given to HMRC, regardless of whether that was intended to bring about an insufficiency of tax.

As regards whether the inaccuracy was "attributable" to the director, the Tribunal considered that the word was not defined and should carry its ordinary meaning: it has something to do with having responsibility for something else, and, in the context of the attribution of a deliberate inaccuracy, carries with it a sense that the person to whom the action is attributed is in some way blameworthy. This slightly qualified the cases relied on by HMRC (*Andrew* [2016] and *Farrow* [2019]) which dealt with recklessness and knowledge of inaccuracy – the judge preferred to confine the concept of "attributable" to situations where the taxpayer had a duty to avoid inaccuracy.

The judge examined the history of the business in great detail, and was satisfied that a fraudulent operation was carried on. However, the assessments and penalty were based on the assumption that the goods in question had existed and had been supplied, and the reason for disallowing the input tax was purely the connection with fraudulent evasion of tax; the judge was not satisfied that, on the balance of probabilities, it was more likely than not that there had been goods to which the parties ever had title. If that was the case, there should have been no output tax or input tax, and the potential lost revenue in this

company would have been nil. As the burden of proof lay on HMRC to prove the amount of any penalty, and the basis of the penalty was in doubt, the judge allowed the appeal.

First-Tier Tribunal (TC07430): *Laurence Donnelley*

5.8.2 Claim in negligence struck out

HMRC disallowed input tax claimed by an individual on the basis that they were connected with MTIC fraud. This was upheld by the FTT and Upper Tribunal. The taxpayer made a complaint about the way HMRC had carried out their enquiry, and HMRC accepted that there were aspects that had not been satisfactory. The taxpayer then made a claim in negligence against HMRC, arguing that his defence in the tax appeals would have been better informed had they carried out their enquiries properly. The basis of the claim was that HMRC owed him a duty of care in the context of the litigation, and had a duty to inform him as soon as they had become aware that aspects of a visit report had been incorrect.

A High Court judge refused an application by HMRC to have the claim struck out for no reasonable prospect of success, considering that it was arguable that HMRC did owe the appellant a duty of care to verify the factual accuracy of the visit report. HMRC appealed to the Court of Appeal. The judges considered that there was no duty of care owed by one party in litigation to the other party, even where the other party relied on a document produced by the first party in the conduct of its case. It had been open to the taxpayer to challenge the accuracy of the visit report during the conduct of the Upper Tribunal appeal, and he could have demanded that HMRC should produce the underlying documentation that would have revealed the errors, but he had not done so. Therefore, there was no realistic prospect of showing that the alleged losses had been a reasonably foreseeable consequence of what it was alleged that HMRC had failed to have done.

HMRC's appeal was allowed, and the negligence claim was struck out.

Court of Appeal: *HMRC v Charles (trading as Boston Computer Group Europe)*

5.8.3 New public bodies entitled to VAT refunds

HMRC have carried out a consultation on a draft order to add four new bodies to those entitled to VAT refunds under VATA 1994 s.33E:

- The East West Railway Company (developing a rail link between Oxford and Cambridge);
- High Speed Two Ltd;
- Transport for Wales;
- The Single Financial Guidance Body (which replaces Money Advice Service, Pensions Advisory Service and Pension Wise).

www.gov.uk/government/consultations/draft-legislation-the-value-added-tax-refund-of-tax-order-2019

6. ADMINISTRATION AND PENALTIES

6.1 Group registration

6.1.1 New grouping rules

The Finance Act 2019, Schedule 18 (VAT Groups: Eligibility) (Appointed Day) Regulations 2019 specified 1 November 2019 as the date on which the new rules on eligibility for group treatment came into force. Non-corporate entities, such as individuals, partnerships and Scottish partnerships are now allowed to join VAT groups, provided they control all their corporate subsidiaries.

SI 2019/1348

6.1.2 Updated HMRC Manuals

HMRC have updated their manuals in relation to the new rules on group registration, including a large number of amendments in relation to "the protection of the revenue" reason for refusing an application, as well as changing the terminology in relation to the anti-avoidance legislation in VATA 1994 Sch.9A to reflect the new VAT grouping eligibility criteria.

VGROUPS02400 and 02120 now contain added guidance on VAT group treatment for non-corporate entities.

6.1.3 Updated Notice

HMRC have also updated the Notice *Group and divisional registration* to reflect the new rules. The relevant section now says:

2.2.2 Individuals, Partnerships and Scottish partnerships

Under section 43A and 43AZA of the VAT Act 1994, non-corporate entities such as individuals and partnerships can join a VAT group if:

- *they control the UK body corporate or all of the UK bodies corporate in the VAT group (see section 2.9) and*
- *they are carrying on a business by making supplies and*
- *they are established, or have a fixed establishment in the UK in relation to that business (see section 10.4)*

An individual or partnership controls a UK body corporate if it would, as a company, be the UK body corporate's holding company.

A partnership for this purpose means two or more individuals, body corporates or Scottish partnerships carrying on a business in partnership.

Notice 700/2

6.2 Other registration rules

6.2.1 Church bar

A member of a church congregation was encouraged by her mother and the parish priest to operate the bar of the social club that was affiliated to the church. She started to do so in 2013; HMRC took note of the operation and came to the conclusion that she should have been registered for VAT between 1 April 2014 and 31 December 2015. They registered her and issued an assessment for £10,617.

She appealed, contending that she was only the manager of the social club, not in business on her own account. The judge emphasised that she had not acted in any way dishonestly, and was motivated throughout by a desire to help the church and the congregation; it was purely a question of whether she had misunderstood her status and its significance.

She had signed a document entitled "management contract" in 2013. This provided for her to pay £625 in rent to the church every week, whether or not she made that much money, and she was responsible for staffing and other costs of running the bar. She was paid no wages by the church; the profit of the bar was hers to keep. The rent was later reduced to £500 per week because she was not making enough to cover it. The Tribunal described the way in which the bar operated, which was not disputed by HMRC. The appellant's representative accepted that the VAT threshold had been exceeded and that someone was liable for output tax, but argued that it was the church rather than the individual.

The judge accepted that the individual's motivation was to be helpful. However, the facts were inconsistent with her merely being a manager. In particular, the payment of rent regardless of the level of takings, the banking of takings in her personal account, her right to keep any profits and her liability for related expenses all confirmed that she was running the business independently.

The appeal was dismissed.

First-Tier Tribunal (TC07450): *Marites Salbit*

6.2.2 Backward look and forward look

Under VATA 1994 Sch.1 para.1(3), a trader who has become liable to register under para.1(1)(a) (the "backward look") is not liable for registration if the Commissioners are satisfied that taxable supplies will not exceed the deregistration threshold (£83,000) "in the period of one year beginning at the time at which, apart from this sub-paragraph, he would become liable to be registered". A trader disputed HMRC's application of this rule.

