VAT UPDATE JULY 2020

Covering material from April – June 2020

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VAT Update July 2020

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1. INTRODUCTION

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

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

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

1.1 Appeals pending

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

The HMRC website section which reports the progress of appeals was updated on 12 May 2020.

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

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

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

- *Alan McCord*: HMRC granted leave to appeal against the FTT decision that a car dealer was entitled to input tax on cars purchased for domestic sales, but denied input tax on cars purchased for sale to customers in the Republic of Ireland.
- *Anna Cook*: HMRC granted leave to appeal against the FTT decision that classes in Ceroc dancing qualified for exemption as "educational" (hearing scheduled for October 2020).
- *Cheshire Centre for Independent Living*: HMRC have been granted leave to appeal against the FTT's decision that a charity's operation of PAYE for disabled people was sufficiently closely connected to welfare to qualify for exemption (hearing scheduled for May 2020).
- *DCM (Optical) Ltd*: both sides have been granted leave to appeal to the Court of Session against the Upper Tribunal's decisions in relation to apportionment of sales between taxable and exempt supplies (hearing scheduled for June 2020).

- *Good Law Project*: (not on HMRC's list) HMRC appealing against decision of High Court that it was lawful for them to disclose certain facts in relation to a dispute with a taxpayer, so it was not necessary for them to apply for a court order in order to be granted permission to do so (hearing scheduled for Court of Appeal in April).
- *Newey (t/a Ocean Finance)*: HMRC describes the CA decision as a "partial win for HMRC". The case has been remitted to the FTT for further consideration in the light of the CJEU judgment (hearing June/July 2019 – decision awaited).
- *News Corp UK and Ireland Ltd*: HMRC have been granted leave to appeal against the UT's decision that digital newspapers qualified for zero-rating.
- *Northumbria Healthcare NHS Foundation Trust v HMRC*: CA to hear HMRC's appeal against UT decision that provision of cars under a salary sacrifice scheme could not be regarded as a supply of services, so the Trust was entitled to claim VAT on leasing in full under s.43 (not on HMRC's list – hearing scheduled for June/July 2020).
- *Pacific Computers Ltd*: MTIC case remitted by the UT to differently constituted FTT for rehearing (not on HMRC's list).
- *Privin Corporation Ltd*: the FTT found in favour of a MTIC appellant. HMRC were granted leave to appeal to the UT, but it was agreed that the case would be remitted to a differently constituted FTT for rehearing (not on HMRC's list).
- *Target Group Ltd*: company is seeking leave to appeal against UT decision that its supplies of loan administration services did not fall within art.135(1)(d) (not on HMRC's list).
- *The Core (Swindon) Ltd*: HMRC have been granted leave to appeal against the FTT decision that certain products were "liquid meal replacements" rather than "beverages" (scheduled for October 2020).
- *The Ice Rink Co Ltd and another*: the UT remitted the case to the same FTT for reconsideration of whether the supply of children's ice skates was a separate zero-rated supply or part of a compound supply (hearing June 2020).
- *Tower Resources plc*: HMRC have been granted leave to appeal on three grounds against the FTT's decision that a holding company was entitled to recovery of input tax on some overhead costs.

1.2 Decisions in this update

- *Beigebell Ltd*: HMRC succeeded in appeal against the FTT decision a company's directors did not have the means of knowledge of the connection of their company's transactions to a missing trader fraud: case remitted to a differently constituted FTT.
- *Blackrock Investment Management (UK) Ltd*: argument about application of reverse charge to software bought in for use in management of investment funds – UT dismissed HMRC's appeal on the "exemption" issue but referred the "apportionment" issue to the CJEU – A-G's opinion now available.

- *Done Brothers (Cash Betting) Ltd and others*: HMRC have been unsuccessful in their appeal against the FTT decision that the company was entitled to exemption of its gaming supplies on fiscal neutrality grounds.
- *KE Entertainments Ltd*: the company's appeal against the Court of Session's decision on its adjustment for output tax in relation to bingo calculations was dismissed by the Supreme Court.
- *Rank Group plc*: HMRC have been unsuccessful in their appeal against the FTT decision that certain supplies qualified for exemption on fiscal neutrality grounds.
- *Royal Opera House Covent Garden Foundation*: HMRC have succeeded in their appeal against the FTT decision on the partial exemption recovery percentage.
- *Thorsteinn Gardarsson t/a Action Day A Islandi*: HMRC have succeeded in their appeal against the FTT decision that a trader's products qualified as "books" rather than "stationery".
- *The Wellcome Trust Ltd*: HMRC granted leave to appeal against the FTT decision that the company was not subject to a reverse charge on investment management fees. The UT has agreed to refer questions to the CJEU (Case C-459/19): the A-G's opinion (favouring HMRC) was released on 30 June.

1.3 Other points on appeals

- *Fortyseven Park Street Ltd*: company has been refused leave to appeal to the Supreme Court against the CA decision that their "high end timeshare" was covered by the "hotel exclusion" from exemption.
- *Opodo Ltd*: HMRC have dropped an appeal to the Upper Tribunal (against FTT decisions that do not appear to have been published yet – HMRC were refused a reference to the CJEU, then granted leave to appeal to the UT, but have now dropped that appeal).

2. OUTPUTS

2.1 Scope of VAT: linking supplies to consideration

2.1.1 Consideration or compensation?

In an article in *Taxation*, Edward Hellier examines the difference between receipts that are outside the scope as compensatory and those that are regarded as consideration for a supply, with analysis of the main cases on the issue such as *Societe Thermale d'Eugenie-les-Bains*, *Air France*, *MEO*, *Bass* and *Esporta*. He makes the point that the Covid-19 pandemic has led, and may lead, to many situations in which there are disputes over forfeited deposits or other payments where a service is not provided, so the rules are topical. He also refers to HMRC's change of policy on forfeited deposits in March 2019, and suggests that it should be "treated with care".

Taxation, 4 June 2020

2.2 Disbursements

2.2.1 Decision confirmed

The Supreme Court refused leave to appeal in the *Prosser* case, which concerned VAT being recharged on medical reports obtained in connection with litigation by a passenger claiming that he had been injured on a flight. Although such reports are in principle VATable, they would not be subject to VAT if the practitioner preparing them was not registered for VAT by virtue of trading below the registration threshold.

The solicitors had used a subsidiary company to obtain medical reports, and the subsidiary company had added VAT to the recharge. BA was liable to pay the plaintiff's costs and would not be able to recover VAT, if VAT was due, because it arose on a supply that was not made to BA. Although the amount was relatively small, BA argued that, as a point of principle, VAT should not have been added to this element of the costs.

The Court of Appeal held that it was reasonable for the solicitors to recharge the fee, with VAT attaching, to BA without investigating the VAT position of the underlying expense. The recharge was "reasonable and proportionate" in line with CPR 44.3.

The Court of Appeal also gave guidance on when a disbursement could be recharged without adding VAT, and concluded that VAT should have been added in this case. The medical reports were obtained by the solicitors for use in providing advice to their client, rather than for the client's own use. That meant that the cost was proper to the solicitors, and itemising it on the fee note did not mean that recouping the cost could be outside the scope of VAT.

