VAT UPDATE
JANUARY 2022

Covering material from October – December 2021

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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 is updated on an irregular basis. The latest update appeared on 14 October 2021, so it is a little "stale".

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. Conversely, appeals regularly appear in the Upper Tribunal and higher courts without ever having appeared on the list.

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

- *Beigebell Ltd*: HMRC succeeded in appeal (covered in July 2020 update) against the FTT decision that a company's directors did not have the means of knowledge of the connection of their company's transactions to a missing trader fraud: case remitted to a differently constituted FTT.
- *Chelmsford City Council, Mid-Ulster District Council*: HMRC have been granted leave to appeal on particular points against the FTT's decisions on local authority sports provision (no appeal against the related decision in *Midlothian Council*). UT hearing listed for March 2022.
- *DCM (Optical Holdings) Ltd*: the taxpayer has been granted leave to appeal against the Court of Session's decisions in favour of HMRC (listed for 8 February 2022).
- *Netbusters (UK) Ltd*: HMRC have been granted leave to appeal to the UT against the FTT decision that the company's provision of sporting facilities was exempt.

- *News Corp UK & Ireland Ltd*: the company is seeking leave to appeal to the CA against the UT's decision that its digital newspapers did not qualify for zero-rating before the law was changed on 1 May 2020.
- *NHS Lothian Health Board v HMRC*: Court of Session allowed taxpayer's appeal on grounds that "no repayment" had to be the wrong answer; remitted to FTT for reconsideration of the amount; HMRC have been granted leave to appeal to the Supreme Court.
- *Privin Corporation Ltd*: the FTT found in favour of a MTIC appellant. HMRC were granted leave to appeal to the UT, but it was agreed that the case would be remitted to a differently constituted FTT for rehearing (not on HMRC's list).
- *Revive Corporation Ltd*: MTIC case remitted by the UT to the FTT for rehearing.
- *The Prudential Assurance Company Ltd*: FTT decision in company's favour in the July 2021 update. HMRC are seeking permission to appeal to the UT.
- *Thorsteinn Gardarsson t/a Action Day A Islandi*: HMRC succeeded in their appeal against the FTT decision that a trader's products qualified as "books" rather than "stationery", and some issues have been remitted to a differently constituted FTT for further consideration.

1.1.1 Decisions in this update

- *Ampleaward Ltd*: HMRC's appeal against the UT decision that the company was not caught by the "fallback acquisitions" rule was rejected by the CA.

1.1.2 Other news on appeals

- *Bluejay Mining plc*: HMRC were granted permission to appeal against the FTT decision that a holding company was entitled to input tax recovery, but the website now says that the appeal has been withdrawn so the FTT decision is final.

2. OUTPUTS

2.1 Scope of VAT: linking supplies to consideration

Nothing to report.

2.2 Disbursements

Nothing to report.

2.3 Exemptions

2.3.1 Fund management fees

The Autumn Budget and Spending Review 2021 included an announcement that there will be a consultation on options to simplify the VAT treatment of fund management fees. No further details were given in the Budget, other than the review is part of an "ongoing review of the UK's funds regime".

OOTLAR Oct 2021, para.2.20

2.3.2 Education

A German partnership ran a swimming school, teaching the basics and techniques of swimming mainly to children. It considered that it ought to be exempt from VAT. The tax authority disagreed, and raised assessments for the years 2007 to 2011. During the course of the dispute in Germany, the authority replaced the original assessments with revised versions that allowed the deduction of input tax. The national Finance Court upheld the taxpayer's appeal, holding that swimming constituted "school education" and therefore fell within art.132(1)(j) PVD, and that a civil law partnership qualified for the "private tuition" exemption.

Questions were referred to the CJEU. The referring court considered that the situation was different from that in *A & G Fahrschul-Akademie* (Case C-449/17), because that dealt with more specialised tuition; it also asked whether a partnership might have "similar objects" to a public body and therefore fall within art.132(1)(i), on the grounds that there is a public interest in people being able to swim safely. The questions therefore related to whether swimming fell within (i) and (j); whether the objects could be regarded as falling within (i); and whether a partnership could satisfy "private tuition".

The CJEU commented that exemptions must be strictly interpreted. A swimming school did not provide the transfer of knowledge and skills covering a wide and diversified set of subjects, as characteristic of school or university education; it was too specialised, in the same way as the driving instruction in *Fahrschul-Akademie*.

This meant that it was not necessary to consider the second or third questions, because the subject-matter did not qualify for exemption.

CJEU (Case C-373/19): *FinanzamtMünchen III v Dubrovin & Tröger GbR – Aquatics*

2.3.3 Spiritual welfare

A Church of England minister ran spiritual retreats. She was a "self-supporting" minister, not receiving a stipend from the church. The retreat activities were not run by a charity because of legal difficulties with the fact that they took place in her home. She appealed against a ruling that the activities did not qualify for exemption as "welfare" under Sch.9 Group 7 item 9.

The question before the Tribunal (Judge Nicholas Aleksander) was whether her activities fell within the words of the statute, or whether she could rely on the principle of fiscal neutrality. The judge agreed that the supplies of spiritual welfare clearly fell within Note 6; however, the supply also had to fall within the basic conditions of Item 9. As the supplier was not a charity or a public body, the only possible condition was that of "a state-regulated private welfare institution or agency".

The minister put forward several arguments based on the wording of Note 8. That refers to "exempted from registration by any Minister or other authority pursuant to a provision of a public general Act". The Church of England was subject to various Acts of Parliament and was, as the established church, an emanation of the state. She was a minister of that church, and had been approved and licensed by the church in respect of the retreat activities.

The judge agreed that this meant that the activities were "regulated by the state". However, "a state-regulated agency" was a defined term of law, and the difference was critical. The reference to "any Minister" in its context clearly referred to a government minister (or the equivalent in the devolved administrations). The legislation governing the Church of England is not in "public general Acts". This distinction was described as an "esoteric point": the judge expressed some sympathy with HMRC attempting to frame guidance in Notice 701/2, which at section 3.3.1 refers to providers regulated by various listed organisations and "any other similar regulatory body". This was necessarily written in straightforward language to be useful to the majority of traders, but it could not override the law, which did not regard the Church of England as the type of regulator that would make the services qualify for exemption.

In relation to the fiscal neutrality argument, the appellant contended that the same services provided by a charity would be exempt, and she competed with them directly. This argument had been dealt with and dismissed by the Court of Appeal in *LIFE Services and The Learning Centre Romford v HMRC* in 2020: the court held that art.132(1)(g) PVD had been correctly implemented in the UK by Item 9, and the conditions did not breach fiscal neutrality. That was a binding authority and the appellant's submissions on the point must therefore fail.

The judge dismissed the appeal, and suggested that it might be worth taking specialist legal advice to see if it was in fact possible to operate through a charity, in spite of the fact that the activities used the minister's own house.

First-Tier Tribunal (TC08315): *Taylor (trading as Mill House Retreats)*

2.3.4 Sport

A company owned a boathouse at Ely, and licensed it for use to three Cambridge University boat clubs. The company wanted to deduct input tax on expenditure; HMRC considered that its supplies were exempt within VATA 1994 Sch.9 Group 10 item 3: "The supply by an eligible body to an individual of services closely linked with and essential to sport or physical education in which the individual is taking part." HMRC disallowed repayment claims for periods from 02/16 to 04/18, and raised assessments for 05/17 and 07/18; the total VAT at issue was £575,000.

It was common ground that the company was an "eligible body" for the purposes of Group 10. The question was whether the "true beneficiaries" of the supply were the individual rowers taking part in the sport, or the clubs. Judge Anne Redston set out a summary of her decision at the beginning:

"*The Tribunal decided that the Clubs were the true beneficiaries, because they have the right to use the Boathouse for their training programmes and the right to store their equipment, and they pay for those rights. In contrast, the rowers:*

(1) had no right to access or use the Boathouse other than at the invitation of the Clubs and at the direction of the Clubs' employees;

(2) did not pay, either in money or in kind, for the usage of the Boathouse; and

(3) had no right to store their own equipment in the Boathouse."

This did not finally determine the company's appeal: HMRC considered that its entitlement to input tax depended on various further factors which would now be the subject of negotiation between the parties. If there is no agreement, the issues will be the subject of a further hearing.

The judge set out the history of the business of the appellant. The annual boat races between Oxford and Cambridge date back to the 19th century. Until 2016 three unincorporated clubs were responsible for fielding teams for the races; these were effectively incorporated in August to October 2015, and now three companies carry on the same activities.

The decision sets out the objects and purposes of the clubs, which were effectively identical in relation to the men's, women's and lightweight men's teams – to produce University crews to beat Oxford. There were subsidiary purposes to promote college rowing and to enable the best rowers to represent the University nationally and internationally. However, the boat race itself no longer appears in the objects of the companies, which are set out in more general terms relating to public benefit and the participants' health, well-being and development. However, a director of the women's company gave evidence that the primary purpose remains to win the annual boat race. The other companies agreed with her submissions.

Before the appellant constructed the boathouse at Ely, the facilities available to the three University crews were poor, and threatened the competitiveness of the squads. Oxford had built a state-of-the-art boathouse and was likely to attract better rowers as a result. The appellant was incorporated in October 2015 as a non-profit making company limited by guarantee. The boathouse was constructed over the period to January

2017 at a cost of some £5 million, funded by donations and a loan from the University. The company opted to tax the boathouse in order to recover the £575,000 VAT incurred in the construction.

The company granted a 99-year licence to the three companies, expressing the purpose of the arrangement as primarily to "beat Oxford". The companies were granted various rights of use in respect of the boathouse and surrounding premises. The rights were granted on a non-exclusive basis to all three companies; other rowers and clubs might also be able to use the facilities.

The fees payable by the clubs were determined annually with the intention of covering running costs and leaving a small margin to form a sinking fund for future enhancement, repair and replacement costs. The income is approximately £40,000 to £50,000 a year from licences; there are small other sources of income from hiring the boathouse for events, licensing the fishing rights and occasional use by other clubs.

The annual boat races are organised by another company, which organises and receives sponsorship for the races and pays the rowing companies a large proportion of their income (e.g. 51% of the men's company's 2017 income of £235,000). The Tribunal decision records the way in which the race crews are recruited and how they use the boathouse.

HMRC's decision was based on the CJEU judgment in *Canterbury Hockey Club v HMRC* (Case C-253/07). The CJEU held that affiliation fees paid by hockey clubs to England Hockey were covered by the exemption, because they were effectively paid on behalf of the individuals who took part in the sport. This was based on the principle that exemptions must be strictly construed (implying that only "individuals" could benefit from the exemption), but that the interpretation should not deprive the exemptions of their intended effect. The exemption would apply to supplies received by a "legal person" as long as the "true beneficiaries" were individuals taking part in sport, and the services were directly linked to that participation.

A different result was reached by the FTT in *Berkshire Golf Club* (TC04774), which concerned fees paid to golf clubs in respect of "corporate golf days". The clubs argued that the true beneficiaries of the services were the individuals who played golf; the FTT agreed with HMRC that the corporate body that arranged the event and invited the golfers was the true recipient of the supply, and it was taxable. There was no relationship and no supply between the golf club and the individual.

The Tribunal also referred to the Upper Tribunal decision in *Abbotsley Ltd v HMRC* (2018). This confirmed the FTT's decision that affiliation fees paid by golf clubs in respect of their members being awarded recognised handicaps (under the CONGU system) were for the direct benefit of the individuals and were therefore exempt.

Rowers who put themselves up for selection paid £150 to the rowing company; those who were selected paid further amounts each term, but those who were "cut" did not receive a refund. The company argued that there was no direct link between the payments made by the individuals and any right to use the boathouse. Those who were cut never visited it; those who did train there were receiving many other benefits for their

payment. The Tribunal agreed with the appellant's representative that the individual rowers gave no consideration for the right to use the boathouse.

HMRC's representative argued that the beneficiaries of the payment had to be either the rowers or the sponsors, and clearly it was nonsense to regard the sponsors as benefiting. The company's representative responded that the clubs/companies were limited companies with their own independent and clear purpose (to win boat races), and they could be beneficiaries. The judge went on to consider more factors to determine whether the rowers or the clubs were the true beneficiaries.

The appellant's representative argued that the situation was very similar to that in *Berkshire Golf Club*: rowers could only use the boathouse when invited by the clubs/companies, and under their direction and supervision. The judge agreed with HMRC that the situations were different: at a corporate golf day, the golf is only one purpose in the context of developing business relationships, but rowing was the sole purpose of the clubs and the rowers. However, the analogy was close enough: the use of the boathouse for training belonged only to the clubs, as derived from the licence between the clubs and the appellant, and the rowers only had the right to use the boathouse at the invitation of and under the direction of the clubs.

The clubs were also the clear beneficiaries of rights of storage: everything in the boathouse, that did not belong to the appellant, belonged to the clubs. The boats were expensive and had to be safely stored, and this was an important benefit to the clubs rather than to the individuals.

The judge also rejected HMRC's argument that the rights were similar to the handicaps in *Abbotsley*. It was necessary to focus on the supply, which was of the use of the boathouse for training and storage. There was no flow-through of those rights to the rowers. The handicaps clearly benefited individual golfers by enabling them to take part in serious competitions. The benefit to individual rowers of using the boathouse was much less direct, and it did not make them the "true beneficiaries" of the supply.

HMRC also argued that a finding in favour of the appellant in this case could lead to many other sports clubs being denied exemption. The argument was that many clubs, like the clubs in the present appeal:

(1) have an identity which continues beyond the current active participants;

(2) select teams and reject others who would like to play; and

(3) own the major items of equipment and the rights to carry out the sport in a particular location. For instance, rowing clubs typically own the boats, and football clubs license the pitch and provide the goal posts, corner posts, nets and balls.

The appellants' representative responded that this misrepresented the position. In most clubs the members had rights of access and usage, whereas in the present case none of the rights to use the boathouse were passed to the rowers. The judge considered that such an argument was hypothetical and could not affect the decision; however, she also agreed with the appellant that it would be rare for a club to limit use of its facilities so strictly.

The issue for determination was settled in favour of the appellant, and the further issues were left to be discussed between the parties.

First-Tier Tribunal (TC08304): *Cambridge University Boathouse Ltd*

2.4 Zero-rating

2.4.1 Work on aircraft

HMRC ruled that supplies made by a company to the Ministry of Defence were standard rated. The company appealed, arguing that they were zero-rated within VATA 1994 Sch.8 Group 8 item 2 as "The supply, repair or maintenance of a qualifying aircraft or the modification or conversion of any such aircraft provided that when so modified or converted it will remain a qualifying aircraft." HMRC ruled that the supply comprised goods, rather than services, and was therefore standard rated. The VAT assessed was £12.5 million, but this was agreed to be incorrect because the contract stipulated that the price was VAT-exclusive.

The company faced a problem in establishing its case to the required standard of proof because some of the sensitivity of some of the evidence. The hearing was held in private, which is unusual, and the published decision redacts some of the contractual material. The Tribunal heard oral evidence from employees of the company and the MoD under cross-examination, and had to consider an electronic bundle of 1,504 pages.

The decision starts with the following interesting detail:

During the course of the hearing, we raised with both parties the possibility that the supply made by LMUK to the MoD was neither a supply of goods (as submitted by HMRC), nor a supply of zero-rated modification/conversion services (as submitted by LMUK). This potential analysis was rejected by both parties at the hearing. However, following discussions between the members of the Tribunal panel after the conclusion of the hearing, we considered that this potential analysis ought to be given proper consideration and gave directions for additional submissions from the parties on the following two questions:

(1) Under what circumstances (as a matter of law) it is possible for there to be a supply of goods by supplier to customer where the tangible property that is the subject of the supply incorporates tangible property that belongs to the customer?

(2) In the event that such a supply cannot be a supply of goods, could the supply by LMUK to the MoD be a supply of services which is not a supply of modification services?

The company's submissions included reference to a recent Supreme Court judgment in which the Court of Appeal was criticised for engaging in "inquisitorial activities" rather than deciding between the merits of the cases advanced by the parties. The company considered that it could not, and should not have to, address a case that had not been formulated and put to it properly in advance. Judge Aleksander decided that the Tax Tribunal was entitled to raise arguments of its own motion and could come to a decision on a basis that had not been adopted by either party; he considered that giving the parties the opportunity to make written submissions was enough to preserve procedural fairness.

The judge set out the history of the contract, which involved updating the radar capabilities on Royal Navy aircraft. The total contract price was over £100 million. It was a highly technical, complicated and long-running operation, that had involved a subcontractor "losing control" of its part of the project, resulting in further difficulties for the appellant in meeting its obligations to the MoD.

The parties had agreed that there was a single complex supply, and the Tribunal had to determine the character of that single supply for the purposes of VAT. That involved identifying the predominant element of the single supply. The judge quoted at length from A-G Kokott's opinion and the full court judgment in *Levob*, highlighting the importance of the predominant element for the customer. The case of *Aktiebolaget* was also relevant in deciding what was a supply of goods and what was a supply of services, and the more recent decision in *Mesto Zamberk* gave more detail about the identification of predominant elements. The judge noted that the UT had criticised the FTT in the *Wetheralds* case for "entering into an unduly detailed dissection of all the elements of a supply, rather than conducting an overall assessment from the perspective of the typical consumer."

HMRC argued that the predominant element of the supply was "role-fit kits" which were attached to the helicopters, and this was a supply of goods. A supply of goods involved the transfer of the right to dispose of something as owner; the judge invited submissions on whether it was possible to make a supply of goods where the supply incorporated tangible property owned by the customer (i.e. the helicopters to which the role-fit kits were attached). The submissions referred to *Sai Jewellers* (VAT 12679 and VTD 13567), which concerned customers giving jewellery to a jeweller to be remodelled into something new, and *Graphic Procede*, which involved producing copies from originals that continued to belong to the customer. In *Sai*, the Tribunal decided that the nature of the supply depended on the proportion of the new item that was made with the customer's own gold; in *Graphic Procede*, the CJEU ruled that it depended on the complexity of the "additional elements" in the reprographic services – simple copying onto a supplier's own paper would be a supply of goods, but if there was a more involved process, it could predominate and change the nature of the supply into one of services.

The Tribunal went on to consider what is meant by "modification or conversion" in the legislation, referring to Notice 744C and to a number of passages in the HMRC *VAT Transport Manual*. This included the following examples:

– if a part or piece of equipment is to be removed and disposed of and replaced by a new part, although there may be an associated amount of service, that is a supply of goods and it is standard-rated

– if an unserviceable part or piece of equipment is replaced by a reconditioned part or piece of equipment, this is a service and it is zero-rated

– if there is extensive and wide-ranging work to the whole ship or aircraft and, although there may be an associated supply of goods, the overall supply is likely to be of services and is zero-rated.

The judge noted that the witnesses were conscientious and honest, doing their best to assist the Tribunal. However, their statements contained numerous comments on HMRC's Statement of Case which were in the nature of legal submissions or opinions rather than pure evidence. In addition, the company's employee had only been involved with the project in its preliminary stages; he was unable to give first-hand evidence about the details of what was actually supplied. Similarly, the MoD employee was very helpful in relation to the procurement process, but was unable to provide details of the predominant elements of the supply.

After a long and detailed examination, the judge made a number of findings of fact. He noted that part of the problem for the company was that, six years into the contract, it was still in a state of flux: it had not fulfilled its obligations under the contract, and was still working out how to do so. It was not clear what the supply would involve when the company had not yet determined how to achieve it.

At the risk of over-simplifying, the decision appears to be based on the fact that the role-fit kits were always intended to be fitted to and removed from individual helicopters. The company had not therefore modified any particular aircraft; it had supplied something that could be used to modify the aircraft in general – ten kits for 30 helicopters – and that was a supply of goods. It was not possible to consider a "typical customer" when there was only one possible customer; but the company had failed to produce reliable and credible evidence about the nature of its supply to the other contractor, or the other contractor's supply to it, or its supply to the MoD. It had therefore failed to discharge its burden of proof that the assessment was incorrect in principle.

The appeal was dismissed. The amount of VAT would have to be recalculated on the basis that the contract price was stated to exclude VAT; the burden of the VAT would therefore fall on the MoD. The judge had discussed earlier in the decision the curious result, that HMRC were pursuing an assessment where the outcome would simply be to move money from one part of the public purse to another.

First-Tier Tribunal (TC08332): *Lockheed Martin UK Ltd*

2.4.2 Updated Manuals

HMRC's *VAT Health Manual* has been updated to provide a link to a list of approved providers and countries for zero rated dispensing of drugs by EEA registered health professionals from 1 January 2021.

VATHLT6030

2.5 Lower rate

2.5.1 Insulation for roofs or insulated roof?

In TC07828, the FTT had to consider an argument about the supply of insulated roofing panels. The company appealed against assessments for £2,581,092 in respect of supplies charged at 5%, when HMRC considered they were standard rated, from 12/17 to 12/19. By the time of the hearing,

HMRC had accepted that some assessments for earlier periods were out of time, and a separate appeal for the 03/19 period had been added to the list, with a hardship application accepted by HMRC.

