VAT UPDATE
JANUARY 2024

Covering material from October – December 2023

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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 at irregular intervals. The latest update appeared on 20 December 2023.

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

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

- *Conservatory Roofing UK Ltd*: Upper Tribunal remitted case to FTT to consider further relevant information not taken into account when dismissing company's appeal.
- *Hippodrome Casino Ltd*: HMRC appealed the FTT decision in the company's favour on partial exemption (heard by Upper Tribunal in October 2023).
- *Hotel La Tour Ltd*: HMRC have been granted permission to appeal the UT decision in the company's favour to the Court of Appeal (hearing listed for April 2024).
- *Innovative Bites Ltd*: HMRC have appealed the FTT decision in the company's favour to the Upper Tribunal (hearing was in November 2023).
- *Sintra Global Inc & Parul Malde*: HMRC have been granted leave to appeal to the Upper Tribunal against FTT's decision to allow appeals against various assessments and penalties relating to alleged inward diversion fraud (listed for hearing July 2024).

- *Sonder Europe Ltd*: HMRC have been granted leave to appeal the decision in this update at 2.9 that supplies of accommodation were covered by TOMS (hearing listed for December 2024).
- *The Prudential Assurance Company Ltd*: taxpayer has been granted leave to appeal to the CA against the UT's decision in favour of HMRC's appeal on the interaction of the time of supply and grouping rules (listed for hearing January 2024).
- *Wm Morrison Supermarkets plc*: the company's appeal on the liability of cereal bars was allowed by the UT and remitted to the FTT for reconsideration.
- *Yorkshire Agricultural Society*: HMRC is seeing permission to appeal against the FTT's decision that the Great Yorkshire Show qualified for the charitable fundraising exemption.

1.1.1 Decisions in this update

- *Gap Group Ltd*: HMRC is not seeking permission to appeal (section 2.8).

1.1.2 Other points on appeals

- *Sports Invest UK Ltd*: HMRC is not seeking permission to appeal (July update – place of supply of sports agent's services).
- *The King (oao Royal Surrey NHS Foundation Trust)*: HMRC is not seeking permission to appeal (October update – deduction of VAT by NHS Trust on centrally purchased equipment).

2. OUTPUTS

2.1 Scope of VAT: linking supplies to consideration

2.1.1 Refer a friend scheme

An energy company offered a "refer a friend" scheme to retail customers. When someone signed up for electricity supplies, the company provided the customer with a personalised electronic referral link which the customer could send to anyone. When the recipient clicked on the link, that person was taken to a webpage where, should they wish, they too could sign up to become a customer. If that person was accepted as a customer, having used one of these links and switched their energy supply to the company, both the referrer and the new customer (a "recruit") received a credit against their energy charges. About 90% of customers took the credit as a "discount" on their energy bill; the remainder took cash.

HMRC concluded that the action of referring a friend constituted non-monetary consideration for the supply of energy to the person making the referral. The credit given to that person was therefore subject to output tax. The company accounted for output tax on the basis of payments received, which therefore excluded the value of any credits set against the bills.

The only question for the Tribunal was whether the referrals by customers constituted non-monetary consideration for the supply of electricity. It was common ground that, if it was, the value was simply the amount of the credit given.

Judge Mark Baldwin considered a number of very old precedents on consideration in general, including the Dutch potato case, *Apple & Pear Development Council*, *Tolsma*, *South African Tourist Board* and *Elida Gibbs*, before turning to directly relevant cases about non-monetary consideration – *Naturally Yours Cosmetics*, *Empire Stores* and *Westmorland Motorway Services*. In each case, the judge simply described the facts of the case and the main principles derived from it, leaving the application of the precedent until later.

The most complicated precedent was the 2001 Court of Appeal decision in *Littlewoods Organisation plc*, where agents earned commissions for carrying out non-monetary services for the company, and could take that commission in a number of different ways. The CA held that the company had genuinely given its selling agents a discount rather than bartering goods for services.

The judge went on to consider *Boots* on money-off coupons, *Mirror Group* on reverse premiums, *Ridgeons Bulk Ltd* on rent-free periods (a case not referred to by either counsel), *Everest Ltd* on cashbacks and *Lex Services* on "bumping" of part exchange valuations, and *Kumon Educational UK Co Ltd* on "reward payments" that were in fact rebates of charges.

The appellant's counsel put forward a range of arguments based on the precedents. The customer did very little in relation to the electronic link in order to earn the discount, and there were many uncertainties about receiving it. She stressed the similarities to those cases where no link was

found between the discount and a supply, and the differences between this situation and the barter cases.

The judge examined the arguments put forward in great detail, accepting some of the points made but rejecting others. He concluded:

We see the tests for 'contractual exchange' required to establish the element of 'consideration' met because:

(1) There was a direct legal link between something done and something which counts as consideration in the contract between Bulb and referrers articulated in the Terms and Conditions. It created a clear, legal link between what was required of referrers who wanted to participate in the RAF scheme (they should introduce their friends and colleagues to Bulb in an appropriate, personalised way and pass on their referral link) and Bulb's "side of the bargain" (to reward customers who could show, because their referral link had been used, that they were the source of a recruit).

(2) There was a direct link between those actions and the RAF credits as a referral was a conditio sine qua non for the RAF credit.

(3) A relationship can be established between the level of the benefits which Bulb obtained from the services provided and the amount it was prepared to pay as consideration: it gave a RAF credit for each successful referral.

(4) That price (a RAF credit for each successful referral) was the subjective value in money put by Bulb and its customers on the service performed by referrers.

The judge distinguished between the discount given to the new customer recruited by the referrer and that given to the referrer. The new recruit had simply agreed to be a customer, and that involved no consideration given for the supply: that was a true discount. The referrer had done something in return for the reduction in the cost of electricity, and that was consideration.

The appeal was dismissed.

First-Tier Tribunal (TC08995): *Simple Energy Ltd*

Lecture 1

2.1.2 Broadcasting services

An Austrian individual claimed repayment of the VAT charged by a broadcaster, arguing that a CJEU decision (*Český rozhlas* (Case C-11/15)) showed that the fees she had paid were outside the scope of VAT. The company rejected her claim, which she pursued through the domestic courts, which eventually referred questions to the CJEU.

The referring court noted that the broadcaster charged a non-VATable broadcast fee (effectively a licence fee) and a VATable programme fee. The broadcast fee was payable by any broadcast user who operates or has in his or her possession an operational broadcast receiving device such as a television set or a radio, regardless of the place of reception. The programme fee is payable only if the place of reception is within the terrestrial broadcasting area for programmes broadcast by the company ORF.

The court noted that the questions referred dealt with the concept of "supply for consideration". However, the issue appeared to be wider than that, because Austria had been allowed to continue to tax certain transactions such as public broadcasting under transitional provisions when it joined the EU. The court would reformulate the questions in order to give an answer that would be useful to the referring court.

Although public broadcasting activities are included in the exemptions at PVD art.132(1)(q), that does not extend the scope of VAT: it presupposes that the activities constitute supplies for consideration carried on in the course of an economic activity. Art.378 PVD allowed Austria to derogate from the exemption in this respect.

The circumstances of the case appear to be specific to Austria and to its transitional rules. The transitional derogations had not been relevant in the case relied on by the appellant, because that case related to the Czech Republic. The court concluded that Austria was entitled under the Directive to treat the programme fee in this circumstance as VATable.

CJEU (Case C-249/22): *BM v Gebuhren Info Service GmbH (GIS)*

2.1.3 Free gift

A Portuguese company sold subscriptions to publications. To promote sales, it gave away a smartphone or tablet, the value of which was always below €50. The subscription gift was sent by courier to subscribers with their magazine after the first monthly subscription payment, the amount of which was identical to that of subsequent monthly payments. As there was no minimum subscription period, customers could keep the subscription gift without incurring any penalty, after the first monthly payment, even if the subscription was cancelled.

The company applied the reduced rate of 6% to its subscription invoices, and made no separate mention of the gifts. The tax authority considered that the gifts exceeded the ceiling in Portuguese law of 0.5% of the turnover of the previous calendar year, and assessed for output tax equal to the standard rate of 23% applied to the purchase price of the gifts. The assessment covering the years 2015 to 2018 was nearly €3.5 million. After initially complying with the assessment, the company claimed the money back, and appealed against the tax authority's refusal. In due course questions were referred to the CJEU.

The company argued that the supply of the tablet was not free of charge, as it was linked to a subscription. If it was regarded as a gift, the low value of the individual item should mean that no output tax was due; the company argued that the 0.5% rule was incompatible with PVD art.16 and with the principles of proportionality, neutrality and equal treatment.

The court first considered whether the supply of the "gadget" required separate treatment for VAT, or should be regarded as part of a single economic supply. The usual principles about compound and multiple supplies were cited: in order to determine whether the taxable person performs several distinct main supplies or a single supply, it is necessary to identify the characteristic elements of the transaction in question, from the perspective of the average consumer. There would be a single supply where one element is the principal supply and the others are ancillary to it.

The court noted that the provision of subscription gifts was an integral part of the commercial strategy of the applicant, and that subscription costs were significantly higher where gifts were involved. There was therefore a clear link between the provision of gifts and the subscriptions to the magazines. However, various factors suggested that the supplies were not indivisible: for example, someone renewing a subscription did not receive a new gift.

It was for the referring court to determine, but the CJEU considered that the gift appeared to be ancillary to the subscription for the magazine. Although some subscribers cancelled their subscription after the first payment, which entitled them to keep the gadget, many did not. The tablet or phone enabled the customer to consult a digital edition of the magazine, and was therefore for its better enjoyment. Subject to confirmation by the referring court, the supply of the magazine and the gadget constituted a principal and an ancillary supply which would be subject to the same VAT treatment.

Because the court had concluded that there was a supply for consideration, it was not necessary to consider the other questions about the compatibility with the PVD of the Portuguese rules for small gifts.

CJEU (Case C-505/22): *Deco Proteste – Editores Lda v Autoridade Tributária e Aduaneira*

Lecture 2

2.1.4 Updated Manual

The *VAT Business/Non-Business Manual* has been updated with new summaries of historic cases relating to:

- the principles to be considered in determining when an organisation is carrying on an economic activity for VAT purposes – operating in a commercial competitive marketplace (*Hutchison 3G UK Ltd* (Case-369/04) and *SPÖ Landesorganisation Kärnten v Finanzamt Klagenfurt* (Case C-267/08));
- the apportionment of input tax where some of the input tax is attributable to supplies outside the scope of VAT (*Vehicle Control Services* UT 2016]);
- whether supplies are provided in the course of a business – the relevance of a profit motive (*Morrison's Academy Boarding Houses Association* and *Finanzamt Freistadt Rohrbach Urfahr & Anor v Unabhängiger Finanzsenat Außenstelle Linz* (Case C-219/12)).

VBNB72300, VBNB72500 and VBNB72700

2.2 Disbursements

Nothing to report.

2.3 *Exemptions*

2.3.1 Loan administration services

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

The appellant acted as undisclosed agent for the bank with limited discretion. It dealt with the entire lifecycle of a loan, apart from the making of the loan. It did not set interest rates, and although it dealt with arrears, decisions on enforcement action were taken by the bank.

The company's appeal was based on the contention that it was exempt either under VATA 1994 Sch.9 Group 5 Item 1 (transactions concerning payments/debts) or Item 8 (the operation of a current or deposit account).

Judge Sarah Falk noted that both the PVD and Group 5 exempt "the granting and the negotiation of credit and the management of credit by the person granting it". In relation to Item 1, the judge summarised the principles of the CJEU decision in *SKD* (Case C-2/95):

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

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

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

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

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

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

(7) it is necessary to distinguish a "mere physical or technical supply, such as making a data-handling system available to a bank", or "technical and electronic assistance to the person performing the essential, specific

functions": these are not exempt; in particular the court must examine the extent of the supplier's responsibility, and whether it is "restricted to technical aspects" or "extends to the specific, essential aspects of the transactions" (paragraphs [37] and [66]).

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

In *ATP Pension Service* (Case C-464/12), the CJEU concluded that the reference to payments and transfers in Article 13B(d)(3) covered services by means of which the rights of pension customers were established through the creation of accounts within the pension scheme system and the crediting of those accounts. The processing of direct debits was held to be within "transactions concerning payments" in *Axa UK plc* (Case C-175/09), but subject to the exclusion from exemption of "debt collection and factoring". The principle of strict interpretation of exemptions required a broad interpretation of the exclusion from exemption.

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

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

She concluded:

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

Cordara that the reference by Advocate General Tizzano to "economic purpose", referred to by Jonathan Parker LJ in Tesco, is relevant.

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

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

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

Upper Tribunal

The appeal was dismissed, and the company appealed to the Upper Tribunal (late 2019). The judges agreed with the FTT that a loan account is not similar to a "current account or deposit account". Those have different functionality, in allowing the customer to pay in and draw money out again, and in the case of a current account, to pay third parties. The loan account was much less flexible, requiring fixed payments in and no withdrawals (except by varying the amount of the loan, but that was a different type of transaction).

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

Court of Appeal

The appeal was dismissed again, and the company appealed again to the Court of Appeal (July 2021), where Lady Justice Simler gave the leading judgment, and Henderson LJ and Underhill LJ simply agreed. The judge set out once again the facts and a detailed analysis of the legislation and

all the precedents, before coming to the same conclusion as the Upper Tribunal. The following points were particularly noteworthy:

She discounted the older UK precedents that the appellant relied on (*FDR* and *EDS* in particular) because they predated the main CJEU decisions in this area. The most recent CJEU decisions made it clear that giving instructions to other parties to move money did not constitute a "transaction concerning payments".

The company's counsel tried numerous arguments, all of which were rejected by the judge. For example, he sought to distinguish the present case from *Bookit* and *NEC* by characterising those appellants as tainted by an avoidance motive: they were attempts to carve out an exempt element from a taxable supply of tickets. The judge responded that there was nothing in the CJEU decisions to indicate that an avoidance motive was relevant. She also distinguished the present case from *ATP Pension Service*, where making accounting entries had been held to be "transactions concerning payments" – the context and the legal relationships were materially different.

She declined to comment on the question of whether giving instructions for payments to be made on the date they fall due constitutes "debt collection". It was not necessary to consider the point because the "debt collection carve-out" did not apply; she commented that it was a difficult area, given that the FTT's interpretation could bring practically all financial transactions within the definition, and she preferred to leave the matter for a case where it would be material to the outcome.

She set out her understanding of the status of EU law following Brexit, which could be important for other cases:

However, although the 1972 Act was repealed with effect from exit day pursuant to section 1 of the European Union (Withdrawal) Act 2018, Parliament has by section 2 of the 2018 Act preserved the effect of EU-derived domestic legislation (such as the VAT Act). By section 5(2) of the 2018 Act the principle of supremacy of EU law in relation to domestic legislation passed or made before exit is preserved, so that domestic law must be interpreted, as far as possible, in accordance with EU law, subject only to the power of the court to depart from retained EU case law in the narrow circumstances provided for by section 6 of the 2018 Act and the European Union (Withdrawal) Act 2018 (Relevant Court) (Retained Case Law) Regulations 2020.

This meant that, viewed in 2021, the *Marleasing* principle (construing UK law in such a way that its effect is consistent with EU law where possible), and the overriding authority of CJEU decisions which conflict with earlier UK precedents, would continue into the future, until the UK law is changed. The facts of the present case all took place while the UK was still part of the EU, but it appeared that the decision would be the same even if they were after 1 January 2021. That is now affected by the Retained EU Law Act 2023, discussed at 6.9.1 below.

Supreme Court

On the company's further appeal to the Supreme Court, Lord Hamblin gave the leading judgment and the four other judges agreed. He summarised the issues as follows:

10. The principal issue on this appeal is whether Target carried out "transactions…concerning" "payments" and/or "transfers" and/or "debts" within the meaning of article 135(1)(d).

11. Target contends that it did so on two bases:

(1) By giving instructions which automatically and inevitably resulted in payment from the borrowers' bank accounts to Shawbrook's bank accounts via BACS ('the payments/transfers issue'); and/or

(2) By the inputting of entries into the borrowers' loan accounts with Shawbrook ('the loan accounts issue').

12. If Target succeeds in its appeal on this principal issue a further issue arises, namely whether its services are nevertheless excluded from exemption because they comprise a single composite supply which amounts to "debt collection" (the exclusion from the exemption under article 135(1)(d)) and/or "the management of credit" by a person other than the person granting it (i.e. Shawbrook), a supply which is specifically not exempted under article 135(1)(b).

He summarised the decisions below before setting out the principles of interpreting VAT exemptions:

(1) The exemptions contained in the PVD (and formerly the Sixth Directive) are independent concepts of EU law.

(2) The terms used in the PVD to specify exemptions must be interpreted strictly because they constitute exceptions to the general rule that VAT is to be levied on all services supplied for consideration by a taxable person.

(3) Where there is a specific exemption (here for the management of credit but only by the grantor of that credit), a broader exemption (here, article 135(1)(d)) should not be interpreted so widely as to undermine the deliberate legislative choice made in restricting other exemptions.

(4) Conversely, the phrase "debt collection" in article 135(1)(d) must be construed broadly because it is an exception to the exemption.

He also cited the explanation of "strict construction" from *Expert Witness Institute* (CA 2001). It is for the taxpayer to demonstrate that the supplies come within a fair interpretation of the words of the statute; however, if they do, the court is not required to reject a claim simply because there is another, more restricted, meaning of the words which would exclude the supplies in question.

He then went through the precedent case law chronologically: *SDC*, *FDR*, *Axa*, *Nordea*, *Bookit/NEC* and *DPAS*. His conclusion was:

Given the generalised terms in which the judgment in SDC was expressed, it is understandable that there should have been some doubt as to whether the law as there stated was to be interpreted according to the narrow interpretation, or the wider interpretation adopted in FDR. Later CJEU case law, and in particular Bookit II, NEC and especially DPAS, have made it absolutely clear that the narrow interpretation is the correct one. This is consistent with the need to interpret the exemption strictly, the fact that its subject matter is financial transactions and its rationale of covering cases where it is not possible to identify the tax base.

The narrow interpretation means that the services must in themselves have the effect of transferring funds and changing the legal and financial situation. It is not enough to give instructions to do so thereby triggering a transfer or payment. It is not enough to perform a service which is essential to the carrying out of the transfer or payment, nor one which automatically and inevitably leads to transfer or payment. It is necessary to be involved in the carrying out or execution of the transfer or payment – its "materialisation". This requires functional participation and performance. Causation is insufficient, however inevitable the consequences.

The judge described the taxpayer's counsel's submissions as "ingenious attempts to rely on the law as stated in *FDR* notwithstanding the subsequent CJEU case law." The domestic law had taken "a wrong turn in *FDR*" and the CA conclusion in that case must be overruled. The Court of Appeal had come to the correct conclusion in the present case for the correct reasons: the appellant's activities were indistinguishable from those in *DPAS*, and did not constitute "transactions concerning payments".