The company exceeded the threshold at the end of July 2015. It claimed that its turnover for the 12 months from 1 September 2015 was below the relevant threshold, and this gave it exemption from registration liability. Normally this can only be claimed at the time, because it is necessary for HMRC to "be satisfied" that this is the case; however, it appears that HMRC did not dispute the possibility of exemption being applied retrospectively, apparently as an application of the "liable no longer liable" policy. The company had been subject to a compliance check in November 2016, leading to a LNLL assessment for the period October to

December 2011. A second check led to a LNLL assessment for the period from 1 September 2015 to 31 July 2016, amounting to £5,235.

HMRC argued that the relevant period for para.1(3) is the 12 months from the date on which the trader exceeds the threshold, i.e. the 12 months commencing 1 August 2015. In this period, turnover was too high to confer exemption.

Judge Rachel Short agreed with HMRC's interpretation. Sch.1 para.1(1) provides that "a person who makes taxable supplies but is not registered under this Act becomes liable to be registered under this Schedule ... at the end of any month, if the person is UK-established and the value of his taxable supplies in the period of one year then ending has exceeded £85,000 or at any time [continuing to the forward look test]". That is the time that is referred back to by para.1(3); the date of actual registration under the backward look is only given by a later provision, para.5, which is not relevant for the interpretation of para.1(3). There is a distinction between being "liable to be registered" and actually being registered.

The judge expressed sympathy for the trader's position, noting that the HMRC manuals were confusing and could be interpreted as supporting that interpretation. However, they were for guidance only and could not override the legislation. The appeal was dismissed.

The judge was very critical of HMRC's conduct of the appeal, and suggested that an award of costs might have been made: "With no disrespect to HMRC's representative at this hearing, it seemed to the Tribunal that HMRC had significantly failed to properly prepare either their representative or the Tribunal to be able to hear this case effectively, by failing to provide an up to date bundle of documents and failing to ensure that their representative was aware of recent developments in the Appellant's case. HMRC did not provide any reasons why this failure had occurred. In the event the first two hours of the Tribunal hearing were spent attempting to obtain copies of the relevant documents, eliciting up to date information from HMRC and allowing Ms Davis time to prepare for the case which was actually being argued by the Appellant before the Tribunal. With the help of those at the hearing centre and the Appellant's representative, it was possible for Dorset's appeal to be dealt with. Had this not been possible the Tribunal would have had no hesitation in making an order of costs against HMRC on the basis that it had acted unreasonably in conducting the proceedings without adequate preparation."

First-Tier Tribunal (TC07480): *Dorset Trimming Company Ltd*

6.2.3 Advance registrations

In November HMRC updated their Notice *Should I be registered for VAT?* with more information about the provisional registration of EU traders to take effect after Brexit, where registration in the UK has not been required because of EU simplification rules but where registration will be needed immediately to carry on trading.

4.7 Submitting advanced notification of UK VAT registration should the UK leave the EU without a deal

4.7.1 Summary

Non-UK businesses in the EU who are currently not required to VAT register in the UK owing to cross-border simplifications, such as call-off stock arrangements and the zero-rating of intra-community acquisitions of goods and accounting, may need to register for VAT if the UK leaves the EU without a deal.

Businesses who are not currently eligible to VAT register yet, need to be from 1 November, can benefit from temporary arrangements for advanced notification of VAT registration. VAT registrations will go live only if the UK leaves the EU without a deal.

This is to support supply chains for UK businesses who have suppliers in the EU with minimal disruption.

HMRC will continue to refuse applications for VAT in all scenarios outside of this in order to protect the integrity of the VAT regime and guard it against fraud.

4.7.2 How to apply under these circumstances

Applications should be submitted online, following the information set out in paragraph 4.1. You should include the following criteria for a voluntary registration from an advanced date:

- *tick the box 'Making or Intending to Make Taxable Supplies'*
- *when reaching the 'reason for registering' section, answer 'Yes' to your intention to make taxable supplies in the UK in the next 30 days and insert 1 November 2019 as the earliest date*
- *when reaching the section on business activity enter using trade class/SIC code 99000 and then select sub code 013 European Community*
- *in the free-text box enter the description of what your business does*
- *ensure there is a positive amount entered in the 'estimated taxable turnover in next 12 months' box (otherwise the application will automatically be refused)*
- *check the box indicating you need an EORI number - this applies even if you already have an EORI number*

Ensuring all the details are accurate and complete will reduce the likelihood of your application being rejected.

4.7.3 What this means for you

You will receive notification of your registration and a VRN. The VRN will go live on 1 November 2019 however if a deal is agreed with the EU your registration shall be amended or cancelled.

There are reports that this process is not running smoothly in all cases.

Notice 700/1

6.3 Payments and returns

6.3.1 Manual Updates

HMRC's accounting manual has been updated to add guidance on the use of reg.25 SI 1995/2518 to require monthly returns from traders known to be in financial difficulty. This helps to prevent the accumulation of potential large irrecoverable VAT liabilities.

VATAC7000 – VATAC7400

6.3.2 Retrospection of FRS rejected

A company that registered for VAT in 2016 applied to join the FRS in August 2017, to take effect from 1 January 2017. HMRC accepted the application in November, but only gave effect to it from 1 July, on the basis that returns had already been filed for the first two periods of the year. The company appealed, noting that HMRC's stated policy is that retrospection might be allowed in "exceptional circumstances", including "where the survival of the business" is in issue.

Judge Anne Redston considered that retrospection to grant a cash refund to a struggling business would have been beyond the powers granted to HMRC by art.24 6th Directive to implement simplified schemes. It would not have been done for simplification purposes, and would have breached the basic condition that such schemes are not supposed to reduce the overall tax. Although both VATA 1994 s.26B and SI 1995/2518 reg.55B(a)(b) do not impose restrictions on HMRC's power to backdate, they have to be interpreted in line with the purpose of the FRS, which is to simplify the procedure for charging and collecting the tax. That cannot be achieved where "normal" returns have already been filed.

Even if that was wrong, the judge did not consider that the exceptional circumstances applied. She gave her decision orally at the hearing, and on the request of the directors, provided a full written decision later. This began with a consideration of a late appeal application, which was allowed; it appeared that there had been a delay arising from confusion between HMRC and the trader about whether the company was appealing directly to the Tribunal or asking for a review.

The decision goes through the history, the correspondence and the precedent case law in some detail. It notes that the Tribunal's jurisdiction in relation to a refusal to use the FRS is only supervisory. The company's directors appear to have understood what this meant, because they argued that the decision had been unreasonable in that it failed to apply HMRC's own policy; they relied on a 2013 decision of the FTT (TC02738 *Geoffrey Seeff*) in which the trader had succeeded with a similar argument.