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

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

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

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

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

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

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

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

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

(3) The Upper Tribunal gave no guidance in Pinevale itself how to apply the distinction between "insulation for roofs" and the "roof itself" in particular cases. The taxpayer in Pinevale was not represented and there

is no record of any submissions being made to the effect that Pinevale's products, despite being "roof panels", nevertheless constituted "insulation for roofs".

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

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

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

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

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

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

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

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

The UT rejected arguments based on earlier precedents suggested by the appellant's counsel, including *Marchday Holdings* (1996). Those cases concerned the difference between construction and alteration, and involved a comparison of the situation before and after the work had been done. However, they had not been about the reduced rate as it applied to insulation for roofs: *Pinevale* and *Wetheralds* were the directly applicable binding precedents. The conclusion that the new panels provided the majority of the surface area of the roof, and was therefore "a new roof", could not be undermined by this argument.

An argument that the FTT had wrongly considered the state of the roof in the middle of the installation process was also rejected. This was a detail

of the FTT decision: the FTT had concluded that there was no roof at all after the original panels had been removed, so it was not possible for the new panels to be "insulation for a roof". The UT considered that this was part of the FTT's overall evaluation and involved no error of law.

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

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

The appeal was dismissed.

Upper Tribunal: *Greenspace Ltd v HMRC*

2.6 Computational matters

Nothing to report.

2.7 Discounts, rebates and gifts

2.7.1 Rebates in the distribution chain

Boehringer Ingelheim (BI) is the Hungarian subsidiary of a pharmaceutical company. Its main activity is the marketing of subsidised drugs to wholesalers, who sell them to pharmacies who then distribute them to patients. In Hungary, medicinal products are sold at the retail level, with the exception of hospitals, through pharmacies. Pharmacies source from wholesale distributors and wholesalers from pharmaceutical distribution companies, such as BI.

The state health insurance body (NEAK) subsidises some medicines through a "purchase price subsidy" system. The patient pays a net amount to the pharmacy, equal to the difference between the price of the drug and the amount of the subsidy paid by NEAK. The pharmacy is then reimbursed by NEAK. The pharmacy is liable for output tax on both elements of consideration received for the sale.

In order to ensure that the medicines it distributed on the Hungarian market remained subsidised, BI concluded "reimbursement agreements" with NEAK. This provided for a rebate to NEAK based on the amount of the subsidy and the volume of sales. In some cases, the rebate was 100%, after a certain level of sales had been achieved. NEAK did not issue

invoices representing the value of the rebate, but the amounts could be verified by other documentation.

In November 2018, BI filed a correction to its output tax for the period from 1 October 2013 to 31 December 2017, claiming back approximately €1m in respect of the rebates paid. The tax authority refused the correction. Questions were referred to the CJEU, noting in particular the earlier case brought by the same group in respect of rebates paid in Germany (Case C-462/16), where the CJEU held that the tax base should be reduced by the refunds. The referring court noted that there was a possibly significant difference in Hungary, in that the rebates were paid by virtue of a private law agreement that was optional for the parties, whereas in Germany the rebate was covered by national law.

The CJEU set out in clear terms the mandatory nature of the adjustment required by art.90 PVD. Although the article refers to Member States having some "margin of appreciation" in how the provision is implemented, nevertheless it is a fundamental rule of VAT that a supplier should only have to account for output tax on the consideration finally received. The distinction between national law and a private contract did not have any relevance.

Similarly, art.273 allows Member States to introduce measures that they deem necessary to ensure the correct collection of VAT and to avoid fraud, but these may in principle derogate from compliance with the rules relating to the tax base for VAT only within the limits strictly necessary to achieve this specific objective. Although requiring an invoice to support an adjustment of this type was a reasonable provision, in the present circumstances it would infringe the principle of effectiveness: it would be practically impossible or excessively difficult for BI to comply. The principles of VAT neutrality and proportionality require that the Member State concerned allow the taxable person to establish, by other means, before the national tax authorities, that the transaction giving entitlement to the reduction in the tax base has in fact been carried out. This was even more so when the transactions involved a State entity such as NEAK.

The Hungarian rules were held to be contrary to the Directive in both respects.

CJEU (Case C-717/19): *Boehringer Ingelheim RCV GmbH & Co. KG Magyarországi Fióktelepe v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága*

2.8 Compound and multiple

Nothing to report.

2.9 Agency

2.9.1 Services or staff?

In TC07690, a company appealed against assessments totalling £164,866 for periods 01/11 to 01/14 in respect of the supply of staff, which it had treated as exempt supplies of medical services.

There was a chain of supplies, and the decision was based on analysis of the chain of contracts:

- between the appellant and various medical consultants and doctors;
- between the appellant and an intermediary company, A&E Ltd;
- between A&E Ltd and the various clients who used the staff, mainly NHS trusts.

The judge (Jonathan Cannan) noted that the care was provided by registered medical practitioners and was also provided in hospitals. There was therefore no doubt that the supplies were made in connection with an activity that was within the exemption both under EU and UK law. The only question was whether the appellant supplied the care, or whether it only supplied staff.

The judge considered a number of precedents, including *Moher* (dental nurses) and *Adecco* (temporary staff), where the crucial factor was the control assigned by the appellants to their clients and exercised by the clients over the staff. The judge noted that the situation was particularly fact-sensitive and considered that the cases of *Rapid Sequence* and *City Fresh* were not particularly relevant because their facts were not sufficiently similar.

The judge also noted that the parties had referred to cases that emphasised the importance of contractual terms in deciding what was supplied (such as *Reed Employment*), but not to more recent cases such as *Esporta Ltd* that required regard to be had to the economic and commercial reality. He said that he would consider all the circumstances in which the supplies took place. The parties were agreed that the key issue in light of all the circumstances is whether the consultants came under the control, direction and supervision of the NHS Trusts. If so, that would be a supply of staff by the appellant. If not, then it would be a supply of medical care by the appellant. He would consider that test taking into account the objective of the exemption and the EU law principle of fiscal neutrality.

He went on to examine the contracts and the way in which they were carried out in practice. He described the director's witness statement as 'notable for its brevity' and the evidence as 'notable for its generality'. Two doctors who worked for the appellant gave evidence and were considered to be reliable witnesses. The company's counsel put forward an analogy of a plumber being brought into a hospital to repair a leaky pipe, and drew five principles from his analogy, most of which were not accepted by the judge. In his view, the essence of the company's argument was that a supply of staff required control of what the person did to be transferred to the client, and the nature of the work was such that the doctors themselves controlled what they did; therefore control could not be transferred, and therefore it could not be a supply of staff. He did not accept that this was valid. It was not control of clinical decision-

making that counted, but control over the way in which the consultant worked. The evidence suggested that this was exercised by the NHS Trusts, not by the appellant.

After detailed examination, the judge concluded that the supply was taxable, being in the nature of a payroll service. The company had obtained professional indemnity cover, but it appeared that this covered the doctors for claims by the trusts, not the company for claims by patients. That too was suggestive of a supply of staff rather than care.

The principle of fiscal neutrality did not assist the appellant, because it was not clear that there were comparable services that were exempt under the law. The purpose of the exemption was to reduce the cost of medical care to consumers, but the purpose of the exemption could not override its application. The judge noted that no evidence had been presented on whether A&E Ltd charged VAT on its supplies to the NHS Trusts, which appears to be a surprising omission.

All the evidence that was presented related to the 80% of doctors supplied who were consultants. No evidence had been presented in relation to the other 20% who were GP Specialists; accordingly, the same conclusion followed. The appeal was dismissed.

The company appealed to the Upper Tribunal, where it came before Mr Justice Mellor and Judge Guy Brannan. It put forward six grounds of appeal:

- the test of control should apply to the clinical decision-making, rather than "the framework within which the consultants operate";
- the FTT should not have considered that either Mainpay or the clients exercised control over the doctors – they provided medical care under their own control, and their supplies were Mainpay's supplies;
- even if the FTT had applied the correct test, it had applied it incorrectly;
- the FTT's interpretation of the law was inconsistent with the purpose of the law;
- the FTT made a number of errors in relation to its approach to fiscal neutrality;
- the FTT was wrong to say that it had no evidence relating to GP Specialists, and drew unjustified conclusions.

The UT asked for written submissions on the scope of the medical exemptions within art.132(1)(b) and (c). Following these, the appellant's counsel changed his position to rely solely on (c): Mainpay could not fall within (b) because it was not a hospital or similar institution. This revealed an error in the FTT's decision, which stated that there was "no material difference between Item 1(a) and Item 4" (the UK equivalents of the two PVD provisions).

The UT examined the first three grounds of appeal together. The judges rejected the appellant's arguments that the key element of control was that over clinical decision-making, and also rejected an argument that the supplies made by the doctors were effectively made by Mainpay itself.

The precedents showed that the correct approach was to analyse the contracts in the light of commercial and economic reality, having regard to all the circumstances; that is what the FTT had done, and there was no reason to interfere with its decision.

The argument that the supplies should be exempt because the purpose of the exemption was to reduce the cost of medical care was described as "circular": it would lead to a very wide application of the exemption, which had to be interpreted strictly. The purpose of the exemption was to reduce the cost where the exemption applied; there were numerous cases in which the CJEU had chosen to regard supplies as taxable that would surely have been exempt if this was the correct approach (e.g. *d'Ambrumenil*, *Kugler*).

The UT also rejected the appellant's submissions on fiscal neutrality. Counsel argued that CJEU precedents suggested that the structure within which a supply was made did not matter (i.e. medical care supplied by Mainpay to A&E Ltd to the NHS Trusts); the UT did not accept that this was the meaning of the decisions referred to (e.g. *Canterbury Hockey Club*). Leaving aside the question of whether a sole consultant supplying services through a personal service company would be exempt (the UT did not express a view on this), that was a very different situation from Mainpay supplying the services through the intermediary company.

On the last ground, the UT did not consider that the evidence referred to had been sufficiently specific to affect the outcome of the appeal.

In their closing remarks, the judges stated that they had some reservations whether the art.132(1)(c) exemption could apply to supplies made in a hospital environment but otherwise than by the hospital. However, they had come to their decision on the arguments put to them at the hearing and in written submissions, and had no need to give a decision on that point. The company's appeal was dismissed.

Upper Tribunal: *Mainpay Ltd v HMRC*

2.9.2 Updated Notice

HMRC have updated their Notice *Health professionals and pharmaceutical products* with information about umbrella companies. Section 6.6 'Supplies of nurses, nursing auxiliaries and care assistants by state regulated agencies (the nursing agencies' concession)' describes the informal extra-statutory concession that exempts supplies of nursing staff and nursing auxiliaries supplied to a third party by nursing agencies acting as a principal. The update confirms that this does not apply to umbrella companies supplying services of staff to a recruitment agency. It only applies to the direct provision of staff.

Notice 701/57

2.10 Second hand goods

2.10.1 Second hand vehicles in Northern Ireland

Under the Northern Ireland Protocol, car dealers in Northern Ireland are not allowed to use the second-hand margin scheme for vehicles that are purchased in Great Britain and sold in NI; they must therefore account for output tax on the full selling price. Two measures have been announced to remedy this situation.

One of the measures is described as an interim arrangement and is intended to provide for the use of the VAT margin scheme for sales in Northern Ireland of motor vehicles sourced in Great Britain.

The other measure is intended to enable the introduction of a second-hand motor vehicle export refund scheme to allow businesses that buy used motor vehicles in Great Britain that are moved for resale in NI or the EU to claim a refund equivalent to the VAT on the price paid. This should put businesses in a similar financial position to using the second-hand margin scheme for these vehicles.

OOTLAR Oct 2021 para.1.37, 1.38

2.10.2 Manual Updates

HMRC have updated the *VAT Margin Schemes Manual* to remove out of date content on the interaction between margin schemes and TOGCs, and to correct an error in the example on bad debt relief on margin scheme supplies.

VATMARG02050, VATMARG11000

The same manual has also been updated to clarify the treatment of margin scheme sales between Northern Ireland and the EU.

VATMARG06000

2.11 Charities and clubs

Nothing to report.

2.12 Other supply problems

2.12.1 Commercial dispute

In a commercial dispute between two companies, a High Court judge awarded a figure of £212,294 to one of the parties. This was the determination of the amount properly due for a supply of services under contract, so the question of VAT arose. The parties did not dispute that the figure awarded was the net value of the supply, so VAT at the standard rate should be added when the amount was paid.

The judge also awarded the claimant a continuing fee on the basis of 10% of the defendant's profits arising out of a relationship with one of its clients. This also appears to be a net figure.

The rest of the judgment deals with the question of interest. The case is a reminder that some awards by a court (and out of court) are outside the scope of VAT because they are in the nature of damages; but where the court is determining the amount that ought to be paid for something, the award is consideration for whatever is the subject of the dispute, and is therefore within the scope of VAT.

High Court: *Premia Marketing Ltd v Regis Mutual Management Ltd*

2.12.2 Updated Manual

The *VAT Government and Public Bodies Manual* has been updated to confirm that a supply of staff by a public body made in its capacity as a public authority is outside the scope of VAT. The guidance has also been updated to provide examples of where HMRC considers there to be no economic activity meaning the supply is outside the scope of VAT. New guidance has been added setting out the steps to follow to determine the liability of a secondment arrangement.

VATGPB8860

3. LAND AND PROPERTY

3.1 Exemption

3.1.1 Simplifying the land exemption

On 30 November the Government published a summary of responses to the call for evidence on the simplification of the VAT rules for land and property, which ran from 12 May to 3 August.

Under "Next Steps", the document states that the Government will not be taking further any of the potential options that had previously been discounted by the Office of Tax Simplification. In particular, linking the VAT treatment to an independent land register is regarded as ineffective and probably inoperable.

HMRC recognise that "any significant changes to the VAT rules would require considerable further consultation and sufficient lead in times and transitional rules." Further consultation is promised for Spring 2022. In the meantime, more and better guidance is promised on a number of areas, including the treatment of dilapidations.

www.gov.uk/government/consultations/call-for-evidence-simplifying-the-vat-land-exemption

3.1.2 Storage pods

A company bought buildings at various sites throughout the UK and engaged contractors to convert them into self-storage facilities. These consisted of "store pods", which investors could buy with the expectation of a guaranteed 8% return in the form of rent to people who actually used them for storage. It would also be possible for someone to buy a pod and store possessions in it; but the structure of the business was to grant 999-year leases for a premium as well as annual charges; the pods were then subject to a six-year leaseback to the company, which rented them out to users. 99% of the people to whom the company sold pods were investors rather than users.

HMRC assessed for output tax on the amounts paid by investors for long leases, including the premiums, the annual service charges and ground rent payable. There was a preliminary dispute about whether the assessment had been raised in time, but the FTT agreed with HMRC that a typographical error in the company's spreadsheet had to be corrected by investigation and the officer did not have enough information to justify raising the assessment until satisfied that the correct figures were being used.

The FTT (Judge Anne Scott) drew the parties' attention to the Court of Session in *Sibcas Ltd*, which neither of them had referred to. Although it did not deal with a similar situation, it contained a thorough analysis of the relevant law and precedents. In particular, Lord Carloway said that "In deciding whether a supply is, put shortly, a grant of an interest in land, such as a lease of immoveable property, the whole circumstances of the supply and not just the physical properties of the product, must be looked at in order to understand the substance of the commercial transaction (supply) undertaken."

HMRC's assessment was based on the exclusion of self-storage facilities from exemption in accordance with VATA 1994 Sch.9 Group 1 Item 1(ka). The Tribunal held that the substance of the transactions was not "the provision of self-storage facilities" to the investors – they were suppliers of such facilities, not consumers of them. Item 1(ka) did not apply to the supply.

The other issue was whether the supply amounted to a licence to occupy land or a leasing or letting of immoveable property. HMRC argued that the company had adduced no evidence to show that the pods were immovable. There was some inconsistency between the director's witness statement and the company's counsel's skeleton argument about the construction of the pods, so the director was cross-examined on how they were built. Even so, the judge said that "frankly, on even a superficial basis, we had difficulty with HMRC's argument. The pictures demonstrated clearly that the Store Pods simply looked like rooms in a building."

The leases were registered at the Land Registry, and clearly could not be removed without destroying the asset. The annual rent and service charges were peripheral, and did not amount to "the letting of immovable property". Instead, the long leases for a premium transferred effective ownership of the property to the investors, and constituted the supply of part of a building. That was exempt within art.135(1)(j) PVD.

The appeal was allowed, except to the extent that any investor used the pod personally for storage. The quantification of any such use was remitted to the parties for them to agree.

First-Tier Tribunal (TC08299): *Harley Scott Commercial Ltd*

3.1.3 A convoluted argument

A dispute about the liability of the grant of a lease came before Judge Anne Scott, who referred to the documentation at the start of her decision: "We had the Substantive Bundle extending to 1245 pages and the Authorities Bundle from the previous hearing. We had no less than three iterations of Authorities Bundles supplied for this hearing, the last of which extended to 1139 pages. We also had an Additional Hearing Bundle extending to 139 pages." She stated that the appellant's representative had "advanced many disparate arguments which were at times incomprehensible and which were not inherently consistent"; she commented that the appeal had had "what can only be described as an unhappy procedural background".

This included procedural hearings in which the appellant had applied to serve witness evidence late and HMRC had applied for strike-out. She had refused most of the appellant's applications on the basis that the submissions were not relevant; however, she said that she decided not to strike the appeal out "on the basis that I had come to the view that the sums involved were large and, scattered disparately through the voluminous correspondence, Mr Macdonald had advanced various arguments which taken together might amount to a possible stateable Ground of Appeal." She stated that she had "pulled together some of the more credible and arguable points" and redrafted the ground of appeal for him.

The decision proceeds with further explanation of the judge's attempts to identify relevant arguments put forward by the appellant and to limit the files of "facts" to those that were potentially relevant to the issues to be decided. She commented: "*Whilst it would be our usual practice to outline and address an appellant's arguments, in this appeal that is neither proportionate nor feasible. As we have made clear the appellant has never understood:*

(a) What is evidence?

(b) What is opinion?

(c) What is assertion?

(d) What is admissible?

Therefore we address only the substantive issues in this appeal and disregard the multiple peripheral arguments."

After all this background, the judge turned to the facts of the case. The appellant was a non-profit club that provided facilities for hockey, cricket, tennis and croquet. Services and facilities were sometimes also used for other sports. Canterbury Christ Church University (CCCU) entered into an agreement with the club to develop a new indoor sports facility. The intention was that CCCU would contribute £2m towards the development costs; the club would contribute the same amount. The club wanted to retain the freehold of the ground and to retain control over the facilities, while the university wanted to ensure that it had some security for its capital investment and an annual payment of £250,000, and wanted to ensure continued access to the facilities. The university's lawyers described proposed arrangements in 2012 as "unduly complicated".

After further discussions, which included consulting a VAT adviser (but not following up a suggestion of clarifying the VAT treatment with HMRC), an agreement for lease was entered into in December 2014. The "tenant's contribution" of £2m was referred to in some places as a premium. Following correspondence between HMRC and the club during 2016 and 2017 about an option to tax, this became the subject of an assessment for £308,883 in July 2017. The actual lease was finally entered into in September 2017. Surprisingly, the basis of the assessment is not explicitly stated anywhere in the decision: it seems simply to be that the option had been exercised and the £2m was consideration for the opted supply, as opposed to "something else" (possibly a financing payment) that was not affected by the option.

The appellant's representative, who was an accountant, insisted that the nature of the payment was determined by the university's accounting treatment. The judge pointed out that nothing that constituted evidence had been submitted about that; in any case, the contractual position was the proper starting point. Similarly, an illegible spreadsheet attached to the appellant's own accounts could not support the accountant's arguments.

Turning to the contractual position, the accountant submitted that the various documents reflecting the transaction had to be considered separately rather than together. The judge pointed out that, by the time of the hearing, that position had been shown to be wrong by the CJEU decision in *Mydibel* ("to which, unfortunately, neither party referred us").

That decision makes it explicit that it is for the national court to assess if, the contractual structure of the transaction notwithstanding, the evidence put before the court discloses the evidence of a single transaction. The accountant relied on the Court of Session decision in *Balhousie Holdings*, which was reversed by the Supreme Court a few days after the hearing of the present appeal.

The accountant put forward many and varied arguments about the meaning of the word "premium" in relation to the £2m. The judge said that was "simply not the VAT issue". The issue was whether the payments were consideration for the grant of the lease. All of the documents had to be read together, from the agreement for lease signed in December 2014 to the actual lease in September 2017.

The accountant further contended that the annual payments of £250,000 were the consideration for the use of the facilities and the £2m had therefore to be "something else". The judge came to a very brief final decision on this point, referring to *Card Protection Plan*: the payment of the £2m and the grant of the lease were inextricably linked on an economic and commercial basis.

The appeal was therefore dismissed.

First-Tier Tribunal (TC08294): *Polo Farm Sports Club*

3.2 Option to tax

Nothing to report.

3.3 Developers and builders

3.3.1 Opco/Propco

A company operated care homes, which made exempt supplies. It contracted with a connected company to construct a new care home for use in its business. The supply of the new building was zero-rated because of a relevant residential purpose certificate issued by the Operating Company (OpCo) to the building company (PropCo). HMRC concluded that some of the supply did not qualify for zero-rating because it was not part of a single compound supply of the building; alternatively, input tax would be disallowed in PropCo because the supply included elements that were not "building materials". The VAT involved was £96,500, and the case served as a lead case for another dispute involving another transaction between companies in the same group.