Supreme Court: *British Airways plc v Prosser*

2.2.2 Search fees

HMRC have released a policy paper announcing the withdrawal of the concessionary VAT treatment for property searches conducted by post from 1 December 2020. The concession dates from the 1990s and has been overtaken by technological developments (most searches are now carried out online, where the concession does not apply, as confirmed in the *Brabners LLP* case). Search fees are now more likely to be subject to VAT charged by the local authority, which reduces the difference that disbursement treatment would make, but it is still important to get the accounting right. HMRC are withdrawing the concession to remove the inconsistency and to reduce the confusion over what can be treated as a disbursement.

Revenue & Customs Brief 6/2020

2.3 Exemptions

2.3.1 Pension fund management

There have been numerous disputes about the application of the exemption to pension funds. The position reached in earlier decisions can be summarised very briefly as:

- "money purchase" or "defined contribution" pension schemes are capable of being "special investment funds", so management of the funds can be exempt;
- "defined benefit" or "final salary" schemes are not sufficiently similar to open ended investment companies and other retail collective investments to qualify for exemption.

The latest case to reach an Advocate-General's opinion raises a different argument, that management services for an occupational pension scheme can qualify for exemption as an "insurance transaction" under art.135(1)(a) PVD.

A-G Pikamae starts his opinion by citing from EU Directives relating to life assurance. The First Life Assurance Directive of 1979 mentions "management of group pension funds, i.e. operations consisting, for the undertaking concerned, in managing the investments, and in particular the assets representing the reserves of bodies that effect payments on death or survival or in the event of discontinuance or curtailment of activity" as one of the activities that is subject to the Directive. The 1979 Directive has been repealed and replaced, but the relevant provisions remain broadly unchanged.

The UK has always regarded the management of occupational pension schemes by insurance companies as exempt under the heading of insurance. Before 1 January 2005, this depended on the law restricting the insurance exemption to authorised insurers. Following the *Card Protection Plan* decision, it was recognised that such a restriction contravened EU law: if a transaction constituted insurance, it had to be exempt, regardless of the authorisation of the supplier. The law was

changed, but HMRC continued to regard pension fund management to be exempt as "insurance" only when supplied by insurance companies.

In March 2014, the trustees of the United Biscuits defined benefit pension scheme made a claim to HMRC for recovery of VAT charged on investment management services between 1 January 1978 and 30 September 2013. These services had been supplied by both insurance companies and non-insurers (who were authorised under different legislation to carry on investment management business). The authorities had treated those supplied by insurers as exempt and those by non-insurers as taxable. The claim was dismissed by the High Court in November 2017; the judge held that pension management services supplied by non-insurers were taxable. The trustees appealed to the Court of Appeal, which referred questions to the CJEU. The hearing was in February 2019, but the A-G's opinion was only delivered in May 2020.

The A-G started by defining the scope of the question: in his view, it was not affected by the change from the 6th Directive to the PVD, nor by the wording concerning exemptions being applied "without prejudice to other Community provisions" or "under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse". It was simply whether the management of occupational pension funds by a non-insurer could be regarded as "insurance transactions" within the first part of art.135(1)(a).

The exemptions in art.135 are autonomous concepts of EU law the purpose of which is to avoid divergences in the application of the VAT system from one Member State to another and which must be placed in the general context of the common system of VAT. The terms used to describe the exemptions envisaged by art.135 must be given a strict interpretation, since they constitute derogations from the general principle that VAT is to be levied on all services supplied for consideration by a taxable person; however, the interpretation must be consistent with the objectives pursued by the exemptions and the principle of fiscal neutrality. Operators must be able to choose the form of organisation which, from the strictly commercial point of view, best suits them, without running the risk of having their transactions excluded from the exemption provided for in that provision.

The A-G went on to examine the concept of "insurance transactions" in detail. There is no definition in the PVD. In the case law, the essentials of insurance transactions are 'that the insurer undertakes, in return for prior payment of a premium, to provide the insured, in the event of materialisation of the risk covered, with the service agreed when the contract was concluded'. Thus, it is the *assumption of risk* for consideration that allows an activity to be classified as an 'insurance transaction'.

It is also necessary to distinguish between art.135(1)(a), which only exemptions "insurance transactions" in the strict sense, and arts.135(1)(d) and (f), which extend the financial exemptions to transactions "concerning" or "relating to" certain banking operations.

As the fund management services did not involve the assumption of any risk by the manager (a fact that the A-G confirmed at the hearing), they

did not fall within the scope of the exemption as previously established by the CJEU.

In response, the applicants argued that the term must be given a common interpretation in EU law, and various other Directives brought pension fund asset management within the scope of insurance, even though it did not meet the definition applied in previous VAT decisions. This was based partly on the judgment in *CPP*, which stated that ‘there is no reason for the interpretation of the term “insurance” to differ according to whether it appears in the [The First Non-life Directive] or in the Sixth Directive’. The A-G considered that this only meant that the court should refer to relevant other EU rules “insofar as they pursue concordant objectives”. It was therefore necessary to consider the reasons for, and the function of, the exemption for VAT of insurance transactions.

The A-G pointed out that the start of the First Life Assurance Directive, relied on by the applicants, referred to “types of insurance” (art.1(1)) and then to “operations” (art.2(2)). A comparison of the various language versions of the Directive showed that only the English and Danish versions described management as a “class of insurance”; the other versions described it as a “class of activity”.

In any event, according to settled case-law, where there is a divergence between the various language versions of an EU text, the provision in question must be interpreted by reference to the general scheme and the purpose of the rules of which it forms part. The purpose of the Directive was to bring within the scope of its regulatory regime both the insurance transactions that were the main business of insurance providers (and which would be also covered by VAT exemption) and also ancillary activities (which would not). The ancillary activities only came within the scope of the Directive to the extent that the Member State chose to regulate them; if that were followed through to its logical conclusion, the insurance exemption could then vary from country to country, which would be wrong.

The purpose of the VAT exemption is related to the permission in the PVD for separate taxes on insurance transactions; they are exempt from VAT in order to prevent double taxation of the same thing. The Commission also argued that the exemption was related to the difficulty of establishing the taxable amount for each payment of an insurance premium. The services in the present dispute did not suffer from these disadvantages.

The A-G was satisfied that the main precedents, *CPP* and *Skandia*, supported this conclusion: a supplier of insurance transactions was exempt regardless of whether it was an insurance company, and not all transactions of an insurance company qualified for exemption, if it did something that was not insurance.

The A-G finished by considering the argument based on fiscal neutrality. He observed that the problem was that the UK had, until 1 April 2019, exempted supplies of this kind by insurance companies because they were supplied by insurance companies. That was incorrect, and the applicants could not benefit from the same incorrect treatment by arguing for fiscal neutrality.

CJEU (Case C-235/19) (A-G): *United Biscuits (Pension Trustees) Ltd and United Biscuits Pension Investments Ltd v HMRC*

2.3.2 Reverse charge on management system

A UK VAT group included two investment fund management companies. They received services from a US affiliated company, in the form of an "investment management computer platform" that was used to manage investment funds. HMRC ruled that a reverse charge was due on the purchase of the services; the companies argued that the supply was exempt because it was involved in the management of special investment funds.