On the "loan account" issue, the judge distinguished the present case from *ATP*, in which the accounting entries effected a change in the legal situation. According to the facts found by the FTT, the accounting entries in the present case related to the recording of payments that the borrower was "expected" to have made, and they were reversible; they did not legally change anything.

It was once again not necessary to consider the debt collection point. The appeal was dismissed unanimously.

Supreme Court: *Target Group Ltd v HMRC*

Lecture 3

2.3.2 Fund management consultation

HMRC have published the outcome of their consultation on the VAT treatment of fund management. The key conclusions drawn by the government are as follows:

1.43 Firstly, respondents raised concerns that the principles of what constitute a SIF caused confusion and required greater clarity. It was clear there is widespread reliance by industry on Items 9 and 10, with a strong preference among respondents to continue to rely on a single model based on these items.

1.44 After fully considering the consultation responses and the outcomes of the additional stakeholder discussions, the government has established that existing UK VAT legislation covers the vast majority of fund types for which management services should be VAT exempt. The government further considers that a list-based approach of Items 9 and 10 of Group 5 Sch. 9 of the VATA provides the industry with sufficient legal certainty. This approach is in line with industry preferences following extensive engagement with stakeholders, and meets the stated aims of providing clarity, certainty, and simplicity.

1.45 The government has considered the calls for the introduction of a definition of 'management' of a fund in legislation to provide greater

clarity on the application of the existing exemption, especially in regard to Items 9 and 10. The government has concluded that the current position established by settled case-law provides sufficient legal certainty.

1.46 However, the government has noted the request for greater definition in this area and will take this forward as part of the review of current guidance. This work will be focused on providing additional clarity in relation to the current legal position and will not incorporate proposals from some respondents to widen the existing definition.

1.47 Several respondents made suggestions outside the scope of this consultation. The main proposal was to zero rate fund management services to UK domiciled funds to increase UK competitiveness in terms of fund domicile. There were also calls for expanding the scope of the VAT exemption. The government recognises that some respondents will be disappointed that such proposals are not currently being taken forward, but the government keeps all taxes under review.

It therefore seems likely that there will be no significant changes to the law or to the scope of the exemption (or extension of the relief to zero-rate some services), but there will be revisions to guidance on some of the terms used.

www.gov.uk/government/consultations/vat-treatment-of-fund-management-consultation

Lecture 4

2.3.3 Online dispensing

A company supplied services in connection with the online sale of contact lenses. It treated its supplies as exempt, and appealed against a decision letter dated 5 June 2020, assessments covering the period 1 April 2015 to 21 March 2020 and the rejection of an error correction notice for the period 1 April to 30 June 2020. All these matters were the subject of a review, which upheld HMRC's initial conclusions on 12 February 2021. For periods after 30 June 2020, the company accounted for VAT pursuant to HMRC's decision letter, and sought repayment of VAT for those periods if the appeal against the decision was successful.

The issues for the Tribunal were:

- Whether the company's supplies constituted "medical care";
- If they did, whether they were wholly performed or directly supervised by appropriate persons.

Both questions had to be answered "yes" for the appeal to succeed.

The company was a member of a corporate group with a sister company based in the Netherlands. Another group company held the lease of a large warehouse facility near York that was operated by the appellant. The warehouse stored contact lenses and other optical products belonging to the Dutch company; they were despatched to customers by the appellant's fulfilment operatives. The appellant also employed customer assistants to deal with customer enquiries.

The Dutch company operated the website and sold the contact lenses. The company regarded 82% of the price paid by a customer as for the lenses

and 18% as consideration for the supply of dispensing services by the appellant.

A consultant to the company explained the different grades of qualification involved in dispensing of contact lenses and other eye health matters: optical assistants, dispensing opticians, contact lens opticians, optometrists and ophthalmologists. He explained the steps in selling contact lenses: a customer would have an initial consultation leading to a prescription, after which subsequent purchases will generally be dispensed without the need for involvement of a qualified person.

The sale of contact lenses is regulated in the UK by the Opticians Act 1989, which restricts testing of eyesight and fitting of contact lenses to suitably qualified persons, and requires sales to be made only where the seller has received the wearer's specification and has verified that it is valid. Because UK high street opticians will not cooperate with online suppliers by providing these specifications or verifying them, it was necessary to sell the lenses from the Netherlands, where these restrictions did not apply.

A witness from the General Optical Council (called by HMRC) confirmed that the group's sales of contact lenses would be in breach of the UK law if made from a UK base, but the prohibition did not apply to sales made from within the Netherlands. The GOC had received complaints about the group's website, but was satisfied that the sales were made by a Dutch company (in spite of the website being ".co.uk").

The website made it clear that customers had to visit an optician to obtain a prescription. The website then contained information to help customers identify the lenses that matched the prescription. The prescription has to be provided by the optometrist after an eye test, and also appears on the packaging of previous purchases.

The Tribunal heard detailed evidence from the company's witnesses about the way in which the business operated and how it safeguarded customers' optical health by using qualified people to supervise the dispensing process.

One witness described investigations as a "mystery shopper" into the practices of high street opticians. These revealed wide differences in the VAT treatment of supply of lenses, ranging from £19.35 SR/£2.15 E through £9.55 SR/£9.95 E to £8 SR/£12 E and £0 SR/£23 E.

After this examination of the business, Judge Mark Baldwin discussed the law. There was agreement that for services to qualify as "medical care" they must have as their purpose "the diagnosis, treatment and, in so far as possible, cure of diseases or health disorders". He referred to CJEU cases which showed that healthcare can be supplied at a remove from the patient, as long as there was involvement in a process that qualified as healthcare. UK case law showed that the supplies of dispensing and lenses were separate supplies, even if made by the same person.

The judge went on to consider a number of precedent cases about the meaning of "supervision". This should be interpreted purposively, taking the intention of Parliament as aimed at preventing "cowboy" operators. It did not require constant observation, but some degree of oversight and authority over the quality of the work. Counsel for the appellant

contended that supervision could also be provided by training, but HMRC disagreed.

HMRC argued that the "regulatory arbitrage" engaged in by the group undermined the purpose of the UK law in promoting quality healthcare by means of the exemption. According to HMRC, the supplies made by the company, which it describes as dispensing services, cannot properly be described as a professional clinical advice or therapeutic care. The company saw no patients and gave no specific advice; as the advice on healthcare issues was available freely on the Dutch company's website, there was no supply of that advice that the UK company was paid for. The company's counsel and witnesses put forward a number of arguments to support the exemption.

After summarising the submissions, the judge analysed what it was that the company supplied, to test whether it amounted to appropriately supervised medical care. It appeared to do three things:

- It provided a facility to deal with customers' queries, both in relation to ordering and clinical matters.
- It sent out prompts and reminders to customers.
- It operated the warehouse facility near York, managing the operation and the despatch of products (which belonged to the Dutch company).

The judge agreed with HMRC that any service of medical care that might be supplied through the website appeared to be supplied by the Dutch company, not by the UK company. The Dutch company owned the website and appeared to supply its content. The website was also available for anyone to read for free, so it could not be "supplied" for VAT purposes, either by the UK company or by the Dutch company. Its content therefore could not be taken into account in characterising what the UK company did.

According to the company's own evidence about the use of the customer helplines, 92% of customers did not use the facility at all, and three times as many customers used it to raise non-clinical issues as clinical ones. Very few customers asked for their prescriptions to be verified, and it was not possible to fulfil that request for many of those who did ask. The judge concluded that the service could not fairly be described as "provision of medical care". It was the provision of a customer support facility covering a range of issues, which could include issues of a clinical nature, and a reminder or prompt function.

The fulfilment services might meet a dictionary definition of "dispensing", in that they involved selection, packing and despatch, but in the context of the exemption for medical care, they were not dissociable from the supply of the goods themselves and could not constitute a separate supply of medical services.

That was sufficient to decide the appeal in HMRC's favour, but the judge went on to consider the question of supervision. He considered that supervision was made up of three elements: *Firstly, appropriate training of the non-qualified individuals, so that they can competently carry out the functions delegated to them. Secondly, access to an appropriately qualified person at all relevant times to help unqualified individuals with*

any questions of difficulty. Finally, there must be an element of proactive (supervisor-initiated) oversight of the unqualified individuals.

The company's submissions concentrated on the first two (training and availability of qualified help), and the Tribunal was entirely satisfied that these elements were present. However, there was no evidence of the third element – "authoritative, intrusive (if not constant) checking, knowing for yourself what is going on" – which the judge considered to be essential. The judge would therefore also have held that the second issue would be decided against the taxpayer.

The judge finished with a brief consideration of fiscal neutrality, which he did not regard as being engaged. There was a significant difference between the services supplied by UK high street opticians and those supplied by the appellant. The UK suppliers were within a chain of activity from eye test to dispensing; that chain was broken by someone providing one of the links without being in a position to confirm that all the previous links were in place. The difference in quality from the viewpoint of recipients justified a difference in the VAT treatment.

The appeals were dismissed.

First-Tier Tribunal (TC09002): *Vision Dispensing Ltd*

Lecture 5

2.3.4 Disposal of the remains of the dead

The decision in this case starts with an interesting procedural note. At a first hearing, the judge (Abigail McGregor) invited written submissions, and on receiving them, decided that a second hearing was necessary. This was held online; due to a technical hitch, the conference system had to be changed at the last minute, and due to HMRC changing the person who would attend, that person did not receive the message. The Tribunal decided to proceed in the absence of representation by HMRC, and the judge commented that this was HMRC's own fault for failing to notify the Tribunal of the change of person attending (as they were required to do). The hearing proceeded with the benefit of HMRC's written submissions.

The issue was whether particular supplies made by the company were exempt within VATA 1994 Sch.9 Group 8 as "the making of arrangements for or in connection with the disposal of the remains of the dead", or were zero-rated within Sch.8 Group 8 as "the making arrangements for the supply of space in any ship or aircraft" (item 10) or supplies in connection with the exportation or importation of goods (item 11). VATA 1994 s.30(1) has the effect of giving zero-rating priority over exemption if a supply falls within both categories.

The company provides the service of repatriating bodies of people who have died in one country but are to be laid to rest in another. The majority of its business related to persons who had died in the UK whose families wished them to be laid to rest in another place; a smaller part of the business was bringing back to the UK people who had died abroad. The customer was almost always the next of kin of the deceased.

A director of the company described the procedures involved in repatriation, which were not in dispute. It was a more specialised arrangement, both legally and physically, than the normal work of a UK

undertaker. The director contended that the company had no involvement with the funeral arrangements, but only provided specialist transport services. Embalming was required, but it was not the same as that which would be carried out by an undertaker – it was necessary for the international flight. The bodies were transported as "goods" according to the airway bill.

The director also complained that HMRC had not questioned the zero-rating of the services on two previous compliance visits, and had now changed the position without any change in the law or in the services. The judge pointed out that the FTT can only fulfil its statutory function in hearing appeals on matters specified in VATA 1994 s.83, and could not consider complaints about HMRC's behaviour.

HMRC's written submissions referred to VAT Notice 701/32 which stated that repatriation services were exempt. The services fell squarely within the terms of the exemption, and were not simply specialised transport services. The High Court had decided in *Network Insurance Brokers* (1998) that "in connection with" broadened the scope of the exemption for making arrangements for the disposal of the remains of the dead.

The judge analysed the reasoning of the judge in the High Court case. She concluded that there was a "line" of connection to the disposal of remains, and at some point a service would be too far removed; in her view, the appellant's services were much closer to the disposal than the insurance policies in that case. She concluded that the services were covered by Sch.9 Group 8.

However, they would still be zero-rated under s.30(1) if they also fell within Sch.8. The judge noted the importance attached to the "predominance" test by Simler LJ in *Gray & Farrar International LLP*: there were different elements in the appellant's supplies that might have different liabilities on their own, and in characterising the supply as a whole it was necessary to consider whether there was a predominant element.

With that as a guiding principle, the judge found that the predominant element of the supplies made by the appellant are those of transport. When a customer approaches the company, it is because they want the company to arrange for their deceased relative to be transported to another country, so that the customer can go on to arrange a funeral in that other place (using other undertakers).

The supply was a mixture of actual transport services within Sch.8 group 8 item 5 and making arrangements for transport services within item 10. The appeal was therefore allowed.

First-Tier Tribunal (TC08937): *UK Funerals On-Line Ltd*

Lecture 6

2.3.5 Broadcast theatre

Admission to live cultural events such as theatrical productions is exempt if supplied by a charity that is managed on an essentially voluntary basis (VATA 1994 Sch.9 Group 13). In the *British Film Institute* case (Case C-592/15), the CJEU held that the UK was entitled to draw a distinction between theatres and cinemas in the cultural services exemption, because

the PVD referred to "certain cultural services" – that meant that the member state could choose to exempt some rather than having to exempt all.

A charity appealed against decisions refusing exemption for tickets to "Live Events", which are theatrical performances of the National Theatre and Royal Shakespeare Company made available to cinemas throughout the UK. The charity submitted a voluntary disclosure claiming a repayment for periods from June 2012 to December 2015; this led instead to additional assessments for those periods and a long-running dispute leading up to the present appeal. Part of the dispute was about whether HMRC had issued assessments in time.

It was not disputed that the appellant was an eligible body. The only question was whether the "Live Events" fell within the exemption, because they were theatrical performances, or were excluded, because they were shown in a cinema.

The Tribunal concluded readily that repeat screenings were not "live" and not sufficiently linked to a theatrical performance to qualify for exemption. Where the event was genuinely "live", the judge (Ruthven Gemmell) considered arguments about "always speaking" following the *News Corp* case. In his view, that decision required him to take a narrow view of the principle: the Supreme Court had concluded that digital newspapers were not sufficiently similar to printed versions to justify extending zero-rating to them, and he concluded that broadcast theatrical performances suffered from the same problem in relation to exemption. The experience of attending a live event, in which the audience interacts with the performers, is different in kind and not just in degree from the experience of attending a cinematic version of the same event. The appeal in relation to the liability of the supplies was dismissed.

Turning to the validity of the assessments, the judge accepted HMRC's reasoning that their officer had not appreciated the nature of the so-called "live events" until a phone call in December 2018 made it clear that the audience and the performers were in different places. He could then not raise an assessment until he had some financial information on which to base the amounts. This was supplied in May and July 2019, which provided the "last piece of evidence"; assessments issued in January 2020 were therefore in time.

The appeal therefore failed.

First-Tier Tribunal (TC08972): *Derby Quad Ltd*

Lecture 7

2.3.6 Philanthropic purpose

In TC08250, the FTT dismissed an appeal by the governing body for the majority of Freemasonry lodges in England and Wales in relation to claims it had made in 2014 and 2018 for repayment of £2.83 million of VAT paid on membership subscriptions between 06/2010 and 03/2018. The basis for the claim was that the supplies to members were exempt under art.132(1)(f) PVD and Item 1(e) Group 9 Sch.9 VATA 1994 because its main aims were of a philosophical, philanthropic or civic nature.

HMRC rejected the claims; while they accepted that the entity's aims included each of the above elements, they were not its sole aims, and they were not "in the public domain". This argument had succeeded in a hearing in the FTT in 2014 (upheld by the UT in 2015) in relation to a *Fleming* claim for VAT accounted for before 1996. The FTT also found that the aims of Freemasonry were not limited to philosophic, philanthropic and civic aims but also included social aims, self-improvement and, in some part, the promotion of Masonic ritual and ceremony. The FTT found that, in the period before 2000, UGLE's other aims were aims in themselves and were not simply insignificant or ancillary to the qualifying aims of a philosophical, philanthropic or civic nature.

The FTT made various comments about the nature of Freemasonry appearing to have changed after 2000, becoming more outward-looking. The organisation decided to make claims for later periods based on the same arguments and some of the same evidence, also introducing some new evidence.

Judge Greg Sinfield examined the meaning and relevance of "public interest" in the heading of art.132. He rejected HMRC's submission that, as well as showing that its main aim was 'philosophical', UGLE must also prove that its aim was in the public interest, i.e. for the benefit of the public. By analogy with the exemption for trade unions, it was clear that it was not necessary for an exempt body's aims to benefit the whole public: trade unions are regarded as acting in the public interest when they defend and represent the interests of their members. UGLE's philosophical aims could likewise be "in the public interest" even if they were mainly of concern to the body's own members.

It was agreed that the only issue was whether UGLE's aims of a philosophical, philanthropic or civic nature were, separately or together, its main aim or aims. This necessitated a detailed consideration of the meaning of the three terms, as well as consideration of evidence presented by three witnesses who were all Freemasons. The judge found them credible and adopted the evidence of one in his findings of fact, but regarded the others as giving mainly historical information that was not relevant to the issues for determination.

The judge considered the activities and aims of UGLE in detail. One of its aims was the provision of "relief", which took two forms: donations to good causes unconnected with Freemasonry, and supporting Freemasons and their dependants in distress. This was a significant aim and was not "philanthropic" within the meaning of art.132(1)(f). That was enough to deny exemption, even if the other aims met the relevant criteria.

The appeal was dismissed, and the appellant tried again in the Upper Tribunal. The appellant did not dispute the FTT's separate conclusion that it did not have a civic aim, and HMRC did not dispute the FTT's conclusion that the main aim must be "in the public interest" before the exemption could apply. The grounds of appeal were:

The FTT failed to address or give reasons for rejecting the Appellant's case that it had one main philosophical aim and that its activities in support of the Masonic charities were in service of the philosophy of Freemasonry, in particular the third of the three Grand Principles, Relief, and thus fell within its philosophical aim.

Even if its activities related to the Appellant's charities could be treated as an aim which was not in service of its main philosophical aim, the activities of the Appellant in support of the Masonic charities fall within the ordinary meaning of the word "philanthropic". The FTT misdirected itself in law by failing to apply the ordinary meaning of the word and instead adopted a meaning of "philanthropic" which is too narrow.

In considering the first ground, the Upper Tribunal (Judge Phyllis Ramshaw and Judge Kevin Poole) set out a number of precedents on the need for FTT judges to identify and state the reasons for their decisions, and to address all of the arguments put forward by appellants in explaining those decisions. They then examined in detail how the argument had been put in the FTT, and how the reasoning of the judge had been explained. They we rejected the appellant's arguments that there was one main philosophical aim, and all of its activities should be understood as being in service of that aim. The FTT's finding that the provision of "Relief" was a separate main aim of at least equal importance to the philosophical aim was, in the UT's view, unimpeachable.

However, they did consider that the FTT failed to provide adequate reasons as to why it did not accept the appellant's argument that there was one main philosophical aim, and everything was done in pursuance of that aim. HMRC argued that the reasoning was implicit in the decision, but the judges disagreed: this had been an important part of the appellant's case, and the reason for rejecting it should be set out explicitly. That constituted an error of law.

In relation to the second ground, the appellant argued that the provision of "Relief" was philanthropic, even if it was directed to people who had contributed to the organisation (described as "self-insurance"). It was argued that the cases of *Game Conservancy Trust* and *Hallé Concerts Society* showed that the possibility of an organisation's members benefiting from their membership did not prevent the organisation from being philanthropic. The judges distinguished those cases: the benefits to the members were not of the same kind as in the present appeal.