The judge "respectfully" disagreed with the decision in *Seeff*, preferring to follow the High Court decision in *Burke* (2009). HMRC's decision had not been unreasonable in the required sense. In addition, the company had managed to survive by taking other measures, which meant that the survival of the company was not, in fact, in issue.

The appeal was dismissed.

First-Tier Tribunal (TC07400): *Holy Cow! Ice Cream Company Ltd*

6.4 Repayment claims

Nothing to report.

6.5 Timing issues

Nothing to report.

6.6 Records

6.6.1 Article on MTD

In an article in *Taxation*, Neil Warren comments on the problems that a change of system may cause, in particular with the introduction of Making Tax Digital software. Although the system is intended to reduce the incidence of errors, it is still essential to be familiar with the correct procedure for correcting the errors that may arise. Form 652 may not have enough space to adequately explain the circumstances, and a bespoke letter is a legally acceptable alternative.

Taxation, 31 October 2019

6.6.2 Updated Notice

HMRC have updated the May 2019 version of their Notice *Making tax digital for VAT* with information on when and how businesses may apply for an extension of the April 2020 deadline for having digital links in place for transfers of data between software applications. HMRC will require businesses to demonstrate that it is ‘unachievable and not reasonable’ for them to have digital links in place by the current deadline.

Notice 700/22

6.6.3 Survey on MTD

The CIOT and ATT carried out a survey up to 31 December to assess the experience of tax professionals and businesses during the introduction of MTD. The responses will be used as the basis of a submission to HMRC on any future roll-out of MTD, whether that is the development of the VAT obligations or the extension of the requirements to cover other taxes.

www.tax.org.uk/media-centre/press-releases/press-release-vital-new-survey-making-tax-digital-open-all

6.7 Assessments

6.7.1 Labour or administration?

A company was assessed for over £9m in relation to periods from June 2012 to November 2016. The judge noted that the total amounts of VAT, interest and penalties affected by the decision, taking into account later periods, would probably exceed £20m.

The company director had the idea of grouping together the workers of smaller employers in order to obtain employee benefits (such as pensions, wellness packages and shopping vouchers) on the more favourable terms that were usually only available to larger employers. He incorporated a company to put this strategy into effect. In order to show to the benefit providers that the company had sufficient employees to qualify for the favourable terms, participating employees were actually transferred to the company. It had 12 to 15 customers and 1,200 to 1,500 employees.

The Tribunal decision starts with a review of a typical contract with a client. It suggested that the employees were legally transferred to the appellant, and then supplied back to their former employer as a supply of staff.

The next section sets out the history of the enquiry from March 2015 to the unsuccessful conclusion of ADR in July 2017. There were considerable delays and postponements by the company. At the very least, HMRC would have reason to suspect that the company was not willing to give straightforward explanations. The director, who had once been an Inland Revenue inspector, was cross-examined at length about this, but claimed that the company had been sabotaged by a former employee as revenge for the director appearing as a prosecution witness when he was accused of murdering his wife.

The judge had to consider a number of issues. Most important was to determine what the company supplied to its customers. The director argued that he only supplied administration services for a commission; HMRC said that the company supplied the labour of its employees for the full amount paid by the customers. The judge considered that the contracts provided for a supply of labour, but it was still necessary to consider all the surrounding circumstances to see if the economic reality was the same. The judge was satisfied that amounts of wages paid directly by the customers to the staff should be included in the VATable consideration receivable by the appellant.

The assessments were raised to best judgement and were not excessive. The judge turned to the penalties, which had been levied on the deliberate scale. The decision contains some discussion of what that means, and also consideration of whether the Tribunal could of its own volition substitute “careless” penalties if HMRC had not alleged careless behaviour; the judge concluded that it could not, and asked HMRC for further submissions to which the appellant responded.

The judge noted that it was likely, from the information available, that the customers were all taxable registered businesses. There would therefore have been no VAT advantage in failing to charge them output tax on the full amount, because they would be able to recover it. This was strongly suggestive that the output tax errors were careless, not deliberate.

On the basis of these submissions, and after considerable discussion, the judge decided that the behaviour should be regarded as careless rather than deliberate, and that the sabotage carried out by the former employee was a "special circumstance" that HMRC should have, and had not, taken into account in mitigating the penalties. Although the restriction of the discount for "telling, helping and giving" to only 5% was appropriate owing to the lack of cooperation, an extra 20% should be given because the sabotage was a contributing factor in the inability of the trader to cooperate.

The penalties were therefore reduced from 68.25% to 26.25%; however, the appeal against the assessments was dismissed.

First-Tier Tribunal (TC07399): *In Tandem Resources Ltd*

6.7.2 Enquiry

A company running a restaurant and takeaway appealed against assessments to corporation tax and VAT and related penalties based on understatement of takings for periods from 2011 to 2015. The enquiry had commenced in 2013 but the alleged fraud had continued long after that. The trader appealed, arguing that the assessments were not made to best judgement and were excessive.

The decision gives a detailed account of an investigation of this type, including the drawing of conclusions from inspections. HMRC concluded that there had been understatement because the amount of cash sales on the date of the first invigilation was higher than on any previous date, and the ratio of card sales to cash sales was lower. There were other indicators that cash sales were routinely excluded from the records, some of which had been destroyed – in HMRC's view, to frustrate their efforts to recreate an accurate picture.

There were some issues relating to the amounts of the assessments that the Tribunal could not determine and that were therefore left to the parties to agree. However, in principle, the judge confirmed the validity of all the assessments and the "deliberate, concealed" penalties.

First-Tier Tribunal (TC07436): *Exotic Spice (Sprotborough) Ltd*

6.7.3 Triple issue

A company appealed against assessments totalling £296,689. Following ADR, the dispute had been reduced to £90,615 (it appears that the company accepted liability for the remainder); this was broken down into:

(1) input VAT difference of £20,171 – the 'Input Tax' issue';

(2) output VAT difference of £19,922 – the 'Turnover' issue';

(3) balance-sheet difference of £50,522 – the 'Balance Sheet' issue.

HMRC had carried out an extended check of records in 2013, following which a Schedule 11 Notice was issued requiring the company to keep various records going forward. In 2015 a further check was carried out, and the original assessments were based on differences between the figures in the annual accounts and the figures shown on the VAT returns.

The company was taken over by another business buying 65% of the capital in November 2014, and the finance team in the new holding

company attempted to recreate and substantiate the records. The FD stated that while due diligence was carried out prior to the acquisition, this did not extend to a review of the company's VAT compliance. After the acquisition, it quickly became apparent that errors had been made in the completion and submission of VAT returns, including keying errors, the inclusion of quotations as purchase invoices (in addition to the invoices themselves, resulting in a double claim), and entries for which no documentation could be traced.