One of the key elements in the company's case was that the projects were "turnkey developments" – the properties developed by PropCo were supposed to be capable of immediate operation as soon as they were handed over to OpCo. This supported the contention that everything that was covered by the contract was part of a single compound supply.

The judge reviewed the evidence and did not accept that this was a true "turnkey" arrangement. The obligations of the developer were delegated to OpCo under a Technical Services Agreement, so the "convenience" that was claimed was illusory. It was suggested that the use of the PropCo/OpCo structure enabled the group to obtain financing on better terms; the question was also raised whether a VAT advantage was intended, to which the answer appears to have simply been "OpCo was partially exempt".

Judge Aleksander examined the history of the development, and summarised the issues. The dispute concerned two types of "furniture, fixtures and equipment" (FF&E):

(1) FF&E which were in some manner fixed, attached, or installed in the building, which HMRC submitted were "incorporated" and which PropCo submitted were "loose". This included items such as wardrobes and bookcases.

(2) FF&E which were on any basis "loose" (and not "incorporated"). This included a wide range of items, such as chairs and tables, beds, linen, kitchen equipment, crockery, and general household goods, first aid kits, hairdressing kits, J-Cloths, puzzles, photocopier consumables and bird tables.

With regard to the "incorporated" items, HMRC regarded them as subject to the builders' block. The loose items were not part of a single supply of the building and were therefore not eligible for zero-rating.

The judge examined lists of items in the light of the Upper Tribunal decisions (2017 and 2018) in *Taylor Wimpey*. He set out the principles he derived from those cases in determining whether an item is "incorporated" in a building, and also the FTT decision in *Wickford Developments* on what is meant by "ordinarily installed by builders in a building of that type". After going over the principles and their application in some detail, he concluded that the company had not discharged its burden of proof to show that any of the incorporated FF&E were goods of a description ordinarily incorporated by builders in care homes. None of them qualified as building materials.

The next question was whether the FF&E were part of a single supply, which fell to be determined according to the principles of *Card Protection Plan* and *Levob*. The company contended that the "turnkey" nature of the project supported the treatment as a single compound supply. The judge did not accept this: "there is remarkably little evidence (if any) that supports Mr Simpson's submission that the intention of the parties was to develop Priors House on a turnkey basis." Various documents that might have been relevant were not provided by the appellant; the judge "drew inferences" from their absence, and after detailed consideration, he concluded that there was no intention on the part of any of the companies concerned that the care home should be developed on a turnkey basis.

Further, the FF&E could not be comprised within a single contract (the lease), except to the extent that an item was a landlord's fitting. The "loose" FF&E could only be supplied separately. The judge decided that the original reason for PropCo buying the FF&E was its more advantageous borrowing position, without any regard to how the items were to be provided to OpCo; the parties then sought to "reverse

engineer" the Agreement for Lease and the Lease and argue that they should be construed to bring the FF&E within their scope, even though there was no intention at the time those agreements were executed that they would include the FF&E. This would also have the benefit of zero-rating the supply of FF&E.

The appeal was dismissed, save in respect of the unincorporated status of curtains and voiles and bath thermometers. The decision includes a long and detailed list of particular items, setting out individual decisions on the "incorporated" status of each and whether they are subject to the builders' block.

First-Tier Tribunal (TC08284): *Silver Sea Properties (Leamington Spa) Sarl*

3.3.2 Updated Manual

HMRC have updated the *VAT Construction Manual* to clarify the treatment of building land sold by developers with back-to-back constructions contracts. In accordance with an old CJEU case (*Kerrutt v Finanzamt Mönchengladbach-Mitte*, Case C-73/85), a sale of building land is a separate transaction from construction services to be supplied later, even if they are governed by the same contract. Presumably this applies to a developer with a land bank selling land with a contract to build a house on it: the sale of the land is exempt. If the supplier had opted the land, the option should be disapplied in these circumstances by VATA 1994 Sch.10A para.11. If the construction has commenced when the land is transferred, the whole transaction may be zero-rated.

VCONST03700

The same manual has been updated to clarify the treatment of a deposit paid by a customer before construction has started, where it is expected that completion of the transaction will take place after the "golden brick" stage. The deposit creates a tax point at the time it is received by the supplier, but it is treated as part of the consideration for the supply that is expected to take place. It is therefore zero-rated, rather than exempt, because the supply is expected to constitute dwellings in the course of construction.

The manual states: "It is possible that the state of the land at completion will differ from that which was anticipated and where this is the case it will be necessary to revisit the VAT treatment of the deposit. It is not possible to give more detailed guidance as the position will depend upon the facts and contractual terms applicable in the particular case."

VCONST03540

3.4 Input tax claims on land

3.4.1 Second DIY claim

A couple appealed against a refusal of a second DIY claim in respect of their housebuilding project. They had started building the house in 2013, living in a mobile home on the site. In 2015 the new structure was rated

for council tax, but was clearly not complete. No building control completion certificate had been obtained by the time of the 2021 hearing. Nevertheless, in 2017 the couple made a DIY claim and were repaid £5,182 in VAT. It was clear from that claim that nothing was included for the construction of the garden walls, accessway to the property or kitchen and bathrooms.

The guidance notes to VAT Return 431NB states that only one claim can be made for a single building, and it must be made within 3 months of completion. The form contains a declaration that the claimant has read the notes. However, this claimant found the form self-explanatory, so he had not read the notes. The form itself states that a valuation is satisfactory evidence to allow a repayment claim to be made.

A further claim was made in 2019 for VAT on the items that were not included in the 2017 claim, and was rejected by HMRC purely on the ground that it was a second claim. The couple appealed, arguing that "It is not unreasonable to expect that more than one claim can be made as the period of construction is likely to be years where the individual is able to work on the building only at weekends and during holidays. To do otherwise is not to place a DIY Builder in the same position as the developer. HMRC policy needs to be amended to put self-builders in a comparable position even if not in an identical position." They said that there is no mention of the "one claim" rule on HMRC's website, nor on the form itself. If HMRC were right, they should not have repaid the 2017 claim, which was made before the building was complete, on the basis of a council tax valuation that was made some 15 months earlier.

Judge Heather Gething cited the law, which is in VATA 1994 s.35 and in SI 1995/2518 regs 200 and 201. HMRC argued that references to "the claim", "a claim" and "his claim", and the procedural requirements of reg.201, all supported their view that only a single claim could be made. The judge disagreed. On the plain reading of the section there is no express indication that only one claim may be made. Like many provisions, it is drafted in the singular, but Interpretation Act 1978 s.6 provides that "the singular shall include the plural and the plural shall include the singular".

She went on to conclude that the regulations would be ultra vires to the extent that they limit a claimant to a single claim, because the regulations could not change the primary legislation. They would also be ultra vires in requiring the building to be complete before a claim could be made; they would be lawful in putting a final time limit on claims, i.e. not later than three months after completion.

The judge discussed the possible application of fiscal neutrality, in that the way the rules work for a DIY builder is considerably more restrictive than for a developer making a zero-rated supply. She did not come to a conclusion on the point, and left it for consideration by the Upper Tribunal if the case is appealed.

Her overall conclusion was that the 2017 claim was a valid claim on the grounds that the regulations were ultra vires; the 2019 claim was also a valid claim, and another claim would be possible once the building was finally complete (there were some items that were still not finished in accordance with the planning permission, although the building was now habitable).

The appeal was allowed.

First-Tier Tribunal (TC08277): *Andrew Ellis and Jane Bromley*

3.4.2 Updated guidance

HMRC have updated their guidance on claiming a VAT refund for goods under the DIY Housebuilders' Scheme to add that manual window blinds and shutters are allowable building materials with effect from 5 October 2020. The guidance includes a list of goods (building materials) and services that are eligible for a VAT refund. Services can only be claimed for conversions as any services in construction of a new build property should be zero rated.

www.gov.uk/guidance/goods-and-services-you-can-claim-for-under-the-vat-diy-scheme

4. INTERNATIONAL SUPPLIES

4.1 E-commerce

Nothing to report.

4.2 Where is a supply of services?

4.2.1 Matchmaking

In TC07457, the FTT had to consider the liability of a company which 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 (£1.745 million for periods from 12/12 to 09/16) was not in dispute; the Tribunal only had to consider whether the supplies fell within art.59(c).

First-Tier Tribunal

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.

Upper Tribunal

The trader appealed to the Upper Tribunal, where it came before Mr Justice Johnson and Judge Ashley Greenbank. The UT decision summarises the decision below, identifying key findings of fact and the issues that the FTT had to determine, and the divergent views of the judge and side member that led to the dismissal of the appeal.

The ground of appeal was that the FTT had erred in law in failing properly to characterise the supply in accordance with the "predominant element" test in *Levob*. HMRC countered by objecting to the FTT's conclusions that the service fell within "consultancy" and that "data provision and the provision of information" could be read as two separate types of supply rather than as a single composite phrase.

The UT started by considering the scope of "consultancy" within art.59(c) PVD. The main authority, *Linthorst*, was considered for the reasoning of the A-G in his opinion. This concentrated on the nature of the service rather than any qualifications held by the supplier; it had to be similar to the services listed, which appeared mainly to be concerned with giving advice.

After considering the competing arguments, the UT preferred the approach of the FTT and the appellant. Art.59(c) simply defines the nature of the activities, and does not imply that they have to be supplied by "members of the liberal professions". That expression was not mentioned in the conclusion of the CJEU in *Linthorst*, nor in the *von Hoffmann* case. It was therefore wrong to concentrate on (for example) the qualifications of the provider or the level of expertise required to provide the service.

Turning to "data processing and the provision of information", the UT examined the detailed wording of the different versions of the law in the PVD and in para.16(2)(d) Sch.4A VATA 1994. HMRC relied on the insertion of a comma and the omission of "the" in the UK legislation:

- PVD: "the services of consultants, engineers, consultancy firms, lawyers, accountants and other similar services, as well as data processing and the provision of information"
- VATA: "services of consultants, engineers, consultancy bureaux, lawyers, accountants, and similar services, data processing and provision of information, other than any services relating to land"

The UT noted that the differences between the versions were too small and insignificant to suggest that Parliament deliberately intended to

produce a different result. It was therefore necessary to construe the UK legislation as being consistent with the EU law. HMRC relied on an old VAT Tribunal decision, *Fairpay*, which considered the phrase, but that decision did not support their argument – that company's services had been different in nature from both data processing and the provision of information. In other cases (*Amex* and *BBL*), the distinction had not been directly in point, so it was not possible to be sure what the judges had concluded; however, it appeared more likely that "data processing and the provision of information" were intended to describe two separate activities, either of which was covered by art.59(c).

Turning to the "predominant nature" point, the UT set out the findings of the FTT about the components of the supply:

(i) the interview and vetting process;

(ii) the preparation of the brief;

(iii) the matching process and

(iv) the post-introduction liaison with clients.

The managing partner undertook most (but not all) of the interviews and supervised the vetting process. She also prepared or supervised the preparation of the brief and undertook the matching process. The support team undertook most of (iv). The FTT judge had decided that (iv) was not an inconsequential part of the other elements, and it was not expert advice, so the whole service fell outside art.59(c).

The parties differed on the correct way of characterising a composite supply where there was no overarching element to which the other parts were ancillary. The UT noted that the parties had referred to an "array of case law" including *Levob*, *CPP*, *Deutsche Bank*, *Mesto Zamberk*, *College of Estate Management*, *Byrom (t/a Salon 24)*, *Honourable Society of Middle Temple*, *Metropolitan International Schools* and *The Ice Rink Co.*

The UT considered that the primary test was that in *Mesto Zamberk*, as a comprehensive CJEU decision on this issue that is more recent than *Levob*. The CJEU had decided that it was necessary to take into consideration all the circumstances in which the transaction takes place in order to ascertain its characteristic elements and its predominant elements must be identified. The predominant element must be determined from the point of view of the typical consumer of the supply and having regard, in the overall assessment, to the qualitative and not just the quantitative importance of the competing elements. The view of the typical consumer is determined by reference to objective factors derived from the objective characteristics of the supply. The subjective intentions of particular users of the supply are not relevant.

The UT noted applications of these principles in other cases:

- *Levob* – the supply of standard software that was customised to meet the customer's needs was a supply of services, because that was what was important to the customer;
- *Metropolitan International Schools* – the supply of distance learning courses was not merely a supply of books because the provision of the books was not qualitatively the predominant element;

- *Deutsche Bank* – where there is no predominant element, the supply will not fall within an exemption, because it will not fit the description in the law.

The "principal/ancillary" test in *CPP* is also available, but where the test can apply, it will normally produce the same answer as the "predominant element" test. The FTT side member had applied this test in concluding that the post-introduction liaison services were not an aim in themselves for the customers, but a means of better enjoying the other services. The FTT judge considered that those services "went beyond" the provision of expert advice and took the whole supply outside art.59(c).

The UT considered that the FTT judge had tried to apply the *CPP* test of what was ancillary, and found that the liaison service was not ancillary in the sense of being "for the better enjoyment" of the other elements. He should then have considered the potential application of the predominant element test from *Levob* and *Mesto*, which is the primary test derived from CJEU case law. "It permits of the possibility that there may be a material element of the supply, which is not ancillary to a principal element (in the sense used in *CPP*), but which does not govern the characterization of the supply because another element predominates: see for example, the software in *Levob*, the recreational facilities in *Mesto*, and the books in *MIS*." This failure to consider the relevant test was an error of law.

The UT then had to consider whether to remake the decision or remit it. The judges considered that they were able to remake it, applying the predominant element test. It was necessary to consider what the typical consumer would regard as a qualitatively predominant element of the supply – "in essence, we have to ask what is the typical consumer of the supply bargaining for?" In the view of the UT, the most important element to the typical consumer was the introduction to a prospective partner. This involved the advice and the information provided relating to a potential match. On the basis of the FTT's findings of fact, the provision of post-introduction liaison was not sufficient to disturb this conclusion.

The UT concluded that the services provided by the appellant were "consultancy services … or similar services … and the provision of information" and were therefore within art.59(c) PVD and para.16(2)(d) Sch.4A VATA 1994. The appeal was allowed.

Upper Tribunal: *Gray & Farrar International LLP v HMRC*

4.2.2 Consultancy

In TC07714, the FTT considered a company that supplied career coaching and support to students of Chinese origin. It treated the supplies as outside the scope of VAT as "consultancy" supplied to persons belonging outside the EU; HMRC argued that the services were taxable in the UK as "services relating to educational activities", and raised assessments totalling over £1.4m for periods from 12/13 to 06/17.

First-Tier Tribunal

As well as the issue about the correct classification of the supply, there was a further question as to who was the recipient of the supply. If it was the parents, who usually paid for it, it was accepted that they habitually resided in China. If it was the students, who received the advice, there

was a potential argument that they "belonged in the UK" for the purposes of the law. The company argued that they were only in the UK for the temporary purpose of education, but that might involve a substantial presence over several years.

The judge (Guy Brannan) started by considering the wording of art.54 and art.59 PVD. Art.54 covered "services and ancillary services relating to educational or similar activities"; the place of supply is "where the services are performed". Art.59 covered "the services of consultants", and the place of supply is "where the customer belongs" if the customer has his permanent address or usually resides outside the EU. He also noted the "use and enjoyment" provision in art.59a; the exemption of educational services in art.132(1)(i) and (j); and the provisions on place of supply in the Implementing Regulation 282/2011/EU (articles 3, 12, 13, 23, 24 and 44); and the UK transposition of the PVD rules in VATA 1994 Sch.4A paras.14A and 16.

The company began trading in 2007. Initially its main business activity was that of supplying Mandarin-speaking staff, but this quickly evolved into the provision of career coaching support to help students of Chinese origin to gain job and internship opportunities in major international commercial organisations. The candidates were usually studying at UK universities, and almost always relied on financial support from their parents at home in China.

The Tribunal heard evidence about the nature of the services that were provided and how the business developed. Part of it involved coaching candidates in interview skills, but extended to other "soft skills" training and advice, and workshops.

The taxpayer's representative argued that there was no directly applicable case law on what were "educational activities" for VAT, but there was case law on the meaning of "school or university education". For example, *Eulitz* (Case C-473/80) suggested that training of fire prevention officers could constitute education, but *A & G Fahrschule-Akademie* (Case C-449/17) held that vehicle driving tuition did not. He submitted that activity which may appear to be educational, because it involved the transfer of knowledge with a view to the development of skills or knowledge, fell outside the meaning of educational activity on the grounds of being specialised so that it did not cover a diversified set of subjects characteristic of school or university education. He characterised the company's services as providing advice and guidance; the workshops were only an introductory and minor part of the services.

HMRC's representative relied on guidance in Notice 701/30, HMRC's internal manuals at VATEDU 36100, and the Oxford English Dictionary in support of the argument that "education" included the company's activities. By contrast, the dictionary definition of consultancy was "a company giving expert advice in a particular field", which he argued did not apply to the company.

The judge rejected HMRC's reliance on phrases from *Eulitz* ("the transfer of knowledge of skills") to indicate that this was education. That case was concerned with the exemption of "school and university education", which was a different context. The phrase "educational activities" in art.54 was wider, but it was an undefined term and difficult to interpret, even using the words on the list in which it appears.

The judge decided, quite briefly, that the services were unlikely to be educational activities because they were supplied to present or recently graduated higher education students. That suggested that the subject-matter was different from the educational activities that they would have undertaken at the institutions with which they were or had recently been affiliated.

It was still necessary to consider whether the services were "consultancy". The judge referred to the recent FTT decision in *Gray & Farrar International*, which considered the same question in the context of a matchmaking service. The judge agreed with the reasoning and conclusions in that case, with one exception – the earlier Tribunal's suggestion that one of the points raised in the *Dutch vets* case was effectively "obiter dicta". The judge commented that there is no such concept in EU law, and all parts of a CJEU decision are authoritative.

The conclusion was that the services that consultants "principally and habitually supply" consist of the giving of "advice based on a high degree of expertise" or of "specialist and expert advice by someone with extensive experience/qualifications on the subject". "Consultants" were not limited to members of the liberal professions but included persons who acted in an independent manner to give advice to a client. In the Tribunal's view, the company satisfied these tests.

A final attempt by HMRC to resist this conclusion involved an argument that "consultancy" related to improving the general efficiency and working practices of an organisation, rather than improving the skills and knowledge of each individual recipient. The judge saw no authority to support this proposition outside HMRC's internal manuals: "We should observe that it is unhelpful for HMRC simply to cite its own published practice as an authority in a dispute with a taxpayer. HMRC's practice reflects nothing more than its own view of the law and our firm conclusion in this case is that that view is plainly erroneous or inapplicable." Art.59 PVD dealt with supplies to non-taxable persons, who would in general be individuals. There was no reason why private individuals should be excluded from receiving consultancy services.

The next question was whether the services were supplied to the students or to their parents. Before July 2016, the contract might be with the student, but the taxpayer's representative argued that the economic reality was that the supply was made to the parents; after July 2016 that was the contractual position. HMRC argued that the economic reality, and the principle that VAT was a tax on consumption, suggested that the true recipient of the supply was the student.

The Tribunal reviewed the precedents of *Airtours* and *Newey*. The judge started the consideration of the problem by distinguishing between:

- "third party consideration", in which A makes a supply to B but is paid by C – C does not receive the supply, and therefore cannot recover input tax if a taxable person (as in *Airtours*);
- "three-cornered consideration", in which A instructs B to make a supply to C and pays for it – in these cases, there is a gift by A to C, but A (who has paid for something to be done) has received a supply. The judge gave an example of someone paying a florist or a wine merchant to deliver goods to someone else.

The judge considered that, up to July 2016, it was not necessary to look beyond the contractual arrangements. The contract was with the student and was usually paid for from the student's bank account; even if it was ultimately funded by the parents, and even if the parents "took the decisions", that was not sufficient to overturn the contractual position.

From July 2016, the parents contracted directly with the company, which had had offices in China since 2011. Now the parents had rights under the contract, and once again it was not necessary to depart from the contractual position to some different economic reality. They paid for the supply and they received it.

That resolved the issues in favour of the company after July 2016. Before that date, it was necessary to consider where the students "belonged" for the purposes of art.59 PVD. The taxpayer's representative raised a number of arguments to contend that the students had their permanent residence, centre of interests and other connecting factors in China. HMRC responded that the issue was determined by the students' right or permission to be in the UK, which created a "habitual residence". HMRC's main argument, though, was based on the Tier 4 visa which gave the students "permission to stay". The candidates were in the UK voluntarily, had permission to be in the UK, and therefore belonged in the UK for the time being.

Their representative also referred to the Tribunal's 2012 decision in *Ist Contact Ltd*, which also dealt with advice given to foreign visitors (young people from Australia, New Zealand and South Africa coming to the UK temporarily for working holidays or overseas experience). The judge commented that this was of little assistance: first, it dealt with the legislation as it stood before the Implementing Regulation applied, and the Tribunal appeared to rely on UK income tax concepts of "ordinary residence", which the judge ("with respect") did not believe was correct as a matter of EU law.