The conclusion was: "We accept that an aim may be considered to be philanthropic if an organisation aims to provide relief to specific categories of persons. However, we consider there is a qualitative difference between organisations which raise and distribute funds for identified groups of persons and an organisation that raises funds from within the members that constitute that organisation with the aim of essentially re-distributing a large part of the funds (by way of benefits procured by them) back to some of those members and members' dependents. That cannot be considered to be philanthropic in the sense of benevolence to the world at large, a love of mankind etc. We therefore reject the submission that the FTT applied too narrow an interpretation of philanthropic."

Because of the inadequacy of the reasoning in the FTT decision, that decision was set aside. However, the UT considered itself able to remake the decision, and dismissed the appeal again on the grounds that the organisation had a main aim that was not philanthropic.

Upper Tribunal: *United Grand Lodge of England*

Lecture 8

2.4 *Zero-rating*

2.4.1 Chocolate biscuits

HMRC ruled that a product was standard rated as "partly covered with chocolate or something similar in taste and appearance". It was agreed that it was a biscuit, that it contained something similar to chocolate, and it was not wholly covered in chocolate. Judge Jennifer Dean therefore described the issue as "a narrow one".

It is interesting that the company asked for HMRC's view in July 2021, before the product went on sale. HMRC ruled that it should be standard rated, but "noted that as no sales had been made their decision as at 15 October 2021 was not an appealable decision". After the products were sold for the first time in December 2021, HMRC maintained their view and the company appealed to the Tribunal in February 2022.

The basic point was that the chocolate was mainly within the biscuit rather than "covering" it. The consumer would bite into biscuit first. HMRC considered this to be a distinction that was not reflective of the legislation. However, HMRC's own guidance allows zero-rating for "sandwich-type biscuits" such as Bourbons and also for chocolate chip biscuits. The appellant argued that its product was of that type. The chocolate should be classified as a filling rather than a covering.

The judge cited a number of authorities for the principle that such decisions should be made on the basis of the ordinary meanings of the words rather than "mind-numbing legal analysis". The classification of foodstuffs "It is a short practical question calling for a short practical answer."

The judge was persuaded by HMRC's argument. There was a biscuit cup case into which the chocolate filling was piped; this was then partly covered by a biscuit "lid" with a logo on it. As the lid only partly covered the chocolate, it was logically necessary that some of the chocolate was "covering" the rest of the biscuit. As the law referred to "partly" covered, which meant the same as "to some extent" or "not completely", it fitted the words of the legislation and could only be standard rated.

The appellant's submission that a covering must be the "first constituent part of a biscuit to be bitten into" was rejected as introducing additional words into the legislation. The judge concluded, "We asked ourselves, if the biscuit logo does not cover the whole, what covers the remaining area? We consider that the view of the ordinary man in the street informed as we are, would conclude that the biscuit is partly covered by a layer of chocolate."

The appeal was dismissed.

First-Tier Tribunal (TC08941): *United Biscuits (UK) Ltd*

Lecture 9

2.4.2 VAT in the Autumn Statement

The Chancellor's Autumn Statement included two extensions of zero-rating:

- the inclusion of reusable period underwear in zero-rating for women's sanitary products from 1 January 2024;
- from February 2024, expanding the VAT relief available on the installation of energy-saving materials by extending the relief to additional technologies – such as water-source heat pumps – and bringing buildings used solely for a relevant charitable purpose within scope.

www.gov.uk/government/publications/autumn-statement-2023

The Value Added Tax (Women's Sanitary Products: Reusable Underwear) Order 2023 enacts the first of these measures with effect from 1 January 2024.

SI 2023/1341

On 11 December, HMRC published a summary of responses to their consultation on VAT energy saving materials relief which was announced at the Spring Budget 2023, and has led to the changes mentioned above from February 2024.

www.gov.uk/government/consultations/vat-energy-saving-materials-relief-improving-energy-efficiency-and-reducing-carbon-emissions/outcome/summary-of-responses

2.5 Lower rate

2.5.1 Updated Notice

The VAT Notice *Fuel and power* has been updated at section 6.1 'Supplies taxed at the reduced rate' to clarify the qualifying uses of fuel oil, gas oil or kerosene.

Notice 701/19

2.6 Computational matters

Nothing to report.

2.7 Discounts, rebates and gifts

Nothing to report.

2.8 Compound and multiple

2.8.1 Intra-group support services

An American bank, CBNA, appealed against a series of assessments covering periods from 06/2013 to 12/2020, which gave effect to an HMRC decision that supplies to a related company SPLC were single composite standard rated supplies. As CBNA and SPLC are members of the same VAT group, supplies from one to the other would ordinarily be disregarded under s.43(1)(a) VATA 1994; however, as CBNA bought in services from overseas in order to enable it to make those intra-group supplies, HMRC contended (and CBNA disputed) that those intra-group supplies were taxable pursuant to s.43(2A) and (2B).

The Tribunal (Judge John Brooks) identified two broad issues:

- Whether there were single or multiple supplies from CBNA to SPLC of "support services" and "business delivery services";
- Whether, if there were separate supplies, any of them were exempt.

HMRC also argued that the company had failed to identify any specific supplies that qualified for exemption; the burden of doing so fell on the taxpayer, and without such identification, it could not treat anything as exempt.

The company described "support services" as "the services which support SPLC generally as a business. These are typically generic services which are not specific to a particular part of the business and include Human Resources, Real Estate and Legal. In contrast, the services which make up the trading infrastructure (which comprises a number of functions including Quantitative Research ("QR"), Technology, Operations and Market Risk which are described more fully below) which is necessary for SPLC to carry out transactions with clients is described by CBNA as Business Delivery Services." It accepted that these, if supplied separately, were taxable; but if the Tribunal found that they were part of a composite

supply, the company argued that they were part of a single supply that was overwhelmingly exempt.

In relation to the exemption issue, the company claimed that its supplies of "business delivery services" qualified for exemption within art.135(1)(d) and/or (f) – "transactions concerning payments" and "transactions including negotiation in shares etc.".

The decision includes a very detailed description of the contracts between the parties and the way in which the services were delivered in relation to different business lines and types of transactions, with evidence being taken from a number of company employees. This will be of interest to anyone who specialises in large financial businesses, but is probably not of wider relevance.

At para.236 of the decision, the judge turns to the history of the dispute between the parties and the raising and appealing of the disputed decisions. There had been extended discussions about whether HMRC's ruling applied to all the business lines or just the one used for an illustrative paper; HMRC stated that they had made an appealable decision even though they were not in a position to be sure about the amount of the liability, and issued protective assessments for estimated amounts while "constructive discussions are ongoing". The appeals covered several assessments for different periods, as well as the liability decision in principle and the refusal of a s.80 claim made on the basis that the company had mistakenly treated supplies as taxable.

After reciting the relevant law from the PVD and the VATA, the judge started with the "identification issue" – whether CBNA had identified any specific exempt supply and for what consideration those supplies were given. HMRC argued that the contracts and invoices did not identify specific supplies in such a way that qualification for exemption could be demonstrated. The company responded that the appeal concerned intra-group supplies, so "one would hardly expect the contractual documents to identify whether any given supply is taxable or exempt." The invoices were not concerned with individual components but with supplies made and received as a whole. The issue of the VAT liability for those supplies only arose when s.43(2A) was applied. The judge agreed that it would not be appropriate to dismiss the appeal purely on this ground.

He next turned to the question of whether there were multiple supplies or a compound supply. He referred to a number of precedents, in particular the 2013 Upper Tribunal decision in *Honourable Society of Middle Temple* and the 2022 FTT decision in *Spectrum Community Health CIC*. Judge Brooks quoted extensively Judge Sinfield's reasoning in this second case, which in turn relied significantly on the CJEU decision and A-G opinion in *Frenetikexito*. The judge recognised the distinction between two different types of "single supply", abbreviated as "*CPP*-type" and "*Levob*-type" – those with a principal and ancillary elements, and those where the lesser elements could not be realistically dissociated from the main supply. The A-G in *Frenetikexito* had given four indications that can be used to determine whether there is a *Levob*-type supply:

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

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

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

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

After further detailed examination of the arguments and reference to the evidence, the judge concluded that the different elements of the supply were indivisible and indispensable in order to achieve the aim of the supply. CBNA made a single supply to SPLC of what HMRC's counsel described as "Support Function Services" which encompasses and includes both Support Services and Business Delivery Services.

In characterising a single supply, it was necessary to apply the test of "predominance" which the CJEU had used in *Mesto Zamberk* and the Court of Appeal had followed in *Gray & Farrar International LLP*. In this case, there appeared to be no principal or predominant element: every part of the supply was necessary for a fully functioning trading platform. Following the precedent of *Deutsche Bank* (Case C-44/11), a supply that could not be characterised could not meet the requirement that exemptions should be strictly interpreted and narrowly construed. The supply had to be taxable.

Having decided that, it was not strictly necessary to consider the application of the art.135 exemptions, but the judge did so for completeness. He quoted extensively from the recent CA decision in *Target Group* as demonstrating that it was not enough for the outsourced services to be essential for the customer to carry out exempt transactions: they had to be involved in the transactions in changing the legal and economic circumstances. The judge agreed with HMRC's counsel that CBNA provided technical or administrative services that were used by SPLC to make exempt supplies, and it did not qualify for the exemption in its own right.

The appeals were dismissed.

First-Tier Tribunal (TC08957): *JP Morgan Chase Bank NA*

Lecture 10

2.8.2 Effect of withdrawn appeal

Two companies appealed against assessments of £882,412 and £74,768 raised by HMRC in March 2022 and confirmed on review. The issue was whether the companies' supplies qualified for zero-rating as services in the course of construction of residential property. The companies had filed returns on the basis that their supplies were wholly zero-rated after the laying of the first "golden" brick above foundation level; HMRC ruled that their supplies continued to be mixed supplies of exempt land and zero-rated services.

In December 2022, HMRC applied for a direction that the appellants' arguments about single zero-rated supplies should be struck out of the

appeal. This was based on Tribunal Rule 8(3)(c) (no reasonable prospect of success) on the grounds of "cause of action estoppel, issue estoppel and abuse of process". This was because in 2018 the former representative member of the VAT group of one of the appellants (which owned 50% of the other appellant) had written to HMRC for a ruling in respect of similar supplies made by companies in the group. HMRC had ruled that these were mixed exempt and zero-rated supplies; the company had appealed, but had withdrawn the appeal in February 2022. HMRC argued that the company could not raise the same argument again.

Judge Nigel Popplewell set out the principles he would apply in the appeal:

(1) When considering whether the appellants' case has a reasonable prospect of succeeding, I need to consider whether they have a realistic as opposed to a fanciful prospect of success i.e. the claim must carry some degree of conviction and is more than merely arguable.

(2) When considering the legal relationship between the appellants and their counterparties, a tribunal should start by considering the meaning and effect of the relevant contractual terms but it then needs to consider whether those contractual terms reflect economic and commercial reality.

(3) Where an appellant withdraws its appeal before the determination of that appeal has been made by the tribunal, then the appellant and HMRC are deemed to have come to an agreement that the decision under appeal should be upheld without variation.

He noted that these principles were wider in scope than the limited strike-out application made by HMRC, but as the issues had been fully argued before him, he considered that it would make better use of court time if he gave a decision on all the matters.

The judge set out the background to the ruling request and the subsequent appeal in relation to it. When the company withdrew the appeal, it notified HMRC of the projects on which it had recovered input tax on the basis of its view that the supplies were zero-rated; HMRC then issued the assessments in respect of those projects.

The ruling request had included a sample contract with a housing association customer. HMRC had refused to accept that this was representative of all the contracts covered by the appeal, on the basis that there would be differences of detail between the contracts which might be material to the outcome. The judge noted that there were different contracts with different customers; the wording was sometimes identical and often similar, and might have the same effect, but it could be argued that there were significant differences.

When the company withdrew from the first appeal, the Tribunal was deemed to have decided the matter in HMRC's favour. The question was the extent of that deemed determination. The judge considered that the issues in the first appeal were restricted to the contract that the company had offered as representative of all its supplies. In his view, the deemed decision was not a ruling "in the abstract": it was a specific ruling in respect of those supplies, and did not extend beyond the supplies made under that agreement.

The judge reviewed precedents on estoppel and abuse of process, and concluded that HMRC were not being "vexed with the same matter twice". The Tribunal judge hearing the 2022 appeals would have to consider the contracts and commercial and economic reality of each transaction, which might be different from those deemed to have been determined on the withdrawal of the earlier appeal. He therefore refused HMRC's application for strike-out.

First-Tier Tribunal (TC08974): *Vistry Homes Ltd and another*

Lecture 11

2.8.3 Fuel and plant hire

A company supplied hire of plant which ran on red diesel. It treated the supplies as multiple: the diesel was supplied in small quantities that qualified for the reduced rate, whereas the plant hire was standard rated. HMRC considered that there was a compound supply of "plant with fuel", all standard rated, and assessed for more than £1 million (reduced to £845,000 by the time of the hearing).

The company is one of the largest privately owned plant hire businesses in the UK. It had been trading for over 50 years and operates from more than 175 depots across the country. Equipment hire revenue for 2021/22 was £185 million, and charges for fuel represented only 1.5% of turnover. The dispute related to supplies made between 06/2017 and 12/2020.

Until 31 December 2016 the appellant was a registered dealer in controlled oils. HMRC then deregistered the company as its supplies of red diesel were under the 2,300 litre per day supply threshold and there was therefore no requirement for the Appellant to be RDCO registered.

There was a statement of agreed facts and a statement of issues. The issues were whether the supplies of plant hire and fuel were multiple or single supplies, and whether they could have different liabilities even if they were single supplies (on the basis of *Talacre Beach Caravan Sales* and fiscal neutrality).

Judge Anne Scott examined the relationships between the company and its different categories of customers, including those with "major accounts" and less significant amounts of business. She noted different contractual terms relating to fuel, and the way in which fuel was charged – typically on the difference between the amount of fuel in the tank when the plant was provided and the amount in the tank when it was returned. The customer might have had the item for a long time and could have filled it many times in between, during which time it would only have been invoiced by the company for plant hire. It was not possible readily to identify the percentage of customers who purchased fuel from the company's management information.

HMRC's counsel submitted that the appellant's witnesses had been inconsistent and had advocated their case rather than providing objective evidence. The judge considered this at some length, concluding that in her view, the three witnesses had been credible and straightforward, and had fairly and accurately answered the questions that were put to them.

HMRC argued that the supply of fuel was made when the plant was provided at the beginning of the hire, but it was only invoiced at the end

of the hire. The amount itemised as a charge for fuel was incidental from the customer's point of view, and they never questioned it. In many cases, the plant could not be operated without fuel.

The judge referred to the principles set out by the Upper Tribunal in the *Middle Temple* case:

(1) Every supply must normally be regarded as distinct and independent, although a supply which comprises a single transaction from an economic point of view should not be artificially split.

(2) The essential features or characteristic elements of the transaction must be examined in order to determine whether, from the point of view of a typical consumer, the supplies constitute several distinct principal supplies or a single economic supply.

(3) There is no absolute rule and all the circumstances must be considered in every transaction.

(4) Formally distinct services, which could be supplied separately, must be considered to be a single transaction if they are not independent.

(5) There is a single supply where two or more elements are so closely linked that they form a single, indivisible economic supply which it would be artificial to split.

(6) In order for different elements to form a single economic supply which it would be artificial to split, they must, from the point of view of a typical consumer, be equally inseparable and indispensable.

(7) The fact that, in other circumstances, the different elements can be or are supplied separately by a third party is irrelevant.

(8) There is also a single supply where one or more elements are to be regarded as constituting the principal services, while one or more elements are to be regarded as ancillary services which share the tax treatment of the principal element.

(9) A service must be regarded as ancillary if it does not constitute for the customer an aim in itself, but is a means of better enjoying the principal service supplied.

(10) The ability of the customer to choose whether or not to be supplied with an element is an important factor in determining whether there is a single supply or several independent supplies, although it is not decisive, and there must be a genuine freedom to choose which reflects the economic reality of the arrangements between the parties.

(11) Separate invoicing and pricing, if it reflects the interests of the parties, support the view that the elements are independent supplies, without being decisive.

(12) A single supply consisting of several elements is not automatically similar to the supply of those elements separately and so different tax treatment does not necessarily offend the principle of fiscal neutrality."

She considered that principles (2), (5) and (6) were her starting point. Principle (10) was also significant: in her view, there was a genuine economic choice that the customers knew they had and exercised as a matter of commercial reality: they could refill the tanks themselves before

returning the plant, or they could incur a charge for fuel. There was a genuine freedom to choose.

After discussing some of the other principles, the judge concluded that the supply of fuel was actually made at the point that the customer decided, for whatever reason, not to refill the tank. The typical customer who made that decision had made an unfettered choice, and this led to the conclusion that there were multiple supplies.

In case she was wrong on that, she considered very briefly the alternative ground based on *Talacre Beach Caravan Sales*. That was dismissed very briefly – if there was a single supply, it would have to be taxed all at the standard rate.

On the basis of the first issue, however, the taxpayer succeeded. The appeal was allowed.

First-Tier Tribunal (TC08991): *Gap Group Ltd*

Lecture 12

2.9 Agency

Lecture 13

2.9.1 Uber and the Autumn Statement

The Autumn Statement includes the very brief comment “The government will consult in early 2024 on the impacts of the July 2023 High Court ruling in *Uber Britannia Ltd v Sefton MBC*.” The heading of the note refers only to “VAT treatment of private hire vehicles”, but the solution to the problem posed by the *Uber* case could extend to reforms to TOMS in more general terms.

www.gov.uk/government/publications/autumn-statement-2023

2.9.2 More TOMS

A company (B) provided “mobile ride-hailing services” which are are on-demand, private hire passenger transport services ordered and paid for through a smartphone application (i.e. similar to Uber). In a letter dated 4 October 2022, B asked HMRC for a non-statutory ruling that the Tour Operators Margin Scheme applied to the ride-hailing services supplied by B as principal. HMRC gave their considered opinion that TOMS did not apply, and B appealed to the FTT.

Judge Greg Sinfield set out the basis of the appeal: it was brought under s.83(1)(b) VATA 1994 which provides for appeals in respect of “the VAT chargeable on the supply of any goods or services”. It was not in dispute that the supply was taxable at the standard rate, but the application of TOMS would reduce the VAT chargeable.

The judge also noted that “This appeal is not concerned with supplies made by B to business customers who have a business account.” That suggests that B may treat those supplies as outside the scope of TOMS in order to allow their business customers to recover input tax; the point of the *Sefton* case mentioned above appeared to be that TOMS would be mandatory where it could apply.

Since the date of the ruling, B had introduced “scheduled rides”, which could be booked up to three days before the desired pick-up time. HMRC submitted that the appeal only concerned the rides that were the subject of the ruling itself, and the judge agreed. As the ruling request had only covered on-demand rides supplied to consumers, a number of other services were outside the scope of the ruling and therefore outside the scope of the appeal. Nevertheless, the judge noted that there might be points of generally applicable principle that he could give guidance on so the parties would be able to tell where the dividing line between TOMS and non-TOMS supplies lay.