The decision goes through lengthy explanations provided by investigating accountants and the finance team of the holding company that sought to analyse the reasons for the discrepancies. The assessing officer maintained that none of these explanations bridged the "credibility gap" between the VAT returns and the annual accounts, which in his view were the more reliable source of information, and on which he had based his best judgement assessments.

The Tribunal reviewed the case law on such assessments, starting with *Van Boeckel* – the Commissioners must fairly consider all material placed before them and, on that material, come to a decision which is one which is reasonable and not arbitrary as to the amount of tax which is due. This was refined in *Rahman* to set the bar very high for a finding that an assessment was not to best judgement – it would have to be dishonestly or vindictively or capriciously made, or a spurious estimate or guess without judgement, or wholly unreasonable. The question of best judgement involved a supervisory jurisdiction; the principal issue for the Tribunal would always be the amount assessed, on which it had a full appellate jurisdiction once it was satisfied that the assessment was valid in principle.

The appellant's representative stated that he did not argue that the assessment had been unreasonable on the basis of information available to the officer at the time it had been raised, but that the amount was excessive, as should have been accepted on the basis of further information provided afterwards.

The judge examined the explanations in detail, and decided that they were not sufficient to provide more credible figures in relation to the turnover and input tax assessments. The appeal was dismissed in respect of these two elements.

However, it appeared that the assessment based on a balance sheet difference effectively duplicated the other assessments. The judge noted that an assessment based on balance sheet differences could in some circumstances be valid, but in this case the circumstances that gave rise to the difference had also given rise to the discrepancies that were covered by the other two parts of the assessment. The appeal was therefore allowed in respect of the balance sheet issue.

First-Tier Tribunal (TC07438): *Euro Systems (Scotland) Ltd*

6.8 Penalties and appeals

6.8.1 Default surcharge

A company appealed against a 15% surcharge of £1,431 for its 08/18 period. This was its fifth default since 11/16; it had only previously had a financial penalty in respect of the 10% penalty for the fourth default. The appeal was based on the unreliability of an employee who had made various mistakes and had been sacked, as well as unfairness and the impact on the business of having to pay the surcharge.

This could not constitute a reasonable excuse. The judge agreed with HMRC that the warnings on the default surcharge liability notice set out how surcharges could be avoided in future, and the appellant could and should have heeded them. The appeal was dismissed.

First-Tier Tribunal (TC07478): *Stratford Glass Ltd*

6.8.2 Misunderstanding

A partnership failed to register at the right time and was charged a late registration penalty of £1,226 by HMRC. The firm consisted of a husband and wife who were both artists; they had had a very low income for some years, but their turnover increased to £78,218 in 2010/11 (as shown on the self-assessment income tax return) when the VAT threshold was £70,000. It was over the threshold for 2011/12 and 2013/14 as well.

The husband said that he had discussed the requirements with a local VAT office in London and had understood that he only needed to count sales in the UK and EU towards the registration threshold. He had therefore calculated sales to non-EU customers, chiefly in the USA, which would have comfortably reduced the "taxable" turnover to below the registration threshold in all the years. This view was supported by his accountants in a letter in February 2015.

The registration team at HMRC dealt with this as a request for exemption from registration, which is only available if supplies are wholly or mainly zero-rated. This was plainly not the case. However, on 10 July 2015, the registration service wrote back, stating "based on the information you have provided to us, we are not satisfied that your client is liable to register for VAT. For this reason, we have not granted them exemption from VAT registration, but we have not registered them for VAT."

Correspondence continued intermittently until November 2016, with some misunderstandings and some letters going astray. It was only in November 2016 that a new officer pointed out that the sales to non-EU customers would have been zero-rated exports rather than exempt, and should therefore have been included in turnover for registration purposes. The officer proposed to register the partnership for specified past periods on a "liable no longer liable" basis.

In May 2017, the officer sent a penalty notice, categorising the behaviour as "non-deliberate" and the disclosure as "prompted", and giving reductions of 20% for telling, 30% for helping and 30% for giving access, thereby mitigating the penalty in the 20% to 30% range to 22% of the potential lost revenue. This was upheld on review in October 2017.

The firm appealed, arguing that they had been given conflicting information throughout the enquiry; HMRC had failed to provide guidance on how the sales should have been treated, and had themselves made mistakes in their own correspondence that added to the confusion. The traders had given full cooperation and should not be penalised for "not understanding a complex part of the tax legislation".

The judge noted that the basic facts were not in dispute: the traders were liable to register and had not done so at the right time. There was therefore a prima facie entitlement of HMRC to levy a late notification penalty. The principal issue for determination was therefore whether a reasonable excuse existed. This had not been explicitly pleaded by the appellants, but the judge considered it in the interests of justice.

The problem was that the conflicting advice was given during the course of the enquiry, not at the time. It could not therefore have caused the failure to register. Read properly, the letter of July 2015 related to the current and future situation, not the past failure in 2011/12. Although the husband also said he had relied on conflicting advice from the London VAT Office before 2011, there was no evidence of this, and it appeared to have been obtained second-hand through his former accountants. This contributed to a mistaken belief that was genuinely held, but on its own that could not constitute a reasonable excuse. According to the Upper Tribunal in *Perrin*, "to be a reasonable excuse, the excuse must not only be genuine, but also objectively reasonable when the circumstances and attributes of the actual taxpayer are taken into account."

On this basis, the judge decided that the firm did have a reasonable excuse for the first of the two LNLL periods: the law was complex, and an artist could reasonably have misunderstood it. There is a detailed justification of this departure from the normal principle that "ignorance of the law is no excuse" in the decision, which may be useful in other cases. However, for the second period, the traders had appointed new advisers, possibly suggesting that they suspected their former accountants were not giving correct advice. The new accountants did appear to understand the law, but also appeared to have been given incomplete information at the outset, leading to the failure to advise that registration was required. There was therefore no reasonable excuse for the second period, and the appeal was allowed in part.

The accountants and taxpayers had debated the issue of "prompted" disclosure at length in correspondence and at the hearing, but there was no doubt that this failed to meet the definition of "unprompted" disclosure in the legislation. The fact that HMRC had in one letter referred to "unprompted" disclosure appeared to be a typographical error that could not change the basic fact.

A late notification penalty could not be suspended, and HMRC's decision not to allow a "special reduction" could not be said to be unreasonable, which would be the standard for the supervisory jurisdiction of the Tribunal in that regard. The appeal was therefore allowed in part, by discharging the first penalty of £958 and confirming the second penalty of £267.