It was accepted that the US company made a single supply of the platform (called "Aladdin"), and separate supplies of some other services. There were two questions: did the SIF exemption apply at all, when the supply was from one company to another rather than to the individual small investors? And if it did apply, could the reverse charge be apportioned because Aladdin was also used for non-SIF investments? The dispute had been running since a ruling request in 2012, and the FTT hearing (TC06069) covered appeals for the periods from 1 January 2010 to 30 September 2016.

First-Tier Tribunal

The FTT examined the way in which SIFs operate, the way in which the software was used to assist in their management, and the different ways of managing investments before and after the software was introduced.

The judge went on to consider the two main relevant authorities of the CJEU on management of SIFs and outsourcing: *Abbey National plc v C&E* (Case C-169/04) and *GfBk Gesellschaft fur Borsenkommunikation mbH v Finanzamt Bayreuth* (Case C-275/11). He set out the following principles:

(1) The exemption in Article 135.1(g) PVD is defined according to the nature of the services provided and not according to the person supplying or receiving the service. (*Abbey National* [66]-[69] *GfBk* [20])

(2) The exemption was an exception to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person, and should therefore be interpreted strictly. (*Abbey National* [60])

(3) The exemption applied not only to investment management involving the selection and disposal of assets under management but also to administration and accounting services. (*Abbey National* [26], [63] and [64] and *GfBk* [27])

(4) Services falling within the exemption included those functions which related to administering the fund, such as those set out under the heading "administration", in Annex II to the UCITS Directive. Annex II was not exhaustive. (*GfBk* [25])

(5) To ensure fiscal neutrality, the transactions covered by that exemption are those which are specific to the business of undertakings for collective investment. (*Abbey National* [62]-[63])

(6) There was nothing in principle which prevented the management of special investment funds from being broken down into a number of separate services. (*Abbey National* [67] *GfBk* [28])

(7) The services supplied fall within the exemption if, viewed broadly, they form a distinct whole, and are specific to, and essential for, the management of special investment funds. (*Abbey National* [72] *GfBk* [21])

(8) Mere material or technical supplies, such as the making available of a system of information technology, are not covered by the exemption. (*Abbey National* [71])

(9) Services which were intrinsically connected to the activity characteristic of an investment management company would have the effect of performing the specific and essential functions of management of a SIF. (*GfBk* [23]) The service of giving recommendations to an investment management company to purchase and sell assets was so intrinsically connected. (*GfBk* [24])

(10) The purpose of the exemption was to facilitate investment in securities by small investors by means of collective investment by excluding the cost of VAT in order to ensure fiscal neutrality when compared with direct investment. (*Abbey National* [62] and *GfBk* [30])

(11) It followed from the principle of fiscal neutrality that investment advice services provided by a third party should not be subject to a disadvantage when compared with funds which provided their own investment advice. Economic operators must be able to choose the form of organisation which, from the strictly commercial point of view, best suits them. (*Abbey National* [68] *GfBk* [31])

The key test, therefore, was whether the services supplied by the US affiliate to the UK companies formed a distinct whole, and were specific to, and essential for, the management of special investment funds. The judge was satisfied that they were "specific and essential": the meaning that HMRC tried to import into that expression was too restrictive. As regards "a distinct whole", the judge noted that the CJEU had not clarified the meaning of this expression, and the A-G opinions in the two cases seemed to be inconsistent. Nevertheless, he was satisfied that the services were "interrelated and had an inner coherence", which he considered to be the test. HMRC had argued that they were "a mere tool used in management of SIFs", but the judge did not agree that this was the relevant test.

Given that the services constituted a single supply, the question was then whether different parts of it could have different liabilities. The company argued that the *Talacre Beach Caravan Sales* case applied, and that apportionment would serve the purpose of the exemption. HMRC responded that the same could be said of any compound supply where part was exempt, and apportionment should only apply in exceptional and clearly defined circumstances.

The judge agreed with HMRC: there were special circumstances in both *Talacre* and *French Undertakers* that did not apply here. The normal rule was that a single supply must have a single liability. The proper functioning of the VAT system required a single liability, and that overrode the purpose of the specific exemption.

The company's appeal would have succeeded on the liability issue, but it failed on the apportionment issue.

Upper Tribunal

The company appealed to the Upper Tribunal (Mrs Justice Falk and Judge Roger Berner) on the apportionment issue. HMRC cross-appealed on the exemption issue, so the whole argument was revisited. Although it was primarily the taxpayer's appeal, the exemption issue was considered first, because the apportionment issue only arose if exemption was available in principle.

The UT considered *Sparekassernes Datacenter* (Case C-2/95) in detail before reviewing the cases on which the FTT decision was based. The principle established was that "in order to be characterised as exempt transactions within the exemptions in question, the services provided must, viewed broadly, form a distinct whole, fulfilling in effect the specific, essential functions of a service as described by the relevant provisions."

Turning to the decisions in *Abbey National* and *GfBk*, the UT carried out its own analysis of the judgments, and concluded that the requirements for exemption of management of SIFs depended on "distinctiveness" and "specificity". These tests were considered in the A-G's opinion in *GfBk*, which was expressly approved by the full court in that case. The UT rejected HMRC's arguments that there was any error of law in the FTT's conclusions in this area. The judges did not agree with HMRC that "significant aspects of management and administration have to be outsourced and that each of those aspects needed to be sufficiently outsourced". The Aladdin Services formed a distinct whole, and the FTT's conclusion was the only one that could properly have been reached on the evidence before it. There was no basis for a reference to the CJEU, as HMRC requested.

The taxpayer's counsel based his argument on the apportionment issue partly on the CJEU judgment in *Commission v Luxembourg* (Case C-274/15). Although this concerned the cost-sharing exemption, it did contain a suggestion by the court that a single supply could be apportioned between exempt elements (the underlying cost that was used for the group member's exempt or non-taxable activities) and taxable elements (the underlying cost that was used for the group member's taxable activities). This gave the judges "pause for thought".

After some further consideration of other judgments on compound and multiple supplies, the judges concluded that they could not with certainty decide the apportionment issue. As a result, reference should be made to the CJEU, and in the meantime, the appeal would be stayed.

Advocate-General's opinion

Advocate-General Pikamae gave his opinion at the end of March 2020. He started by summarising the facts found by the UK Tribunals and the essential issue, which was the apparent recognition of the possibility of exempting part of a supply in the *Luxembourg* case. If the supply could be apportioned, the further question was whether the values of the funds under management would be an appropriate basis for that apportionment.

Next, the A-G reviewed the precedent cases on 'what are SIFs' (member states have some discretion, but must exercise it in a manner consistent with EU law – *JP Morgan Claverhouse*) and 'what is management' (member states have no discretion, as it is an independent concept of EU law – *Abbey National*).

The A-G considered that the development of artificial intelligence probably warranted an examination by the court of the concept of "management of SIFs" where the service is provided by a third party using an IT platform; the question of "specificity" of the service could then be considered in the context of modern technology. However, the way the UT had framed the questions meant that this was not possible within this case. Instead, it was necessary only to consider whether the single supply could have two liabilities.