The judge considered that the correct test was that of "permanent address or usual place of residence" in accordance with art.13 of the Implementing Regulation, and HMRC were applying the wrong test, one for which there was no authority. Usual residence did not include temporary residence for a specific purpose and a definite period of time, such as a degree course.

Art.23 of the Implementing Regulation required suppliers to establish the place of belonging on the basis of factual information provided by the customer, and to verify that information by normal commercial security measures such as those relating to identity or payment checks. The company did not do this prior to July 2016 – it appeared to have collected very little information of the type required to verify place of supply, presumably because it did not understand the importance of doing so.

It was common ground that the parents' usual place of residence was China. Accordingly, the supplies from July 2016 onwards were made in China, and the appeal was allowed to that extent. It was dismissed in relation to periods up to July 2016.

Upper Tribunal

The company appealed to the Upper Tribunal, where it came before Mr Justice Meade and Judge Jonathan Richards. The issues between the parties had narrowed: it was now accepted that the company was

supplying consultancy rather than education, and also that the company supplied the students up to July 2016 and the parents from July 2016 onwards. HMRC did not challenge the FTT's conclusion that Tier 4 student visas did not establish a person's "usual residence" as the UK. The remaining issue was therefore whether the supplies to the students up to July 2016 could be treated as outside the scope.

The company had not collected detailed information about individual students. Instead, it had relied on information and assertions about students in general. The FTT had concluded that the records did not sufficiently demonstrate this to justify treating the supplies as outside the scope. This was expressed in a conclusion about the requirements of Implementing Regulation art.23, which were not satisfied at the time of supply (when payment was received). The UT noted that HMRC's case before the FTT had been that Tier 4 visas established a UK place of residence, so the arguments had been different; the parties had not focused on art.23 in the same way that they did in the UT hearing.

The UT went on to consider the binding status of the Implementing Regulation in the UK, the relevant articles and the precedents on those articles. Art.13 defines where a natural person "usually resides" as "where the person usually lives as a result of personal and occupational ties". It goes on to provide that personal ties are more important than occupational ties, where they conflict. There were no directly related CJEU cases on this provision, but *Schaflein* (Case 284/87) and *Ryborg* (Case C-297/89) were cited as decisions in which the CJEU had considered (in different contexts) the concepts of "resident" and "normal residence". Both authorities approached the question as involving a multi-factorial assessment of all facts relevant to the location of a person's permanent centre of interests.

The company appealed on the grounds that the FTT had erred in law in its application of the verification requirement in art.23. In effect, it had treated the requirement to verify the customer's status as a substantive requirement rather than a formal requirement, which was disproportionate where the principal facts were not in dispute.

The parties agreed that the issues for the UT were as follows:

- should the FTT have considered "informal evidence" as well as documentary evidence in deciding whether the company had met the requirements of art.23?
- what evidence could the company rely on for that purpose, and was it restricted to evidence obtained at or before the time of supply?
- taking into account the answers to these two questions, had the company established a prima facie case that the supplies were to persons with a permanent address or usual residence outside the EU?
- if so, was there an evidential burden on HMRC to rebut that prima facie case?
- if the company had failed to satisfy the requirements of art.23, was that fatal to its case?

The company did not challenge the FTT's finding that it had failed to verify information as required by art.23. HMRC relied strongly on

Implementing Regulation art.3, which appears to require the supplier to "demonstrate" that the place of supply is outside the EU, and covers the part of the regulation that includes art.23. The UT did not accept HMRC's argument: complying with art.23 meant a supply was outside the scope, but the opposite conclusion was not justified by the words of the law. HMRC argued further that the conclusion was justified by the purpose underlying the law, and the regulation should be interpreted in accordance with its purpose.

The judges considered the balance between the purpose of the law and the need for traders to be given manageable responsibilities. In their view, art.3 and art.23 struck a balance between the two: if the trader failed to comply with art.23, it was still possible to argue that the supply was outside the scope under art.59 PVD. The IR did not change the place of supply; failure to comply with it might lead to regulatory penalties, but it should not change the application of the place of supply rules. The trader also had to find alternative evidence to support the treatment, instead of the relatively limited and well-defined steps that would suffice under art.23.

The UT went on to discuss the difference between formal requirements and substantive requirements, and rejected HMRC's contention that the word "demonstrate" in art.23 elevated the evidential rule into a substantive requirement. The conclusion was that a failure to collect and verify information to the standard required by Article 23 would not prevent the production of evidence to the effect that particular customers have their usual residence outside the EU.

Similarly, HMRC's argument that only evidence collected at the time of supply could be put forward. Art.25 provided that the place of supply was to be determined by the circumstances existing at the time, but those circumstances could be proved later. A change in the circumstances afterwards would not affect the place of supply; it was the circumstances at the time that had to be proved. It would be practically useful for the trader to be sure at the time of the supply what the liability was, but that was not the same as making it a requirement. It would be disproportionate to require the wrong VAT to be charged where the circumstances were clarified after the time of supply.

The nature of the evidence that could be relied on was not defined by art.23, beyond that it had to be "factual". It could be formal or informal. Given that the company had not complied with art.23, there was no limitation on the nature of the evidence it could bring forward to show that art.59 was nevertheless satisfied.

These conclusions were in favour of the appellant. The UT went on to consider whether it had established that the supplies were outside the scope, starting out with the observation that the burden lay on the appellant to prove it on the balance of probabilities. As a matter of civil litigation procedure, it was open to Mandarin to discharge its burden of proof by adducing sufficient evidence to establish a prima facie case. If it did so, an evidential burden was placed on HMRC either to rebut or challenge Mandarin's evidence. If it did not do so, Mandarin's burden of proof would be discharged.

HMRC argued that the FTT had made a number of findings of fact to the effect that the information held by the company was insufficient. The

company's argument was different: it contended that the FTT had incorrectly concentrated on satisfaction of art.23, which was not the relevant test. The UT examined the relevant conclusions of the FTT on the facts, which were based on examining a sample of folders about supposedly representative customers. The UT characterised the company's argument before the FTT as an "all or nothing" approach: it could not show evidence about all the customers individually, so it sought to persuade the FTT to draw conclusions about the customers in general, based on a sample.

The FTT had not been satisfied that the sample was representative. This dealt a severe blow to the company's case, because it meant that the company had insufficient evidence to convince the FTT even if the FTT had correctly realised that satisfying art.23 was not the proper test. The "generic" evidence provided by witnesses about the business and its customer base was "given at a high level of generality". It was not irrelevant, but it was not capable of confirming the settled intentions of all the students. That, according to the precedent of *Ryborg*, was an essential element of any examination of "usual residence".

The UT concluded that many of the students were likely to be resident in China, but that fell short of a prima facie case that all of the students were resident in China. This emphasised the usefulness of art.23 for the trader: if the company had collected a limited amount of information from each student (which the UT did not consider impractical or onerous), it would not have had to fall back on a general multi-factorial determination that was much harder to satisfy.

The approach of the FTT had contained an error of law, and had to be set aside. However, in remaking the decision, the UT concluded that the company could not demonstrate that supplies to all of its students were made outside the EU, and the result was therefore unchanged.

Upper Tribunal: *Mandarin Consulting Ltd v HMRC*

4.3 International supplies of goods

4.3.1 Fallback acquisitions

TC06858 concerned a company that was an alcohol wholesaler that was approved to own excise duty suspended alcoholic goods in tax warehouses in the UK. It received goods, from its suppliers, into its accounts in a tax warehouse in a member State other than the UK. Those goods travelled across another EU border before being placed in the appellant's accounts, and those supplies were treated as exempt despatches by the suppliers using the company's UK VAT registration number. Neither the appellant nor its customers were registered for VAT in the country of destination, and no acquisition tax was accounted for.

HMRC ruled that the use of the UK VRN triggered a "fallback" acquisition tax charge in the UK, which could only be avoided if it could be shown that tax had been accounted for in the country of arrival. The company's director argued that this was a matter for the tax authorities in the other country, and it was not for HMRC to police the tax system

elsewhere. His failure to produce the requested information to show what had happened to the goods was ascribed to the expense of going through all the paperwork in relation to many transactions.

The FTT judge (Barbara Mosedale) analysed the place of acquisition rules in articles 40 and 41 PVD, and the UK's transposition of them in VATA 1994 s.13. She noted that the UK's rules on warehousing (s.18) transposed an optional provision of the PVD (articles 157 and 162). Crucially, s.18(3) states "Where this subsection applies and the material time for the acquisition or supply mentioned in subsection (2) above is while the goods in question are subject to a warehousing regime and before the duty point, that acquisition or supply shall be treated for the purposes of this Act as taking place outside the United Kingdom if the material time for any subsequent supply of those goods is also while the goods are subject to the warehousing regime and before the duty point."

The taxpayer argued that s.13 clearly states that it is subject to s.18, so s.18 should take precedence. HMRC responded that it was necessary to interpret the law so that s.18 was subject to s.13, rather than the other way around, and also that s.18 did not apply to the facts of the case.

The judge rejected HMRC's argument that s.18(3) and s.13(3) were mutually exclusive. HMRC's interpretation would deprive s.18(3) of any application, so it was rejected. However, the judge did accept HMRC's argument that s.18 should be interpreted as only applying to goods arriving in a warehouse in the UK, not anywhere in the EU. Although this is not the literal wording, reading it otherwise would create inconsistencies with the PVD, and it appeared to be the derogation that Parliament had intended to implement. That derogation had been achieved by deeming the place of supply to be outside the UK rather than providing for exemption with credit (as art.157 envisaged), but the result was the same.

The judge rejected other HMRC interpretations and constructions of the statute, but found in their favour on the simple grounds that s.18 had no relevance to a transaction that was actually outside the UK. On that basis, the "fallback" charge applied, as determined by the CJEU in the *Facet Trading* case. The trader argued that acquisition tax should then be deductible as input tax, but the judge ruled that this would only be possible if there was evidence of a link to taxable outputs. In the absence of any evidence about accounting for VAT in the other country, no recovery was available.

The director had claimed that the tax law in the other country had been complied with by self-cancelling entries in the books of the company's tax representative there. Instead of producing evidence of that, he had chosen to litigate the assessment in the UK. In dismissing the appeal, Judge Mosedale commented that it was still open to the director to produce the evidence and thereby to cancel the liability.

Upper Tribunal

The company appealed to the Upper Tribunal (Mr Justice Miles and Judge Jonathan Richards) on the following grounds:

(1) Ground 1 – The FTT was wrong to construe EU law in Articles 155 to 162 of the PVD as permitting a member state to exempt an acquisition only into a bonded warehouse situated in that member state.

(2) Ground 2 – The FTT was wrong to construe s.18(3) VATA 1994 as applying only to acquisitions into a bonded warehouse in the UK. In particular, whether or not the FTT was correct in its interpretation of Articles 155 to 162 of the PVD, the FTT was not entitled, given the clear statutory provisions, to "read down" s.18(3) so that it applied only to acquisitions into UK bonded warehouses.

(3) Ground 3 – The FTT was wrong to conclude that the Appellant was not entitled to credit for any tax arising as a consequence of the operation of the fallback regime in s.13(3) VATA 1994.

The judges agreed with the appellant that, if s.13 and s.18 are read without regard to the PVD and CJEU decisions, their meaning is clear: the whole of s.13 is subject to s.18. The only reason for departing from this analysis would have to be based on a conclusion that the EU law required it under the principle of "conforming construction". The judges analysed articles 155 – 162 PVD in detail, then went on to examine a Court of Appeal precedent concerning corporation tax "controlled foreign companies" legislation (*Vodafone 2 v HMRC* [2009]). They concluded that their task when construing the UK statutory provisions was to apply the broad principles of purposive interpretation set out in the *Vodafone* decision; applying those broad principles, they should interpret the UK statutory provisions, so far as possible, in the light of the wording and purpose of the PVD. However, a conforming construction should "go with the grain" of the legislation, and cannot override the clear words of the UK law ("contra legem").

Applying those principles, the judges respectfully disagreed with Judge Mosedale that it was possible to interpret s.18(3) as being restricted to goods entered into a warehousing regime in the UK. "We consider that such an approach would cross the boundary between interpretation of the legislation and amendment of it."

The appeal was allowed: on the basis of s.18(3), which took precedence over s.13(3), and s.18(7), which was not limited to goods warehoused in the UK, the trader was not liable to acquisition tax in the UK. The question of whether acquisition tax would be recoverable as input tax therefore did not arise.

Court of Appeal

HMRC appealed to the Court of Appeal. Lewison LJ noted that there was some discussion about the right of appeal to the CA when HMRC wanted to advance a point of law that was not considered by the UT: they had argued it in the FTT and lost, and had apparently abandoned it in the UT appeal. The CA decided that it would be unfair on the appellant to allow them to revive it. That ground of appeal was about the interpretation of the expression "warehousing regime" as defined in VATA 1994 s.18(7).

The judge confirmed that the UK had incorrectly extended the scope of the exemption in s.18(3): the deeming provision in art.41 PVD deemed the place of acquisition of goods to be in the UK, but it did not deem a bonded warehouse to be in the UK when it was not. However, it was not possible to apply a conforming construction to law that clearly stated a non-conforming rule: s.18(7) specifically contemplated a warehousing regime as including movements between warehouses in different member states. Although the UK had incorrectly widened the permissible scope of

the exemption, there was no scope for that error to be corrected. Any necessary change would have to be made by legislation.

HMRC's appeal was dismissed.

Court of Appeal: *HMRC v Ampleaward Ltd*

4.3.2 Evidence of despatch

A company supplied used commercial vehicles. It appealed against assessments for output tax and penalties for periods between 08/12 and 10/15 after HMRC had formed the view that it did not have the required evidence to support zero-rating of despatches to the Republic of Ireland. During the course of the enquiry a notice to produce statutory records had been issued, and penalties were levied for failure to comply. The notice and the penalties had been challenged and upheld on review.

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

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

First-Tier Tribunal (TC08318): *CPR Commercials Ltd*

4.3.3 Transfer of residency

A married couple moved to France in 1991 and lived there until 2016, when the husband retired. They decided to move back to the UK, and placed their French house on the market, leaving it furnished to help with the sale. A sale was not finalised until November 2020; because of the pandemic, they could not arrange for transportation of their furniture until after the end of December. The haulage company informed them that, because of Brexit, customs duty and VAT would be due on the importation of their own possessions, many of which had been bought in the UK in the first place. They applied for Transfer of Residency Relief, which HMRC refused on 1 March 2021, and the couple appealed to the FTT.

Judge Manuell set out the law in detail, including the amended SI 1992/3193 which operated from 31 December 2020 to give relief for personal goods permanently imported on a change of residence. The problem was that the relief is available only where the goods move within six months before and twelve months after the person becomes resident in the UK. In this case, the goods arrived several years after the change of residence.

The couple argued that they had only moved in 2016 in a "technical sense"; there were exceptional circumstances because of Brexit, and HMRC had the power to grant relief even where the conditions were not satisfied. HMRC responded that the couple had had the opportunity to move their goods before Brexit, but had failed to do so; there were no exceptional circumstances.

The judge expressed sympathy for the appellants, who had given their evidence in a straightforward manner and had been caught out by circumstances that would probably apply to others in due course. However, HMRC were right: the changes arising from Brexit were all foreseeable in advance, the law on residency was clear, and there was nothing exceptional that could justify granting the relief.

The appeal was dismissed.

First-Tier Tribunal (TC08333): *Brooks*

4.3.4 Personal export scheme

Under SI 1995/2518 reg.133 and Notice 707, a person who intended to leave the EU within 9 months and remain outside the EU for a period of at least 6 months, could purchase a new car for subsequent export without paying VAT. The zero-rating conditions were contained in the Notice, which required an application by the purchaser; if VAT was charged by the supplier, the customer is not entitled to a refund.

An individual purchased a car which was exported to Jersey on 23 October 2019. He enquired how he could obtain a refund of the £3,871 that had been charged in VAT, and after some correspondence, was issued with a formal decision that it could not be repaid. He appealed to the Tribunal, where all parties agreed that if he had applied for the Personal Export Scheme in advance, HMRC would probably have agreed that he was eligible to receive a zero-rated supply.

The appellant submitted "a significant amount of background to his appeal" and asked the Tribunal to take "his entire circumstances into account". Judge Sarah Allatt did not set out any details of these circumstances, but concluded that it was not possible for his appeal to succeed. HMRC had no power to allow the scheme to be used retrospectively; it was clear that he had not complied with it at the time of supply.

The appeal was dismissed.

First-Tier Tribunal (TC08341): *John Denton*

4.3.5 Free Zones

The October Budget included a measure affecting registered businesses authorised to operate in the customs site or "free zone" of a Freeport. The main VAT benefit of operating in a free zone is that businesses selling goods within free zones can zero-rate their supplies, and services carried out on goods in those zones may also be zero-rated subject to conditions, which provides a cash flow rather than an absolute advantage (i.e. the supplier does not have to charge output tax that a business customer would generally be able to recover later).

The new measure will ensure that VAT will be due where goods leave a free zone and there is no qualifying onward supply of the goods, or where there is a breach of the rules of the free zone customs procedure.

OOTLAR para.1.34

The *Free Zones (Customs, Excise and Value Added Tax) Regulations 2021* came into force on 8 November 2021. Among other amendments, the Regulations add a new Group 22 to VATA 1994 Sch.8, to provide for the zero-rating of supplies of goods and services between free zone businesses within a free zone. The invoicing rules in SI 1995/2518 reg.14 are also amended to require the words ‘free zone’ to be used on relevant invoices.

SI 2021/1156; *www.gov.uk/government/publications/the-free-zones-customs-excise-and-vat-regulations-2021/the-free-zones-customs-excise-and-vat-regulations-2021*

4.3.6 Import VAT on the VAT return

HMRC have updated their guidance on accounting for import VAT on the VAT return to add information on how to adjust errors. Where businesses have accounted for import VAT on their VAT Return and later find out the amount has changed or is incorrect, they must either:

- amend any nil net tax errors on the next VAT Return (where the import VAT adjustment in box 1 will be equal to the input tax claim in box 4), or
- follow the normal error correction procedures (there is an online link from the guidance to Notice 700/45).

Businesses should continue to use existing methods for any over or underpayments of customs duties. They must not include import VAT in any of these adjustments to HMRC if they have used postponed VAT accounting for those customs declarations.

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

4.3.7 One Stop Shop guidance and rules

HMRC have updated the online guidance on reporting and paying VAT on distance sales of goods from Northern Ireland to cover businesses whose turnover is below the UK VAT registration threshold.

UK businesses which use the One-Stop Shop (OSS) to manage the VAT on their distance sales of goods from Northern Ireland to consumers in the EU must be registered for UK VAT.

HMRC’s updated guidance now advises businesses whose turnover is below the UK VAT registration threshold to:

- register for UK VAT before they can register for the OSS Union scheme, and
- choose ‘63990 Distance sales of goods (below UK VAT threshold) for OSS purposes’ to select their business activity when they register.

Businesses which register for UK VAT only in order to gain access to the OSS scheme will not need to account for VAT on domestic sales until they become liable under the normal UK rules.

The guidance sets out the record-keeping requirements of the OSS, which include retaining for 10 years records for each sale of:

- *the EU country where you made the sales — known as the EU country of consumption*
- *the date you supplied the goods*
- *the taxable amount, including the currency used*
- *any increase or decrease of the taxable amount*
- *the VAT rate you applied*
- *the amount of VAT due and the currency used*
- *payments your business received — the dates and amounts*
- *any payments on account your business received for goods before you supplied them*
- *the information shown on any invoices you issued*
- *your consumers' names — where known*
- *the information you used to work out where a consumer is based*

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

HMRC have published details of a service that can be used by business owners or an intermediary acting on behalf of the business owner to tell HMRC:

- that they have deregistered from the VAT Import One Stop Shop (IOSS) in the EU
- of a change of business details such as contact email, business address or UK VAT number

Before using this service, businesses must first deregister or change their business details with the EU country they are registered with.

www.gov.uk/guidance/tell-hmrc-about-changes-to-your-vat-ioss-registration-in-the-eu

HMRC have also updated the online guidance on One Stop Shop VAT Return to clarify how corrections should be made:

Errors can only be corrected:

- *on previous returns within 3 years — if you discover you've made a mistake on one of your returns, you'll need to wait until your next return to correct it;*
- *for distance sales of goods made after 1 July 2021.*

When you complete a return you'll have the option to make corrections to an earlier OSS return. You can:

- *change the total VAT amounts you've previously declared to each country;*
- *add VAT amounts on sales for each country that you did not include on an earlier return.*

There is an online procedure for making corrections.

The guidance on 'Ways To Pay' has also been updated, allowing traders to select the 'pay by bank account' option to pay online or through their mobile banking account or use a debit or credit card payment. There is a non-refundable fee for using corporate credit or corporate debit cards and payment cannot be made by personal credit card. For bank transfers taxpayers can use the HMRC bank account details provided to pay by Faster Payments, CHAPS or BACS, and guidance is given about avoiding bank charges on such payments.

www.gov.uk/guidance/completing-a-one-stop-shop-vat-return

The *Value Added Tax (Distance Selling and Miscellaneous Amendments) Regulations 2021* and *Value Added Tax (Distance Selling and Miscellaneous Amendments No. 2) Regulations 2021* came into force on 1 December 2021.