First-Tier Tribunal (TC07390): *Alan and Carolynda Macdonald*

An individual appealed against a personal liability notice in relation to penalties charged on one company of which he was a director, and a second company of which he was also a director appealed against penalties and assessments. The judge examined the evidence presented by HMRC and dismissed the appeals, agreeing that HMRC had made out their case that invoices had been fabricated.

First-Tier Tribunal (TC07455): *Hassan Ahmad and another*

6.8.3 Updated HMRC Manual

HMRC have updated the section of the Compliance Manual dealing with reductions in penalties for quality of disclosure, giving more detail about the effect of the timing of disclosure. This includes the length of time between the inaccuracy arising and the disclosure (3 years is considered a "significant" delay) and the relationship between the timing of a disclosure and any compliance intervention by HMRC. In discussing penalties with HMRC, it is always useful to know the policy that the officer is supposed to be applying.

CH82465

6.8.4 Dishonest conduct notice

TC06852 related to a decision dated 31 July 2018 in which the FTT held that the appellant acted dishonestly while acting as a tax agent with a view to bringing about a loss of tax revenue in the course of assisting his client with his tax affairs. An article appeared in *Taxation* magazine on 6 November 2018 criticising the decision for procedural unfairness, because the hearing was conducted in the absence of the appellant. He had offered reasons for his inability to attend (inability to afford care for his disabled wife), but postponement was refused; he had been unaware that it would have been possible to "appear" by telephone or videolink.

The judge examined the circumstances and arguments in detail, and decided that, in order that justice should be seen to be done, the case should be reheard by a differently constituted Tribunal, at a hearing when the appellant has a reasonable opportunity either to attend in person or by telephone or by videolink. The judge expressed the hope that the appellant, who had complained bitterly of unfair treatment by HMRC (and had made allegations of bullying and dishonesty), would avail himself of the opportunity.

The re-hearing came before Judge Jonathan Cannan in August 2019, still with no appearance by the appellant. The judge noted that a postponement appeared unlikely to allow the appellant to participate more fully in the proceedings because his wife needed constant attention. He had therefore taken careful account of everything that the appellant had submitted in support of his case, and had proceeded with the appeal in the interests of justice.

The judge considered the history of the matter in detail. It related to the investigation by HMRC of one of the agent's clients, which revealed that certain invoices had been falsified in order to increase deductions for VAT and income tax. The agent admitted that he had done this, but denied that this was dishonest. The judge considered that it was "dishonest by reference to the standards of ordinary decent people".

The agent also argued that he had received assurances that he would not be prosecuted in return for full cooperation with the investigation. The judge commented that he could not consider legitimate expectations in the FTT; however, in any case, this was not a prosecution. The officers could not be held responsible for the agent's misunderstanding that no further action would be taken.

The appeal was dismissed and the determination was confirmed.

First-Tier Tribunal (TC07380): *Colin Rodgers*

6.8.5 Late appeals

An individual was convicted of cheating the public revenue and served 11 months of a 22 month sentence. In October 2015, he was deported to Bulgaria. He had been assessed to £1.8m of VAT in May 2014, before the criminal trial, but only appealed against it in February 2019.

The assessments related to a failure to register a business of importing used catalytic converters for sale to recycling companies. Judge Anne Redston reviewed the history of the case and applied the usual criteria for allowing a late appeal to proceed: she considered that there was a very substantial delay with no credible reason for the failure to appeal.

In "balancing all the circumstances", the judge considered a number of arguments put forward by the appellant's representative to suggest that the assessment itself was not valid, but she considered that the merits of the case were weak. In her view, the balance of fairness to both parties weighed against her allowing the appeal to proceed. The application was dismissed.

First-Tier Tribunal (TC07428): *Ivan Yanev*

A trader sought leave to appeal out of time against 19 default surcharges. Applying the normal factors, although the delay was not so great in this case, the reasons "did not make sense". It seemed most likely that the trader only decided to appeal when Debt Management started to pursue the payment of the surcharges. Once again, the prospect of success was minimal. The application was dismissed.

First-Tier Tribunal (TC07440): *Dalchini Spice Ltd*

An individual sought leave to appeal out of time against assessments for VAT periods 07/11 to 07/12. The decision rehearses the history of a long and tortuous dispute that had already been to the Tribunal. Once again, the merits of the case were weak, the delay substantial and the reasons insufficient. It appeared likely that the only reason for an appeal was the threat of the commencement of bankruptcy proceedings; however, as succeeding in the appeal would not apparently prevent that, the prejudice to the appellant was limited. The application was refused.

First-Tier Tribunal (TC07443): *Paul Shore*

6.8.6 Reinstatement

A trader failed to register when he crossed the threshold in 2003. This was detected by HMRC in 2008; in 2011 they assessed him to a net £98,891 for a period from 11/03 to 12/08. He submitted a return in January 2014 showing a liability of only £44,667 and appealed against

HMRC's refusal to substitute this for the assessment. ADR followed, and procedural complications relating to income tax appeals as well as VAT. Following an oral hearing in November 2015, the Tribunal refused the appellant leave to appeal out of time against the VAT assessments or the amendments made by HMRC to self-assessments for income tax. Some issues remained outstanding, and correspondence between the Tribunal and the trader's accountants continued; in May 2016 the trader had been convicted of a criminal offence and imprisoned, which added to the delays.

After the trader was released from prison in November 2018, a hearing was listed for 5 March 2019. HMRC filed a skeleton argument on 14 February; the following day, the accountants e-mailed the Tribunal withdrawing the appeal. However, on 4 March they e-mailed again, stating that the appellant wanted to reinstate the appeal. HMRC objected to this, and the matter came before the Tribunal on 3 October.

Judge Jane Bailey noted comments on reinstatement applications by Judge Mosedale in *Maltavini Ltd* [2016] and Proudman J in *Pierhead Purchasing Ltd v HMRC* [UT 2014]. The Tribunal should take into account five factors:

- The reasons given by the Appellant for the withdrawal and the reasons given for the application for reinstatement;
- Whether HMRC would be prejudiced by reinstatement and, if so, the extent of that prejudice;
- Whether the Appellant would be prejudiced by a refusal to reinstate and, if so, the extent of that prejudice; and
- Whether reinstating this appeal would be prejudicial to the interests of good administration;
- The merits of the proposed appeal so far as they can conveniently and proportionately be ascertained.

The fifth factor should be ignored in the context of what was effectively a case management decision, unless the case was so weak that HMRC would have succeeded on an application for strike out on the grounds of "no reasonable prospect of success". That was not the case here (although the case was weak, it was not that weak). However, the other four factors should be weighed and balanced.