The UT had based its questions on the premise that the services constituted a single supply comprising several elements. The Commission considered that there was a single supply that was not capable of subdivision. The A-G reviewed the precedents that emphasised that a single supply should not be artificially divided – *Card Protection Plan*, *Mesto Zamberk* and *Stadion Amsterdam*. Although there were different elements in the Aladdin service that might in theory be provided separately (market analysis, monitoring performance, risk assessment, monitoring regulatory compliance and implementing transactions), the value to the recipient was in the combination of all of them together, none of which predominated. It therefore appeared that this was a single supply.

The only cases in which the CJEU has recognised apportionment of a single supply were *Talacre Beach Caravan Sales* and *Commission v France* (the undertakers' case). The A-G considered that these did not establish general principles and were therefore not applicable. They were limited to their facts and the legal provisions that gave rise to them (zero-rating in the UK and the lower rate in France).

The judgment in *Luxembourg* on which the company relied was also not applicable. Art.132(1)(f) specifically refers to a "share" of costs, which suggested that apportionment might be available. There was no similar language in art.135(1)(g). The court was answering specific questions in a restricted context, and it would be wrong to extend the conclusions to the present situation.

The A-G went on to consider whether there was an argument based on fiscal neutrality for the supply to be split where a minority of a service was used to manage SIFs, given that if it was used only for management of SIFs, it would be exempt. In his view, this would compromise the objective of the exemption, which was focused on supplies solely used for the management of SIFs. Fiscal neutrality could not override the law, and exemptions had to be interpreted strictly.

The use of the value of funds managed as a basis for apportionment was also rejected. The liability of the supply would vary according to factors that were nothing to do with the supply, which would be unworkable. Case law supported an approach which followed "practicality over accuracy": it was either impossible, or otherwise very difficult, to determine the proportion in which the services were used for SIF management, so treating the single supply as wholly taxable was the simplest outcome.

The A-G concluded by recommending that the court should find this supply wholly taxable, but also emphasised that the answer might be different if a similar supply was used by an investment manager solely to manage SIFs.

CJEU (Case C-231/19) (A-G): *Blackrock Investment Management Ltd v HMRC*

2.3.3 Card handling fees again

A travel agent charged customers who paid by credit card a “card payment fee”. It treated such charges as exempt, and appealed against assessments for periods from 08/07 to 02/13 totalling over £160,000 (reduced by the time of the hearing to £100,000 after agreement that certain booking fees were zero-rated). The appellant’s case was that card payments by a customer for a holiday through the appellant involved two distinct transfers of money:

(1) A transfer to the appellant from the customer’s card issuing bank effected by the appellant’s merchant acquirer, Barclays (described as “Payment A”).

(2) A bank transfer by the appellant to the travel provider according to the agency terms of business between the appellant and the travel providers (described as “Payment B”).

The appellant stated that Payment B took place before Payment A under the terms of its contract with Barclays. Because of the possibility of a charge-back on fraudulent use of the card, the taxpayer took a financial risk by making Payment B with the possibility that it would have to refund Payment A; the payment charge was intended to cover that financial risk, and therefore ought to be exempt.

It was accepted that the card fee was charged in respect of a service supplied by the appellant to the customers, and it was the only supply made to the customers. The appellant earned a commission from the providers of travel and accommodation that it sold on their behalf; it did not make any supply of those services to the customers. The company’s evidence, which the judge (Jonathan Cannan) accepted, was that the fee was charged in respect of three matters:

(1) In consideration for the risk the appellant takes that funds for Payment A will be the subject of a charge back after the appellant has made Payment B.

(2) In consideration for accepting card payment so as to recover the fees the appellant incurs to the merchant acquirer for processing the card payment.

(3) In consideration for the administrative costs incurred by the appellant associated with accepting card payments.

The judge reviewed the CJEU precedent cases of *SKD*, *Bookit*, *NEC*, *DPAS* and the Upper Tribunal’s recent decision in *Target Group*. The taxpayer’s representative argued that the company did far more than the mere “back office functions” undertaken by Bookit and NEC: in making Payment B, it was transferring money, and the charge was in respect of it.

The judge considered that the situation was on all fours with *Bookit*. Although Bookit had not argued that the fee was intended to cover the risk of charge-backs, nevertheless the situation was the same: the company gave instructions for the banks to move money, and did not itself effect the transfers.

The taxpayer’s representative argued that the UK legislation exempted an “order for the payment of money”. The judge said that this was a

misrepresentation of that phrase: in its context, it clearly referred to a negotiable instrument, not to an instruction.

The appeal was dismissed in principle, and the parties were left to agree the amount of the liability.

First-Tier Tribunal (TC07711): *Ulook Ubook Ltd*

2.3.4 Manual changes

HMRC have updated their internal guidance to cover the amendments to the scope of the fund management exemption from 1 April 2020.

VATFIN5100, VATFIN5120

2.3.5 Gambling

In TC06607 and TC06608 (quarterly update October 2018), the FTT considered appeals by *The Rank Group plc* and *Done Brothers (Cash Betting) Ltd and others*, claiming exemption for supplies made using slot machines between 1 October 2002 and 5 December 2005 (Rank) and supplies made through Fixed Odds Betting Terminals (FOBTs) between 6 December 2005 and 31 January 2013 (Done Brothers). In both cases, the FTT decided in principle that the machines under consideration were for practical purposes similar and in competition with other machines that were exempt under the law, and fiscal neutrality therefore required that they should be given the same VAT liability. HMRC appealed to the Upper Tribunal.

Mr Justice Mann and Judge Thomas Scott begin their decision with the comment 'It was not straightforward to pin down the precise ambit of HMRC's appeal, but in broad terms HMRC submit that in both decisions the FTT erred in law in relation to the evidence which it took into account in applying the EU test of fiscal neutrality'.

The Rank claim concerned the distinction drawn by the VAT law between 'section 16/21 machines' and 'section 31/34 machines', named after the provisions of the Gaming Act 1968 and the Lotteries and Amusement Act 1976 which applied to them. During the Rank claim period, supplies through section 16/21 machines and FOBTs were treated by HMRC as exempt, while section 31/34 machines were regarded as taxable 'gaming machines', excluded from the exemption in VATA 1994 Sch.9 Group 4. As well as resisting the repayment claim in respect of the section 16/21 machines, HMRC raised an assessment on the basis that the section 31/34 machines were also standard rated gaming machines, and Rank appealed against that.

The Done Brothers claim related to the change in the law that was made in December 2005 in response to the CJEU judgment in *Linneweber*. From that point on, supplies of gambling by means of FOBTs was treated as taxable; this had the effect that a game of roulette was exempt if playing online, in a casino or on an electronic roulette machine, but standard rated when played on a FOBT. This was held by the CJEU to breach fiscal neutrality in 2011, but the UK law was not changed until 2013 to make FOBTs exempt again.

The FTT's conclusions in both decisions were that such differences as there were between the various comparator games in terms of their

relevant characteristics did not have a significant influence on the average customer to use one machine or another. The games treated as liable to VAT in the two appeals were similar for the purposes of fiscal neutrality to the versions of those games played on other machines or by other means which were treated during the relevant periods as exempt. The FTT concluded that this was a breach of fiscal neutrality and allowed the appeals.