The distance selling provisions amended by these regulations were enacted by FA 2021 to implement the e-commerce package in relation to VAT. This included the introduction of two new schedules into VATA. Sch.9ZD contains the rules for the OSS scheme and Sch.9ZE contains the rules for the IOSS scheme.

The schemes are designed to simplify VAT accounting for the sale of goods direct to consumers by suppliers based in the EU and by suppliers who import goods into the EU for sale. Both schemes only apply in the UK in relation to goods in Northern Ireland.

SI 2021/1164; SI 2021/1165

4.3.8 End of transitional easements for import VAT

The *Customs and Value Added Tax (Managed Transition Procedure) (EU Exit) Regulations 2021* extended the end date of the *Customs (Managed Transition Procedure) (EU Exit) Regulations 2019* (SI 2019/487) from 31 December 2021 to 31 December 2022 and set out how VAT registered businesses making customs declarations by conduct on importation account for import VAT. From 1 January 2022, full customs controls have applied at GB border locations for EU-GB imports and exports.

The Regulations also provide that where a VAT registered business makes a declaration by conduct under the customs public notice provisions it must bring the import VAT to account in its VAT return at that point rather than waiting for the supplementary declaration. This was optional during 2021.

SI 2021/1375

The *Taxation (Cross-border Trade) (Miscellaneous Amendments) (EU Exit) (No. 2) Regulations 2021* extended existing staged customs controls for goods that are in Ireland or Northern Ireland immediately before their importation into Great Britain. This means that the import controls taking effect for EU-GB movements of goods from 1 January 2022 will not apply

to such goods. This ensures existing processes are maintained while discussions continue between the UK and EU on the future of the Northern Ireland Protocol.

SI 2021/1444

4.3.9 Dental prostheses

The October Budget included an announcement of exemption for importations of dental prostheses into the UK by (or on behalf of) registered dentists or registered dental care professionals. Qualifying importers can claim the exemption from 28 October 2021, but the relief is backdated to 1 January 2021.

HMRC have published a Brief to explains the change, how businesses can claim repayment of any overpaid import VAT paid after 1 January 2021, and how businesses can declare the correct VAT value for imports of dental prostheses. The overpaid import VAT will only be claimable after Royal Assent to the Finance Act 2022.

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4.4 European rules

4.4.1 Action against organised crime group

On 20 October 2021, the European Public Prosecutor's Office (EPPO) coordinated an operation where law enforcement authorities carried out searches, arrests and seizures worth more than €13 million in Germany, Italy and Bulgaria. The 10 arrested people are suspected of forming a criminal organisation and evading taxes by operating a carousel fraud reselling cars multiple times across different EU countries.

www.eppo.europa.eu/en/news/international-strike-against-organised-crime-group-10-arrests-and-seizures-worth-least-eu13

4.4.2 Rules for VAT rates

The Council of the European Union has reached an agreement on a proposal to update the rules for VAT rates for goods and services. The proposal offers Member States more flexibility and equality supporting the EU's green, digital and public health priorities. The Council of the EU awaits the European Parliament's opinion on the proposal to formerly adopt the new directive by March 2022.

Art.98 will be replaced with a new rule allowing up to two reduced rates, but also in certain circumstances a further reduced rate and the possibility of exemption with deduction (i.e. zero-rating). A number of transitional derogations will be abolished so that all Member States have the same opportunities to set rates.

Annex III will also be largely replaced, although many of the categories remain similar to those that are at present eligible for reduced rating.

www.consilium.europa.eu/en/press/press-releases/2021/12/07/council-reaches-agreement-on-updated-rules-for-vat-rates/

4.4.3 Reverse charges and anti-fraud measures

A Spanish company, F, declared that it had acquired scrap metal from another Spanish company in 2008, and had accounted for a reverse charge. The tax authority discovered that the recorded supplier did not have the material and human resources to make the supply, and concluded that the invoices issued by F to record the transaction must be false: although the materials had been supplied, the identity of the true supplier had been concealed. The tax authority issued an assessment to disallow the deduction of the input tax, and charged a 100% penalty on what it regarded as a sham transaction.

The company appealed, arguing that the right to deduct the input tax was absolute, and there was no possible tax advantage to it when it was also declaring the output tax. The tax authority maintained that naming a fictitious supplier on the invoice demonstrated the sham nature of the transaction; it had to be considered to be connected with both VAT fraud and direct tax fraud, and F had not proved that there was no tax advantage.

The Spanish Supreme Court referred questions to the CJEU, asking:

(i) whether mention of the supplier of the goods concerned is a purely formal condition of the right to deduct VAT;

(ii) the consequences of stating a false identity in respect of the supplier and of the fact that the purchaser knows that that reference is false; and

(iii) whether the case-law of the CJEU necessarily means that deduction of VAT can be refused – even where bad faith is involved – only where there is a risk of loss of tax revenue for the Member State when, under the reverse charge procedure, in principle the taxable person is not liable to pay the Treasury any VAT.

The CJEU noted the distinction between “formal” and “material” conditions for deduction. The mere naming of the supplier on an invoice is a formal condition; however, the status of the supplier as a taxable person is a material condition. After examining at length the different principles that may apply to potentially fraudulent transactions, the answer given by the court was as follows:

[The PVD] read in conjunction with the principle of fiscal neutrality, must be interpreted as meaning that a taxable person must be refused the right to deduct VAT relating to the acquisition of goods supplied to that taxable person where he or she has knowingly mentioned a fictitious supplier on the invoice which that taxable person him- or herself has issued in respect of that transaction under the reverse charge procedure, if, taking into account the factual circumstances and the evidence provided by that taxable person, the information necessary to verify that the true supplier had the status of taxable person is lacking, or if it is established to the requisite legal standard that the taxable person has committed VAT fraud or knew or ought to have known that the transaction relied on as a basis for the right of deduction was connected with such a fraud.

CJEU (Case C-281/20): *Ferimet SL v Administracíon General del Estado*

4.4.4 Allocation of assets to a business purpose

The CJEU has now given its decision in two joined cases where the opinion of A-G Tanchev was covered in the July 2021 update. The dispute, referred from Germany, relates to the taxpayer's right to allocate capital goods, and in particular immovable property, to the business, to private assets, or to a mixture of both, and the consequences of that allocation for the entitlement to deduct input tax. The A-G considered that the German rules, which effectively denied the taxpayer a deduction if the allocation decision was not communicated to the authority within a certain time limit, was contrary to the principles of fiscal neutrality and proportionality, given that there was no suggestion of tax evasion in the present case.

In the first case, a trader constructed a private house during late 2014. It contained an office which took up over 10% of the floor area. The trader made no claim for input tax in monthly returns for 2014 and 2015, but did so for the first time in the annual return for 2015, submitted on 28 September 2016. The tax office refused to allow a proportional deduction on the grounds that the allocation to business assets had not been done at the time the input tax was incurred – that is, a decision made in September 2016 could not be effectively backdated, because the German law imposed a five-month limit on such an allocation.

In the second case, an individual incurred VAT on the installation of solar panels in 2014. He made a claim for input tax on an annual return for 2014 made in February 2016. The same time limit was applied, and the input tax refused.

The questions referred by the German court asked whether the time limit for making an allocation to business assets in the German law was incompatible with the rules in the PVD, in particular articles 167 and 168a, and whether there was a presumption that an asset had been allocated to private use if no explicit allocation had been made to the business.

Advocate-General

The A-G started by considering whether a right to deduct existed at the time the VAT was incurred. This depended on whether the traders had, as a matter of fact, allocated the expenditure to business use. Making a specific notification to the tax authority was not essential to show that something had been so allocated. Whether a person was acting in an economic capacity was a question of fact that had to be assessed in the light of all the circumstances of the case. It would be for the referring court to make that assessment.

The next question was whether the notification of that allocation was a formal or a substantive requirement. The A-G considered that making an identifiable allocation decision was a substantive requirement, but communicating it to the authorities was not. It was therefore necessary to consider the discretion of a Member State to introduce a time limit for such a notification.

The A-G considered that art.168a, introduced by an amending Directive with effect from 15 January 2010, was relevant: this specifically referred to VAT incurred on immovable property and stated that it was deductible up to the extent to which it was used for business purposes. The right to

deduct arose immediately on the incurring of input tax for business purposes; the German government was correct in stating that the right should be exercised immediately, but that did not mean that EU law permitted Member States effectively to cancel the right in the event of non-compliance with a time limit set for claiming it.

Although it would be for the referring court to determine the question, the A-G noted that there was nothing in the order for reference that called into question the actual intention to use the expenditure for economic purposes. There was a relatively short time between the cost and the use. In both cases the expenditure was fit for economic use.

The overall conclusions of the A-G were that the refusal of credit in these circumstances was incompatible with art.168a. If a trader could show evidence to support the fact that expenditure had been incurred with the intention of business use and had been allocated to the business at the time, a short time limit for notification of that allocation to the authorities was a formal requirement, not a substantive one, and denying credit would be disproportionate.

Full court

The court reviewed the principles governing the right to deduct, including the fundamental nature of that right to preserve the neutrality of the tax, and the distinction between the substantive conditions for deduction and the formal conditions that may be imposed. It has been established by past cases that a trader has the right to allocate mixed-use assets wholly to the business or partly to the business; if wholly to the business, the whole of the input tax is deductible immediately, except for VAT incurred on immovable property which is limited to the business proportion by art.168a.

The taxpayer's choice of total or partial allocation to the business is a substantive condition for the right to deduct. The question of whether an input was incurred in the capacity of a taxable person is a question of fact which it is for the national court to determine, on the basis of objective evidence and following an examination of all the circumstances of the case. A clear and express declaration of intention to use the goods for business purposes is helpful in establishing the capacity of the trader, but it is not the only way in which the intention can be established. The VAT Directive does not, therefore, make the grant of a right of deduction conditional upon the adoption and communication of an express allocation decision.

The factors which may implicitly show that intention include, in particular, the nature of the goods concerned, the capacity in which the person acted and the period which elapsed between the acquisition of the goods and their use for the purposes of the taxable person's economic activity. By contrast, it is irrelevant that the goods in question were not immediately used for taxable transactions, since the use to which goods are put merely determines the extent of the initial deduction or the extent of any subsequent possible adjustments but does not affect the issue of whether a right of deduction arises.

The court suggested possible sources of evidence that would support the allocation to business. In the case of the office, the description as "office" on the plans was relevant, but would have to be supported by objective

evidence of actual use; in the case of the solar panels, the existence of a supply contract supported a business allocation. The claim for input tax itself was capable of being evidence of a business intention, but the absence of a claim in the provisional VAT returns for the periods did not constitute conclusive evidence that there was no business intention.

The court then noted that articles 250 and 261 gave Member States the right to require submission of returns showing all the required information and to impose deadlines for doing so. However, communicating an allocation decision to the tax authorities is only a formal condition for deduction. According to settled case law, non-compliance with a formal condition cannot, as a rule, lead to a loss of the right to deduct. The imposition of conditions that deny the right to deduct cannot go further than the permitted purposes of art.273 (prevention of fraud, evasion and abuse); the complete refusal of a deduction would be disproportionate.

On the other hand, the case law also supports the imposition of time limits to protect the principle of legal certainty. A time limit that had the effect of denying a right to deduct would not be incompatible with the Directive as long as it applied in the same way to analogous rights in tax matters founded on domestic law and those founded on EU law (the principle of equivalence) and as long as it did not make it excessively difficult or practically impossible to claim (the principle of effectiveness). In this case, the time limit in the German law did not appear to infringe either principle.

Nevertheless, Member States were required to observe the principle of proportionality in balancing the need for legal certainty and the fundamental right of the trader to deduct input tax. It would be for the referring court to consider whether the time limit in the case (31 May in the year following the year in which the allocation decision was taken) was proportionate to the objective of ensuring compliance with the principle of legal certainty. In making that assessment, the referring court should take account of:

- the possibility for the national authorities of imposing penalties on a negligent taxable person that would be less detrimental to the principle of neutrality than the outright rejection of the right of deduction, such as administrative financial penalties, and
- the fact that a period expiring after 31 May of the year following that in which the allocation decision was taken does not appear, prima facie, incompatible with observance of the principle of legal certainty and
- the pre-eminent place of the right of deduction in the common VAT system.

The answer to the questions states that the German law is not incompatible with the PVD, provided that it is applied in accordance with the principle of proportionality.

CJEU (Case C-45/20): *E v Finanzamt N* and CJEU (Case C-46/20): *Z v Finanzamt G*

4.4.5 Deregistration

A Romanian company's VAT registration was automatically revoked on 30 April 2014 because six successive monthly VAT returns had shown no transactions subject to VAT. The company continued to issue invoices "exclusive of VAT" from May 2014. The tax authority started an enquiry in 2019, which resulted in the company filing tax returns, then amended returns claiming input tax deduction; the initial filings showed VAT owing (which the tax authority sought to deduct), but the revised returns showed no debt.

The national law required that a taxable person whose registration had been revoked remained liable for output tax, but did not have a right to deduct input tax. The taxpayer argued that this was contrary to the principle of effectiveness. There were other problems with re-registering for VAT in these circumstances that appeared to be specific to Romania, including the fact that the owner and director of the company was a partner in another business that was subject to insolvency proceedings.

The court noted the fundamental right of a taxable person to deduct input tax where it related to taxed output transactions. The answer given is slightly curious, in that it starts by saying that the Romanian law is not contrary to the Directive in denying a person the right to deduct input tax in these circumstances, but makes that conditional on allowing such a person to re-register and therefore exercise the right to deduct. As the Romanian tax authorities appear not to have allowed that, the effect of the decision appears to be that the taxpayer's claim was justified.

CJEU (Case C-281/20): *Promexor Trade SRL v Direcția Generală a Finanțelor Publice Cluj – Administrația Județeană a Finanțelor Publice Bihor*

4.4.6 Excessive payments?

A Hungarian company entered into a contract with an advertising company to place stickers with its name on racing cars. The VAT on the price paid was deducted in the company's tax returns for 2014. The tax authority rejected the deduction on the basis that it was not linked to the taxed outputs of the business, and assessed to recover the VAT together with a penalty.

The company appealed, arguing that "the right to deduct VAT can be exercised even if the expenditure made by the taxable person was neither reasonable nor economically profitable, so that the alleged lack of advertising value of the services provided is irrelevant". The national court referred questions to the CJEU to find out if the "usefulness" of a service to the customer was relevant to the ability to deduct input tax, and whether the generation of turnover for the recipient of a service should be taken into account. A second question asked whether the authorities could refuse a deduction on the basis that the price charged for a service appeared to be excessive in comparison to other similar services.

The CJEU rehearsed the fundamental nature of the right to deduct, and concluded that the national court had to consider whether the inputs were genuinely used for the purposes of the business – either as directly linked to outputs or as overheads – and were not disallowed by art.176 (luxury, amusement or entertainment). If they were so used, the fact that there was

no increase in turnover could not be a reason to disallow the deduction; an excessive price could only be relevant in the circumstances envisaged by art.80 (transactions between connected persons). The guidance to the referring court was to consider "*whether the affixing of advertising stickers on cars on the occasion of the motor racing championship at issue in the main proceedings was intended to promote the goods and services marketed by Amper Metal, so that it could figure among the general expenses of the company, or if, on the contrary, the expenditure incurred on that occasion turns out to be devoid of any professional character and of any link with the economic activity of the said company. In accordance with the finding set out in paragraph 35 of this judgment, the fact that the services acquired by Amper Metal did not result in an increase in its turnover is irrelevant for the purposes of that assessment.*"

CJEU (Case C-334/20): *Amper Metal Kft v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága*

4.4.7 Status of supplier

A Czech company claimed input tax of about €784 in each of 2010 and 2011 in respect of advertising services provided during a golf tournament which had taken place in those periods. Following an audit, the tax authority discovered that the supplier recorded in the company's records disclaimed any knowledge of the transactions. The authority ruled that the input tax was not deductible, not because the supplies had not taken place, but because the claimant could not show that they had been supplied by a taxable person – this was not possible as the true supplier could not be identified.

The company appealed, arguing that the name on the purchase invoice was not a substantive requirement for deduction, and the authorities could only refuse a deduction if they could show that the claimant knew or ought to have known that the transactions were connected with fraud. Questions were referred to the CJEU. The referring court noted that the CJEU appeared to consider that a deduction was possible even though the taxable status of the supplier had not been established (*Maks Pen*, Case C-18/13), even though in that case the trader was denied a deduction for a different reason.

The court observed that the naming of the supplier on the purchase invoice is only a formal condition for deduction of input tax. However, the status of the supplier is a substantive condition: art.168 requires that the supply must be received by the claimant, being a taxable person, from another taxable person. Citing in particular *Ferimet* (Case C-281/20), the court commented that a deduction cannot be refused where the tax authorities have the information necessary to establish that the material conditions have been satisfied; imposing further conditions on deduction would not be proportional to the permitted objectives of preventing fraud, evasion or abuse.

The position may, however, be different if non-compliance with formal requirements effectively prevents the production of conclusive evidence that the substantive requirements have been satisfied. This might be the case if the true supplier was not named on the invoice. The authorities should not restrict themselves to examining the invoice itself; they must also take account of any additional information provided by the taxable

person. It is for the taxable person seeking deduction of VAT to establish that he or she meets the conditions for eligibility. The tax authorities may therefore require the taxable person to produce the evidence they consider necessary for determining whether or not the deduction requested should be granted, which may include evidence that the supplier was a taxable person. There is a distinction between requiring the claimant to confirm taxable status as an anti-fraud measure (which the CJEU rejects as too onerous) and requiring the claimant to show that the material conditions for a deduction have been met.

The court commented that this would be particularly relevant where the Member State had a "small business exemption"; if the transaction itself was greater than the threshold, the supplier must necessarily have the status of taxable person, and it would be possible for a claimant to deduct input tax without identifying the supplier (subject to the principles of "knowledge or means of knowledge of connection with fraud").

In this case, the transactions were below that threshold, and the failure to identify the supplier (or provide other proof that the supplier was a taxable person) was enough to require the claim to be refused.

CJEU (Case C-154/20): *KemwaterProChemie s. r. o. v Odvolací finanční ředitelství*

4.5 *Foreign refund reclaims*

4.5.1 Reissued invoice

A business made a claim for Romanian VAT under the Refund Directive in 2012. It transpired that the invoice supporting the claim was not correctly issued, so it was cancelled and reissued in 2015. A fresh claim was made for that year; the Romanian court was not sure about the correctness of this claim, and questions were referred to the CJEU.

Advocate-General

A-G Kokott noted that "the Court has the opportunity here to answer one of the most important questions of VAT law in practice, namely whether an undertaking's right of deduction depends upon possession of an invoice." This leads on to the question of the period in which the right to deduct can be exercised if an invoice is corrected after its first issue. If the invoice was not crucial, the claim would depend only on the supply of goods and services, and must fall in 2012; if the correction of an invoice was retroactive in effect, it would also fall in 2012; if possession of a correct invoice was critical, it would fall in 2015. This in turn led into the question of when time limits started to run, whether under the Refund Directive or other limitation periods in national law.

The Romanian government argued that the claim had been refused in 2012 because of a lack of proof of payment, which was still required under national law at that time. The claim could have been resubmitted by 30 September 2014, but this was not done. The A-G commented that it was for the national court to determine the facts; the CJ could answer the questions as referred, and she would proceed on the assumption that the claim had been rejected because the invoices were not in the proper form.

The A-G considered the right to deduct under several headings, including the origin of the right in principle and the origin of the right to deduct in a specific amount. Art.168 established the right in principle on the receipt of a supply of goods or services for one of the creditable purposes; but art.178 was critical in determining the actual amount that could be deducted, because the mere receipt of a supply said nothing about the amount. The need to hold an invoice was fundamental to that. In precedent cases *Volkswagen* (Case C-533/16) and *Biosafe* (Case C-8/17), invoices were issued years later, and the CJ had held that the claim could only be made when the invoices established the amounts that should be claimed. The A-G concluded that an enforceable right of deduction does not arise until the recipient of the supply holds an invoice showing the VAT charged.

The time limits therefore only started to run when both articles (167 and 178) were satisfied. The A-G explicitly stated that the possession of an invoice was a substantive, rather than a formal, condition for deduction. Where the CJ has considered shortcomings in invoices and referred to them as mere formal requirements, this is always in relation to the detailed content, never to the possession of an invoice as such. For example, it has been held that a tax authority cannot refuse a deduction only on the ground that the invoice does not precisely describe the supply (*Barlis–06* Case C-516/14), or does not show the supplier's VAT number (*Senatex* Case C-518/14), or does not show an invoice number (*Pannon Gep*

Centrum Case C-368/09). The correct time for the deduction was when the invoice was held.

The A-G turned to the effect of "cancelling" the original invoices and replacing them. In her view, the question was whether the original documents had been "invoices with minor defects", in which case they justified deduction in 2012 after the defects had been corrected; or if they were missing such fundamental information that they were not invoices at all, in which case the 2015 versions were the only "invoices" that had been issued, and the claim would fall in that year.