The judge considered the various factors, including the fact that the appellant would still owe HMRC some £50,000 even if he succeeded, and would therefore still be made bankrupt (a fact that he apparently only appreciated at the hearing). She concluded that it would be prejudicial to good administration for the appeal to be reinstated and refused the application.

First-Tier Tribunal (TC07460): *Baljit Singh Rai*

6.8.7 Preliminary issue hearing

Judge Barbara Mosedale had to consider an application for a hearing of a preliminary issue in a MTIC case. The appellant denied knowledge or means of knowledge of any connection with fraud; however, it also argued that, if *Kittel* applied, there should be no entries on its VAT return

at all, so it was correct to return no liability for the periods in question. It appears that it had made purchases from traders in other member states and had made onward sales to traders in other member states (zero-rated) or in the UK (subject to the domestic reverse charge), so any liability on acquisition would be cancelled out by an input tax claim without an output tax liability.

The judge commented on the approach to be adopted in a preliminary issue hearing. It should only be used when there is a "succinct, knockout point" which will dispose of the case or an aspect of the case. In this context an aspect of the case would normally mean a separate issue rather than a point which is a step in the analysis in arriving at a conclusion on a single issue. In addition, if there is a risk that determination of the preliminary issue may prove to be irrelevant then the point is unlikely to be a "knockout" one. The tribunal should at all times have in mind the overall objective of the tribunal rules, namely to enable the tribunal to deal with cases fairly and justly.

The judge agreed with the appellant that, on the face of it, the issue raised by the taxpayer met the criteria. If its legal point was accepted, it would have to win its case, regardless of all the factual allegations that HMRC made – it would have no VAT liability. It was a relatively short point of law that would not lead to significant delay.

However, she considered that the legal basis of the appellant's argument was very weak: it depended on the contention that fraudulent transactions were not "proper economic activity" and should therefore be disregarded, and this had been rejected by the CJEU as long ago as the *Optigen* case. There was also a presumption that there should be a full hearing, so a decision to allow a preliminary hearing should be exercised with caution. On balance, the judge decided to refuse the application, and issued directions for the matter to proceed to a full hearing.

First-Tier Tribunal (TC07379): *Coast Telecom Ltd*

6.8.8 Strike-out application

A trader claimed input tax on costs incurred between 2006 and 2011 in his tax returns for periods from 10/13 to 10/16. HMRC discovered this and disallowed the claims; the trader appealed against this and two other matters. HMRC's application to have the input tax appeal struck out was granted, and the trader asked for a full written decision with a view to appealing it. The other two matters were agreed without further recourse to the Tribunal.

The claims related to purchases of vehicles that were used in the trader's business. HMRC made no comment on whether the VAT should have been recovered; their only basis was the clear fact that the time limits in SI 1995/2518 reg.29 had been exceeded (by between 9 months and 6 years and 3 months). The trader accepted that all of the claims were late, but he submitted that he had a legitimate expectation that he could claim because he had been told to do so by an officer enquiring into his self-assessment income tax returns.

Judge Heidi Poon explained in her written decision that the FTT does not have jurisdiction to overturn the time limits, nor to rule on legitimate

expectations. It was therefore inevitable that the appeal would be struck out for having no prospect of success.

First-Tier Tribunal (TC07412): *David Jamieson*

6.8.9 Procedure

HMRC applied for further and better particulars of an appellant's grounds of appeal on 18 June 2019; the appellant gave a partial response on 9 July 2019 but in large part took the stance that it had already provided sufficient detail and HMRC should now provide its statement of case. HMRC amended their application to take account of the limited response and re-submitted it on 21 August 2019. The Tribunal called a hearing to decide how to proceed, but the parties preferred the matter to be decided on the papers. Judge Mosedale examined them and issued a decision. The trader made no further submissions, expressing the view that HMRC had added nothing to what had already been said.

There was more than one appeal outstanding, but the one at issue related to assessments for periods 01/11 to 03/14 totalling just under £1m and a related penalty. The point was whether supplies of certain toasted sandwiches qualified for zero-rating. There were five products in dispute, two of which HMRC appeared to have subsequently accepted were zero-rated; HMRC appeared not to be sure how the appellant had treated them and therefore how the change of view would affect the assessments, but the appellant appeared to want to see HMRC's statement of case before giving any further information.

Judge Mosedale considered various High Court precedents on what is required by way of disclosure before a case can proceed. She concluded:

"The principles I take from these cases are that each party, starting with the appellant, must set out in its pleadings its legal and factual case in sufficient detail for the other party to understand it and in particular to know what evidence and legal arguments it must advance in order to answer it. A party is not, however, at the stage of pleadings, actually required to advance its evidence, nor put forward the submissions in the detail it will make at the hearing.

And a party's pleaded case must be one that is capable of succeeding if the appeal is not to be struck out. In order to have a case capable of succeeding where an appellant challenges quantum, it is clear that the appellant must not only establish that an assessment is wrong, but must establish by how much it is wrong."

On this basis, the judge considered that the appellant had not done enough to state its case. It should set out both the legal basis of the appeal – the provisions it relied on to show that all five of the products were zero-rated – and the factual case, which would require analysis of the products and some engagement with the figures. It should explain by how much it considered the assessment to be excessive, and explain how it arrived at that conclusion.

The appellant was not required at this stage to disclose its evidence, but was required to describe it. So HMRC's application went too far in requiring the appellant to produce all its computations and its supporting business records; but it should provide sufficient detail to enable HMRC

to understand by how much its case was that the assessment was excessive.

The judge also noted that the appellant needed to give more detail on the grounds of its appeal against the penalty. She concluded with various directions on the future conduct of the appeal.

First-Tier Tribunal (TC07487): *Ecko Ltd t/a Subway*

Judge Mosedale also considered an application by an appellant for its appeal to be expedited. The appeal was against a revocation of VAT registration on the grounds that it was being used solely or principally for fraudulent purposes. The company had also been assessed to £46m of input tax that was allegedly related to missing trader fraud.

The company supplied the labour of "mini umbrella companies" (MUCs) to temporary work agencies. It charged VAT to its customers and paid VAT to its suppliers, all at the standard rate. The allegation underlying the deregistration and the assessment was that the arrangements between the appellant and its suppliers was contrived so that in many cases they did not account to HMRC for the VAT that was due. HMRC alleged that the appellant controlled the MUCs with a view to evading VAT; however, the supplies to its customers were not contrived or other than at arm's length.

The decision was made on 16 September 2019 and appealed on 20 September, while the assessment was still under review. The application for expedition was heard on 24 October. Judge Mosedale noted that the application was not backed up by a great deal of evidence, but she found the company's witness "plausible". The appeal should be heard as soon as possible. Nevertheless, HMRC should be given sufficient time to prepare, which included review of 11,000 documents that had only been provided on 23 October in response to an information notice issued in June. The appellant would have to live with the consequence of that delay, which was of its own making.