The judge reviewed the UK legislation on TOMS and the provisions of the PVD at articles 306 – 310. There were questions to be determined about the compatibility of the UK law with the PVD; before considering them, the judge reviewed the CJEU case law on the subject. The cases included:

- *Van Ginkel* (Case C-163/91): supplies of accommodation on its own, to people who provided their own transport, was within TOMS.
- *Madgett and Baldwin (t/a Howden Court Hotel)* (Cases C-308/96 and C-94/97): a hotel providing coach transport as a package was within TOMS, and it was not necessary to be a travel agent or a tour operator to fall within it; but wholly incidental transport services such as taxis to and from a local station would not bring a trader within TOMS.
- *ISt internationale Sprach- und Studienreisen GmbH* (Case C-200/04): services provided to students on educational programmes were within TOMS.
- *Minerva Kulturreisen GmbH* (Case C-31/10): the sale by a travel agent of opera tickets without any travel services did not fall within TOMS.
- *Star Coaches s. r. o.* (Case C-220/11): a transport company which merely carries out the transport of persons by providing coach transport to travel agents, and does not provide any other services such as accommodation, tour guiding or advice, does not effect transactions falling within TOMS.
- *Commission v Kingdom of Spain* (Case C-189/11): TOMS must be applied by travel agents who act in their own name and use supplies of goods or services provided by other taxable persons to provide travel facilities to customers who are not necessarily travellers but to any type of customer (i.e. “wholesale” supplies).
- *Maria Kozak* (Case C-557/11): TOMS only applied to bought-in services and in-house transport supplies were subject to the normal rules of VAT.
- *Alpenchalets Resorts GmbH* (Case C-552/17): the supply of accommodation on its own fell within TOMS.
- *C, sp, z o.o., in liquidation* (Case C-108/22): a “hotel services consolidator” which bought in hotel accommodation and sold it to other travel agents was within TOMS.

The judge derived a number of principles from these precedents. As an exception to the normal rules of the PVD, TOMS must be applied only to the extent necessary to achieve its objective. However, other considerations such as simplicity and fiscal neutrality mean that it is not a necessary condition for the application of the special scheme that the travel agent's supplies must consist of a multiplicity of services or have an overseas element. TOMS is restricted to transactions carried out by travel agents in the provision of travel facilities; however, the term “travel agents” includes tour operators and also traders who are not travel agents or tour operators within the normal meaning of those terms but who engage in transactions that are identical or at least comparable to those of a travel agent or tour operator. The supply of services to someone who is not a traveller can fall within the scheme.

The provision of “travel facilities” means that the supply must be associated with a journey. That was significant where a supply was made on its own, as in *Alpenchalets*. However, whether a supply of transport without accommodation or other services (e.g. information and advice relating to a range of holiday offers and the reservation of the coach journey) falls within the EU special scheme is less clear, according to the *Star Coaches* decision. The judge considered that the key point in Star Coaches was that the trader in that case, which was not a travel agent or tour operator, merely provided transport services as a subcontractor to travel agents and did not make supplies which were identical or at least comparable to those of a travel agent or tour operator.

The judge turned to the UK legislation, which he had to interpret as far as possible in a manner that conformed with the PVD. The TOMS Order includes the condition that goods or services acquired for the purposes of the tour operator’s business must be supplied to the traveller without material alteration or further processing; according to the CJEU, it was only necessary for the goods and services to be acquired from third parties. The judge considered that “goods and services acquired from third parties should not be materially altered or processed” could mean the same as that “they must not be so changed as to become in-house supplies”, in which case the UK law was consistent with the PVD.

Another apparent inconsistency is that art.306 refers to the tour operators acquiring goods and services from “taxable persons”. The TOMS Order does not contain any reference to taxable persons. However, this was essentially a difference of terminology: the taxi drivers in the present case were “taxable persons” within the meaning of art.9 PVD (as they independently carried on an economic activity), even if they were not taxable persons under the VATA (because they were not registered and not required to be registered for VAT).

B’s principal submission was that it provided services of a kind commonly provided by tour operators or travel agents, and was therefore within the scope of TOMS. Its supplies were for the direct benefit of the traveller, and were bought in and sold on as principal. The driver supplied car, fuel and driving, so the services were not in-house supplies by B.

HMRC's primary position was that B’s supplies were not services commonly provided by tour operators or travel agents within the normal meaning of those terms. Tour operators and travel agents do not provide on demand transport services from anywhere at any time to anywhere:

HMRC's case was that, on any ordinary understanding, tour operators and travel agents are traders who cater for those wishing to make pre-booked journeys, usually though not invariably abroad. HMRC also submitted that B's supplies were either in-house supplies, or else were materially altered or further processed before being sold on.

The judge discussed these various arguments at some length. In his view, there was nothing in the CJEU case law to rule out B's supplies falling within TOMS on the basis of their "on demand" nature, or short duration, or being for the purposes of business or shopping rather than holidays, or being in taxis rather than any other form of transport. There was no material distinction between scheduled and on-demand rides – it was just a difference of timing. What B did in selling on the drivers' services to the passengers did not materially alter them or make them in-house supplies.

In conclusion, the judge considered that the supply of mobile ride-hailing services, on their own, fell within TOMS. If he was wrong on that, he still considered that B satisfied the CJEU's condition in Star Coaches in that it supplied various other services such as help and assistance on its app and website, which would bring it within the scheme.

The appeal was allowed.

First-Tier Tribunal (TC09014): *Bolt Services Ltd*

2.10 Second hand goods

2.10.1 Northern Ireland Second-hand Payment Scheme

On 25 October 2023, CIOT announced that HMRC had been in contact with the Institute and other stakeholders to raise member awareness of an extension to an upcoming deadline when accounting for VAT on the sale of second-hand cars in Northern Ireland. The change was due to take effect on 31 October 2023 and that has been extended to 30 April 2024.

HMRC are quoted as advising:

"We advised you that if you have second-hand motor vehicles in stock that you bought in Great Britain and moved to Northern Ireland before 1 May 2023, you can continue to use the VAT margin scheme if those vehicles are sold by 31 October 2023. If they were to be sold after 31 October 2023, you would have to account for VAT on the full selling price of the vehicles sold after 31 October 2023.

We have listened to feedback from businesses about the 31 October deadline, and have now extended the period that you can use the VAT margin scheme for vehicles you had in stock on 1 May 2023 and have not yet sold.

You can now use the VAT margin scheme for eligible motor vehicles that you purchased in Great Britain and moved to Northern Ireland before 1 May 2023 and still have in stock, if you resell them by 30 April 2024. If you sell them after 30 April 2024, you will have to account for VAT on the full selling price.

Find out more information about motor vehicles you had in stock on 1 May 2023: https://www.gov.uk/guidance/claim-a-vat-related-payment-if-you-buy-second-hand-motor-vehicles-in-great-britain-and-move-them-to-northern-ireland-for-resale."

The CIOT asked HMRC to annotate the above guidance page to record the date that the page was updated.

www.tax.org.uk/vat-hmrc-extend-deadline-for-the-second-hand-motor-vehicle-payment-scheme-in-northern-ireland

Lecture 14

2.10.2 Updated Notices

HMRC have updated their Notice *Motoring expenses* to add information on VAT rules when business sells a second-hand vehicle in Northern Ireland that is purchased in Great Britain. A new section has been added to explain that the VAT second-hand margin scheme cannot be used when a business resells a second-hand motor vehicle purchased in Great Britain and moved to Northern Ireland. There is a cross-reference to guidance on the second hand motor vehicle payment scheme that may be used instead.

Notice 700/64

HMRC have updated their Notice on submission of VAT returns with a new section on the second-hand motor vehicle payment scheme. New para.4.7 details the boxes that must be completed on the VAT return by businesses that use the second-hand motor vehicle payment scheme to claim a VAT-related payment if they buy second-hand motor vehicles in Great Britain and remove them to Northern Ireland for resale or export them to the EU for resale, providing they have a business establishment in the UK.

Notice 700/12

2.11 Charities and clubs

2.11.1 Definition of a charity

HMRC have updated their Notice *How VAT affects charities* to reflect changes to the VAT definition of a charity that were made by Finance (No 2) Act 2023. Since 15 March 2023, the legislation restricts VAT and other tax reliefs to UK charities (those charities coming within the jurisdiction of the High Court in England, Wales or Northern Ireland, or the Court of Session in Scotland).

Where a non-UK charity has previously asserted its status for charitable tax reliefs then there is a transitional period in place until April 2024 during which time relief can still be claimed. This is not made clear in the revised Notice.

The VAT definition of a charity has previously included charities based in the Isle of Man, EU member states, Iceland, Liechtenstein and Norway; it is therefore these that are most likely to be affected by the change.

Notice 701/1

2.12 Other supply problems

2.12.1 Article

In an article in *Taxation*, Neil Warren warns of the dangers of trying to apply the "normal rules of VAT" without being aware of the many exceptions that apply. He illustrates his point with examples of the use and enjoyment rules, the "performance" place of supply rules, exception to registration, and the flat rate scheme.

Taxation, 23 November 2023

2.12.2 Fuel scale charge

The VAT fuel scale charge as it applies in Northern Ireland is to be extended for a further three years, under the operation of the Northern Ireland Protocol. The European Commission has proposed that the VAT derogation which applies in Northern Ireland, under which VAT on the private use element of fuel provided in company cars is accounted for using the fuel scale charges, is extended until 31 December 2026. It otherwise would expire on 31 December 2023. The Treasury has issued an Explanatory Memorandum explaining the Commission's proposal.

www.gov.uk/government/publications/em-about-an-amendment-to-eu-decision-2021512-com2023704

2.12.3 Article

In an article in *Taxation*, Neil Warren reviews a number of topical issues in the form of a reworking of "The twelve days of Christmas". These include Christmas gifts and entertainment, multiple and international supplies.

Taxation, 14 December 2023

3. LAND AND PROPERTY

3.1 Exemption

3.1.1 Serviced apartments

Earlier in 2023, the High Court dismissed an application for judicial review in respect of assessments on a company to output tax on the supply of serviced apartments. That application was based on the argument that HMRC were acting unreasonably in raising retrospective assessments when they had carried out numerous control visits over many years and had never questioned the exemption applied by the company. As the decision was only about fairness, it was assumed for the purposes of the argument that the supplies were taxable. A separate technical appeal on that question has now been heard by the FTT.

The company owns a London property comprising 656 self-contained apartments and some commercial units. 421 of these apartments were let on long leases which were undoubtedly exempt. The appeal was concerned with the VAT treatment of the letting of the remaining 235 apartments, which included studio, one-bedroom or two-bedroom self-contained apartments. The company argued that the "service" element was a separate supply made by a separate company (CCSL), which had always charged VAT at the standard rate; it claimed that its supplies were exempt accommodation.

HMRC argued that the letting of the apartments was carved out of the exemption in Item 1 by excepted item (d), which applies to "the provision in an hotel, inn, boarding house or similar establishment of sleeping accommodation". Note 9 to Group 1 provides that "similar establishment" "includes premises in which there is provided furnished sleeping accommodation whether with or without the provision of board or facilities for the preparation of food, which are used or held out as being suitable for use by visitors or travellers".

HMRC had levied a penalty for careless behaviour but had suspended it, and the suspension period had now expired. Nevertheless the company maintained its appeal against the penalty, because it did not accept that it had acted carelessly.

The Tribunal heard evidence from company witnesses describing the way in which the apartments were let and the way in which the business had changed over the years, particularly with the advent of the internet. The company's first witness said that the apartments were different from a hotel in that no catering was provided – the apartments had kitchens and washing machines – and long-term stays were not uncommon: one person had stayed for 20 years. The second witness explained the nature of the services supplied by the separate company, and highlighted a number of further differences between the way in which the property was used and hotels.

The Tribunal considered the way in which utilities and Council Tax were charged to the company and paid for by the occupants. No separate charge was made: the rent was inclusive of these costs. The Tribunal also noted that longer-term residents signed an Assured Shorthold Tenancy agreement (for stays of over 6 months), while those staying for shorter

periods signed a much less formal "Guest Registration Form". HMRC accepted that AST lettings were exempt. The website descriptions of the services offered, and the pricing of different options, were also reviewed.

The Tribunal reviewed CJEU precedents on the exemption for letting (*Temco Europe* Case C-284/03 and *Walderdorff* Case C-451/06) and the exclusion of hotel-like accommodation (*Blasi* Case C-346/95). This case confirmed that the provision of short-term accommodation to asylum seekers was excluded from exemption. The exemption had to be strictly construed, which meant that exceptions to exemption had to be broadly interpreted: the expression "sectors with a similar function [to hotels]" was intended to ensure that the provision of temporary accommodation similar to, and hence in potential competition with, that provided in the hotel sector is subject to tax. However, it would be for individual member states to determine the criteria for distinguishing what was similar to a hotel from longer-term residential letting.

UK cases on the subject included *International Student House*, in which the VAT Tribunal decided that accommodation for students was not similar to a hotel because of the relationship with education and the high degree of control over the residents. Shorter-term student accommodation was held to be taxable by the Tribunal in *Acorn Management Services*. The strongest UK precedent was *Fortyseven Park Street Ltd*, a 2019 decision of the Court of Appeal. The CA had upheld the FTT decision that the combination of sales of fractional interests in a London property, together with services supplied by a related company, were covered by the "hotel exclusion". The last UK precedent was *City YMCA*, a 2021 FTT decision, in which the temporary nature of stays in the YMCA hostel was held to be decisive in determining that it was "similar to a hotel" in spite of numerous differences that HMRC sought to rely on (as HMRC in that case wanted the supply to be exempt, to deny input tax recovery). Lastly, the Tribunal considered an Isle of Man Tribunal decision, *BLS1 Ltd*, which had included an analysis of many of the issues.

The judge summarised his analysis of the precedents as follows:

(1) Supplies will not fall within the land exemption unless the 'essential object' of the transactions is 'the making available, in a passive manner, of premises or parts of buildings in exchange for a payment linked to the passage of time', rather than 'the provision of a service capable of being categorised in a different way'. There are two requirements here. First, to fall within the exemption, a level of exclusivity of occupation is required. Secondly, a supply of accommodation in a hotel or similar establishment coupled with additional services might be such that the overall provision is probably to be characterised as 'a more complicated service' than just a land supply. In such a case it will fall outside the exemption; Fortyseven Park Street and BSLI..

(2) Even if supplies have as their 'essential object' the making available of premises 'in a passive manner', they will be taken outside the exemption if they amount to 'the provision in an hotel ... or similar establishment of sleeping accommodation'. The test of "similarity" is a broad one, as its purpose is to ensure that the provision of temporary accommodation like, and so in potential competition with, that provided in the hotel sector is subject to tax. Here there is an important distinction between long-term lettings of residential accommodation and short-term

lettings of accommodation as in the hotel sector. The provision of meals and drinks, cleaning of rooms and provision of bed linen are among the characteristic features of many establishments in the hotel sector; YMCA/Blasi/BLS1.

(3) Premises will be taken to be an establishment similar to a hotel if they constitute premises in which furnished sleeping accommodation is provided and which (premises) are used by or held out as being suitable for use by visitors or travellers, even if they are also used by others (who are not visitors or travellers). A visitor is someone who is visiting an area for a particular reason and whose stay does not have sufficient degree of permanence to mark that person out as a resident. A traveller is an individual (who might be travelling for any reason) whose stay at the premises is intended as one stay amongst several stays in different places. BLS1/ International Student House.

The judge noted that there is potentially an overlap between "not a letting of land" (i.e. not falling within the exemption at all) and "similar to a hotel" (excluded by item (d)). The position of hotel accommodation in relation to the basic land exemption is not the subject of any directly relevant precedent, although the point was referred to in passing by the House of Lords judge in *Sinclair Collis*. The practical relevance of this was the point considered by the Tribunal in *YMCA*: provision of accommodation in a hotel could benefit from the valuation provision in Sch.6 para.9 (reducing the VATable amount to 20% of the consideration after a stay of 28 days) only if it was in principle within Group 1 but excluded from exemption by item (d). The judge set out the background to Sch.6 para.9, which was the subject of a derogation granted to the UK in 1977. The purpose of the measure was "simplifying calculation of VAT in respect of long stays in hotels by assessing on a flat-rate basis the part of the service deemed to correspond to a letting of immovable property exempt under Article 13(B)(b)(1)". This did not involve exempting any of the supply, and avoided the complications of partial exemption: the supply was wholly taxable, but charged on a lesser amount (contrary to the conclusion of the Isle of Man Tribunal in *BLS1*).

The company argued that the derogation confirmed that stays of over 28 days were supposed to be exempt, and the purpose underlying the derogation would be defeated if HMRC were correct to assess the rental element of the supply. Treating the services as wholly taxable and the rental as wholly exempt fulfilled the same purpose. HMRC's distinction between ASTs and GRFs was not logical: if ASTs were exempt, so should GRFs be.

HMRC responded that ASTs gave tenants a range of statutory rights which one would normally expect to see in a principal place of residence. Hotels and similar establishments do not normally make supplies on such terms given their formality and the statutory rights they confer. They further argued that the company was contractually obliged to supply serviced accommodation, and the service element was therefore subcontracted to the related company rather than being supplied by that company directly to the occupant.

The Tribunal started its discussion of the issues by considering "who supplies what to whom". This would normally start with an analysis of the contracts between the parties (Realreed, CCSL and the occupants);

however, there were no documents to set out the relationship between Realreed and CCSL, and no evidence to show whether one or both of them contracted with the occupants or acted as principal or agent for the other. CCSL issued the invoices for both supplies, but Realreed contended that it did so in respect of the land supply as agent for Realreed (the property owner).

Based on the available evidence, the Tribunal concluded that the analysis that was most consistent with the facts was that:

- Realreed supplies accommodation in the Apartments to occupiers;
- there is a promise or representation (based on the way the Apartments are marketed and consistent with the clear undertaking where ASTs are used) by Realreed that the ancillary services will be provided;
- CCSL provides those services and that is how Realreed discharges its promise to occupiers.

The company had argued that this must mean that the supplies by Realreed and CCSL were separate for VAT purposes, in line with the CA decision in *Telewest*. The judge said that the issues were quite different: that was about compounding two supplies together, whereas the present case was about whether the property was "similar to a hotel". The Tribunal did not accept that CCSL's supplies had to be ignored in determining that question. They were part of the "offering" at the property, and they were enough to convince the Tribunal that the property was "similar to a hotel".

The judge was also clear that the marketing material and other evidence supported HMRC's view that the property fell within Group 1 Note 9: '*"Similar establishment" includes premises in which there is provided furnished sleeping accommodation, whether with or without the provision of board or facilities for the preparation of food, which are used by or held out as being suitable for use by visitors or travellers.*'

The judge went on to discuss the operation of Sch.6 para.9. In his view, it required VAT to be charged on 20% of the consideration for Realreed's supply of the accommodation, in addition to and without reference to the VAT already charged by CCSL for the supply of services. Although at first sight this might seem harsh, in his view it was the inevitable consequence of the arrangements put in place by the companies. If it operated, as argued by the company's counsel, to charge no VAT on Realreed's supply, there would be a risk that the overall charge would be on less than 20% of the total consideration, which would be a breach of the derogation on which the provision was based.