The A-G considered it unlikely that the invoices were so flawed that they would not have constituted invoices at all. She also did not agree with the Commission or the applicant that the cancellation of the invoices annulled them so completely that it was as if they never existed and could therefore be ignored. It would be for the referring court to determine the facts.

If the 2012 invoices would have validated a claim, that was the proper year for it, and as the claimant had not appealed against its refusal, that would now be a final decision. The cancellation and replacement of an invoice could not undermine a decision to refuse the VAT shown on that invoice after the decision had been taken.

Full court

The full court started by considering an argument from the Romanian government that the questions referred were inadmissible because the referring court had not properly described the facts and had effectively put forward only the taxpayer's side of the argument. The CJEU disagreed, holding that it was clear enough what the issue of EU law was, and it would be up to the referring court to consider the government's argument again in the light of the answers given to the questions. They were therefore admissible.

The next section of the decision notes that amendments were made to the PVD by Directive 2010/45, taking effect from 1 January 2013. The referring court framed its questions on the assumption that the amended rules applied. However, the transactions had taken place in 2012; the referring court should reconsider which rules should be applied when rehearing the case. The only amendment relevant to the present case was a change in the detailed wording of art.178(a) in describing the requirements for an invoice to support a claim to deduct. Having noted the point, the court appears to dismiss it as not having a significant effect on the decision.

The court goes on to draw a further distinction between the questions referred and the principles that the court needs to apply. The questions relate to the effect of PVD articles 168 and 178, which are concerned with deduction of VAT by a trader established in the Member State; the circumstances of the case relate to a claim for refund, not a claim for deduction, by a trader established in a different Member State. Nevertheless, the principles are similar: the right to deduct, and therefore the right to a refund, is an integral part of the VAT mechanism and cannot, in principle, be limited.

The possession of an invoice is required to exercise the right to deduct; however, the absence of an invoice will not prevent a deduction if it can be established by other means that the substantive conditions for a

deduction have been met. The absence of an invoice will negate a deduction or refund if it means that proof of the substantive conditions is not available.

The court noted that Directive 2008/9 provides for the tax authorities to ask for further information from the claimant or from the competent authorities in the claimant's Member State, if they are not satisfied that they have sufficient information to prove the substantive conditions. The court drew a distinction between a document that is so vitiated by defects that it does not constitute an "invoice" within the meaning of the VAT Directive and something that is "an invoice with minor defects". It appears that the court is making the same point as the A-G, that this defective invoice should have been the basis for a claim made in 2012 and subject to the normal request for extra information by the tax authority.

Because a trader could only make a claim for deduction, and therefore also a claim for cross-border refund, when in possession of an invoice, it was not permissible to refuse a refund claim on the sole ground that the claim was made in respect of a later year than the transaction on which it was based. If the VAT was invoiced in the period in respect of a transaction that took place earlier, it was permissible to make the claim in the year in which it was invoiced.

However, to treat the unilateral cancellation of invoices by the supplier, subsequent to a refusal by the tax authorities to grant a refund claim, as nullifying those invoices so completely that a new claim could be submitted on the basis of new invoices, would enable taxpayers to circumvent the time limit in Directive 2008/9 (30 September following the calendar year of claim). That could not be right. That cancellation and reissue of invoices therefore had no impact on the existence of a right to refund.

CJEU (Case C-80/20): *WiloSalmson France SAS v Agenţia Naţională de Administrare Fiscală and another*

4.5.2 Refund claim procedures

A Belgian company specialised in marketing pallets. On 28 September 2017 it submitted a cross-border claim to the Hungarian authorities in respect of pallets purchased in Hungary during 2016. The tax authority noticed some discrepancies between the statement of claim and the listed invoices (in both directions) and asked for further information on 2 November 2017. The claimant provided detailed supporting information, but the authority restricted the claim: it agreed to repay approximately €825,000 but refused €300,000. The disputed claim related to some invoices on which refunds had already been claimed, and to others where the amount claimed was higher than that shown on the invoice. Where the invoices showed a higher amount than was included in the claim, only the amount originally claimed was paid.

The first level of appeal ruled that amending the claim to a higher amount, to match the invoices, would constitute a new claim, and that was time-barred. The trader appealed, and questions were referred to the CJEU. The referring court was concerned that the trader's argument, that the tax authority ought to pay the full amount of the invoices even though the trader had claimed a smaller amount, removed too much responsibility from the claimant.

The CJEU noted that the recitals to Directive 2008/9 established that the purposes underlying the Directive included restricting the ability of Member States to delay paying refunds. The Directive modernised the procedure and imposed time limits on the tax authorities as well as on the claimants, and restricted the authorities to asking questions that were necessary to determine the amount of a valid claim.

The court considered that it was necessary to balance the needs and responsibilities of the taxpayer and the administration. If the taxpayer made an error in a claim and the authorities did not notice it, the taxpayer could not blame the authorities for a shortfall in the amount claimed. However, if the authorities discovered a discrepancy that indicated that the claim was too small, it would be proportionate and consistent with the objectives of the VAT system (in particular fiscal neutrality) if the tax authority had the obligation to invite the claimant to correct the claim, rather than simply paying the lower amount. The corrected claim would be deemed to be made on the date of the initial submission, rather than being a new claim that was out of time.

CJEU (Case C-396/20): *CHEP Equipment Pooling NV v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága*

5. INPUTS

5.1 Economic activity

Nothing to report.

5.2 Who receives the supply?

5.2.1 Landlord and tenant

An individual was VAT registered as a sole proprietor running a pub from 16 December 2012. On 12 February 2018 he submitted VAT returns for the periods from 02/15 to 11/17, claiming over £19,000 of input tax, mostly or entirely in relation to the payment of rent. He appealed against HMRC's refusal of the claim, but did not attend the (virtual) hearing. The judge decided that it would be fair to continue without him.

The landlord had opted to tax the rent, but the lease was in the name of the trader's wife. He was registered as a sole trader; there was no evidence of a partnership between himself and his wife, nor any evidence that he had paid the rent. The judge agreed with HMRC that the appeal could not succeed because there was no evidence that the taxable person had received a taxable supply.

The judge noted that the officer had given the appellant "every consideration when examining the multiple VAT input claims which had been made late as a group. There were a number of visits to the appellant as well as extensive correspondence with the appellant's representative. It was carefully explained to the appellant what evidence was needed to support his claim. Time was given to the appellant to gather evidence. The appellant had access to professional advice. All of the documents produced by the appellant were included in the trial bundle and were studied by the Tribunal with care." However, he had not produced any documents that supported his case, and those documents he had produced tended to contradict it. The appeal had to be dismissed.

First-Tier Tribunal (TC08308): *Mr Mpala Mufwankolo*

5.3 Partial exemption

Nothing to report.

5.4 Cars

Nothing to report.

5.5 Business entertainment

Nothing to report.

5.6 Non-business use of supplies

Nothing to report.

5.7 Bad debt relief

5.7.1 Bad debt relief conditions

A Czech company made a supply in November 2013 to a customer that was declared insolvent in May 2014. The company made an adjustment for the bad debt in its return for May 2015; the tax authority decided that it was not entitled to make this adjustment, and issued a decision to that effect in February 2016.

The reason for the decision was that the Czech law included a condition that the unpaid claim must not have arisen during the six-month period preceding the court decision declaring the debtor company concerned insolvent. The unpaid claim at issue in the main proceedings arose on 29 November 2013, by just less than two weeks falling within the six-month period preceding the court’s decision of 19 May 2014 declaring the customer insolvent. The national court referred questions to find out whether such a condition was contrary to the Directive.

Art.90(2) allows Member States to impose conditions on the operation of the relief, but precedent cases have suggested that this only relates to situations in which it may be difficult to determine with certainty that the consideration is irrecoverable. The referring court considered that such an option to derogate must be warranted by uncertainty as to the payment of the consideration and be proportionate to that objective. It would also not fall within art.273, because there was no suggestion of fraud, evasion or abuse.

The court ruled that the absolute denial of bad debt relief for any supply made within the six-month window could not be justified by either art.90 or by art.273. There might be some uncertainty about the way in which the debt would be dealt with by the insolvency, but any condition attaching to the relief should be related to whether the non-payment would be confirmed by the insolvency. Art.273 would require additional evidence to show that there was some abuse involved in the transactions.

CJEU (Case C-398/20): *ELVOSPOL, s. r. o v Odvolací finanční ředitelství*

5.7.2 Updated Manual

HMRC have updated their *VAT Bad Debt Relief Manual* to confirm that a claim for bad debt relief must be made within 4 years and six months of certain events (rather than three years and six months). The law changed with effect from 1 April 2009, so it is to be hoped that officers have not been following the guidance but the law for the last twelve and a half years.

The guidance states that the time limit does not apply to claims relating to supplies made between 1 April 1989 and 30 April 1997, where the due date for payment was before 1 May 1997; however, it seems very unlikely that any new claims can now be made for such debts.

VBDR1600

5.8 Other input tax problems

5.8.1 MTIC appeal

A company appealed against decisions to deny input tax credit of £1.5m in 07/16 and £560,000 in 10/16 in respect of 29 purchases of electrical goods, and the resulting assessment for £2.06m. The decisions were issued on 10 October 2017 and upheld on review on 26 January 2018. An appeal was filed on 24 February 2018.

Judge Zachary Citron reviewed the company's transactions, noting that the turnover for the two periods was £8.8 million and £5.7 million, after being less than £7,000 in prior periods. The supplier of the goods had been deregistered by HMRC on 11 January 2017. It went into liquidation in January 2018 owing HMRC £2.5m. One of the UK customers was deregistered by HMRC on 18 May 2017 on the grounds that it was using its registration for fraudulent purposes. Foreign customers in Czech Republic and Poland had become "missing traders".

The director and shareholder of the appellant had a long history in technology consultancy. In his fifties, he had been claiming jobseekers' allowance after falling prey to a "pension unlocking expert" fraudster; he was introduced to a new business venture by a longstanding contact, and wrote to HMRC to add new SIC codes to the VAT registration. HMRC visited him for a 1.5 hour educational meeting, because the business sectors he specified were high risk for MTIC fraud. The problems were explained, and he was given Notice 726. As a result of this meeting, the director decided not to pursue the venture that he had been considering.

In early 2016, the contact suggested a different venture – trading in electronic goods. The decision records how this developed, with the director being drawn in to suspicious transactions which he expressed unease about. However, he went along with it. In effect, his company's trading activities were controlled by an outside individual known only as "Adam", who kept telling him that he would be trained in due course to carry on the activities himself.

The judge reviewed the precedents and the legal tests. It was clear that there was a tax loss, that it was attributable to fraudulent VAT evasion, and that it was connected with the company's purchases. The questions were whether the director "knew" or "ought to have known".

The judge found that the director did not "know" of the connection to fraud because he did not know about the transactions – these were carried out by "Adam" without his knowledge, and he only found out about them later. It was clear that "Adam" knew of the connection to fraud, and based on precedent cases, the knowledge of the appellant's agent had to be attributed to the appellant.

Turning to the "should have known" test, the judge described the way in which the business was carried on and put under the control of a third party. This was objectively strange and suspicious, and the director had been warned in advance by HMRC that this was an area rife with MTIC fraud. In the view of the FTT, the only reasonable explanation for these circumstances was a connection with fraudulent VAT evasion.

The appeal was dismissed.

First-Tier Tribunal (TC08334): *Turquoise 2 Ltd*

6. ADMINISTRATION AND PENALTIES

6.1 Group registration

6.1.1 Sale of shares in subsidiary

HLT was the holding company of a subsidiary, HLTB, which operated a hotel in Birmingham. HLT was VAT registered on the basis of providing management services to the subsidiary. In mid-2015, HLT decided to construct a new hotel in Milton Keynes; after considering various possibilities, it decided that the best way to finance the development's £34.5 million cost would be to sell HLTB. This took place in July 2017. HLT claimed a deduction for input tax on various fees associated with the sale of the shares, leading to a repayment claim in respect of its 09/17 period. HMRC enquired into the return and disallowed the input tax, initially on the grounds that it was not accepted that the holding company was "in business". This was subsequently accepted, but HMRC maintained the disallowance on the basis that the costs were used in the exempt sale of the shares, rather than in the "downstream" taxable activities that would follow on from the completion of the new hotel.

The company appealed, advancing three separate arguments:

- the inputs could validly be regarded as relating to the future taxable transactions, rather than the present exempt share sale;
- because HLT and HLTB were registered as a VAT group, the share sale should be regarded as outside the scope instead of exempt;
- the sale was analogous to the sale of a business as a going concern.

Judge Richard Chapman considered a number of authorities on the question of "direct and immediate link" and "financing transactions". These included *VW Financial Services (UK) Ltd* (Case C-153/17); *X BV* (Case C-651/11); *Kretztechnik* (Case C-465/03); *AB SKF* (Case C-29/08); *C&D Foods Acquisition* (Case C-502/17); and *Frank A Smart & Son Ltd* (UKSC 2019). The judge noted that the parties had also referred to the older cases of *BLP Group* and *Midland Bank*, but these were effectively covered by the analysis of the precedent case law in *Frank Smart*.

The judge's analysis concentrated first on the question of whether there could be a direct and immediate link between the costs and the downstream transactions. He accepted that, in a fundraising transaction, the question was not whether the inputs were used in the share transaction, but rather whether the funds would be used in taxable activities. As long as that was the case, the initial share transaction would not "break the chain" between the costs and the taxable use, provided that those costs were not demonstrated to be cost components of the share sale. That would be the case if the costs were added into the sale price, or were separately identified as part of the sale; however, the evidence showed that the sale was effected at the best price possible in the market, and that was not affected by the costs incurred in achieving it. This analysis, based on the judgment in *Frank Smart* (as referenced by paragraph numbers in the extract below), was summed up as follows:

(1) The purpose in fundraising was to fund its economic activity [65(iv)]. This is to be ascertained from the objective evidence [65(iv)] and

[65(vii)]. As Lord Hodge notes, "The ultimate question is whether the taxable person is acting as such for the purposes of an economic activity," [65(vii)]. The circumstances to be taken into account include the nature of the asset and the period between acquisition and use for the economic activity [65(vii)].

(2) The funds are later used for taxable supplies [65(iv)]. However, the right to deduct arises immediately, potentially resulting in a time lapse between deduction and use or retention of the right to deduct even if unable to use them in certain circumstances [65(vi)] and [69].

(3) The cost of the services are cost components of downstream activities which are taxable. The right to deduct will therefore be lost if the cost of the services are incorporated into the price of the shares sold in the initial transaction that is exempt or outside the scope of VAT [47] or of downstream activities which are exempt or outside the scope of VAT [65(v)]. If the downstream activities are a combination of taxable transactions, exempt transactions and transactions outside the scope of VAT, the inputs will have to be apportioned [65(v)].

It was necessary to ascertain the purpose of the share sale on objective grounds, rather than considering the subjective intention of the taxpayer. The evidence showed that the intention was to use the funds to finance the development in Milton Keynes, and the funds were so used. The professional costs reduced the net sale proceeds, but that did not mean that they were used to obtain those proceeds in the sense of a direct and immediate link for VAT. The appeal was allowed on this basis.

Even though it was not strictly necessary, the judge went on to consider the other two grounds of appeal. The argument about the effect of group registration was raised very late (only in post-hearing submissions), and HMRC objected to its admission. After considering the case law on late changes to grounds of appeal, the judge ruled that he would not have accepted the additional ground. However, he went on to discuss it and dismiss it in any case. After considering precedents including *Thorn Materials Supply Ltd* and *Taylor Clark Leisure plc*, he concluded that it was not correct to treat the VAT group as a single entity for all purposes (which would effectively mean that HLT's shareholding in HLTB "did not exist", and could not therefore be the subject of an exempt supply). The effect of VATA 1994 s.43 was to disregard intra-group transactions for the time being, but the companies within the group still existed and had their own economic activities. The economic activity could not be ignored, even if intra-group transactions arising from that activity were disregarded.

The going concern argument was based on the CJEU decision in *AB SKF* which raise the possibility that the sale of a subsidiary might in some cases be treated as equivalent to a TOGC. The appellant's counsel tried to distinguish the present circumstances from those in *X BV*, where the CJEU had ruled that going concern treatment did not apply. *X BV* involved the sale of a 30% holding, whereas HLTB was a wholly owned subsidiary. HMRC referred to *DTZ Zadelhoff* (Case C-259/11), which concerned the sale of a company that owned a building: the CJEU confirmed that this had to be treated as a sale of shares, not a sale of immovable property, unless the Member State had implemented an optional provision in the PVD to exclude the exemption in those circumstances.

The judge did not accept that this could be a TOGC. His reasoning was as follows: “There was no transfer of HLT’s management of HLTB. On the basis of *SKF* this would not itself be fatal. However, there is nothing else that was transferred which meant that Dalata as transferee would be carrying on an independent economic activity as HLT’s successor. The relevant assets were held by, and the relevant economic activity carried on by, HLTB rather than HLT prior to the transfer of the Shares and by Dalata immediately after the transfer of the Shares.” This seems to require that it is part of HLT’s economic activity that is transferred; consistent with his decision on grouping, the judge regards HLT’s economic activity as the provision of management services, which was not transferred to the purchaser.

The appeal was allowed on the first of the three grounds. The other two could be the subject of cross-appeals if HMRC appeal the decision.

First-Tier Tribunal (TC08335): *Hotel La Tour Ltd*

6.2 Other registration rules

6.2.1 Application to re-register

On 27 August 2021, HMRC issued a decision to deregister a company for VAT on the grounds that they had formed the view that it had been registered with the sole or principal aim of facilitating VAT fraud. The company appealed to the FTT, but also applied for judicial review of the decision and an injunction to require HMRC to re-register the company pending the outcome of the Tribunal appeal. The company denied HMRC’s allegation and any wrongdoing. The High Court has considered the application for an injunction, while the judicial review application and the Tribunal appeal are outstanding.

The judge reviewed the basis on which a registration can be cancelled, and noted that preserved EU legal principles justified such an action by the revenue authorities if they were satisfied that the registration was used or intended to be used to facilitate fraud. It was agreed that such a power did not need to be expressly stated in the legislation. This is referred to as the *Ablessio* principle, named after the company in Case C-527/11.

The judge reviewed the history of an enquiry into the company that had begun in 2020 (even though the company had been incorporated in 2011 and registered for VAT since 1 February 2012). This had led to an assessment for £23 million, as well as the deregistration decision. The investigating officer had concluded that there were discrepancies and omissions, based partly on tracing sales invoices to the records of counterparties. The officer set out 13 reasons for concluding that the business was being run to facilitate fraud:

a. the business had failed to provide sufficient evidence to establish the current trading position;

b. sales invoices issued by S&S were invalid for VAT purposes;

c. when notified by HMRC that the invoices were invalid, S&S amended the format to refer to 'timesheets'; the supporting timesheets were not made available to HMRC;

d. from the sales evidence provided it was impossible to ascertain the liability of supplies or whether the business is taxable;

e. sales had been routed through an undisclosed bank account, details of which had not been provided to HMRC even when queried;

f. S&S advised that one bank account was operated by the business, however this was later corrected to disclose two further business bank accounts that had been omitted;

g. records from period 7/20 onwards had not been made available;

h. the majority of contact between HMRC and S&S has been via its agent with little involvement from the named Director;

i. the primary accounting records for S&S held on the Merit system. Requests for access to this system and the data had not produced any of the primary records;

j. S&S operates as a successor to Simplify Contracting Services and SMP Support Services Ltd with the trade being transferred over upon the Deregistration or loss of CIS (Construction Industry Scheme) gross payment status of the predecessor company.

k. The predecessor companies to S&S, SMP Support Services Ltd and Simplify Contracting Service, have operated as defaulting traders, accumulating large debts and failing to provide requested information. The same method of operation had been continued with S & S Consulting Services (UK) Ltd;

l. links between S&S and predecessor companies SMP Support Services Ltd and Simplify Contracting Services have not been notified to HMRC;

m. S&S is under the control of Paul Bell operating as a shadow director. A similar structure was operated by SMP Support Services Ltd and Simplify Contracting Services. Although this had not been disclosed to HMRC, it was clear from the past employment history of Spencer Hill (a director of S&S) that he is closely associated with Paul Bell.

A first application for an injunction was refused in a "paper hearing". The judge held that the company had not shown that there was an abuse of power or any unlawfulness of the kind necessary for an injunction to be granted, and HMRC were content for the substantive appeal to the FTT to be expedited.

The company applied again for an injunction, putting arguments to a new judge through counsel. Their counsel set out the catastrophic consequences for the company of the cancellation of the registration: it could not legally trade or compete in the marketplace. She considered that it had been an abuse of power to issue the deregistration decision without any warning. She also argued that the decision was irrational, took into account irrelevant considerations and left out relevant ones, and was disproportionate.

HMRC responded that the scale of the fraudulent activity, and the fact that it was a continuation of previous frauds carried out by linked

companies, showed that there was an overwhelming public interest in protecting the revenue, which justified the decision that had been taken.