The appellant would also have to amend its grounds of appeal, which were at present largely concerned with the unreasonableness of HMRC's conduct. The jurisdiction of the Tribunal was appellate in registration matters, and the appeal would consider whether HMRC's decision was correct based on the evidence.

Judge Mosedale made directions concerning cooperation going forward, including the possible use of samples of MUCs in order to establish a more general picture.

First-Tier Tribunal (TC07421): *Impact Contracting Solutions Ltd*

6.8.10 Costs

In TC07116, the judge criticised HMRC for their poor conduct of a DIY builder's appeal. The taxpayer applied for costs, and the application was considered on the basis of submissions on paper by Judge Richard Thomas. He stated the principles to be considered on the basis of unreasonable conduct where a party has withdrawn from the appeal:

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

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

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

The applicant complained of unreasonable conduct under nine headings, which are worth detailed reading if engaged in a similar dispute, but are only summarised here:

(1) The action of HMRC in issuing a penalties letter to him on 2 May 2017;

(2) The involvement of at least 8 different HMRC personnel in the case, leading to contradictory and confusing statements and reintroduction of matters previously settled;

(3) Planning Approval – Drawings

(4) Planning Approval – Separate Use & Disposal

(5) Misunderstandings and Confusion

(6) Annexe

(7) ADR (Alternative Dispute Resolution)

(8) Respondent's Statement of Case

(9) Respondent's Assumed Role as a Planning Officer

The judge did not accept that HMRC had acted unreasonably under (1) and (2), but he was extremely critical under headings (3) and (4). Under (5), his comment that "With one exception these are all matters of incompetence rather than unreasonable conduct" is hardly encouraging for HMRC. The other headings did not add anything to the findings under (3) and (4).

The judge considered that the effect of the unreasonableness on the appellant was serious, and he should be awarded his costs (he had apparently been hospitalised immediately after the hearing with "transient global amnesia", possibly a mini-stroke brought on by stress). There followed consideration of his claim and HMRC's objections, and the award of £2,242 (118 hours at £19 per hour).

First-Tier Tribunal (TC07403): *Christopher Swales*

6.9 Other administration issues

6.9.1 Queen's Speech

The Queen's speech on 19 December 2019 contained no significant VAT announcements, other than the potential impact of Brexit actually taking place on 31 January and the transitional period ending on 31 December; there was also a declaration that there would be no increase in the rate of VAT, and that is likely to be interpreted as also meaning that there should be no significant extension in the scope of the tax.

6.9.2 Compliance checks

HMRC have updated a number of their compliance check factsheets:

- CC/FS1a: *General information about compliance checks* (minor changes);
- CC/FS1b: *General information about checks by campaigns and projects* (more information on safeguards during compliance checks, and when HMRC may seek to agree contract settlements);
- CC/FS7c: *Penalties for careless inaccuracies relating to tax avoidance* (presumably a new factsheet in relation to new rules that came into effect for tax periods beginning on or after 6 April 2017 and ending after 15 November 2017);
- CC/FS1c: *Compliance checks into certain large and complex businesses* (adding soft drinks industry levy and diverted profits tax to the list of taxes and duties to which it applies).

6.9.3 Policing the police?

The Good Law Project (GLP) issued judicial review proceedings against HMRC, challenging their failure to raise an assessment for VAT on Uber. GLP claimed that HMRC should raise a protective assessment, pending consideration of the actual liability of Uber to pay VAT, in order to avoid each successive VAT period becoming time-barred.

HMRC were concerned that confirming whether or not it had raised an assessment would be a breach of its obligation of confidentiality to a taxpayer (Uber); however, they could not defend the proceedings without saying whether or not they had done so, and so they applied for a court order authorising disclosure and imposing confidentiality obligations on GLP.

The High Court heard submissions from GLP, HMRC and Uber (who resisted disclosure). The court held that it did not need to give permission for such disclosure, because disclosure was automatically allowed in the context of civil proceedings; nor was it necessary to impose restrictions on GLP, as the Civil Procedure Rules already required confidentiality.

High Court: *Good Law Project Ltd v HMRC and another*

6.9.4 HMRC prosecution round-up

A trader was prosecuted after investigators found over £50,000 in cash at his home. His business had existed since at least 2006, but had not been registered for VAT. The investigators found records showing that he had dealt with almost £3.5m in the three months before the raid. He absconded to Pakistan before his trial, but in his absence he was found guilty of money-laundering and sentenced to six and a half years in prison. The £50,000 was confiscated.

http://www.mynewsdesk.com/uk/hm-revenue-customs-hmrc/pressreleases/ledger-books-land-3-pounds-5-pence-million-launderer-with-jail-sentence-2927212

A farmer and his wife made fraudulent claims for VAT repayments totalling £610,000 between July 2011 and March 2015. They pleaded guilty to fraudulent evasion of VAT and money-laundering offences, and were sentenced respectively to 18 months and 15 months imprisonment.

http://www.mynewsdesk.com/uk/hm-revenue-customs-hmrc/pressreleases/county-armagh-couple-jailed-for-vat-fraud-2948933

6.9.5 Criminal appeal

An individual was prosecuted by HMRC for failure to register a company and account for a substantial amount of VAT on property sales. He was convicted and given a suspended sentence, but appealed against his conviction on the grounds of fresh evidence. This mainly comprised a VAT registration certificate that he argued had been withheld by HMRC in the original prosecution, and which showed that he had been registered for VAT. He contended that the failure to disclose the certificate rendered the conviction unsafe.

The Court of Appeal reviewed the “chaotic” history of the business, which had been registered, deregistered, struck off and reinstated before eventually being subject to prosecution. The registration certificate had arrived in the post on the day the conviction was handed down; HMRC explained that it had been requested by one of its officers to test whether the system would produce one, and it had been computer-generated based on current information at the time it was requested, rather than being relevant to the position several years earlier.

The judges agreed that the document did not have the significance that the appellant sought to attach to it. The appeal against conviction and sentence was dismissed.

Court of Appeal: *R v Binfield*

6.9.6 HMRC’s automated processes

HMRC have issued a technical note outlining legislation that they plan to include in the Finance Bill 2020 to put beyond doubt the legal basis on which automated processes are used to issue assessment and penalty notices, following a run of recent court challenges. The legislation will cover: notices for individuals, trustees, partnerships and corporate bodies to file returns; correction of returns by HMRC; and penalty notices for all taxes, including SDLT. It will specify that such notices are equally valid whether automated or issued by an officer of HMRC and will have

retrospective effect, except where matters have been settled by a court or tribunal before 31 October 2019.