Turning to the penalty appeal, the judge was not satisfied that the company had acted in a way that was not careless. There was no evidence that the company had ever taken professional advice about its VAT affairs. Even if it had done so in 1991 as it claimed, a reasonable person in the company's position would have refreshed the advice from time to time. There was no evidence of the position having been reviewed internally: the Finance Director "betrayed absolutely no intellectual curiosity about Realreed's VAT affairs... he simply accepted what he was told and did nothing to validate his understanding." Even relying on

HMRC's control visits was something on which advice should have been taken, and there was no evidence that this had been done.

The appeals against liability and the penalty were both dismissed. This was a decision in principle that would require recalculation of the assessment on the basis of Sch.6 para.9, allowing credit for input tax that the company had not claimed because it had regarded its supplies as exempt.

First-Tier Tribunal (TC09013): *Realreed Ltd*

Lecture 15

3.2 Option to tax

Nothing to report.

3.3 Developers and builders

3.3.1 VAT in the Autumn Statement

Sub-contractors in the construction industry can apply to be paid without deduction of income tax under the Construction Industry Scheme (CIS) if they have a good tax compliance record. The Autumn Statement included an announcement that VAT compliance will be added to the Gross Payment Status compliance test.

Before the Domestic Reverse Charge for construction services was introduced, a Gross Payment Status (GPS) supplier would be paid 120% of the consideration for services; if GPS is lost, they will now be paid 80%, which is a significant cash flow reduction.

www.gov.uk/government/publications/construction-industry-scheme-reform-from-6-april-2024

HMRC has launched a technical consultation on proposed amendments to the CIS regulations which set out exceptions to VAT compliance obligations to ensure that GPS is not refused or removed for minor errors, and exempt certain payments from landlords to tenants from the scope of the CIS. The consultation closed on 9 January 2024, and the new regulations are intended to come into force on 6 April 2024.

CIS Regulations reg.32 sets out the level and number of compliance failings that HMRC will overlook before GPS is refused or cancelled. The exceptions proposed for VAT are in line with allowances for other taxes. The amendments relating to minor VAT compliance failures should be read in conjunction with clause 34 of Finance Bill 2024, and the corresponding explanatory notes.

CIS Regulations reg.20 on reverse premiums will be replaced by a new regulation which is intended to ensure that a payment from a landlord to a tenant, where the tenant engages a subcontractor to complete construction work on the property occupied by the tenant, is not a contract payment and so falls outside the scope of the CIS.

www.gov.uk/government/consultations/construction-industry-scheme-cis-proposed-amendments

3.3.2 Article

In an article in *Taxation*, Neil Warren examines some of the challenges faced when carrying out a conversion of commercial property to residential property.

Taxation, 26 October 2023

3.4 Input tax claims on land

3.4.1 DIY claims

The *Value Added Tax (Refunds to 'Do-It-Yourself' Builders) (Amendment of Method and Time for Making Claims) Regulations 2023* extend the time limit for making a valid VAT refund claim under the VAT DIY builders' scheme from three to six months. They also set the legislative framework to allow digital submission of refund claims. The precise form of digital submission is to be specified by HMRC via a notice.

The new time limit comes into effect on 5 December 2023.

SI 2023/1201

A policy paper and impact assessment gives more details about the measure.

www.gov.uk/government/publications/vat-diy-housebuilders-scheme-digitisation-of-claims-and-extending-time-limit

HMRC have now issued the Notice made under reg.201 of the Value Added Tax Regulations 1995 to specify the form in which a DIY claim must be made. It specifies that the claim can be made either electronically or by post. Where the claim is to be made electronically (under a new digital system for submitting refund claim) it must be made on an online form available via HMRC online services. The claim can still be made by post using either form VAT431NB (for new builds) or VAT431C (for conversions). The guidance has been updated with effect from 5 December 2023.

www.gov.uk/guidance/claim-a-vat-refund-for-a-new-home-or-charity-building-if-youre-a-diy-housebuilder

Lecture 16

3.4.2 VAT refunds for DIY housebuilders

HMRC have updated a number of pages of online guidance for DIY housebuilders, covering new builds, conversions and charitable buildings, to make it clear that VAT invoices that support a refund claim must show the date of issue. Original documents should not be submitted to HMRC, but the documents must comply with the rules if HMRC ask to see them. The guidance says:

You must have a VAT invoice for all the eligible goods you claim for.

The goods must have been supplied to you and we may ask you to prove you have paid for them. The VAT invoice will need to show:

- *the supplier's name, address and VAT registration number*
- *date of issue*

- *the quantity and description of the goods*
- *your name and address if the value is more than £250*
- *the price of each item showing the VAT treatment*

www.gov.uk/guidance/vat-refunds-for-new-builds-if-youre-a-diy-housebuilder

Lecture 16

4. INTERNATIONAL SUPPLIES

4.1 E-commerce

Nothing to report.

4.2 Where is a supply of services?

4.2.1 Supply of interactive streaming

W was a company established in Romania which operated a video recording studio. Its main economic activity was marketing digital erotica to an American company (S) which took the form, inter alia, of online, face-to-face visual communication sessions ('the video chats') with performers. The US customer supplied the videos to its customers on its website.

The performers signed a contract with W and also with S. This designated W as the recipient of all sums due to them in respect of their performances. The contract between S and its customers provided that certain sums would be payable for interacting with the performers; a percentage of this was paid on to W and a percentage of that was paid on to the performers.

W regarded its supplies to S as outside the scope of VAT. The Romanian tax authorities issued an assessment for the period 1 September 2019 to 30 June 2020 on the basis that it was making supplies of "entertainment events" within PVD art.53, and the place of supply was "where the supplier has established its business". The tax authority considered that this was the implication of the CJEU decision in *Geelen* (Case C-568/17). It argued that the supply constituted "admission" to the events.

The Romanian Court of Appeal referred questions to the CJEU to determine whether art.53 PVD applied to this kind of supply. The court began by noting that precedent had established that the "basic rules" of articles 44 and 45 did not take precedence over the "special rules" of articles 46 to 59a. In every situation, the question was whether the supply fell within one of the special rules; if it did not, the basic rule applied. Art.53 was not therefore an "exception" which would have to be narrowly interpreted.

The court also accepted that the *Geelen* judgment had confirmed that video streaming of this kind did constitute "entertainment activities". However, the facts of that case occurred when art.9(2)(c) 6th Directive was the operative rule; that was differently worded from the version that applied after the rules on place of supply of services were amended in 2010 and 2011. The 6th Directive rule had referred to "entertainment activities", but art.53 now refers to "admission to entertainment events". The case could not therefore be used as a relevant precedent.

The court considered that the new rule requires the supply to be made directly to the person attending the event. This was consistent with related rules on "ancillary services" and the further provisions of the Implementing Regulation. It therefore did not apply to a business which supplied content to someone else who sold it on to customers.

The court also noted that the VAT Committee had considered the issue in April 2021, and had almost unanimously concluded that live-streaming, even directly supplied to a consumer, did not represent admission to an entertainment event.

The answer to the question was that art.53 did not apply to the services, which must mean that they are "basic rule B2B" supplies and outside the scope of Romanian VAT.

CJEU (Case C-532/22): *Administratia Judeteana a Finantelor Publice Cluj v SC Westside Unicat SRL*

Lecture 17

4.3 International supplies of goods

4.3.1 Imports without charge

A pharmaceutical company (P) acted as importer of record in relation to pharmaceutical goods arriving in the UK. The supplier retained ownership of the goods and made no charge to P, which processed the goods and either sent them for further processing or sent them to clinics for use in trials. It did not make any onward supply of the goods.

Until 2018, P had claimed input tax credit for the import VAT it paid as importer of record. On 4 October 2018, HMRC issued P with a decision that it was not entitled to credit because the goods were not part of any onward supply, and were therefore not used for the purposes of P's business. This was followed in August 2019 by an assessment for £118,571, which related only to imports incurred after the 4 October 2018 decision in the return period 11/2018. HMRC also issued a decision in May 2019 to withhold a repayment claim of £77,683 for the 02/2019 period.

P appealed against the decision, the assessment and the repayment refusal, arguing that the input tax should be available for credit; and, if it was not, that HMRC's actions contravened the principle of equal treatment, because other taxpayers in a similar situation had been given a transitional period up to 14 July 2019 by the issue of Revenue & Customs Brief 02/2019.

P's financial accountant had contacted HMRC by webchat in January 2018 to confirm the correctness of the company's claims for this input tax. At that time, the response was that it was correct; however, this was followed by an inspection in April 2018, at which the officer questioned the treatment; in June 2018 she notified the accountant that she was taking further advice within HMRC; on 2 August she notified the accountant that HMRC's conclusion was that the import VAT should not be credited, and she would be raising assessments. In due course a formal decision was issued and a review requested.

On 11 April 2019, HMRC issued Revenue and Customs Brief 02/2019. This explained that they had become aware of "incorrect treatment by businesses whereby import VAT has been incorrectly deducted as input tax by non-owners of the goods". Pharmaceutical goods being imported for clinical trials was given as a specific example. In the Brief, HMRC expressed the view that the correct approach would be for the customer outside the UK to be the importer and to pay the import VAT and then

reclaim it. HMRC noted in the Brief that none of this gave rise to any loss of tax for HMRC and accepted that its previous guidance was not clear as to the correct procedure. Based on this they stated that they would not pursue tax where the deduction of the import VAT as input tax had taken place before 15 July 2019, 3 months and 3 days after the issue of the Brief.

Nevertheless, HMRC decided that P was not entitled to the benefit of the grace period, because it had already been told what the correct position was and should have been applying it. The assessments would therefore apply to all import VAT claimed in these circumstances after the date of the original decision.

Judge Robin Vos reviewed the law on input tax credit. The appellant relied on the implication of VATA 1994 s.27(1), which provides that:

"Where goods are imported by a taxable person . . . and (a) at the time of importation they belong wholly or partly to another person; and (b) the purposes for which they are to be used include private purposes either of himself or of the other, VAT paid or payable by the taxable person on the importation of the goods shall not be regarded as input tax to be deducted or credited under s.25; but he may make a separate claim to the Commissioners for it to be repaid."

This suggests that import VAT on goods belonging to someone else that are used wholly for the purposes of the business is available for credit, because it does not fall within (a) and (b). P contended that the expression "used for the purposes of the business" carried no special meaning: it "used" the imported products by making tablets or applying other processes, for which it was paid by the owner of the goods.

HMRC argued that import VAT could only be claimed where it has been paid on a "cost component" of an onward supply, which requires the importer to own the goods.

The judge described the appellant's submissions as "persuasive", but bound to fail because of CJEU precedent case law which was binding on the FTT. The cases include *Midland Bank plc* (Case C-98/98), *Skatteministeriet v DSV Road A/S* (Case C-187/14) and *Financne Riaditeľstvo Slovenskej Republiky v Weindel Logistik Service SR spol. s.r.o.* (Case C-621/19). In this last, the CJEU concluded that art.168(e) PVD:

"…must be interpreted as precluding the grant of a right to deduct VAT to an importer where he does not dispose of the goods as an owner and where the upstream import costs are non-existent or are not incorporated in the price of particular output transactions or in the price of the goods and services supplied by the taxable person in the course of his economic activities".

The appellant's counsel tried to distinguish these cases on the basis that the taxpayer in *DSV* had failed to carry out the customs procedures correctly, and the processes applied in *Weindel* (repackaging and onward distribution) were less apt to be described as "use in the business" than what P did. The judge was not persuaded: in his view, the CJEU clearly regarded the law as settled in this area.

The judge also disagreed with counsel's interpretation of s.26. In the judge's view, the expression "attributable to taxable supplies" was a cost component test, not (as counsel submitted) merely concerned with the question of whether the use was taxable or exempt. Overhead costs gave rise to creditable input tax without being cost components of any specific output, but they were still cost components of the business as a whole.

The judge discussed the implications of the wording of s.27. It was not sufficient to tip the balance in favour of P's interpretation of s.24 and s.26. It simply put the question of deduction beyond doubt in the circumstances described.

Taxpayer's counsel put forward examples of situations in which input tax could be claimed without the claimant incurring any cost. The judge commented that VAT relating to business gifts, or supplies which were paid for by a third party, could still be claimed because the gifts could be cost components of onward supplies, even if they were not paid for – the problem for P was not that it did not pay for the goods, but that it did not own them.

Both parties referred to deliberations of the EU VAT Committee, which had considered the deductibility of import VAT in these circumstances in 2011 and again in 2023 following the *Weindel* decision. The Committee's view was only advisory and the judge therefore placed little weight on it; nevertheless it is interesting that in 2011 the Committee "almost unanimously" opined that the import VAT was not deductible, but in 2023 the vote was 8:4. Because the majority still voted against deduction, the position was maintained, but it is surprising to see that much dissent.

Turning to the second ground of appeal, the judge noted that both parties agreed that an argument based on the EU principle of equal treatment is within the jurisdiction of the FTT. The judge said this was not without doubt, but he proceeded on the basis that he did have jurisdiction.

The principle to be applied, according to the 2022 UT decision in *RT Rate*, was whether P was being treated differently from other taxpayers in similar situations and, if so, whether this was objectively justified. According to the UT, the comparison is not with a single taxpayer but with a class of taxpayers.

Taxpayer's counsel submitted that P should be given the same transitional period as others (to July 2019, allowing all the disputed input tax) or at the least 3 months and 3 days from the date of HMRC's decision in October 2018 (allowing all the 11/18 tax and some from the following period). HMRC argued that P had been aware that the treatment was being questioned from April 2018 onwards, and were aware of it as a settled decision in August 2018.

The judge concluded that, in order to be treated in the same way as other Toll Operators, P should therefore be given the same transitional period as those other taxpayers. In our view, however, this should not be a transitional period allowing input tax credits for import VAT incurred before 15 July 2019, as was the case for Toll Operators who only became aware of HMRC's position on 11 April 2019 but should be a transitional period of three months and three days calculated from the date P actually became aware of HMRC's position. He agreed with HMRC's counsel that this was 2 August 2018 when HMRC wrote to P in clear terms setting

out their position and stating that the import VAT was not available as an input tax credit. Although that letter was not a formal decision by HMRC (as confirmed by the fact that the officer rejected a request for an independent review prior to the date when the formal decision letter was issued on 4 October 2018), the comparison with other Toll Operators should be based on the date when P knew HMRC's position and not the date when HMRC made a formal, appealable decision.

The appeal would therefore be allowed in respect of import VAT incurred up to 5 November 2018, but rejected for import VAT incurred after that date. The parties were invited to agree between them the amounts involved.

First-Tier Tribunal (TC08966): *Piramal Healthcare UK Ltd*

In an article in *Taxation*, Alan Pearce discusses the implications of this case and argues that the government should change the rules (as the UK is no longer part of the EU) to allow a more flexible approach to UK businesses.

Taxation, 16 November 2023

Lecture 18

4.3.2 Outward Processing Relief (OPR)

A company exported gold to Dubai and imported gold jewellery from Dubai. Under OPR, where gold is temporarily exported from the UK in order to be made into jewellery, it is possible, subject to certain conditions, for Customs Duty and import VAT to be paid only on the cost of the work carried on outside the UK when the jewellery is imported into the UK and not on the full value of the jewellery. Following an investigation, HMRC concluded that the company did not meet the conditions. A post-clearance demand note (C18) followed, assessing Customs Duty of £151,427.95 and import VAT of £1,241,709.48 in respect of 18 importations of gold jewellery made by Fatima Jewellers between September 2017 and July 2018. The company appealed.

The company did not dispute the amounts, but argued that it had a legitimate expectation that it was entitled to pay the duties only on the processing costs. This was based on letters written to the company by HMRC and by the Border Force in 2014, and from the fact that the Border Force never raised any issues in relation to the way in which its Customs declarations were made in respect of the 18 occasions of import. In relation to VAT, the company further argued that it had met the requirements of the VAT regulations.

Judge Robin Vos noted that the parties had agreed on the contents of the evidence bundle; he said that it would have been helpful if the parties had provided additional documents to the Tribunal, but they had chosen not to do so and the decision had to be reached on the basis of the limited evidence available.

The company had corresponded with HMRC about operating Outward Processing Relief in 2014. It had been refused authorisation because the main benefit relates to goods of EU origin; the company did not have a certificate of EU origin for its gold. It appears that a consultant was

engaged to organise the exports and reimports, and he appears to have declared the imports as “gold bars” (equating to what was exported) and “jewellery”, with the value given as only the processing work carried out outside the UK. This was not questioned by Border Force, but was used for a total of at least 68 imports from October 2016 onwards. HMRC originally intended to assess all of these imports but, by the time they came to raise the assessment, they were out of time to do so in relation to all but the last 18.

The judge noted that arguments about legitimate expectation are normally reserved for the Upper Tribunal; however, the FTT may have jurisdiction where the HMRC decision was mandatory rather than involving discretion. He discussed the difference between the UK and EU principles of legitimate expectation, but concluded that it was not engaged. The 2014 letter relied on did not give assurances in the terms that the company contended; the actions of Border Force were not enough to generate a “protected” legitimate expectation.

Although there was no appealable decision about remission of customs duty because of “special circumstances”, the judge noted that such remission would be ruled out by “obvious negligence” of the taxpayer. The judge commented that this decision might appear harsh: the company had applied for OPR, had its application refused, had operated a parallel system for several years without meeting any objections, and when HMRC and Border Force changed their approach in 2018/19, had reapplied for OPR and been accepted. However, the EU was clear that reliance could not be placed on assurances that were inconsistent with the relevant rules if the taxpayer was aware of those rules. That was the case here, and the appeal against the customs duty demand failed.

In relation to import VAT, the judge noted that the VAT regulations do not require a trader to be authorised to operate Outward Processing Relief, in contrast to the Customs Duty provisions, which do require authorisation. The only conditions in the VAT regulations are:

(a) at the time of exportation the goods were intended to be reimported after completion of the treatment or process outside the Member States, and

(b) the ownership in the goods was not transferred to any other person at exportation or during the time they were abroad.

The judge considered the evidence at length and concluded that it was more probable than not that the same gold was used to make the jewellery as was exported. On this basis, he allowed the appeal in relation to the VAT; however, there would be a small increase in the VAT chargeable because the customs duty appeal had failed.

The appeal was allowed in part.

First-Tier Tribunal (TC08964): *Fatima Jewellers Ltd*

4.3.3 VAT in the Autumn Statement: retail exports

The Autumn Statement includes the brief comment “The government is grateful for industry submissions on the VAT Retail Export Scheme and the associated airside scheme (tax-free shopping). The government will

continue to accept representations and consider this new information carefully, alongside broader data."

www.gov.uk/government/publications/autumn-statement-2023

4.4 European rules

4.4.1 European Scrutiny Committee

Parliament's European Scrutiny Committee has published its first report of Session 2023-2024. It comments on Commission proposals for "the most ambitious and comprehensive reform of the EU Customs Union since its establishment in 1968". There are three elements to the proposed customs reforms. The first, a proposed Regulation, would rewrite the EU Customs Code; the second, a proposed Regulation; and the third, a proposed Directive, would update rules on the customs and VAT treatment of goods sold online from a third country to consumers or businesses in the EU. The reforms are important because they will affect the basis on which businesses in the UK export and import goods to and from the EU, and they will directly affect Northern Ireland.