HMRC were refused leave to appeal by the FTT and the UT, but then a further application permitted an appeal on the sole ground that 'the FTT erred in law because it failed to identify the characteristics of the "average consumer" as it was required to do by the CJEU decision in *Rank*.' Precisely what HMRC understood and alleged by this 'has caused considerable confusion'. There was no dispute between the parties that in determining the similarity of two supplies for the purposes of the fiscal neutrality test, it was necessary to do so by reference to the 'needs' and 'point of view' of the average consumer. Nor was there any dispute that the FTT had attempted to do this. In their skeleton argument, HMRC contended that the FTT should have started by identifying 'who the typical consumer is', and without this prior step, the FTT's conclusions were without foundation.

However, it became apparent during the course of the hearing that the actual argument was different – 'the sands of HMRC's argument had begun to shift'. Now HMRC argued that the FTT had failed to identify 'the needs, views and characteristics' of the average consumer, but contained no assertion or discussion as to which characteristics should have been considered and determined by the FTT.

The judges considered that HMRC's position was, in reality, that the FTT had erred in the way in which it had determined the needs of the average consumer, because it had considered evidence which showed average behaviour, and based its analysis of similarity on that evidence, without also considering evidence as to the preferences and possible preferences of individual consumers. The judges were not certain that this was within the grounds on which HMRC were given permission to appeal, but they gave HMRC the benefit of the doubt, and commended the taxpayers' representatives for not objecting on those grounds.

HMRC's argument appeared to be that the FTT should not have based its conclusions on evidence about actual consumer behaviour but should have investigated the reasons for that behaviour. The UT considered that there was no justification in the precedents on fiscal neutrality for a proposition that the FTT was required to consider evidence as to "the average consumers' real reasons for behaving as they have" or "whether those consumers might occasionally have valued the opportunity to behave differently". The precedents suggested that it was up to the fact-finding court to consider all the evidence available and to decide what weight to give to it. In the view of the UT judges, both FTTs had understood their task and had set about it in the right way. They had come to conclusions that were justified on the evidence before them.

The UT also noted the force of argument put forward by one of the taxpayers' representatives that HMRC had not relied in the FTT on the ground put forward in this appeal, and if they had done so, the evidence

and the approach to it would have been different. To raise a completely new argument in the UT is not permitted.

Summing up, the judges said that fiscal neutrality requires that the supplies concerned are inherently similar. Evidence of the actual decisions made by consumers (their actual behaviour) is clearly relevant in deciding whether the nature of the supplies has a significant influence on the choices consumers make. The argument that "the real reasons for their choices" should be assessed instead was rejected.

HMRC's appeals were dismissed.

Upper Tribunal: *HMRC v The Rank Group plc and Done Brothers (Cash Betting) Ltd and Others*

2.3.6 Outstanding *Rank* claims

HMRC have issued a Brief to explain their approach to other claims that have been stood over behind the above cases, based on the claim that the treatment of their gaming machine income as standard rated was a breach of fiscal neutrality.

The brief does not apply to appeals that were originally stood behind *Colaingrove Ltd* or to the operation of non-Fixed Odds Betting Terminals (FOBT) from 6 December 2005 to 31 January 2013. Colaingrove Ltd withdrew its appeal and a replacement lead was set up. *The Rank Group Ltd* and *2016 G1 Ltd* are now the joint lead appellants for this case. The case is scheduled to take place at the First tier Tribunal in November 2020. The Tribunal has not decided the VAT treatment for the operation of non-FOBTs from 6 December 2005 to 31 January 2013 yet.

HMRC outline the history of the dispute that they accept has been settled by the Upper Tribunal decision in *Rank* and *Done Brothers*. They make the following points:

You will only be paid if your claim is properly evidenced.

Claims will not be considered unless they:

- *have already been made within the relevant deadline*
- *are appealed within the appeal deadline*

You cannot make new claims at this stage.

After examining a claim, HMRC may ask for more information. If this is not provided, claims may not be paid.

HMRC reserves the right to examine the amount of the claims as appropriate, including:

- *the requirement to apply revised partial exemption*
- *input tax*
- *capital goods scheme calculations*

Claims will also be adjusted for any amounts due to set-off under:

- *section 81(3) of the VAT Act 1994 (outstanding debts, assessments, etc.)*

- *section 130 of the Finance Act 2008 (outstanding debts under any other head of taxation)*

Any payment will be made net, taking into account any sums owed by you to HMRC.

The Brief was updated on 26 June to add more details on "how to progress a claim" and "what you will need to provide".

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2.3.7 Medical care

A company operated a franchise model for businesses which supply various packages of ultrasound scans for pregnant women. HMRC ruled that supplies by the company and its franchisees were standard rated; the companies appealed, arguing that they were exempt supplies of medical care. The franchisor and two franchisees formed a lead case, with 9 other appeals standing behind it.

The judge (Jonathan Cannan) considered the precedents of *d'Ambrumenil* and *Kugler* and concluded that a supply of medical care must be therapeutic or prophylactic in nature. The principal purpose of such a service must be to diagnose, monitor, treat or prevent illness. There might be more than one purpose, but the principal purpose will determine liability. In deciding that principal purpose, regard should be had to the perspective of the typical customer. As there were different scan packages available, the question would have to be asked in respect of the typical purchaser of each package.

The appellants argued that 'the relief of stress' was a therapeutic aim, and the psychological treatment recognised as medical in *PCF Clinic AB* (Case C-91/12) should not be restricted to treating or preventing a recognisable mental illness. The company's scans had the effect of reassuring women at an emotional and vulnerable time. HMRC submitted that medical care does not extend to general reassurance where there is no evidence that the supply benefits a woman's mental health.

All the franchisees are registered with the Care Quality Commission to carry out a 'regulated activity' at specified premises. This regulated activity is described as 'diagnostic and screening procedures'. The relevant legislation defines such procedures as including the use of ultrasound to examine the body.

HMRC relied on an expert witness who gave the opinion that the services were unnecessary, adding nothing to the NHS scans that were provided free during pregnancy. Their representative submitted that the core feature of the appellants' supplies is the opportunity to see and keep images of the foetus, determine its gender and/or have a 'baby bonding' experience. Any diagnosis, including the detection of abnormalities, was only an incidental benefit.

The judge noted that there was an issue between the parties as to whether the packages were single or multiple supplies. He rehearsed the 12 tests from *Honourable Society of Middle Temple*, but commented that the question did not address the fundamental issue in the appeal, which was whether the supply constituted medical care at all.

The judge went on to consider each of the packages in turn, and was satisfied that the principal purpose of the customers in each case was to obtain medical care. This was less clear in the 21% of cases where provision of images was a significant part of the supply, but the judge still considered that the principal concern of the customer was to make sure that the foetus was healthy.

The appeals were all allowed.

First-Tier Tribunal (TC07687): *Window To The Womb (Franchise) Ltd and others*

2.3.8 Remote consultations

A dispute was referred to the CJEU from Germany concerning the exemption of medical care provided by telephone consultation in the context of publicly funded health provision.

Some of the consultations were made by nurses and some by a category of assistant referred to as a "health coach". The employees responded to requests for information, and were able to use a computer-assisted approach to provide some medical advice. In a third of the cases, a doctor was involved at least to the extent of giving instructions or a second opinion. Random quality checks of recorded calls were carried out by a medical director.

The questions referred concerned the scope of the exemption. Some of the callers were given advice or information that did not involve medical treatment but rather a change of behaviour or lifestyle; the advice might be given by someone who did not have a recognised medical qualification.