The judge reviewed the law on injunctions in general, and in relation to VAT and duty. Both parties relied on the Court of Appeal's 2015 decision in *CC&C v HMRC*, which concerned the suspension of a trader's authority to operate an excise warehouse. The CA had considered that it did have the power to issue an injunction to restore a trader to the register, but only where there was an abuse of power by HMRC. The existence of the Tribunal appeal route, provided for by Parliament without the option of a temporary suspension of the HMRC decision pending the appeal, suggested that the courts should be reluctant to grant an injunction in other circumstances. Other cases concerning excise suspension were considered, and also the 2020 refusal of a similar application relating to a VAT registration in *Ingenious Construction Ltd*.

The judge examined the arguments put forward by the taxpayer's counsel, and concluded that there was no abuse of power by HMRC. It was not true that the deregistration decision had come without any warning: there were numerous indications throughout the investigation that HMRC were taking the matter very seriously indeed, and the company should have understood that deregistration was one of the possible outcomes.

The judge also commented that he should be "cautious about taking 'prognostications of disaster' from company directors at face value". Although there was a risk that the company would become insolvent before the appeal (listed for February 2022), the company had not shown that this was a high probability.

The application for an injunction was accordingly rejected.

High Court: *R (on the application of S&S Consulting Services (UK) Ltd) v HMRC*

6.2.2 Registration delays

The CIOT has shared feedback from the Joint VAT Consultative Committee (JVCC) on the most common reasons that cause online VAT registration applications to require manual intervention and increase processing time.

The common errors that cause delays to online VAT registration application are as follows:

- addresses provided on the application do not match the business's principal place of business
- notification of a trade classification does not match up with the work that the business itself carries out
- the VAT liability of trading is not correctly identified
- invalid signatory for the application – e.g. for a corporate body it must be a director, company secretary or authorised signatory or an authorised agent
- invalid dates on the application – e.g. does the effective date of registration requested match up to the circumstances that have been outlined for requesting registration elsewhere in the application?

- the bank account details provided are not in the name of the taxable person

HMRC encourages agents and taxpayers to check that all information requested at "Register for VAT by post" is included with the application to avoid any further delays. Applications from agents and taxpayers are all subject to the same checks.

www.tax.org.uk/vat-registration-list-of-common-reasons-why-online-applications-are-delayed

6.3 Payments and returns

6.3.1 Failure to operate the FRS correctly

A company was registered for VAT with effect from 5 August 2014 and authorised to use the Flat Rate Scheme from the same date under the categorisation "management consultancy", with a flat rate of 14% (13% in the first year of registration). The sole director wrote to HMRC on 8 June 2015 stating that the company had "overstated" the VAT due for 08/14 and 04/15; the adjustments made in this "correction" implicitly withdrew claims for input tax that had been included on the original return. HMRC did not respond to the letter but simply processed the amendments.

HMRC commenced an enquiry with a letter in December 2017. After receiving no reply, in January 2018 HMRC wrote stating that it appeared that there were errors in the returns and an additional £6,770 was due. The company now engaged in correspondence, and it became apparent that the FRS percentage had been applied to net turnover rather than gross turnover; in addition, input tax had been claimed in 01/15 and 04/15 in relation to expenditure that was not "capital expenditure goods" (although the 04/15 claim had been cancelled by the earlier amendment). HMRC raised a best judgement assessment for £8,474, and the company appealed.

The director's only defence was that "HMRC should have been more vigilant in checking the returns and its advice and guidance should have been clearer". She also complained that dealing with the enquiry and the appeal had been upsetting and distressing. The judge noted that HMRC accepted that there had been "an imperfect customer service", but the FTT did not have jurisdiction to consider HMRC's conduct.

It was clear that the company had applied the rules incorrectly; apart from reducing the assessment by £39 in respect of the withdrawn input tax claim, the appeal was dismissed.

First-Tier Tribunal (TC08311): *Swiss Dawn Consultants Ltd*

6.3.2 Interest rates

HMRC interest rates for late tax payments are linked to Bank of England rates, so the recent interest rate rise to 0.25% from 0.1% has led to increases in HMRC rates with effect from 4 January 2022 for most payments. The rate of default interest for VAT has been 2.6% since April 2020, and has now reverted to 2.75% (which it was briefly from 30 March 2020 to 6 April 2020; before that it had been 3.25% since August 2018).

Repayment interest is unchanged at 0.5% per annum, which it has been since 29 September 2009.

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

6.4 Repayment claims

6.4.1 Demonstrator claims

Two car dealerships sold ex demonstrator vehicles between 1973 and 1996 and accounted for output tax on the margin on sale, in accordance with the law at the time. They made claims for repayment under the principles of the *Italian Republic* decision that such sales should be exempt, because the input tax was not recoverable. Claims were made in 2003 and in 2009; the 2003 claims were agreed in March 2006. HMRC argued that the 2009 claims were simply a different way of calculating the amount claimed in 2003, and "had nothing new to say"; they were therefore covered by the s.85 VATA 1994 agreement of the earlier claims, and litigating them would be an abuse of process. The companies argued that the claims were different and not covered by the agreement.

The judge set out the background to *Italian Republic* claims in general and the claims made by these companies in particular. This included the use of estimates to calculate the amount of overpaid VAT for periods in which records had not been retained. The agreement between the parties, entered into in March 2006, covered both *Italian Republic* and *Elida Gibbs* claims.

The 2009 claims were made just before the *Fleming* deadline of 31 March 2009. They were based on the assertion that the earlier claims had not properly allowed for the effects of car tax and other economic factors prior to 1992, when gross profits were higher. They were therefore, in effect, claims for additional repayments in respect of the same cars as those covered by the earlier claims. One appellant claimed an additional £315,000 plus interest; the other claimed an additional £415,000 plus interest. These figures were later revised downwards to £257,000 and £342,000. The claims were refused, appealed, and stood over behind the leading case of *Bristol Street Group Ltd*.

The tax agent who prepared the 2003 claims gave evidence. She had considered that there was no alternative to using Customs' published tables in relation to *Italian Republic* claims at that time. She had become aware in early 2009 that other traders were challenging the accuracy of those tables; she had not realised until then that the tables were fundamentally flawed and understated the prices likely to have been achieved before 1992. She was further unaware until September 2017 that the *Bristol Street Group* case had been settled, but had then sought assistance from Grant Thornton, who had set out a methodology for calculating justifiable claims.

Judge Nigel Popplewell set out the arguments of the opposing counsel in detail, noting also that it was a brief summary of submissions that had been made in writing and orally over the course of a two day hearing. He summarised the issues for decision as these:

- were the 2009 claims "repeat claims with nothing new to say"?
- were the 2009 claims subject to the 2006 agreement under s.85?
- were the 2009 claims and related appeals abusive under common law?

The first issue involved consideration of the precedent of *John Wilkins (Motor Engineers) Ltd*, in which the CA had decided that it was permissible for a company to bring a claim for compound interest after accepting a payment of simple interest. The judge and the parties agreed that this was persuasive but not binding authority for the permissibility of the taxpayers' claims. The Tribunal also considered the older case of *Hayward Gill*, in which the VAT Tribunal decided that there was nothing in s.80 to prevent successive claims for the same periods. However, the CA in *John Wilkins* suggested that such a second claim would have to be based on new facts; if there was nothing new to add, it would be abusive.

The judge concluded that the discovery by taxpayers of the flaws in Customs' *Italian Republic* tables were a "new fact" that made the 2009 claims justifiable in accordance with *John Wilkins*. He set out his conclusions to this effect in considerable detail, explaining his rejection of HMRC's arguments. He also commented that, in his view, the hurdle which a claimant needs to overcome in justifying that a repeat claim says something new should be a low one. It is in the interest of tax justice that more precise numbers are used to enable a taxpayer to be recompensed, more precisely, for the amount of tax overpaid.

On the other hand, the judge concluded (with some difficulty) that HMRC's counsel had the better argument in relation to the s.85 agreement: it acted to settle any and all *Italian Republic* claims in respect of the vehicles sold in the periods covered by the 2003 claims. They could not literally cover the 2009 claims because those claims had not been made when the agreements were struck; however, they were in effect a compromise made by "equally sophisticated parties" as a commercial matter, and were intended to settle the dispute in relation to the overpaid VAT. The traders had made what turned out, with hindsight, to be a bad deal, and now sought to resile from it. Other traders had made additional claims on the same basis, but they had not entered into s.85 agreements.

The third ground was also decided in favour of HMRC: an appeal against the 2009 refusals would involve relitigating matters that had been settled by the s.85 agreement, and would therefore be abusive. The appeals were dismissed, but the judge noted that the taxpayers might wish to appeal against his decision.

First-Tier Tribunal (TC08316): *Cambria Automobiles (South East) Ltd and another*

6.5 Timing issues

6.5.1 Instalment consideration

A German company, X, provided another company, T, with intermediation services in connection with the sale of real estate. By the time the fee agreement was concluded on 7 November 2012, X had performed all the services involved in the supply. The fee was set at €1 million plus VAT, payable in five instalments of €200,000 plus VAT each, due annually on 30 June each year, starting in 2013. The contract

stated that the company would issue a tax invoice at the payment deadline for each instalment.

The tax authority ruled in December 2016 that the full amount of the tax had been due in 2012, because the entire supply of the services had been completed. X appealed the decision; at first instance, the court applied the "bad debt relief" rules and considered that only the first instalment would be regarded as taxable in 2012. The tax authority appealed, and questions were referred to the CJEU.

The first question concerned the application of art.64 PVD, which governs "continuous supplies". The article refers to supplies that "give rise to successive statements of account or successive payments"; it provides that "the supply of [such] services shall be regarded as being completed on expiry of the periods to which such statements of account or payments relate." The question was whether this applied to a situation where a "a staggered payment is stipulated to consider that a one-off service, which is therefore not provided during a determined period."

The second question asked whether art.90 could be used in the way that the first instance court had used it – to reduce the taxable amount in respect of the later instalments.

Advocate-General

The A-G noted that X did not accept that the service was one-off in nature and completed in 2012. It considered that there were additional services rendered later, and only the first instalment paid for the services that had been supplied in 2012. However, the A-G suggested that the court should answer the questions on the basis of the facts found by the referring court, which included the one-off nature of the supply.

The A-G considered the second question first. He agreed with the German government that art.90 could only be applied where consideration had become irrecoverable. Where payment by instalments had been agreed, the situation did not constitute "non-payment" within art.90. Art.90 allowed Member States some discretion in how they applied the provision, and the German rules did not appear to contravene the principles of the Directive.

Turning to the first question, the A-G considered the relationship between art.63 (basic tax point) and art.64 (continuous supplies). In his view, art.64 was not a derogation from art.63, but was applicable for the avoidance of doubt in situations in which the art.63 tax point would be hard to determine because of the nature of the supply. If X was right and it applied to agreed instalment payments, it would be open to the parties simply to agree the time at which VAT became payable, which could not be right. He agreed with the Commission, which argued that "transactions which give rise to successive payments" must be understood in the sense that it relates to transactions which by their very nature require a distribution over time or a staggering of the payment of the counterpart, and this because of their recurring nature.

X also protested that it was unreasonable to expect it to finance the whole of the VAT when it was only collecting the consideration in instalments. The A-G did not accept this argument. It was up to the trader to arrange its transactions taking into account its obligations; if it had raised a proper VAT invoice showing the whole of the VAT due on the first instalment, it

would have been able to collect that VAT and would not have had to finance it itself. Art.66 PVD allowed Member States some flexibility in how they applied the rules, but that was a derogation and therefore optional; indeed, the existence of the derogation suggested that the basic rule was as the German authorities contended.

Full court

The full court noted that art.64 contains a specific exclusion for sale of goods on deferred payment terms, but there is nothing in the article about services. The situation differed from that in *Baumgarten Sports & More* (Case C-548/17), which concerned the services of a sports agent – in that case, the payment of later instalments were conditional on the long-term success of the agency service; in this case, the payment by instalments was only subject to a set timeframe, and was not conditional.

The taxpayer continued to object to the referring court's findings of fact. The court observed that it was for the national court to decide the facts and to decide its questions; it was therefore appropriate for the court to answer the questions, disregarding the taxpayer's objections.

The court recognised that there were different possible interpretations of art.64. However, the context and the purpose of the Directive required that there should be a relationship between the nature of the services in question and the payment in instalments, so that art.64 cannot concern a one-time supply, even if paid for in instalments. Art.64 could not override art.63 in a situation in which the "actual performance of the service" could be ascertained with certainty; it could not be right that the parties to the contract could determine the chargeable event by agreement, which would be the effect of the taxpayer's interpretation.

As further support for this view, art.66 would be deprived of its substance if art.64 applied in this way. That article permits Member States to derogate from the provisions of art.63 in certain circumstances and to move the chargeable event to the date of issue of an invoice; if art.64 already had that effect in respect of supplies in general, art.66 would be meaningless.

The financing of the output tax by the taxpayer was not a reason to override the clear words of the law, even though the neutrality of the tax was supposed to relieve taxable persons entirely of the burden of the tax. The court's clear answer was that a service supplied on a single occasion remunerated by way of instalment payments does not fall within the scope of art.64.

The court was equally clear that "non-payment of consideration" for the purposes of art.90 did not include an agreement to pay and receive instalments. The taxable amount could not be reduced in respect of that agreed delay.

CJEU (Case C-324/20): *Finanzamt B v X-Beteiligungsgesellschaft mbH*

6.6 Records

Nothing to report.

6.7 Assessments

6.7.1 Best judgement

A company appealed against assessments totalling £190,987 for periods from 03/14 to 03/17, and a deliberate behaviour penalty of £5,405 relating to period 06/17. The company made only standard rated supplies of groundwork in the telecommunications industry, but made numerous repayment claims. When these were investigated, the officer found that many of the purchase records were missing, "lost in a flood". When alternative evidence could not be provided, she raised assessments disallowing input tax; these were reduced when some further evidence was produced. The company appealed against the remaining assessments and the penalty. A "careless" penalty for earlier periods had been suspended, and an appeal against it was withdrawn.

Judge Anne Redston noted that the appellant's counsel had criticised the Tribunal bundles for being randomly ordered and almost impossible to follow. However, these were the company's documents as they had been presented to HMRC – "1,300 pages provided late, without indexing and without any obvious order. It was for the company to ensure that they were indexed and referenced appropriately."

The judge noted that the director (who she held responsible for deliberate behaviour in relation to the penalty) was not a wholly reliable witness. She made various criticisms of his version of events, and did not accept a number of specific assertions. On the other hand, the HMRC officer was an entirely honest and credible witness.

The company did a considerable amount of work for Carillion, which provided it with a purchase card to buy materials. The technically correct way to account for this would be to include the expenditure as inputs on the VAT return because the company received the supplies, and to include an identical amount as outputs to reflect the fact that Carillion paid for them. However, HMRC allowed many subcontractors to leave both entries off the VAT return, as it made no difference to the net liability. As there was no dispute that the appellant had not included any outputs in respect of these purchases, the judge held that it had adopted this "net" basis of accounting.

The decision goes through the history of the enquiry, including attempts by the director to blame the company's accountant (who had since ceased to act, and gave no evidence to the Tribunal) for "tampering" with the records. The judge considered this inherently unlikely, and did not believe that there had ever been a flood (the date of which changed during the course of correspondence).

The judge considered the law and precedents on best judgement assessments, and the arguments put forward by the company, which she rejected. She was satisfied that the officer had taken all relevant material into account and had made an honest and logical attempt to arrive at the correct figure for input tax that was allowable.

The judge's reasoning is set out in considerable detail, perhaps to discourage a further appeal. It must make uncomfortable reading for the director. The appeals against the assessment and the penalty were both dismissed.

First-Tier Tribunal (TC08319): *RNS Utilities Ltd*

6.8 Penalties and appeals

6.8.1 Default surcharge

A company entered the DS regime in respect of its 07/20 period. The late filing and payment of 10/20 did not attract a surcharge because the amount was less than £400, but the late payment of 01/21 incurred a surcharge of £2,281 at 5%. The company appealed, claiming the furlough of the relevant employee as a reasonable excuse; the return had been filed on time on 1 March 2021, but the payment was arranged on Friday 5 March and did not reach HMRC until Monday 8 March, a day late.

The judge noted that the taxpayer had not provided any evidence about what was done on Friday 5 March, in spite of being invited to do so in correspondence with HMRC. The company claimed that it had despatched the money by "Faster Payments", which the judge noted should have arrived immediately; he was therefore not satisfied, on the balance of probabilities, that the company had done so.

The judge commented that he appreciated the difficulties posed by the pandemic, but considered that a taxpayer in the default surcharge regime should have put arrangements in place to make sure that its VAT was paid on time. The appeal was dismissed.

First-Tier Tribunal (TC08268): *Rada In Business Ltd*

6.8.2 Penalties

A married couple trading as a partnership were assessed on the grounds that they knew or had the means of knowing that their input tax claims were connected with a fraudulent tax loss attributable to suppliers that had been deregistered. The assessments amounted to £43,338; initially, a "deliberate behaviour" penalty was issued, but this was later amended (apparently unintentionally) to "careless". The couple appealed against a penalty amounting to £11,699.

HMRC argued that the appellants had had the opportunity to appeal the assessments and had not done so. This suggested that they had accepted that they knew, or should have known, that the transactions were connected with fraud. It would therefore be an abuse of process to allow them to appeal against the penalties which were levied for exactly that situation. HMRC also put forward substantive arguments to support the allegations underlying the penalties, which focussed on close connections between the appellants and the fraudulent suppliers.

Judge Anne Fairpo did not consider the appeal to be an abuse of process, because the matter had not been previously argued before or decided by a Tribunal. She therefore continued to consider the substance of the appellants' defence. She was satisfied that the behaviour was at least careless, and the penalty was therefore justified. Some of the explanations were contradictory, and the absence of records of expenditure was not credible in the context of input tax of more than £43,000.

The grounds of appeal included a statement that the penalty was disproportionate, but no argument was put forward to support this. The

judge confirmed that HMRC had correctly calculated the amount of the penalty in accordance with the law (prompted disclosure, 20% discount for "providing information", no reduction for other factors). The judge considered the reduction appropriate, and there were no grounds for reducing the penalty further.

The appeal was dismissed.

First-Tier Tribunal (TC08288): *Irene and Attila Balazs*

An individual appealed against a PLN for £29,473 based on 52.5% of an underdeclaration of £56,140 by his company. The company was liquidated and HMRC alleged that the loss of VAT was attributable to his dishonesty. The trade had been a kebab shop; HMRC's assessment was based on the conclusion that treating 84% of sales as zero-rated was not credible for this type of business. The trader claimed that he took Z-readings from the till each day, but did not retain his till rolls.

The trader's accountant told HMRC that there had been a misunderstanding between themselves and the trader, resulting in the reversal of the percentages for zero and standard rated sales. The trader did not accept this: he said that he did not understand the difference between the types of VAT liability, and only gave a single figure to his accountants. He had not been told by his accountants to keep his records.

Judge Anne Fairpo considered that a person running a business had a responsibility to inform himself of the basic requirements. The trader had not done so. He could not reasonably have believed that the figures on his VAT returns were correct; the judge considered it "implausible" that the accountants had simply made up the split between zero and standard rated sales, which was the implication of the trader's evidence. There had been no appeal against the assessment by the company or its liquidator, and the trader accepted that the total turnover was accurate.

On this basis, the judge found that the PLN had been validly issued, as there was a deliberate inaccuracy that was attributable to the director. The appeal was dismissed.

First-Tier Tribunal (TC08303): *Taha Osman*

Kevin Hall discusses the above case in an article in *Taxation*, emphasising the weakness of "limited liability" as a defence against personal liability in these circumstances, and the fact that failures of omission were held to be "deliberate behaviour". He notes the following important learning points on the theme of "lack of care":

- Missed opportunities: correctly charging no VAT on sales or eliminating VAT on costs can often be achieved, taking care to make precise steps at the right time.
- Inaccuracies: costly VAT errors can be avoided with careful consideration of the rules, even if this means taking advice.
- VAT fraud in a supply chain (including missing trader intra-community fraud): a business unconnected with an unknown VAT fraud elsewhere in their supply chain can be assessed for large sums of VAT by HMRC, if they decide the business had not paid careful attention to subtle indicators.

- No defence against penalties: penalties for VAT inaccuracies will often be reduced to zero if a business can demonstrate that it has taken due care and behaved reasonably.
- Higher penalties: the range of penalties for a VAT inaccuracy is far lower if it was not deliberate. 'Deliberate' includes paying too little attention, as was found in this case.
- Personal liability: these higher penalties can quickly become personal liabilities of a company officer or manager, where a lack of care renders the VAT inaccuracy deliberate.

Taxation, 2 December 2021

In TC07430, 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 FTT 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.

HMRC appealed to the Upper Tribunal, where the case came before Mr Justice Miles and Judge Jonathan Richards. HMRC contended that the FTT had not been entitled to come to the conclusion it did, when both sides had been proceeding on the assumption that the supplies of the alcohol had indeed taken place.

The UT set out the process by which the FTT had reached its decision, starting with an "either/or" analysis of the situation if the supplies had

taken place (in which case the penalty would be due) or if they had not (in which case the potential lost revenue would be nil, and the penalty would not be due).