The report also discusses Commission proposals for reform of the Import One Stop Shop which British businesses can use post-Brexit to account for VAT when they sell goods online to consumers in the EU. The proposals were published in May 2023: the €150 limit will be abolished, allowing the scheme to be used for all e-commerce sales of goods imported into the EU (except excise products), and the deemed supplier rules will be extended to make online platforms such as Amazon legally responsible for collecting VAT and paying it to the relevant EU authority on all relevant sales. The report comments that the proposals have not dealt with some issues raised by the UK government, but notes that the changes are not intended to be implemented until 2028.

https://publications.parliament.uk/pa/cm5804/cmselect/cmeuleg/166-i/report.html

4.4.2 Administrative procedures

In *Belgisch Syndicaat van Chiropraxie and Bart Vandendries, Belgische Unie van Osteopaten and Others, Plast.Surg BVBA and others, Belgian Society for Private Clinics VZW ea v Ministerraad* CJEU (Case C-597/17), the CJEU held that required professional qualifications could only be one factor taken into account by Member State in deciding extent of healthcare exemption, as long as the supplier held alternative qualifications that ensured an equivalent high standard of service. Belgium changed its law as a result with effect from October 2019, but declared that no amendments would be made to transactions taking place before that date. This was because it would be impractical to refund the VAT wrongly charged to the customers who had borne it, and in the interests of legal certainty for all concerned.

In July 2020, an osteopathy practice filed a VAT return claiming an adjustment in its favour in respect of VAT charged before October 2019. The tax authority refused the claim, on the basis that the Belgian Constitutional Court had decided to maintain the effects of the previous law up to October 2019. The practice appealed, and questions were referred to the CJEU to clarify whether the national court had the power

to make such a declaration without asking permission, and whether the reasoning given (legal certainty) was sufficient justification for effectively making permanent a breach of the PVD.

After confirming that the question was admissible, the CJEU noted that where the authorities of a Member State find that national legislation is incompatible with EU law, while they retain the choice of the measures to be taken, they must ensure that national law is brought into line with EU law as soon as possible, and that the rights which individuals derive from EU law are given full effect.

The CJEU had in fact specifically stated in the *Chiropraxie* decision that Belgium should not suspend the effect of the decision, and there was no reason to come to a different conclusion in the present case. The supposed difficulties which the authorities and taxpayers would have in identifying people to whom VAT should be refunded could not be a reason in principle to override the PVD.

There is an implication that the VAT wrongly charged should be refunded to the persons who originally paid it, but the decision does not explicitly state that an "unjust enrichment" defence would be a reason to refuse a repayment in the circumstances of the case.

CJEU (Case C-355/22): *Osteopathie Van Hauwermeiren BV – Belgische Staat*

4.5 Cross-border refund claims

Nothing to report.

5. INPUTS

5.1 Economic activity

Nothing to report.

5.2 Who receives the supply?

Nothing to report.

5.3 Partial exemption

5.3.1 Special method dispute

The representative member of a group of companies appealed against a number of HMRC decisions in relation to partial exemption. The group offered advice and related services including Equity Release Mortgages (“ER”) and Estate Planning (“EP”) to members of the public aged over 55 years about to enter into or during retirement. It was not in dispute that ER services are, save for a small proportion, exempt for the purposes of VAT and EP services are standard rated. In addition, the group received fees from solicitors in connection with the ER business. Other companies in the group found capital funders to provide ER loans, and a central services company provided the group’s support functions.

The group was partially exempt and used the standard method, with an overhead recovery rate of about 10%. On 1 November 2018, the company’s advisers put forward a special method, arguing that the standard method did not produce a “fair and reasonable” rate of recovery. This was a sectorised method on a trading entity basis and that a transaction count proxy be used to attribute residual costs incurred by each entity to taxable or exempt supplies. After extended correspondence this proposal was refused by HMRC in June 2020, and the refusal was appealed on 7 July 2020.

In December 2019 the appellant proposed an alternative PESM using a transaction count on an “adjusted income basis”. This was rejected following a review on 25 May 2021, and that decision was appealed on 22 June 2021.

The group also submitted error correction notices for periods between November 2018 and 30 April 2021 on the basis of the transaction count method. These were also refused and the appellant appealed against that refusal on 18 March 2022.

Finally, HMRC reviewed the group’s marketing expenditure and concluded that VAT incurred on equity release advertising was exclusively used to make exempt supplies. This led to assessments which were appealed on 28 March 2022.

As a preliminary issue, Judge Malek was asked to redact some of the information covered in the decision. HMRC did not object to the appellant’s request; even so, the judge considered the matter and made his own decision, because in his view open justice is important. He

concluded that it would still be possible to give a fully reasoned decision even with the information redacted, so he agreed to the request.

The first matter considered by the judge was the appeal concerning the marketing expenditure. The company's marketing material was mainly focused on equity release. It explained that this was most effective in attracting interest because it was a powerful and attractive message for the target audience, but once contact had been established it was possible to sell other services. The company contended that the expenditure was incurred for the purposes of marketing the business as a whole and it was properly, therefore, overhead expenditure: it had no direct or immediate link with any particular supply, but did have such a link with the whole of the economic activity carried on by the group.

The judge agreed with HMRC that the marketing material relating to the contested marketing expenditure, viewed objectively, was designed to attract those customers who were looking for ER services. After taking a holistic view of all the circumstances and taking into account the facts as found, the judge concluded that the contested advertising expenditure had a direct and immediate link with ER products and services; no direct link could be established between the contested marketing expenditure and EP products or services. The link to taxable income was only indirect and consequent on the link to exempt products. The appeal against the assessments in relation to the marketing income was dismissed.

The judge next examined the law relating to the use of the standard method and HMRC's discretion in approving a special method. That discretion was based on the requirement that an alternative method had to be more fair and reasonable in the sense that it more accurately reflected the economic use of the inputs.

The facts found included a list of the residual inputs and the conclusion that the transaction count method assumed that EP transactions, on average costing the customer £398, consume the same inputs as ER transactions, on average costing the customer £3,619. HMRC argued that this was not a result guaranteed to be more accurate than the standard method: it grouped together a range of diverse supplies without persuasive objective evidence that those supplies used the same amount of residual inputs.

The judge went through HMRC's objections and broadly agreed with them. As the Tribunal had already decided that marketing expenditure was only attributable to exempt supplies and the method treated it as residual, it was unlikely to succeed. The "evidence" that transactions in one of the sectors consumed the same level of residual input was no more than "assertion or opinion". The arithmetic implied that EP transactions were much less profitable than ER transactions – if the costs were the same and the charges to customers were different by a factor of about 9. The judge commented that this "acted like gravity on unrealistic assumptions". As the company had not suggested that EP was sold as a loss-leader to attract people to ER, "there was no cogent explanation or evidence available to show, in the face of the disparity in profit, why it was economically realistic to assume that EP and ER transactions consume the same inputs."

In summary, the judge concluded that the appellant had failed to show that the first suggested PESM, based on transaction count, was guaranteed to

produce a more precise determination of the use of the input VAT than that arising from the standard method.

The second method purported to remove a distortion that arose from the different values of advances. It used assumptions including adjusting the income based on all advances being the minimum transaction permitted by funders. The judge agreed with HMRC that this was still susceptible to many of the criticisms of the first method, and the use of standardised transaction values did not reflect economic reality.

Some minor variations to the methods had been suggested in the Tribunal. The judge said that these would have to be put to HMRC for proper examination and, if necessary, only then brought back for consideration by the Tribunal. The appeals were dismissed in principle, which means that the standard method should have been used throughout.

First-Tier Tribunal (TC08956): *KRS Finance Ltd*

Lecture 19

5.3.2 Article

In an article in *Taxation*, Ciaran McGee discusses the Upper Tribunal decision in *Hotel La Tour*, reviewing the precedent cases cited and looking forward to the Court of Appeal hearing that will follow in due course to hear HMRC's further attempt to disallow the recovery of incidental costs of a share sale.

Taxation, 19 October 2023

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 Ancient claim

BT have been making claims for historic bad debt relief for many years. The latest (and possibly final) episode was an appeal to the Court of Appeal against a ruling of the High Court in March 2021; the claim had originally been made in June 2010, but was stayed pending the outcome of a different appeal. The claim was based on the direct effect of EU Directives that had not been properly enacted in the UK, and was brought under the law of restitution. There were separate claims for:

(a) restitution of about £8 million for unjust enrichment for the periods 1 April 1973 to 31 December 1977;

(b) restitution of about £65.2 million for unjust enrichment for the period 1 January 1978 to 31 March 1989;

(c) damages for breach of EU law for each of these periods; and

(d) compound interest for each of these periods.

HMRC issued a defence, which led to the company dropping claim (a); after HMRC sought to have the appeal struck out, the company dropped claims (c) and (d). The company maintained claim (b).

In the High Court, the judge noted that the bad debt relief rules were implemented in the UK with effect from 1 October 1978. That scheme for relief was amended on 26 July 1990 and was finally repealed on 19 March 1997. The company's previous claims, dismissed by the Court of Appeal in 2014, were for bad debt relief under the old scheme and for refund of output tax under s.80.

The judge noted the various conditions of the original BDR scheme that were later found not to comply with EU law. He reviewed the history of the changes that were made as a result, and the claims made by *GMAC* and *BT* for historic relief. The CA had decided that BT had a directly enforceable right to relief for its bad debts, but had failed to claim it in time. This decision went through various further attempts by BT to keep it alive before finally being dismissed in 2020.

HMRC sought strike-out of the restitutionary claim that had been stood over while the other appeals were still proceeding. The High Court judge examined the complex arguments in detail; they are likely to be of limited relevance to present disputes. His overall conclusion was that there was a significant difference between the period from 1 January 1978 to 30 September 1978, when the UK had not implemented the Directive, and the period after that. Although BT argued that both periods could be argued in a substantive trial together, the judge disagreed: the claim for the later period was "bad in law", and should be brought to an end. However, the claim in respect of the 9 month period in 1978 should not be struck out, and will presumably now proceed to a substantive hearing. If the bad debts arose roughly in proportion over the period, it will still exceed £4m (plus interest, if successful).

The company appealed in respect of the later period (the larger claim), and HMRC cross-appealed in respect of the 9-month period. The Court of Appeal has now decided against the company on both issues. The judges concluded that Parliament could not have intended a separate scheme (restitutionary claims) to have coexisted with the statutory scheme of bad debt relief that was introduced 9 months after the implementation date for the 6th Directive. The judge had been right to strike out the claim.

The CA also considered that any claim in respect of "unjust enrichment" of HMRC was bound to fail. The company could not argue that the VAT had not been due in the periods in which it had originally been accounted for, so the transfer of value from the company to HMRC was not "unjust". The company's complaint was essentially based on a failure to make a claim in time, rather than an overpayment of tax.

The decision examines in detail the rules on mistakes, limitations and unjust enrichment, but is unlikely to be relevant to current disputes.

Court of Appeal: *British Telecommunications plc v HMRC*

5.8 Other input tax problems

Nothing to report.

6. ADMINISTRATION AND PENALTIES

6.1 Group registration

6.1.1 Backdating a change in grouping

The Upper Tribunal has heard an appeal against the FTT's decision about a backdated grouping application. In TC08167, a company appealed against a rejection by HMRC of an application to backdate the admission of its parent company to its VAT group. The request was made on 29 September 2016; the holding company had joined the group registration on 26 June 2013, and the requested amendment would have changed this to 1 July 2012.

HMRC applied to have the appeal struck out for lack of FTT jurisdiction to consider the matter. Judge Anne Scott confirmed that there was no need for HMRC to make a formal application for strike-out: jurisdiction was fundamental to the Tribunal process, and if not raised by the parties, would have to be considered by the Tribunal itself.

The company's grounds of appeal had referred to VATA 1994 s.83(1)(b), (k) and (t), but the skeleton argument referred instead to s.83(1)(a). The company did not formally apply to amend its grounds of appeal. The judge decided to consider the arguments rather than to "dance on the head of a pin". No arguments were advanced on s.83(1)(b).

The original grouping application had been made on the basis that the US holding company had only satisfied the "UK establishment" criterion in June 2013. The company now argued that secondments of employees met the criterion at an earlier date, with the result that reverse charges on management services of nearly £12.5 million should not have arisen.

The argument was that the company had actually been liable to be registered in the UK from 1 July 2012; if it had been aware of that, it would obviously have joined the VAT group at that point (the company explicitly did not want a separate registration from July 2012 to June 2013). It would be illogical for HMRC not to allow retrospective registration and retrospective grouping. A repayment of £2.2 million was claimed.

HMRC rejected the application on the basis that it was not accepted that the US company had a UK fixed establishment before June 2013; and, in any case, the exceptional circumstances that permitted retrospective grouping did not apply in this case. The judge later noted that HMRC had subsequently in December 2018 issued a decision removing the US company from the VAT group retrospectively, on the grounds that it did not meet the criterion in 2013 in any case.

In considering the question of jurisdiction, the judge set out the issues as follows:

(1) Was the letter of 29 September 2016 a valid application in terms of Section 43B?

(2) What is the consequence if there is no valid application under Section 43B?, and

(3) If there was a valid application what is the consequence of HMRC neither refusing nor agreeing the application within 90 days?

The company argued that failure to include the HC in the group amounted to a refusal to register the company at all. HMRC's counsel responded that membership of a group registration is voluntary, so VAT grouping could not automatically flow from registration.

The judge ruled that the letter of September 2016 was not a valid registration application by the US company – that would have to be done by the company itself, whereas the letter came from the UK subsidiary that was the representative member of the VAT group. There was nothing in the letter that referred to registering the US company; it was only about grouping.

The judge considered the rules on grouping applications in s.43B and concluded that no valid application had been made in 2016, nor could one have been. The consequence of HMRC failing to respond to a grouping application is that the subject of the application joins the group from the date of the application; as the US company was a member of the group at that date, this could not have any effect.

Since there was no valid application for registration and no other decision in relation to registration, there was no appealable issue under s.83(1)(a). As there was no valid application for grouping, s.83(1)(k) was not engaged. HMRC had not made a decision about repayment, so s.83(1)(t) was not engaged. Accordingly, the Tribunal had no jurisdiction to hear an appeal, and it had to be struck out.

Upper Tribunal

The company appealed to the Upper Tribunal (Judge Greg Sinfield and Judge Vinesh Mandalia). The decision starts by setting out the September 2016 letter at length. The grounds of appeal were:

Ground 1: The FTT was wrong to hold that DFUK did not have a right of appeal before it under s.83(1)(a) VATA 1994.

Ground 2: The FTT was wrong to hold that DFUK did not make a valid application under s 43B VATA 1994; and

Ground 3: The FTT was wrong to hold that, if DFUK did make a valid application under s.43B VATA 1994, it was deemed granted from the date of receipt so that the application was of no legal effect with no right of appeal under s.83(1)(k) VATA 1994

It was agreed between the parties that the issue of jurisdiction was a binary one: either the FTT had jurisdiction, or it did not. It was also agreed that the FTT had to consider jurisdiction of its own motion, even if it was not raised by either of the parties.

The UT started with Ground 2. The appellant's counsel argued again that it was not necessary to construe s.43B as prohibiting an application for grouping to be made by a company that was already a member of the VAT group at the time the application was made. The UT considered this in detail, and rejected it for the same reasons as the FTT. The wording of the section envisaged two circumstances in which an application would be made: first, there was no VAT group, and two or more companies applied to form one; second, there was a VAT group, and an application was

made by one or more companies that were not members of the group to join it. The appellant did not and could not meet either of these conditions in 2016.

The judges commented that this did not leave the company without any remedy: it could have made an application for judicial review of HMRC's refusal to amend the group registration retrospectively. No comment was made about the likelihood of such an application succeeding, but the UT "did not consider that to be an inadequate remedy".

On Ground 3, the UT had already decided that the letter was not a valid application; however, if it was wrong on that, it would still not have given rise to a right of appeal under s.83. It was common ground that HMRC had not issued a refusal within 90 days of the letter; if it had been a valid application, then, it would have had automatic effect, and there would not have been a valid ground of appeal.

On Ground 1, the UT agreed with HMRC's counsel that registration and group registration are separate issues. The HMRC decision had concerned only group registration, not registration; there was therefore no decision appealable under s.83(1)(a). The appeal was dismissed again.

Upper Tribunal: *Dollar Financial UK Ltd v HMRC*

Lecture 20

6.2 Other registration rules

Nothing to report.

6.3 Payments and returns

6.3.1 Updated Notice and guidance

HMRC have updated Notice 700/12 *How to fill in and submit your VAT Return* to include information about what happens when a VAT return or payment is submitted late for VAT accounting periods starting on or after 1 January 2023, referring to the new rules on late submission penalties and late payment penalties and interest.

Notice 700/12

HMRC have also their updated guidance on VAT payments on account to include information on late payment interest charges. They confirm that POA that are not paid on time will be subject to late payment interest, while quarterly balancing payments that are paid late may be subject to late payment interest and late payment penalties.

www.gov.uk/guidance/vat-payments-on-account

6.4 *Repayment claims*

6.4.1 Settled claims

Two motor dealers made claims in June 2003 in respect of historical overpaid VAT on sales of demonstrator vehicles. The claims were settled by agreement with HMRC on the basis of the "Italian Republic" tables that were in use for estimation of such claims. These tables were later revised, and the companies made supplementary claims in March 2009 for the further VAT that would have been repaid had the revised tables been in use in 2003. HMRC refused the supplementary claims on the basis that the acceptance of the settlement of the 2003 claims was final.

First-Tier Tribunal

In the FTT (TC08316 in late 2021), 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.

Upper Tribunal

The companies appealed to the Upper Tribunal (Judge Ramshaw and Judge Poole). Their main ground was that the FTT had erred in law in concluding that the s.85 agreement, in settling "the appellants' claim for overpaid VAT", not only covered the claims that had been made at the time but any and all other claims that it might make in relation to the same periods and the same matter.

The judges set out the appellants' arguments under six headings and HMRC's responses. There were errors in the FTT decision, but the UT agreed with the conclusion: a reasonable person, having all the background knowledge which would have been available to the parties at the time of signature of the s.85 agreement, would have understood the phrase "the Appellants' claim for overpaid VAT" in the s.85 agreement to have the meaning contended for by HMRC, namely as extending to all overpayments pursuant to the Italian Republic case in relation to the vehicles supplied by the Companies during the relevant periods.

The UT set aside the FTT decision because of the errors of law, but remade it with the same result – the companies' appeals were dismissed, and the supplementary repayment claims were validly refused.