The court noted the difference between art.132(1)(b) and art.132(1)(c). The first specified the place where medical care was to be provided; the second only specified the persons who were to provide it. Art.132(1)(c) could therefore cover telephone consultations, if they met the other conditions of that provision. That was in accordance with the principle of fiscal neutrality, and the interpretation of art.132 exemptions more broadly in line with their purpose of reducing the cost to the consumer of supplies in the public interest.

However, it was possible for the same supplier to make supplies that are within and outside the exemption. It would be for the referring court to determine whether and to what extent the telephone conversations fell within the provision, here translated as "curative treatment in the field of human medicine".

As precedent cases have held that diagnosis is within the exemption, the fact that calls had no prior prescription could not determine the issue against exemption; similarly, the fact that no medical treatment followed was not decisive, if the purpose of the call and the response was to protect the health of the individual. The court considered that the provision of specific information about diagnoses, therapies, treatments and medication could fall within the exemption; provision of more general information would not contribute to the protection, maintenance or restoration of human health and would not be covered. Provision of merely administrative information such as contact details would also not be exempt.

Turning to the second question, which related to the need for the call handlers to be "within the scope of the medical and paramedical professions as defined by the Member State", the court emphasised the importance of fiscal neutrality. The Member State had some discretion to define the qualifications required by medical service providers, but only to achieve the objective of ensuring that the services were of an appropriately high standard. It was therefore for the referring court to consider whether the exclusion of telephone services provided by nurses and medical assistants would be contrary to the principle of fiscal neutrality, "because these professional groups are able to ensure, on the basis of their professional qualifications, that such services provided by telephone are of a comparable quality level to those provided by other providers in this way".

CJEU (Case C-48/19): *X GmbH v Finanzamt Z*

2.3.9 Welfare

In TC06636, four YMCAs (which are separate charities independently registered for VAT) appealed against HMRC decisions that they were making exempt supplies of welfare. They were in receipt of grants from government to support vulnerable people; they argued that they made two supplies, one to the local authority that delegated responsibility to them (VATable, enabling recovery of input tax) and one to the vulnerable people (for no consideration, funded by the grant). HMRC responded that the support services were made to the individuals for third party consideration from the local authority; that was the economic reality.

The judge (Peter Kempster) considered:

- the nature of housing-related support (HRS) services;
- the identity of the recipient of the services;
- whether the services fell within "welfare";
- an argument about the reduced rate under Group 9 Sch.7A, which applies the reduced rate to "supplies of welfare advice or information by a charity".

The judge started with the contracts between the YMCAs and the local authorities. Some defined HRS services in detail; others had almost none (one referred to a definition in "schedule 1", but there was no schedule 1 in the document included in the bundle of evidence). The judge was able to make a number of findings of fact about the nature of HRS, which included a range of services provided on behalf of the local authorities. It was agreed that the YMCAs were not receiving a voluntary grant – they were receiving fees in return for providing the contracted services.

The appellants argued that the supplies could not fall within the exemption because the distressed person provided no consideration, and if the payments from the local authorities did constitute consideration, the local authority was not a distressed person. The judge did not agree that this was determinative. Both the EU and UK legislation only referred to the nature of the supply, not who paid for it or received it. According to the HL decision in *Redrow*, the YMCAs were supplying a service to the local authorities which was also for the benefit of the individuals. HMRC did not dispute that the local authorities would be entitled to reclaim any

VAT charged under VATA 1994 s.33, but they disputed whether any VAT should be charged. The judge concluded that there was a supply of services for VAT purposes by YMCA to the local authority (regardless of the fact that the main beneficiaries of the HRS are the young residents), and the identity of the recipient does not affect whether the supply falls within Item 9.

The judge did not accept the YMCAs' arguments on the application of Item 9 Group 7. In his view, the recipients of the services were "distressed persons" by reason of actual or potential homelessness; the services involved "instruction" in supporting them towards independent living; and the services were designed to promote their physical or mental welfare, taken in their context in line with the decision of Dr Avery Jones in *Watford & District Old People's Housing Association Ltd* (VTD 15,660). The local authorities determined that certain young people required supported housing and HRS. The HRS services might in a different context appear to be divorced from physical or mental welfare – for example, instructing someone how to hoover, or how to fill in a claim for housing benefit – but in the actual context of a distressed and vulnerable young person anxious to avoid repeat homelessness, the judge considered the HRS services were indeed designed to promote physical or mental welfare of the young recipient.

The judge noted the appellants' argument that HMRC's interpretation of "welfare" within Sch.9 appeared to leave nothing to be covered by "welfare advice or information" in Sch.7A. He disagreed: the reduced rate provisions specifically exclude "supplies of advice or information provided solely for the benefit of a particular individual or according to his personal circumstances" (Note 3(c)). There could be "advice or information" that is "provided solely for the benefit of a particular individual or according to his personal circumstances" but which does not amount to "instruction" in Item 9, and so does not constitute "welfare services" within Item 9.

There was also a question about the effect of the decisions. HMRC had indicated to three of the appellants in 2005 that HRS services were not exempt. They would therefore only apply the effect of the decisions (denying input tax deductions) from the date of the letters which communicated those decisions to the appellants. The fourth YMCA had not received any prior suggestion that its supplies might be taxable, so HMRC proposed to extend the effect of the decision back four years from the time it was made. The judge said that he had no jurisdiction to make any decision on this, but "completely obiter" he expressed the opinion that it was strange for one appellant to receive a less favourable treatment just because it had not had a control visit or a relevant discussion at the same time as the others.

The appeals were dismissed, and the appellants appealed further to the Upper Tribunal, where the case came before Mr Justice Marcus Smith and Judge Jonathan Cannan. The grounds of appeal were described as follows: the housing related support services fell outside the scope of Item 9:

- because of the manner in which they were provided, that is by way of a contract for the benefit of third parties;

- because the persons to whom these services were provided were not "distressed persons";
- because the services did not involve "instruction".

The UT decision set out the relevant statutory and related provisions, including in particular Item 9. It then addressed each of the three grounds separately.

The UT agreed with the FTT that the first ground depended on the question of whether Item 9 excluded supplies to third parties. The ground of appeal appeared to assume that this was the case, but the legislation had to be construed to determine the matter. After detailed examination, the judges concluded that it was the nature of the service that determined whether it should be exempt, not who paid for it. An argument based on the expressions "closely linked" and "directly connected" was dismissed as missing the point: this should focus not on the legal manner in which welfare services are procured, but on the practical reality of how the welfare services are provided. The appellants directly provided housing related support to those vulnerable persons referred to them by their counterparty local authorities.

The appellants argued that the effect of exemption was to increase costs, which was contrary to the intention of the law. The judges considered that the marginal increase in cost was not so great as to render the construction of the law "perverse"; and even if it was, if the law was clear, it had to be followed. The first ground of appeal was dismissed.

Turning to the second ground, the judges noted that the appellants relied on a dictionary definition that suggested that "distress" involved a severe circumstance, which did not apply to the recipients of these supplies. The FTT had concluded that severity was not necessary, and "living in impoverished circumstances" was also within the definition. The UT considered that the FTT's conclusion that the recipients of the supplies were "distressed" was a conclusion of fact, not a matter of law, and it was therefore not appropriate to raise on appeal.