The argument put forward by appellants is that the use of automated processes is not supported by legislation, which usually appears to require an officer of HMRC (or "the Commissioners", acting through delegation) to make a decision. HMRC believe that the use of automated processes is a reasonable use of delegation that is supported by the legislation, but the intention is to put the matter beyond doubt and put an end to the litigation on the matter.

www.gov.uk/government/publications/securing-the-tax-base-affirming-the-legislative-framework-for-hmrc-to-use-automated-processes

6.9.7 Security

HMRC have updated factsheet SS/FS2a: *Securities in respect of VAT at risk*. It will be given to people from whom HMRC may require security against the risk they may not comply with their obligations to pay VAT. Among other things, it sets out the consequences of ignoring a security notice:

It's a criminal offence to continue to make or receive taxable supplies without giving the security shown on a notice of requirement. Taxable supplies mean the supply of any goods or services that are taxable. This includes supplies made between members of a group registration.

If we have sent or given you a notice of requirement and you continue to make taxable supplies without giving the security in full, we may prosecute you. In the event of a successful prosecution, you may have to pay a fine of up to £20,000 for each taxable supply you make without giving the security.

If you're involved in a business that continues to make or receive taxable supplies without giving the security, we may prosecute each individual involved in that business. You may also be personally responsible for paying any fines and compensation awarded by the court.

The factsheet also sets out HMRC's view of the law on appealing about security notices:

If you have appealed to an independent tribunal against a notice of requirement, and you continue to make or receive taxable supplies without giving the security we have asked for, you may still be prosecuted. However, to allow time for your appeal to be heard, we may agree to wait for the tribunal's decision before starting or continuing any prosecution action. If we agree to wait, we'll write to tell you.

If the tribunal dismisses your appeal, or you withdraw it, we may decide to immediately start or restart prosecution action.

www.gov.uk/government/publications/securities-in-respect-of-vat-at-risk

A company appealed against a notice to deposit security of £110,930 issued in October 2018 and confirmed on review in April 2019. The judge started by noting the recent decision in *Pachangas Mexican Restaurant Ltd* in which the judge referred to the slightly different rules in the FA 1994 relating to restoration of seized goods. The present judge did not agree that FA 1994 was in any way relevant and concluded that her

jurisdiction was restricted to considering the facts that were before the officer when the decision was taken, ignoring any facts that came to light later.

The judge also decided that both the original decision and the review decision were equally subject to the supervisory jurisdiction of the Tribunal, because the reviewer had the power to confirm, cancel or vary the original decision.

The director had owned a previous company that went into administration in 2014 owing £116,000 in PAYE and £117,000 in VAT. He had bought the assets of the company out of the administration and carried on the business in a new company, which also went into liquidation owing over £62,000 in PAYE and £78,500 of VAT. The director argued that these companies had been forced into liquidation by outside factors beyond his control, so it was unreasonable for HMRC to take their history into account. The appellant was a third company that carried on the same business as the first two.

The Tribunal reviewed the history of VAT returns and unpaid VAT debts for the appellant company. At the time the security decision was taken, there were arrears of £85,930 and unpaid default surcharges of £7,223, and a VAT return was a month overdue. The officer took into account:

- the amount outstanding;
- the number of returns that had been filed late or not at all;
- the continuing failure to meet VAT liabilities as they became due;
- the fact that the appellant had not paid any VAT at all for nine months;
- the fact that the appellant was using a factoring agent (which meant that it was receiving cash for its sales);
- the losses shown in the company's accounts;
- the history of the previous companies and their debts to HMRC;
- the fact that a TTP arrangement had been entered into (and largely met) for PAYE.

She concluded from all these factors that the company posed a risk to the revenue.

The appellant presented his version of his efforts to pay the VAT and turn the company around. In brief, he could not both afford to pay the security and pay off the arrears; he had hopes of a substantial improvement in business that would enable him to clear all the debts.

The judge could find no fault with the decision or the review, and noted that some of the appellant's arguments were irrelevant to the matters that had to be considered on appeal. The appeal was dismissed.

First-Tier Tribunal (TC07405): *BPF Tanks Ltd*

On 24 September 2018, HMRC issued notices requiring deposit of security for PAYE and NIC, and also for VAT to a taxpayer company (and, on a joint and several basis, from its director). The VAT requirement, based on six months liability for quarterly returns, was

£21,900; the PAYE requirement was originally stated at £14,586, but this was reduced on review to £4,800. The company appealed.

The judge started by noting that the jurisdiction of the Tribunal is wider in respect of PAYE security notices than in relation to VAT. For PAYE, the Tribunal has wide powers to confirm, set aside or vary the Notice; for VAT, its jurisdiction is only supervisory, in that it can allow an appeal if it is satisfied that the decision on which the Notice was based is unreasonable, but it can then only refer the matter back to the Commissioners for a fresh decision. Even if the decision was unreasonable, the trader's appeal will be dismissed if the Tribunal is satisfied that a reasonable decision (e.g. one based on relevant rather than irrelevant factors) would inevitably have been the same.

The judge expressed concern that the officer who had given the decision had not set out her reasons for it in a witness statement or in any of the correspondence with the taxpayer or its representatives. The only document which clearly explained the reasons for HMRC's belief that the company was a risk to the revenue was the Statement of Case for the Tribunal.

The officer who made the decision had retired, but the basis of her decision was recorded in HMRC's electronic case notes. Several related businesses, owned by the same two people and operating from the same address, had been identified; some had substantial outstanding debts for PAYE and VAT, including default surcharges; some had ceased trading or been struck off owing taxes.

The judge noted that the appeal was only concerned with the reasonableness of the decision made by the officer on the basis of the information she had at the time. The director had given a considerable amount of extra information to the Tribunal that explained his business activities and the reasons for the various company failures, but to the extent that this was not known to the officer at the time, it could not be relevant.

The judge accepted the director's argument that some of the companies in HMRC's "chain of connection" were irrelevant because he had only become involved with them after they had become insolvent. HMRC also cited his bankruptcy in 2013 as a relevant factor, but they had not explained how it represented a risk to the revenue in relation to companies that had started trading later. This reliance on irrelevant factors rendered the decisions "unreasonable" in the required sense.

That was not the end of the matter: the judge had to consider whether HMRC would inevitably have come to the same conclusion if they had left out the irrelevant matters. In the absence of a witness statement from the officer who made the decision, or a detailed account of the weight given by her to the various factors, it was not possible to come to that conclusion. The officer carrying out an independent review of the PAYE security notice appeared to recognise that it was the cumulative effect of the historical failures that led to the requirement, and therefore if some of them were removed, HMRC might not have come to the same decision.

The appeal was allowed.

First-Tier Tribunal (TC07423): *Tower Hire & Sales Ltd*