Upper Tribunal: *Cambria Automobiles (South East) Ltd and another v HMRC*

6.4.2 Repayment supplement

In TC08251, the FTT dismissed an appeal by a company against HMRC's refusal to pay repayment supplement. The company (B) purchased a property portfolio from Toys 'r' Us Properties Ltd (TRUP) in its period 10/18 for £355 million plus VAT. This gave rise to a repayment claim for £71 million. B requested that HMRC should offset the repayment against output tax due from TRUP (which was connected to B); this was done on 21 December, and a balance of £85,000 was authorised for repayment to B on that day.

B claimed repayment supplement of 5% of the £71 million that was credited against TRUP's liability. HMRC responded that VATA 1994

s.79 did not apply to the amount so offset, and in any case their enquiries had been carried out within the required period.

The FTT judge (Tracey Bowler) examined the chronology of events, which involved considerable negotiation between HMRC officers and the companies about how the credits and liabilities were to be treated and offset. There was constant contact by telephone and e-mail over the period from 2 November when the request for offset was made to 21 December when it was granted. HMRC officers had made mistakes, for which they had apologised. However, the transaction documents were not simple documents. Their consequences were not straightforward, some of the parties were not identified, and at the time a key document was supplied to HMRC, it was signed but not dated.

The company's representative argued (and HMRC accepted) that s.79 operates as a "spur to efficiency". It was therefore appropriate to interpret it as applicable in cases of offset as well as repayment. He accepted that four days constituted "reasonable enquiries" by HMRC, but other periods that they relied on being left out of account were not "reasonable".

HMRC responded that repayment supplement would constitute a "windfall" for the company. It was not being deprived of the use of the money, because it had requested that it be set against another company's liability. TRUP's return had only been submitted on 10 December, and until that happened, it was not possible for HMRC to calculate the offset requested. That only took a further 10 days. He also argued that s.79 only applies where there is an actual payment to the taxpayer, not where there is an offset.

HMRC argued that it was an implied term of the agreement between them and the company that the set-off would be treated as meeting TRUP's liability in time, and therefore there would be no surcharge, interest or penalty in respect of TRUP's 10/18 return. They contended that it was an implied term that the processing of the offset overrode any obligation to make a payment to B.

The judge commented that s.79 is not designed to deal with the present situation. It refers to time taken making reasonable enquiries into the return; much of the delay in this case was not due to problems with the return, but establishing the offset. The offset was a practical easement offered and operated by HMRC, but it was not envisaged by the legislation, and the legislation could not be adapted to cover it.

The judge concluded that B had not formally agreed with HMRC to give up its entitlement to repayment supplement. However, it had agreed to assign its entitlement to the repayment, which meant that it would have no expectation of receiving the £71 million; s.79 only applied to the amount actually repaid.

He considered the competing arguments in great detail, and the FTT decision contained a thorough analysis of s.79 (and the things that s.79 does not cover). He went on also to consider the relevant period for the delay, which is set out in SI 1995/2518 regs. 198 and 199. The company argued that it had provided a complete answer to questions raised on 23 November on 26 November (leading to an accepted delay of 3 days); the judge did not agree that the answers were sufficient. In particular, the undated agreement was not enough for HMRC to conclude their enquiries.

The judge would exclude the whole period from 23 November to 18 December from the count, which meant that HMRC were well within the statutory 30 days.

One point of detail on which the judge disagreed with the company's counsel was the relevance of a statement in HMRC manuals that an e-mail sent by HMRC after 5pm would be deemed received the following day, and would therefore only "stop the clock" on that following day. The judge described this as a concession that could not displace the law itself.

The conclusion was that:

(1) Bollinway assigned its right to a VAT credit of £71,084,816.4371 to TRUP;

(2) As a result of the assignment Bollinway was no longer entitled to claim repayment supplement under section 79 on the amount of £71,084,816.43;

(3) Even if Bollinway was able to rely on section 79, despite the assignment and the consequent lack of payment to it, HMRC's issue of the requisite direction on 20 December 2018 took place within the relevant period of 30 days from the submission of the VAT return on 2 November 2018.

The FTT dismissed the appeal, and the company appealed to the Upper Tribunal. The stated grounds effectively argued all the issues again:

(1) The FTT erred in law in holding that Bollinway assigned its entitlement to its VAT credit or part thereof to TRUP;

(2) The FTT erred in law in holding that a repayment supplement can become due under s.79 VATA only where HMRC make an actual payment to a taxpayer and/or in holding that the set-off against TRUP's liability was something other than actual payment;

(3) The FTT erred in law (including in the sense set out in Edwards v Bairstow) in concluding that a period of 26 days should be left out of account for the purposes of s.79(4) VATA:

(a) by misconstruing the scope of HMRC's request for information set out in their emails of 23 November 2013 and subsequent communications;

(b) in its findings as to the extent to which Bollinway answered HMRC's requests before 21 December 2018; and/or

(c) in its conclusions as to the reasonableness of HMRC's requests for information.

The parties agreed that the taxpayer had to succeed on ground 3; if it did not do so, the other grounds were effectively academic. After reviewing the history of the transactions again and the communications that led to the eventual offset of the VAT, and setting out the law on repayment supplement, the Upper Tribunal judges (Mr Justice Richard Smith and Judge Vinesh Mandalia) concluded that the decision concerning the "clock-stopping" period was one of pure fact, not involving issues of law. The FTT judge had concluded, as a matter of fact, that HMRC had not received adequate answers and were therefore continuing making reasonable enquiries. The appeal would therefore have to clear a very high hurdle to succeed, and it did not do so. The FTT judge had been

entitled to find that the period from 23 November to 18 December should be excluded from the count, and the appeal therefore had to be dismissed again.

Upper Tribunal: *Bollinway Properties Ltd v HMRC*

6.5 Timing issues

Nothing to report.

6.6 Records

Nothing to report.

6.7 Assessments

Lecture 21

6.7.1 Best judgement

HMRC assessed a sandwich bar owner in respect of the classification of standard rated and zero rated sales. There was no allegation of suppression of takings: Judge Ashley Greenbank noted "there is no evidence to suggest that Mr and Mrs Vinni did not make significant efforts to record and return transactions diligently". However, there was scope for human error in the operation of the till.

HMRC's systems had identified the proportion of SR sales from the two outlets of the business as "too low", so an officer carried out test purchases. The historic records showed the proportion of standard-rated sales as being approximately 11%. HMRC would have expected the proportion of standard-rated sales to be in the range of 25% to 35% having regard to the proportion of such sales achieved by similar businesses. At an unannounced invigilation carried out over the course of a day, the proportion was found by HMRC to be 55%, which was described as "not credible". HMRC acknowledged that there were shortcomings in the results of this invigilation; the Z report for the day suggested that the proper proportion was about 25%.

Subsequently the owners agreed to carry out a "self-invigilation" over two weeks in June 2018. Based on the results of this exercise, the officer concluded that 33.58% of the sales were standard rated, and she proposed to raise an assessment going back 4 years for unpaid VAT of £24,233.

The owner of the business responded with explanations that the period of the self-invigilation was not representative, because of building work being carried out locally which led to an increase in demand for hot food. He also pointed out errors in the results of the one-day invigilation carried out by HMRC. Nevertheless, the officer issued the assessment and notified that she was considering raising a penalty (which might be suspended).

Correspondence followed, and an independent review which upheld the officer's decision on 20 March 2019. The taxpayer appealed to the Tribunal on 18 April 2019. The suspension period expired on 27 May 2019 and the penalty was cancelled as the conditions had been fulfilled.

There was a further dispute about an error correction submitted for the 06/18 period which led to a repayment claim in the 03/19 period. This was credited by HMRC, but subsequently the officer refused the correction and raised an assessment to recover the VAT credited. This decision was also upheld on review and appealed to the Tribunal.

The basic issue for the Tribunal to determine was whether the assessments were raised "to the best of HMRC's judgement". The taxpayer contended that they should be set aside in their entirety. The taxpayer's solicitor submitted that the officer's actions were "arbitrary and capricious" rather than making an "honest and genuine estimate of the amount of the VAT due".

The judge examined the methodology and the criticisms of it in detail and made observations about errors and discrepancies. He rejected the serious accusations made against the officer: she may have been "over-zealous", and had made errors, but had not acted dishonestly.

The judge considered that the high bar for setting an assessment aside entirely had not been reached. The officer had made errors, but they were not exclusively adverse to the taxpayer. Some of the objections did not materially affect the amounts, and there was inconclusive evidence in relation to others.

However, the 03/19 assessment in relation to the refusal of the error correction was not justified. The officer had rejected it on the basis that "there was no evidence to support it". This was not true: the taxpayer's accountant had submitted a report explaining it, but the officer "did not engage with his submissions". This assessment and the related penalty were set aside.

In relation to the larger assessment for the earlier periods, the judge directed that it should be amended along the lines that he had set out in the decision, reducing the SR percentage from 33.58% to 26.72%. That appears to reduce the assessment from £24,233 to just under £16,000; the output tax would still appear to have been understated by 50%.

First-Tier Tribunal (TC08976): *Aleksander Vinni trading as Honey Cake Patisserie and Sandwich Bar*

6.7.2 Best judgement

A company appealed against assessments for most of the periods from 12/16 to 02/19 totalling £117,409 and related penalties amounting to £99,798. The director of the company appealed against a PLN which allocated 100% of the penalty to him. Judge James Austen noted that the tax did not appear to have been paid, which implied that HMRC had accepted a hardship application. The judge noted also that the taxpayer was unrepresented and unable to attend a hearing because of his poor health; an earlier case management hearing had directed that the matter should be settled on the papers, which was difficult because of the sketchy nature of the evidence presented. The judge suggested that Companies House records could and should have been included in the evidence

bundles; she "took judicial notice" of them as they were publicly available statutory records.

The company was incorporated in May 2016 and applied for VAT registration in September 2016. It applied to cancel its registration in May 2019 on the basis that its assets had been sold to its distributor in the UAE and the company would be dissolved; the application stated that the company was still trading, but only making supplies that were either exempt or outside the scope of UK VAT.

The company had been subject to an enquiry in January 2017 to verify a repayment claim. This led to a correction and a small assessment, but apparently no penalty. Following the application to deregister, another enquiry was initiated in June 2019, proposing a visit to inspect the records. The sole director and owner proved unwilling or unable to provide the records, in spite of being issued with an information notice under FA 2008 Sch.36; HMRC issued the assessments and PLN, which were confirmed on review in August 2020. The review decisions were appealed within the extended period allowed by HMRC during the Covid pandemic.

The judge discussed the law on burden of proof and grounds of appeal and their impact on the Tribunal's jurisdiction. It appeared that the grounds of appeal put forward only related to the overall validity of the assessments, not to their amount; it was therefore only open to the Tribunal to uphold them or cancel them in their entirety, not to vary the amount.

The evidence put forward by HMRC comprised the VAT returns of the company, which had declared outputs of £761,055 and VAT of £2,480, and HMRC's own records, which showed that it had made exports of only £40,915. This led to the conclusion that it had made sales of £720,140 which were not exports but on which no (or almost no) VAT had been charged. This was the basis of the assessment.

The company appealed on the basis that it could not provide any evidence because its records had been transferred to the purchaser of the business, but it asserted that its returns had been correct. The judge characterised this as an invitation to take its returns on trust without any supporting evidence. The credibility of an appellant would be important in such a case; the absence of an oral hearing was therefore regrettable. The judge had to conclude on the appellant's reliability on the basis of the papers alone, without the benefit of cross-examination.

The judge did not see why the director could not give at least a narrative explanation of the trade, even without the records. It was inherently improbable, from the evidence available, that it had made such substantial zero-rated sales. He claimed that he was bound by a confidentiality clause in the sale agreement, which the judge analysed and considered "a conspicuously poor document". It was unclear in its effect, and it appeared to relate to a sale of intellectual property rights rather than to a sale of shares (as the director had contended). The judge also noted evidence submitted by HMRC that suggested there was a connection between the vendor, the purchaser and other companies registered in the UK; no explanations of these connections had been provided by the appellant.

The director had made various suggestions in correspondence that HMRC should "take a commercial approach" in that the company in the UAE was involved in significant projects which benefited the UK economy through export deals. The judge commented: '*Mr Williams seems to have been inviting HMRC to waive "rules and regulation" in respect of the Company's VAT affairs with a view to securing what he considered the greater overall financial benefit to the UK. If so, that was a scandalous suggestion which does Mr Williams' credibility considerable damage. HMRC was quite right to ignore it, and Mr Williams is wholly mistaken if he believes the Tribunal can – or will – take a "commercial approach" of absolving the Company from tax obligations in the hope of facilitating crossborder trade. Self-evidently, the rule of law requires all taxpayers in the same position to be treated alike, and no exception can be made for Mr Williams or the Company as a result of "commercial situations".*'

Nevertheless, the judge decided that he did not need to express a conclusion on the veracity of the sale agreement. He expressed his concerns about it and the other circumstances that had been raised in connection with it, and the lack of any explanation from the appellant; however, in his view, the true position did not alter the disposition of the appeals.

After all that discussion, the decision on the s.73 assessments was very brief. The company had not discharged the burden of proof to displace the assessments, and therefore the appeal had to be dismissed. He went on to discuss the precedents on the meaning of "deliberate inaccuracy" and concluded that he had the "cogent evidence" that was required to support such a finding.

He also concluded that the company had "concealed" the inaccuracy, either by executing a sham sale agreement (which had not been proven) or by including the confidentiality clause in a genuine sale agreement and using it as justification for providing no information to HMRC. As the director was the sole officer of the company throughout the period, the inaccuracy could only be attributable to his conduct, and the PLN was therefore justified.

The appeals were dismissed.

First-Tier Tribunal (TC08996): *Conditionaire Energy Savers Ltd and another*

6.8 Penalties and appeals

Lecture 22

6.8.1 Default surcharge

A company appealed against default surcharges totalling £1,790 for its periods 10/20 and 01/21 at 2% and 5%. The company argued that difficulties caused by the Covid lockdowns had led to the failures, and submitted that a call had been made to HMRC by an accountant on behalf of the company (but no details of the call could be provided).

The judge could not find a reasonable excuse. The company had received a surcharge liability notice for its 07/20 period and should have been aware of its obligations. The appeal was dismissed.

First-Tier Tribunal (TC08953): *JFS London Ltd*

The Upper Tribunal heard an appeal against a FTT decision upholding a surcharge of £720 for a company's 08/20 period. The company had been in default several times, paying part of its liability but leaving a substantial amount outstanding. Initially HMRC had issued a surcharge liability notice for 05/19, leading to surcharges for 05/20 and 08/20, but the SLN was later withdrawn and the 05/20 surcharge was cancelled as a result. The 08/20 surcharge was reduced to 2% and the company appealed.

The taxpayer's representative had put forward an argument in the FTT that the legislation required an officer of HMRC to "assess" the surcharge, which invalidated the computer-generated documentation on which the surcharges were based. The representative also submitted that s.59 was only engaged with the taxpayer had neither submitted a return nor made a payment following an assessment.

The judge analysed the reasoning underlying this second ground, which was based on a misconstruction of the relationship between s.59 and s.73. His interpretation was "not one that we recognise"; s.59 was plainly engaged on the facts. An attempt to apply Sch.55 FA 2007 also failed because it had not yet been brought into force.

The UT considered that Parliament cannot have intended that HMRC would be required to consider, on an individual taxpayer basis, the circumstances before raising an assessment. It was reasonable that the process was automated. The word "assess" in its context simply meant the process by which an amount due was determined and demanded, rather than a mental process arriving at a decision.

The appeal was dismissed.

Upper Tribunal: *MJL Contracts Ltd v HMRC*

A company appealed against a surcharge of £458 for its 10/22 period. The returns for 04/22, 07/22 and 10/22 had all been submitted on time, but the payments were received 1, 5 and 5 days late. The trader had also been late paying for period 07/21, which resulted in the issue of a "help letter" as it was a small company with turnover below £150,000; the late payment for 04/22 therefore led to the issue of a SLN, and the 07/22 penalty was less than £400 and not charged.

The appellant asked for the "new" penalty rules to be imposed instead, but the judge said he had no power to do that. He commented that HMRC's decision not to charge the 2% penalty was probably unhelpful to the taxpayer, because a lower penalty actually collected might have caught the attention more than the letter without the charge. There was no reasonable excuse, and the appeal was dismissed.

First-Tier Tribunal (TC08967): *Biznomy Solutions UK Ltd*

6.8.2 Late appeals

The Upper Tribunal heard an appeal about late appeals against assessments for Landfill Tax and VAT. The FTT had allowed the VAT appeal to proceed but had refused permission for the Landfill Tax appeal.

The company had been subject to criminal proceedings; the tax assessments were separate from this but related to it. The officers issuing the assessments had described what should be done to disagree with them in slightly different terms, and it was apparent that the company had believed that resolution of the assessments was being held over while the criminal matter was pursued. The FTT had applied the normal Martland criteria and had concluded that the delay had been substantial and serious without sufficient reason in the case of the Landfill Tax assessment, and the balancing exercise was decided in favour of upholding the statutory time limits.

The company then produced new evidence in the form of exchanges of e-mails between the company and a new accountant appointed in late 2016. The UT gave the company permission to admit this new evidence, which cast further light on the company's actions at the time the assessments were raised and the reasons for its belief that it did not have to do anything to dispute them at that point.

Taking this into account, the UT concluded that it was not unreasonable for the company to have believed that no action was required. HMRC had written to the company on 1 November 2016 stating "Following the conclusion of criminal proceedings, we will write to you again outlining the current position in respect of these assessments." No such letter was written when the CPS informed the company in August 2020 that no prosecutions would be brought; instead, it was only in forfeiture proceedings before the magistrate's court in December 2020 that the company became aware that HMRC were arguing that it was out of time to make an appeal.

Furthermore, it was apparent from the FTT decision that the facts and bases of the two assessments were inextricably interlinked. It was therefore surprising that one should be appealable and the other not. The UT set aside the FTT decision – without criticising the judge, as she did not have the new evidence before her – and remade it, giving permission for the late appeal on Landfill Tax to be admitted.

Upper tribunal: *Octagon Green Solutions Ltd v HMRC*

A company made separate appeals against decisions relating to denial of input tax, denial of zero rating and deregistration for VAT. One appeal, against an output tax assessment of £12.6m, was lodged within the statutory time limits. Two other appeals were late, and the Tribunal had to decide whether to admit them.

Assessments for disallowed input tax of £36.6m for periods 05/21 and 08/21 were issued on 1 December 2021, and a review conclusion upheld the decisions on 3 March 2022; the company's adviser notified an appeal on 18 April 2022.

On 4 March 2022, HMRC issued a output tax assessments for the periods 11/20, 02/21, 05/21, 08/21 and 11/21 in a total sum of £27.9m. The assessments were raised on the basis that the appellant had failed to

provide documentary evidence to support zero rating of sales. The adviser lodged an appeal to the Tribunal on 18 April 2022.

On 8 March 2022, HMRC wrote to the appellant stating that the appellant had been deregistered for VAT with effect from 7 March 2022 on the basis that the VAT registration was being utilised solely or principally for fraudulent purposes. The adviser lodged an appeal with the Tribunal on 22 April 2022.