The third ground depended on the meaning of the word "instruction", which the appellants argued carried the sense of "compulsion" or "command". The judges did not agree. The other meaning of instruction connoted "education", and the findings of the FTT that the services included "advice" and "information" were capable of falling within that meaning. Once again, the FTT decision was one of fact, and there was no reason in law for overturning it.

The appeals were all dismissed.

Upper Tribunal: *YMCA Birmingham and Others v HMRC*

2.3.10 Cost-sharing groups

A-G Kokott has given an opinion on the rules for cost-sharing groups in art.132(1)(f) PVD. In this case, the group is based in Hong Kong, therefore in a third state, whilst its members are subsidiaries of a group of companies, which are all established in the United Kingdom. Almost all those members, together with other subsidiaries of that group of companies in the United Kingdom, form a VAT group. The situation therefore requires consideration of how the CSG rules apply across

borders, in particular in relation to a third country, and how they may interact with VAT grouping under art.11, which also has the effect of not taxing transactions between members of a group.

The fact that Hong Kong does not have VAT made the first issue economically sensitive. If the CSG exemption applied, it would allow the group to buy resources without suffering VAT and bring them into the UK/EU without a charge.

The appellant (KIC) is the holding company of a group which contains a number of companies that are regarded as exempt educational establishments, being "colleges of a university". These colleges recruit students from outside the UK using a network of 500 recruitment agencies, none of which have an exclusive relationship with Kaplan. KIC also maintained an international network of representative offices. Prior to October 2014, the agents contracted directly with the UK holding company; at that point, the colleges established a limited company (KPS) in Hong Kong, 94% owned by the UK HC and the balance by the University of York, which owned 55% of the only international college that was not a 100% subsidiary of KIC.

From October 2014 onwards, the agents supplied their services to KPS. The place of supply of those services therefore moved from the UK to Hong Kong, and were no longer subject to VAT. KPS supplied the following services to KIC:

- services which KPS procured from the agents;
- services which KPS procured from the representative offices;
- services supplied by KPS dealing with matters such as compliance, together with the other activities discussed above, such as supporting the agents.

KIC gave evidence that its group would not seek recruitment services from anyone other than KPS. KPS charged each international college separately for the money due to accounts for the services provided to the relevant college. KPS charged each college both for its own services (e.g. compliance services) and for those procured from the representative offices on the basis of the number of students recruited for that college. KPS calculated the charges by pooling the costs and then dividing them on the basis of student numbers. Agents' marketing expenses were managed in the same way. However, agent commissions were directly attributable to individual students and were charged to the destination college for the student. Overall, no VAT was charged, relying on the CSG exemption.

It was common ground that there were sound commercial reasons for setting up KPS in Hong Kong; there was no suggestion that it was an artificial arrangement or that there was an abuse of rights. It was also not in dispute that KPS provides its members, the international colleges, with the services directly necessary for the exercise of their exempt activities and that the method of charging adopted by KPS provides for exact reimbursement of each member's share of the joint expenses.

HMRC ruled in April 2017 that the CSG exemption did not apply, and KIC was therefore liable for a reverse charge of £5.25m for the period

October 2014 to July 2016. As the UK group's outputs were largely exempt, this would be not recoverable.

The FTT referred questions to the CJEU. The first question asked whether there was a limitation on the territorial scope of the CSG exemption. If there was not, the further questions asked how the principle of preventing distortion of competition should be applied.

The third and fourth questions asked about the significance of the relationship between the "members" of the CSG: did the provision apply only to unrelated parties pooling resources in a CSG, or could it apply where the members were closely linked (members of KIC's corporate group) or for VAT purposes a single entity (a VAT group)?

There were some preliminary problems with the questions set. Part of the first question referred to the possibility of establishment of a CSG in a different Member State; that clearly was hypothetical in the context of this case and was therefore inadmissible.

The order for reference stated that KPS made its supplies to KIC, which was not itself a member of the group; however, the referring court stated that the colleges were "charged", and were deemed to receive the supplies because KIC was the representative member of a VAT group comprising them all. The A-G considered (contrary to the view taken by the Commission and the United Kingdom) that this meant the exemption was applicable in principle. It would be for the referring court to confirm whether the services were in reality supplied to KIC which sold them on (ruling out the exemption), or were in reality supplied to the colleges but subsumed within the VAT accounting of the VAT group.

The A-G commented that grouping is primarily a simplification that operates between the members of the group and the tax authority. It has no impact on the relationship between the group and third parties, who are unlikely even to know of its existence. The individual colleges still had contractual capacity in their own right, and they would also have the capacity to form and be members of a CSG.

The A-G then turned to the question of whether a CSG could be established in a third country such as Hong Kong. She had already considered this in the context of EU Member States in the *Aviva* and *DNB Banka* cases, and agreed with the UK and the Commission that it was not possible. This was based on the derivation of art.132 from 6th Directive art.13, which was headed "exemptions within the territory of the country". The arrangement of the exemptions in the Directive separates domestic transactions (arts.132 – 137) from international transactions (arts.138 – 165). If it had been intended that CSGs applied across borders, they would have appeared in the later articles.

This interpretation avoided an inconsistency with art.11, which explicitly provides for grouping to be allowed only where the persons concerned were established in the territory concerned. Given that the conditions for CSGs are looser than art.11 in terms of the required financial and economic links, it would make little sense if a more favourable exemption could be achieved with less stringent conditions. In the present case, KPS is excluded from joining the VAT group by art.11 because it is established in Hong Kong; why then should it be able to achieve the same result by using art.132(1)(f)?

The tax planning opportunities that would be available if cross-border CSGs were allowed were outlined and considered too favourable to have been intended by the legislature. The company's argument that art.132 provided for exemptions in the public interest, and therefore the risk of exploitation of tax rates was negligible, was described as "surprising" by the A-G.

The requirement to prevent distortions of competition also ruled against cross-border CSGs. It would not be practical for Member States to assess whether the condition was satisfied where a CSG was established in a third country. The basic requirement of art.131, to ensure the correct and straightforward application of the exemptions, also militated against the inclusion of such groups.

The A-G went on to consider the other questions in case the court disagreed with her on the question of whether third country CSGs were permitted. She described the purpose of the provision as being intended to offset the competitive disadvantage of smaller undertakings by comparison with a larger competitor. She noted that the competition clause contained in art.132(1)(f) seems somewhat unusual in this regard and makes little sense, because the whole point is to reduce distortions of competition.

She therefore set out some convoluted principles of interpreting exceptions strictly, and exceptions to exceptions broadly, in order to achieve the objectives of the Directive. She made a number of observations about the way in which Member States should approach the question of establishing distortions of competition and apply the rule, including some indications of when the exemption might be applied inappropriately:

- the group supplies the same services to a significant extent for consideration to non-members and is to that extent, by exploiting effects of synergy, operating on the market primarily as a competitor and less as a cooperative group. This could, under certain circumstances, constitute a correspondingly genuine risk of distortion of competition in relation to third-party suppliers.
- the group does not supply any services tailored to the specific needs of its members, but only sells on the purchased services. Those services could just as easily be offered and received by others. Here, too, third-party suppliers would be forced from the market in question.
- the primary purpose of the group's formation is simply to optimise the input VAT burden rather than to establish reciprocal cooperation with a view to avoiding a competitive disadvantage. An optimisation of the input VAT burden can be taken to exist where a competitive advantage is created by shifting any necessary peripheral services received to a group in a state with a very low VAT rate or even no VAT.