The UT went on to note that the appellant, in his notice of appeal in November 2016, had positively averred that the supplies had taken place. HMRC did the same in their statement of case in February 2017. Up until the FTT hearing, both sides had proceeded on the basis that the supplies were real. After the hearing, and before issuing its decision, the FTT invited submissions on the question of whether the supplies had actually taken place, and the consequences if it concluded that they had not. HMRC submitted that they continued to argue that the supplies did exist, and also suggested that even if they did not, the company would still have owed output tax because it issued VAT invoices. The appellant did not address the question in his submissions, but he did not contradict his earlier statements.

The detailed grounds of appeal were fourfold:

- procedural unfairness: the FTT had decided on the PLR on the basis of an argument that neither party had put forward;
- burden of proof: the FTT had decided that HMRC had the burden of proving that the goods existed, but this had been common ground between the parties;
- two inaccuracies or one: the FTT was wrong to decide that there was no net error if the goods did not exist;
- proportionality of the penalty: the FTT was wrong to conclude that the penalty was disproportionate.

Permission to appeal was granted by the FTT on all but the first, and HMRC did not pursue that line before the UT.

The second ground was considered in some detail. In spite of arguments put forward by the appellant, the UT concluded that there could be no burden of proof in relation to something that was common ground. The FTT was wrong to "go behind the agreed basis on which the dispute had proceeded". Although there was some overlap between this ground and the "disallowed" first ground of appeal, the UT was satisfied that it was a separate and permissible argument before it, and allowed HMRC's appeal on this basis.

Because the FTT had clearly set out the conclusions it would have drawn if it had held that the supplies had taken place, it was not necessary for the UT to consider the other grounds of appeal. The FTT decision was set aside and remade in HMRC's favour.

Upper Tribunal: *HMRC v Laurence Donnelly*

An individual was served with a PLN for £4.9m in April 2015, followed by a Notice of Bankruptcy in February 2020. He filed an appeal at the Tribunal on 11 April 2020, purporting to appeal against both the PLN and the bankruptcy. Judge Anne Redston applied the *Martland* tests and concluded that the overall balance lay against allowing an appeal to proceed five years late: there were no good reasons to excuse three years and nine months of that delay.

The PLN was associated with a VAT loss from MTIC trading involving a company called Millennium Energy Ltd, which was the subject of an unsuccessful appeal to the FTT in October 2018. Judge Redston summarised key findings of that case, which included warnings given to the director by HMRC and a lack of any meaningful due diligence. This contrasted with his assertions in the present appeal that no one had ever explained MTIC fraud to him, and that he had no idea that the trading was suspect.

In applying *Martland*, the judge considered whether the strength of the appellant's case was "overwhelmingly in his favour". From her description, it is clear that she considered his case to be very weak. He put forward a number of criticisms of the earlier FTT decision, but these were rejected.

The only factor weighing towards the appellant was the prejudice against him of being made bankrupt. However, as the judge considered that he had no chance of winning his appeal in any case, this was not significant. The application to appeal out of time was rejected.

First-Tier Tribunal (TC08328): *Richard Stuart George*

6.8.3 Strike-out

In TC06892 (early 2019), a trader had claimed input tax on transactions in his 12/05, 03/06 and 06/06 returns. £22m in respect of 12/05 was repaid in tranches; a similar amount for the two following periods was never repaid. HMRC later refused repayment on *Kittel* grounds. The trader appealed, but the appeals were eventually struck out in 2015 for the appellant's failure to comply with an unless order. Applications to reinstate the appeals were refused, exhausting the trader's rights by 2 November 2017 when the Upper Tribunal confirmed the refusal. In August 2017, HMRC issued misdeclaration penalty assessments on the inaccuracies in the 03/06 returns. The total in penalties was just over £2.5m. The trader appealed against the penalties, and HMRC applied to have the appeal struck out.

The appellant contended that HMRC's delayed repayment of the 12/05 reclaim was relevant to the misdeclaration penalties. He had applied for a repayment supplement in 2006; this was refused and the refusal was appealed. In August 2017, HMRC conceded that appeal. However, they told the appellant that the supplement would be offset against the misdeclaration penalties that he owed.

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

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

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

(c) The assessment was out of time.

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

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

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

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

The judge went on to consider whether she should require HMRC to pay the repayment supplement. She concluded that she had no jurisdiction to consider whether they were entitled to set off the supplement against the penalty. She had no need to consider whether the penalty itself should be paid upfront, because that was clearly not required by the law. The only issue was whether HMRC were entitled to exercise a right of offset, and that was a matter for judicial review, not for the FTT.

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

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

Tribunal had identified the lack of an absolute maximum as the one feature of the default surcharge regime that was arguably disproportionate, so she accepted that this was at least a possible ground of appeal.

In all other respects, the appeal was dismissed.

The individual appealed to the Upper Tribunal (mid-2020), arguing six grounds. The first three essentially argued that a misdeclaration penalty could only be levied after the taxpayer had been given the opportunity to present a reasonable excuse. The fourth was about HMRC's set-off of the supplement against the penalty, where the FTT had concluded it had no jurisdiction to interfere. The fifth attacked the penalty under the ECHR; and the last was simply that the FTT should not have struck out the penalty appeal.

The first five grounds were considered in detail, and the decisions of the FTT confirmed in each case. In relation to the sixth ground, the UT decided that the FTT decision contained two errors of law in considering that allowing the appeal to proceed would be an abuse of process. The FTT had adopted too narrow an approach in rejecting the argument that HMRC's failure to notify a misdeclaration penalty before the strike out of the *Kittel* appeals was relevant in deciding whether he should be allowed now to plead reasonable excuse. HMRC argued that it was unlikely that the individual's decision to abandon an appeal about £22m would have been affected by knowledge of a possible penalty of £2m; however, the UT said that was not a matter for a strike-out hearing but for a full hearing.

The FTT had also considered it an abuse of process that the individual now claimed that the *Kittel* appeals had been abandoned because of lack of funds, when he had not done so in the reinstatement hearings. The two matters were separate from each other, and it was not correct to insist that he should have raised the issue earlier just because he could have done.

The UT allowed the appeal against the strike-out decision and referred it back to the FTT for case management directions to progress towards a substantive hearing.

Court of Appeal

HMRC appealed to the Court of Appeal, where Newey LJ gave the leading judgment. He considered the authorities on "issue estoppel", that would make it an abuse of process to argue again something that had already been determined. The examination of the law is detailed, but the overall conclusion was that there was a significant difference between raising a point that would have been argued about in an earlier case that was struck out for a procedural failing, and raising a point that had been relevant to an earlier case that was either found against the claimant or was withdrawn by the claimant. In this case, the defence against the penalties had never been considered by the Tribunal, and the taxpayer ought to have the right to put it forward.

The relevant precedent (*Johnson v Gore Wood & Co*) suggested that a "broad, merits-based judgment" should take account of all of the facts of the case. The appellant's lack of funds to pursue his original appeal, and the lack of notification of a misdeclaration penalty when that appeal was abandoned, were relevant to such a broad approach.

Arguments about the excessive delay before the penalty was imposed were rejected, mainly on the ground that s.77 VATA 1994 clearly allows HMRC to raise a penalty assessment within two years of the determination of the liability for the period concerned. The taxpayer's application to have the penalties struck out was refused.

Nugee LJ and King LJ agreed. The case will presumably now return to the FTT for a substantive hearing on the penalty.

Court of Appeal: *HMRC v Kishore*

6.8.4 Procedure

A company is involved in an appeal over disallowance of £760,000 of input tax on "*Kittel*" grounds. Appeals were lodged in 2018, followed by "*Fairford*" directions issued by the Tribunal in 2019. These are a normal part of MTIC disputes: they seek to identify matters which are agreed between the parties, to reduce the amount of time that is required for testing the evidence in the Tribunal. The appellant was required to submit, by 22 November 2019, confirmation of:

(a) whether it accepted the transaction chains set out in the deal sheets by HMRC, and if not, to specify the issues for determination in all or any of the particularised deal sheets, and to specify any facts on which it would seek to rely;

(b) whether it accepted its transactions were connected with the fraudulent evasion of VAT, and if not, to set out its response to HMRC's Statement of Case; and

(c) in respect of the chains, if the appellant did not accept its transactions were connected to fraudulent tax loss, it should particularise the evidence it would seek to rely on against the respondents' witness evidence, and at the same time, specify the parts of the respective witness statements it would seek to counter.

HMRC were not satisfied with the appellant's responses, which contained inherent inconsistencies (e.g. refusing to accept that there was a tax loss, while at the same time criticising HMRC for failing to prevent that tax loss). Further directions and correspondence followed, at the end of which the company effectively stated that it intended to dispute everything and requested disclosure of a great deal of supporting material from HMRC's files.

HMRC then applied for a direction requiring the company to file an amended Notice of Issues, contending that it had not complied with the earlier directions. The company resisted this application and made its own application for disclosure.

Judge Heidi Poon noted that the disclosure application was disproportionate. The burden lay upon HMRC in any case to demonstrate that there was fraud in the supply chains, and much of the requested material would have to be relied on (and therefore disclosed) by HMRC in any case. It was not appropriate for the Tribunal to order disclosure of material that HMRC did not consider relevant and would not rely on.

The judge went on to grant HMRC's application, and suggested that the company's counsel (newly engaged for the appeal) to explain to the company the possible implications for a potential award of costs of failing

to comply fully with the "tool of efficient case management" that *Fairford* directions represent.

First-Tier Tribunal (TC08266): *Greencyc Ltd*

In the latest development in a *Kittel*-based dispute going back to 2015, and involving numerous procedural hearings so far, the FTT heard an application to have the substantive hearing brought forward from its scheduled date of November 2022. After postponement of the hearing from September 2021 because of the unavailability of HMRC's key witness, the Tribunal asked for "dates to avoid" and settled on November 2022 on the basis of HMRC's counsel and witnesses being unavailable before then. Judge John Brooks balanced a variety of considerations: it was not practicable to bring the hearing forward to February 2022, and there seemed little to be gained by bringing it forward by just a few months to June/July when the parties had agreed to make themselves available in November. The company's application was refused and the judge ordered that the substantive hearing should proceed as listed to commence on 15 November 2022.

First-Tier Tribunal (TC08326): *Elbrook (Cash And Carry) Ltd*

6.8.5 Late appeals

An individual applied for leave to appeal out of time against personal liability notices in respect of VAT lost on the insolvency of the company of which he had been the sole shareholder and director. The assessments (also for corporation tax) had been issued in August 2017; in spite of reminders by HMRC, no appeal was lodged until May 2020.

The taxpayer himself had undergone a quadruple heart bypass around the time of the assessments; HMRC accepted that he had been very unwell. It was submitted on his behalf that the delay had been caused by him leaving everything in the hands of his tax agent, who had died; the taxpayer had believed that everything was being sorted out and there was only a small liability that was still under discussion.

Judge Anne Fairpo considered the explanations and carried out the standard three-stage assessment of the delay, the reasons and the balance between the parties. In her view there was not a sufficient reason to justify the whole of the delay, and no evidence had been put forward to support the assertion that the assessments would lead to the taxpayer's bankruptcy. The balance fell on the side of respecting statutory time limits. She refused leave to appeal.

First-Tier Tribunal (TC08295): *Mustak Talati*

A golf club made a *Fleming* claim for £12,129 in overpaid VAT on green fees on 25 March 2009. This was acknowledged by HMRC on 11 August 2009, and refused on 14 August 2009. The refusal letter was filed by the club rather than being passed on to the honorary auditor. He was therefore unaware that the claim had been refused. He followed up what he considered to be an extant claim in June 2016 following the *Bridport* decision in the CJEU; he phoned again in March 2018 and wrote three letters in 2018/19 which went unanswered. At last, in June 2020, HMRC responded stating that the club could ask for permission to make a late appeal if it had a reasonable excuse, but HMRC did not consider that it had one.

Judge Christopher McNall applied the *Martland* principles. The appeal was very late. The letter of 14 August 2009 had been clear in stating the decision and setting out the possibilities for an appeal or review; it was not HMRC's fault that the club had chosen to file it without showing the auditor. HMRC "did not cover itself with glory" in failing to respond to letters during 2018/19, but this was not relevant – the deadline for an appeal had already passed long before.

The judge did not accept that the situation was similar to another golf club case, *John O'Gaunt Golf Club*, where a late appeal had been allowed to proceed. The delay in that case was much shorter. The delay was very long, there was no reasonable excuse, and the balance favoured allowing HMRC to continue to regard the matter as closed. Permission to bring a late appeal was refused.

First-Tier Tribunal (TC08267): *Woodford Golf Club*

An individual applied for permission to appeal out of time against a PLN for £183,540 issued in August 2018 (amended from an earlier PLN for £222,869 issued in October 2016). The penalties related to underdeclarations of VAT by a restaurant business run by a company in which the individual was the sole shareholder and director, and the same business before it was incorporated. In July 2018, the director had been disqualified from acting as a company director for 9 years by the Insolvency Service in an action arising out of the liquidation of the company. The individual applied for leave to appeal the PLN in April 2020.

The main reason put forward for the delay was mental health issues suffered by the appellant throughout his adult life. It was suggested that the business had effectively been run by his brother, and he had not fully understood the VAT dispute or its consequences. Being made bankrupt as a result of the PLN would exacerbate his health problems. Some evidence was presented relating to his medical history.

Judge Fairpo applied the principles of *Martland* and came down in favour of applying the statutory time limits. Once again, no evidence was provided of the financial effect on the applicant: it was simply asserted that he would be bankrupted by the enforcement of the demand. The application was dismissed.

First-Tier Tribunal (TC08292): *Azam Ali*

6.8.6 Information notices

In the context of an appeal against the issue of information notices to two individuals and a company, the appellants applied for disclosure of HMRC's unredacted files, including the whole of the VAT records of the LLP. The information notices related to an investigation into the date on which the company had acquired the business of a predecessor LLP; HMRC had formed the view that this had been backdated to avoid the effect of a change in the law on corporation tax relief for amortisation of goodwill.

Judge Anne Redston noted that precedent cases on disclosure applications showed that the Tribunal must identify "the legal test to be applied", so that disclosure is "closely related to the issues in dispute in the proceedings". In the context of an appeal against a Sch.36 information

notice, guidance on the legal test is provided by the 2016 CA decision in *Derrin Brothers v HMRC* and the 2019 High Court decision in *Kotton v HMRC*. It was clear from these cases that HMRC are required only to show that there is "rational connection between the information and documents sought and the underlying investigation" and this "does not require any examination of the nature and extent of the underlying tax investigation". In other words, HMRC did not have to demonstrate that their officer's understanding of the accounting and valuation issues leading to the issue of the notices was correct, but only that his view was rational.

The judge could not identify any precedent where a party had applied for disclosure of the other party's entire file, let alone any case in which a court or tribunal had granted such an application. The Civil Procedure Rules (CPR) require the party itself to carry out a search in order to identify specific documents. Nevertheless, she considered the application in the terms in which it was made. The legal principles in relation to information notices, as set out by Etherton LJ in *Derrin Brothers*, are:

"The purpose of the statutory scheme is to assist HMRC at the investigatory stage to obtain documents and information without providing an opportunity for those involved in potentially fraudulent or otherwise unlawful arrangements to delay or frustrate the investigation by lengthy or complex adversarial proceedings or otherwise."

In *Kotton*, Simler J (now LJ) said: "the question for the HMRC officer (and therefore the FTT judge) is an expressly limited one: the officer must be satisfied that the information or documents to be sought by a third party notice are 'reasonably required' for the purpose of 'checking' the tax position of the taxpayer."

She went on: "provided there is a genuine and legitimate investigation or enquiry of any kind into the tax position of a taxpayer that is neither irrational nor in bad faith, that is sufficient. The challenge is not to the lawfulness of the investigation, but is limited to the rationality of the conclusion that the information/documents are reasonably required for checking the taxpayer's tax."

Judge Redston examined the possible relevance of the disclosure of the complete file to various arguments and defences put forward by the appellants, and concluded that it should not be granted. The notices were issued as part of the preliminary stages of an investigation, and arguments based on claims that HMRC should particularise allegations of fraud were premature.

The application for disclosure of "VAT records" was granted insofar as it related to the VAT returns submitted by the company. It was not clear why the company had not retained its own copies, but it appeared that HMRC would rely on the VAT returns in its submissions, and it was in the interests of justice that both parties should have access to the same information.

The judge also refused an application to require HMRC to carry out a search of their records for other relevant documents and to disclose a list of any documents that adversely affected their own case, or were no longer in HMRC's control, or in relation to which they asserted a right or duty to withhold inspection. This was an application of the CPR, but once

again an information notice was only a demand from HMRC to the taxpayer to provide information in relation to an enquiry, and such measures were irrelevant or premature.

The application was granted to the limited extent of requiring disclosure of the VAT returns.

First-Tier Tribunal (TC08273): *Asif Malek and Others*

A company which was the subject of a long-running dispute over compound and multiple supplies was later the subject of a more wide-ranging HMRC enquiry into its corporation tax, VAT and PAYE affairs. The investigating officer issued an Information Notice requiring production of various documents, and a dispute arose about whether the company was required to comply.

A taxpayer has the right to appeal against the issue of an Information Notice, but not where the Notice relates to the production of what are referred to as "statutory records" – that is, documents that the taxpayer is required to create and retain by law. The Tribunal (Judge Heather Gething) considered that HMRC's power to demand production of statutory records was still subject to the overall requirement that the documents demanded must be "reasonably required for the purposes of checking the tax position". For example, if HMRC wanted to verify the position of a single employee, it would not be reasonable to require production of the statutory records relating to all employees.

The decision examines the legal rules in great detail, including the identification of what are and what are not statutory records. The documents that a taxpayer must create and retain for 6 years under SI 1995/2518 reg.31 cease to be statutory records on the expiry of those 6 years. The decision concludes with an amended Information Notice setting out what the judge considered HMRC were entitled to demand.

First-Tier Tribunal (TC08322): *Metropolitan International Schools Ltd*

6.9 Other administration issues

6.9.1 Finance Bill 2022

The Finance Bill 2022 was published on 4 November 2021. The clauses relating to VAT are:

- *68 Interim operation of margin schemes for used cars etc: Northern Ireland*
- *69 Margin schemes and removal or export of goods: VAT-related payments*
- *70 Margin schemes and removal or export of goods: zero-rating*
- *71 Relief on the importation of dental prostheses*

Schedule 14 deals with the treatment of goods in free zones, and Schedule 13 sets out the penalties for electronic sales suppression.

https://bills.parliament.uk/bills/3060

6.9.2 Tax Administration and Maintenance Day

Over 30 documents were published on the inaugural ‘Tax Administration and Maintenance day’, 30 November 2021, signifying the start of a period of consultation and evaluation. The only one related to VAT was the response to the earlier consultation on simplifying the exemption for land (see section 3.1).

www.gov.uk/government/collections/tax-administration-and-maintenance-autumn-2021

6.9.3 Articles

In an article in *Taxation*, Neil Warren discusses whether face-to-face compliance visits for VAT are a thing of the past, and whether HMRC officers now only concentrate on checking repayment claims for SMEs. He offers some suggestions on how to be ready for HMRC questions and to spot errors made by businesses before they are noticed by HMRC.

Taxation, 11 November 2021

In another article, Neil Warren discusses a number of challenges faced by businesses in 2021, and some to come in 2022:

- construction industry reverse charge from 1 March 2021;
- reduced rate for hospitality etc. changing on 1 October 2021 and again (unless a change is announced) on 1 April 2022;
- Brexit from 1 January 2021;
- MTD to be extended to voluntary registrations from 1 April 2022;
- the introduction of a new penalty regime for late filing and payment from 1 April 2022.

Taxation, 16 December 2021

6.9.4 HMRC prosecutions round-up

HMRC successfully prosecuted a criminal gang who smuggled illicit alcohol into the UK and evaded more than £4.8m in VAT and £11.9m in excise duty using a fake network of businesses and supply chains, supported by false paperwork detailing fictitious transactions. On 29 November 2021, the ten individuals involved were sentenced to a total of 34 years in prison.

www.mynewsdesk.com/uk/hm-revenue-customs-hmrc/pressreleases/crime-gang-jailed-for-34-years-3140393

6.9.5 Disqualification of directors

There is an interesting examination of the responsibilities of directors for a company's involvement in a MTIC fraud. The hearing was in the context of applications for disqualification orders by the Secretary of State. The judge reviewed what the four individuals did and handed down lengthy disqualifications for three of them, described as "top bracket cases".

The most interesting part of the discussion relates to the fourth individual, who claimed to have had no part in running the business, and blamed HMRC for bringing about the insolvency. The judge described his attitude as an "abrogation of duty": the director had "lost sight of the interests which even on his own account he was there to represent". Although he was not as culpable as the others, this was still worthy of a disqualification of four years.

High Court: *Re X E Solutions Ltd (no 07025602) Secretary of State for Business, Energy and Industrial Strategy v David Ian Selby and others*

6.9.6 Public procurement policy

The Cabinet Office has published updated guidance for threshold values which determine the regulations to be applied by various public authorities in considering tenders for contracts. From 1 January 2022, the contract value estimates should be stated inclusive of VAT when deciding whether the threshold has been breached. However, for the purposes of advertising, and publicising contract award notices, the values will continue to be stated on a VAT-exclusive basis.

www.gov.uk/government/publications/procurement-policy-note-0921-thresholds-and-inclusion-of-vat