At a first hearing of the permission application, the judge (Anne Scott) pointed out an inconsistency between the argument being put forward and the adviser's witness statement. The appellant's counsel asked for an adjournment so the adviser could be called to give evidence; HMRC opposed this, but the judge agreed, on the condition that the appellant should pay the costs of the wasted hearing.

The judge summarised the *Martland* tests, including detailed comments on the weighing of the relative prejudice to the parties, and the relevance of any apparent strengths or weaknesses in the appellant's case. She commented that there is obviously much greater prejudicated for an applicant to lose the opportunity of putting forward a really strong case than a very weak one. However, the procedural hearing should not descend into a detailed analysis of the underlying merits of the appeal.

HMRC had opened an enquiry into the company in June 2021, expressing a concern about a possible payroll fraud. An information notice was issued on 6 September; the controlling director provided some books and records just over a month later, and further notices and responses followed. These led to the issue of assessments for £36.6m on 1 December 2021. HMRC commenced an action in the Court of Session on 1 December and obtained a "freezing order" in an English court on 2 December in the sum of £48m. That order was still in force and could be extended.

The decision records the numerous exchanges of correspondence that followed up to the lodging of the appeals. There was also a claim by the director that he had suffered mental health issues that had made him unable to "engage with" HMRC or his adviser for a time. The judge commented that "the evidence from [the director] in relation to his mental health can only be described as lacking in relevant detail." However, there were also medical reports from doctors which went into much more detail about his depression and anxiety.

Applying *Martland*, the judge found that the delays were 16 days, 16 days and 15 days. HMRC's counsel argued that the delays were both serious and significant; they were not trivial. Furthermore they occurred at the end of an enquiry where there had been numerous delays. The appellant's counsel submitted that the delays were neither serious nor significant, and sought to distinguish between those two concepts. "Significant" meant "having an effect on the proceedings". The judge considered that the delays were not significant in the context of a 30-day time limit.

She accepted that any delay is potentially serious, but "there are degrees of seriousness and that has to be considered in context". The adviser had had difficulty contacting his client in order to take instructions. On balance, the judge agreed with HMRC that the delays were serious.

The judge considered various reasons given for the delay, and rejected some as irrelevant (the freezing order) or unlikely to be sustainable (postal delays). HMRC argued that the medical evidence only concerned the director's state of health later in the year; however, the judge concluded that he was probably suffering from depression and anxiety, not taking his prescribed medication and self-medicating with other drugs, and this was likely to be a contributory factor in the delays.

Carrying out the balancing exercise, the judge commented again that she would not and should not consider the substantive evidence. There was very little of it in relation to the output tax appeal, but the appellant's counsel said that witness statements and other evidence were being prepared. She concluded that the balance was in favour of admitting the appeals. If the witness statements did not materialise in due course, HMRC could make an application for strike-out.

The application was allowed, and directions were issued in relation to case management, requiring the four appeals to be consolidated.

First-Tier Tribunal (TC08939): *People Services Solution Ltd*

6.8.3 Strike-out

A college appealed in November 2022 against a decision of HMRC that it was not an eligible body (a college of the University of South Wales) for the purposes of Sch.9 Group 6. On 9 June 2023, HMRC notified the Tribunal that they no longer wished to defend the decision under appeal, and have accordingly withdrawn and cancelled their decision. They notified the Tribunal that the parties were in discussion in order to reach an agreement on how to dispose of the proceedings, and applied that the stay then in force in relation to the appeal be extended.

On 28 July, HMRC e-mailed the Tribunal to say that agreement could not be reached. However, the earlier withdrawal and cancellation of the decision under appeal meant that there was no extant appealable decision, and the proceedings should therefore be struck out for lack of jurisdiction. HMRC could have withdrawn their case under Rule 17 of the FTT Rules, but instead applied for strike-out under Rule 8.

On 31 July, the appellant asked the Tribunal instead to formally allow the appeal.

The judge (Nicholas Aleksander) considered some precedent cases, but distinguished them because HMRC had not issued a new decision to replace the original disputed one. He considered that HMRC's withdrawal could not end the jurisdiction of the Tribunal – otherwise the Tribunal could not consider an award of costs where HMRC were alleged to have acted unreasonably. The case could not therefore be struck out for lack of jurisdiction, and the fact that HMRC had withdrawn suggested that the taxpayer did not lack a reasonable prospect of success. The judge refused to strike the appeal out.

He invited the parties to agree to a joint application for the appeal to be allowed by consent under Rule 34. If they could not agree, and HMRC refused to withdraw under Rule 17, there would have to be a hearing to dispose of the matter, which could be a short video conference.

First-Tier Tribunal (TC08993): *Learna Ltd*

6.8.4 Costs

In *Sylvia Hook (trading as Sylmis puppies also known as Sylml puppies) and another* (TC08859), the FTT found that two businesses were operating as one and manipulating and suppressing turnover to stay below the registration thresholds. The appellants nevertheless claimed costs of an earlier hearing that was adjourned at short notice when HMRC discovered that relevant documents were missing from the bundles that had been prepared.

Judge Jane Bailey recounted the history of the appeal proceedings, which included the adjourned hearing that had been set for 23 – 25 November 2023 and adjourned by agreement on 21 November. The appellants had e-mailed HMRC on 30 November asking for costs related to the cancelled hearing to be paid. HMRC did not consider costs were payable, but asked for more information; the appellants' accountant notified that £4,315 had been paid to himself and to another adviser in relation to the hearing, and this was the substance of the claim.

The appellants continued to submit that their costs should be paid, and e-mailed the Tribunal seeking an order to that effect before the relisted substantive hearing in June 2023. An application for costs is required by Rule 10 to include a schedule setting out in detail what is being claimed; none of the submissions by the accountant did this. At the substantive hearing, Judge Bailey said that the appellant could resubmit a claim, but it must comply in every respect with Rule 10. A further application, now for £6,595.60, was filed on 26 June, still without a detailed schedule.

Judge Bailey first considered whether HMRC's conduct had been "unreasonable". The omission of relevant documents from the bundle (which ran to 1,800 pages) was said to be a "genuine mistake", but no further explanation was given. There had been problems with the bundles: a version prepared on 8 November appeared to have been complete, but poorly put together, and Judge Poole directed that it needed to be better organised. The incomplete version was sent out on 18 November and the omissions noticed on 21 November, when there would not have been time to get a new hard copy to the appellants before the hearing. The judge did not consider that HMRC's conduct was "unreasonable" in the sense required by the law, and no order for costs would be made.

She then turned to the absence of the schedule, and was scathing about the failure of the adviser to provide what had been explicitly directed by the FTT. Had she found that HMRC's conduct had been unreasonable, she would have awarded £20.20 for a train fare, which was the only item that she considered had been adequately specified on the claim (and even that had been calculated incorrectly – the claim showed "£70.50 less refund of £50.30 = £14.20"). As HMRC's conduct had not been unreasonable, not even that would be awarded.

First-Tier Tribunal (TC08984): *Sylvia Hook and another*

6.8.5 Updated Manuals

The *Appeals Reviews and Tribunals Guidance Manual* has been updated with a new page of guidance on the circumstances in which a third party can ask HMRC to review an indirect tax decision.

Where a person other than the recipient of an indirect tax decision has a right to appeal that decision as a third party (see ARTG3030) they also have a right to ask for a review and, if they do not agree with the conclusions of the review, to appeal to the tribunal.

They can ask for a review by writing to the decision maker within 30 days of the date they became aware of the decision.

If the third party applies to HMRC within 30 days of the date they became aware of the decision, we may extend the time within which they can ask for a review to

- *30 days from the date of the letter granting the extension, or*
- *30 days from a date given in that letter or further letter*

To have effect, HMRC must write granting any extension before the end of the 30-day period which began when the third party became aware of the decision.

However, the third party may not request a review if they have already appealed to the tribunal.

ARTG4291

A note has been added to the guidance in the Compliance Handbook about the resetting of penalty points for late filing of returns. Under the new harmonised regime, this is currently only in force for VAT. The addition confirms that points can be reset to zero where the relevant conditions are met regardless of how many points had been awarded.

CH192210

6.9 Other administration issues

Lecture 23

6.9.1 Interpretation of VAT and excise law

On 20 October 2023 HMRC published a new policy paper *Interpretation of VAT and excise law*. The policy paper is reproduced in full below, because it is clearly an important document.

General description of the measure

This measure clarifies how VAT and excise legislation should be interpreted in the light of changes made by the Retained EU Law (Revocation and Reform) Act 2023 (REUL Act).

The REUL Act ends the supremacy and special status afforded to retained European Union (EU) law in the United Kingdom (UK). In relation to VAT and excise, this measure confirms that it will no longer be possible for any part of any UK Act of Parliament or subordinate legislation to be quashed or disapplied on the basis that it was incompatible with retained EU law (REUL). The government is taking a bespoke approach in relation to UK VAT and excise law so that it continues to be interpreted as Parliament intended, drawing on rights and principles that currently apply in interpreting UK law. This measure protects billions of pounds of Exchequer revenue and provides legal certainty and stability for businesses.

Policy objective

This measure ensures the stability of the VAT and excise regimes and provides legal certainty for business following the changes in the REUL Act taking effect. It mitigates the risk of re-litigating settled interpretation of UK law, protecting billions of pounds of Exchequer revenue – VAT and excise duty revenue from alcohol, tobacco and hydrocarbon oil raise over £200 billion of revenue per year.

Background to the measure

REUL is EU legislation (and EU derived domestic legislation) that continued to apply in the UK after the UK's exit from the EU. It was introduced as a temporary measure by the European Union (Withdrawal) Act 2018 (EUWA 2018) to ensure legal continuity.

The REUL Act introduces provisions to allow for the amendment of REUL and to remove the special status it has in the UK legal system from the end of 2023.

This measure clarifies how VAT and excise law should continue to be interpreted and therefore ensures the VAT and excise regimes continue to operate as intended.

Detailed proposal

Operative date

The measure will have effect from the end of 2023.

Current law

Under EUWA 2018 various concepts of EU law continue to be recognised and enforced in UK domestic law. This includes the continued application of:

- *EU-derived subordinate legislation (section 2) and retained direct EU legislation (section 3)*
- *EU rights, powers, liabilities, obligations, restrictions, remedies and procedures (section 4)*
- *the supremacy of EU law (section 5(3))*
- *decisions of the European Court in binding lower courts (section 6(3)(a), (4) and (5A))*
- *general principles of EU law (section 6(3)(a))*

Changes made by the REUL Act

With effect from the end of 2023 the REUL Act will make provision (including by amending EUWA 2018) to:

- *revoke EU-derived subordinate legislation and retained direct EU legislation listed in Schedule 1 (section 1 and Schedule 1)*
- *revoke retained EU rights, powers, liabilities (section 2)*
- *abolish the supremacy of EU law (section 3)*
- *abolish the general principles of EU law (section 4)*
- *convert REUL to 'assimilated law' (section 5)*
- *make it easier for courts to depart from decisions of the European Court (section 6)*

The REUL Act also contains powers to modify, restate, revoke, replace or update REUL and assimilated law (sections 9 to 15).

Proposed revisions

This measure confirms that, in relation to VAT and excise law, in line with the REUL Act, it will no longer be possible for any part of any UK Act of Parliament or domestic subordinate legislation to be quashed or disapplied on the basis that it was incompatible with retained EU law. It also ensures that UK VAT and excise legislation continues to be interpreted as Parliament intended, drawing on rights and principles that currently apply in interpreting UK law.

The policy document was included in the Autumn Statement without revision, noting that there should not be any Exchequer effect or cost to HMRC associated with the measure (presumably because it is supposed to maintain the present situation rather than changing anything).

www.gov.uk/government/publications/interpretation-of-vat-and-excise-legislation

The CIOT has responded to the draft legislation after collating member feedback. The response acknowledges the draft legislation's intention to preserve general principles of EU law as an aid to construing legislation going forwards. However, the complexity of the draft legislation (in particular the complex relationship with other legislation) makes it difficult to evaluate its effectiveness.

The CIOT points out a lack of clarity in the distinction between 'disapplication and quashing' of an enactment by reliance on an EU law on the one hand, and interpretation in light of EU law on the other, which will result in future uncertainty.

Concerns are raised about the interaction between this draft legislation and direct effect of EU law. In many cases, inconsistencies have been resolved by past legal disputes which have led to binding precedents and often to changes in the law. However, there remain gaps in the UK legislation which cannot be solved by the *Marleasing* principle of consistent interpretation, and these will lead to uncertainty in the future.

The response notes a further lack of clarity over how far higher courts are intended to be bound by prior CJEU case law. The CIOT recommends clarification and restriction of the circumstances in which UK courts can depart from CJEU case law, possibly by reference to EU (Withdrawal Act) 2018 s.6.

The CIOT comment also refers to articles in *Tax Adviser* in September (Jeremy Woolf) and October (Dr Michael Taylor).

www.tax.org.uk/ref1237

6.9.2 Autumn Finance Bill

Following the Autumn Statement, the Finance Bill was published on 29 November 2023. It is expected to become Finance Act 2024 when it receives Royal Assent. It contains 38 sections and 13 Schedules, but the only VAT matter is clause 27 dealing with the above proposed legislation. It is sufficiently important to reproduce in full.

27 Interpretation of VAT and excise law

(1) This section makes provision about how –

(a) the European Union (Withdrawal) Act 2018 ("EUWA 2018"), and

(b) the amendments made to that Act by the Retained EU Law (Revocation and Reform) Act 2023 ("REULA 2023"),

are to apply for the purpose of interpreting enactments relating to value added tax or any duty of excise ("VAT and excise law").

(2) Section 4 of EUWA 2018 (retained EU rights, powers, liabilities etc) continues to have effect (despite the provision made by section 2 of REULA 2023) for the purpose of interpreting VAT and excise law subject to the following exception.

(3) The exception is that Articles 110 and 111 of the Treaty on the Functioning of the European Union (which relate to internal taxation on products) have no effect for that purpose.

(4) Section 5(A1) to (A3) of EUWA 2018 (which are inserted by section 3 of REULA 2023 and which abolish the supremacy of EU law) have effect in relation to VAT and excise law as they have effect in relation to other domestic enactments but only so far as they relate to the disapplication or quashing of any enactment as a result of EU law (and, accordingly, the superseded provisions continue to have effect for the purpose of interpreting VAT and excise law).

(5) Retained general principles of EU law –

(a) continue to be relevant (despite the provision made by section 4 of REULA 2023) for the purpose of interpreting VAT and excise law in the same way, and to the same extent, as they were relevant for that purpose before the coming into force of that section, but

(b) otherwise have effect for that purpose subject to the provision made by that Act (including, in particular, the amendments made by section 6 of that Act (role of courts)).

(6) In this section—

(a) the reference to any duty of excise is to be read in accordance with section 49 of TCTA 2018,

(b) the reference to the superseded provisions is a reference to section 5(1) to (3) of EUWA 2018 as those subsections had effect immediately before the passing of REULA 2023, and

(c) the reference to retained general principles of EU law is to be read in accordance with EUWA 2018 as that Act had effect immediately before the passing of REULA 2023.

(7) This section needs to be read with sections 42 and 47 of TCTA 2018 (which make other provision about EU law relating to VAT and excise law and which continue to have effect for the purpose mentioned in subsection (1) above).

(8) This section is treated as having come into force on 1 January 2024.

6.9.3 Draft Finance Bill 2023-24

CIOT submitted detailed comments on a number of aspects of the draft Finance Bill that was published in July. The main area that is relevant to VAT is the legislation proposed to introduce a new criminal offence of failing, without reasonable excuse, to comply with a stop notice issued by HMRC requiring them to stop promoting a tax avoidance scheme. CIOT was concerned about the safeguards that would be required to protect the innocent against a criminal conviction, and also about the effectiveness of the deterrent if promoters either did not consider the risk of conviction to be high, or were not aware of their responsibilities.

www.tax.org.uk/collection-of-finance-bill-2023-24-draft-legislation-responses

HMRC have responded to the CIOT's comments. In summary:

- HMRC are looking to publish a summary of the robust governance processes that will apply before a Stop Notice can be issued;
- With regard to external oversight for the Stop Notice regime, it is the judiciary who have the final say on the legitimacy of a Stop Notice where a promoter exercises their appeal right. In addition, HMRC would not be the ultimate arbiter of whether a criminal offence has been committed – this would always be a matter for the courts to decide;
- Regarding the tribunal appeal process, the tribunal can effectively provide that the Stop Notice did not have effect at any time. No person could be charged with the proposed offence once the Tribunal

had made such a direction, and any person who had been charged would not be guilty of the offence;

- The new offence has not been designed with solely offshore promoters in mind. It covers all promoters subject to a Stop Notice, both those based offshore and those based in the UK.

www.tax.org.uk/ref1198

6.9.4 Labour supply fraud

The High Court has considered and upheld claims for £21m in VAT and £2m in penalties brought by the liquidator of a company against a range of individuals and companies, including the directors. The company supplied nurses; although the leading director claimed that it was entitled to use the Nursing Agency Concession to reduce the output tax charged, in fact the company had charged VAT on the full amount paid by its customers, and had simply failed to account for it to HMRC. The judge gave examples of the understatements: "for October 2019 Mercy received VAT of £2,582,112 on a turnover for that month of £12,910,559. It accounted for no VAT at all that month. And for January 2020 Mercy received VAT of £2,738,686 on turnover of £13,693,430, while accounting for just £34,108 on stated turnover of £127,097."

The judge was satisfied that the fraud had taken place, and nearly all the defendants were liable to compensate the company in line with the claims. The proceeds of the fraud could be traced into a number of property purchases, and these could also be claimed by the liquidators.

High Court: *Mercy Global Consult Ltd (in liquidation) v Abayomi Adegbuyi-Jackson and others*

6.9.5 Recovery of proceeds of fraud

The Crown Prosecution Service has reported that an additional £2.7m has been recovered from two defendants, Syed Mubarak Ahmed and Shakeel Ahmad, who were convicted in 2007 for their involvement in a £12.6m conspiracy to defraud HMRC and sentenced to seven years' imprisonment. The CPS has said that the original case involved 21 defendants, and that proceeds of crime proceedings have now resulted in the recovery of more than £10m from these two defendants alone.

www.cps.gov.uk/cps/news/ps2million-home-and-large-pensions-sold-repay-fraudsters-court-order

6.9.6 Extradition to Poland

An UK national aged 39 was the subject of a European Arrest Warrant issued in October 2018 by the Polish judicial authority in connection with his alleged participation in a VAT fraud in Poland between December 2013 and March 2014. The accused was arrested in Scotland and appeared at Edinburgh Sheriff Court for the first time in June 2020 to object to extradition to Poland. There were delays arising from the pandemic and various appeals on different grounds, but the Scottish Appeal Court has now held that the Sheriff's decision to allow extradition was not flawed. The details of the fraud are not covered in the decision, which concerns various aspects of human rights law and extradition arrangements.

Scottish Appeal Court: *AH v Lord Advocate (for the Government of the Republic of Poland)*