Having effectively found against the appellants on all the issues so far, the A-G turned to the relationship between VAT grouping and CSGs. Here, she disagreed with the Commission and the UK, and opined that there was no reason for members of a VAT group to be precluded from enjoying the exemption for supplies by a CSG to them, as long as the other conditions

were met. The law did not require a "group of independent persons" but "independent groups of persons". However, if all the members of a CSG were members of the same VAT group, art.11 would take precedence over art.135(1)(f) – the supplies would be outside the scope rather than exempt.

CJEU (A-G) (Case C-77/19): *Kaplan International Colleges UK Ltd v HMRC*

2.4 Zero-rating

2.4.1 Digital publications

In an article in *Taxation*, Melanie Lord discusses the *News Corp* decision and the Budget announcement that digital publications were to be zero-rated from 1 December. She notes that audiobooks are a 'different animal' because of the element of performance, and will remain standard rated in spite of representations by the Royal National Institute of the Blind.

Taxation, 2 April 2020

In the event, the change was brought forward to 1 May by the *Value Added Tax (Extension of Zero-Rating to Electronically Supplied Books etc) (Coronavirus) Order 2020.* This was a response to the coronavirus pandemic, which has made it much harder to obtain physical books and newspapers and has increased the attractiveness of digital supplies.

The extension is intended to provide for zero-rating of a wide-range of e-publications, but not:

- publications that are wholly or predominantly advertising;
- audiobooks;
- intellectual property;
- e-readers;
- e-reading software.

Zero-rating also extends to the loan of e-publications for a charge (e.g. by a library).

The change is made by adding a new item to VATA 1994 Sch.8 Group 3 which states that the kinds of publications which were already zero-rated will also qualify for relief when 'supplied electronically' unless they are wholly or predominantly devoted to advertising or they consist wholly or predominantly of audio or video content. There is no legislative definition of what 'supplied electronically' means and HMRC has indicated that it 'falls to be interpreted in accordance with its generally accepted meaning and includes supplies made over the internet and by e-mail.'

Revenue & Customs Brief 3/20; SI 2020/459

The change of rate raises the question of what the tax point is for annual subscriptions: if the subscription has been received before the change of rate, covering a period straddling 1 May 2020, is the publisher eligible for a reduction in output tax, and is the customer entitled to ask for a refund? The relevant rules are in VATA 1994 s.88 and VAT Notice 700 section 30.8, which appear to be inconsistent. It is not clear whether an annual subscription for a periodically delivered publication is a continuous supply, or a single payment for a series of separate supplies, or a series of separate supplies. This is problematic because of the different tax point rules that apply to goods and to services.

The question is also raised of the borderline between something that is a mere publication and something that is more interactive and is therefore not covered by zero-rating.

2.4.2 Books etc.

In TC07255, the FTT allowed an appeal by a sole trader who sold a product called the “Action Day Planner”. HMRC ruled that the product did not qualify for zero-rating and issued a decision that he should be registered with effect from 26 July 2013, together with assessments to tax and penalties. He appealed, and the Tribunal had to consider whether the product was in fact eligible for zero-rating.

The trader operates from his home in Iceland, selling goods through the Amazon marketplace. HMRC began a routine check on non-established taxable persons in July 2017 and concluded that he should have been registered from his first sale into the UK (as non-established persons do not have a registration threshold). The trader had applied for registration on 4 July 2017, but he considered that no VAT was payable.

The assessments covering the long registration period from July 2013 to 30 June 2017 was £158,000, with another for £12,770 for the 08/17 period, and a late notification penalty of £33,189 and an inaccuracy penalty of £1,915 were later added.

The Tribunal examined an example of the product, which is between A4 and A5 in size and contains 115 pages. It is described as a time management tool developed to “help people to grow; to teach and instruct people time management skills”. It is an interactive tool intended to facilitate the discipline of time management, step by step building habitual behaviour. The first 16 pages of the ADP contain text setting out a narrative of the ethos articulated by the Appellant for effective time management following themes of “attitude”, “goals” and “actions” together with the “discipline of rituals”. The remainder of the ADP is taken up with 52 double page planners. The layout follows the methodology advocated in the first 16 pages with space to set out “tasks to execute” “delegation and teamwork” a column for each day of a week and “goals/projects I am going to work on this week”. The columns for each day represent a little over one quarter of each double page.

HMRC’s view was that this was essentially a stationery item similar to a diary or an address book. VAT Notice 701/10 contains a discussion of the difference between “stationery” and “books that qualify”.

The Tribunal considered the precedents of *Colour Offset Ltd* (HC 1995) and *Tudor Print and Design Ltd* (VTD 17848). In both cases the courts confirmed Customs’ decision that the products were mainly intended to be written in, and were therefore stationery.

The appellant appeared in person, and presented an analysis of the items that are regarded as zero-rated according to Notice 701/10. In particular, some products that are intended to be written in are zero-rated. HMRC’s representative could not explain why HMRC regard GCSE revision aids and crossword books as zero-rated when writing in them is a significant purpose of the product.

The Tribunal noted that the product had to be a “book” to qualify at all; it was then necessary to consider whether it was excluded as “stationery”.

The product had the characteristics of a book – hard covers and pages. The judge noted that the purpose of the section at the front did appear to be to impart information; if there had only been a single template for the planning section, which the purchaser would have to photocopy to apply the lessons learned, there would be little doubt that the product would be zero rated. After much debate, the Tribunal decided that the fact that there were 52 copies of the template did not change the main function or purpose of the product to that of a diary. It was no different from a crossword book or exam revision guide. It qualified for the zero rate.

This meant that the assessments fell away. In theory, the trader was still liable for registration, as he had not applied for exemption on the grounds that his supplies were all zero-rated; however, the penalty for failing to register was tax-geared, so there was no penalty to pay. The appeal was allowed, and HMRC appealed to the Upper Tribunal.

The essence of HMRC's grounds of appeal was that the *Colour Offset* decision was binding on the FTT, but the FTT had failed either to identify the correct test set out in that case, or to apply the test correctly to the facts it had found.

HMRC's representative also argued that the product would have been excluded from relief from purchase tax as a "diary, calendar or similar article", and that meant that the UK would not have been able to give it relief from VAT. There was a standstill clause in the Second Council Directive 67/228/EEC to the effect that exemption with refund of VAT (zero-rating) should only be allowed 'where the incidence of such measures does not exceed that of the reliefs applied under the present system' (i.e. purchase tax, which preceded VAT). This was not in the permitted grounds of appeal; HMRC's representative acknowledged that he could only ask the UT to apply it if he persuaded them first that there was an error of law in the FTT decision based on *Colour Offset*, and the UT then chose to remake the decision itself.

The judges (Judge Swami Ragavan and Judge Jonathan Richards) noted that HMRC's representative 'admirably discharged his professional duties when acting against an unrepresented party' by pointing out the limited significance of a relevant passage in the judgment in *Colour Offset*: the judge had agreed that the main function of the products at issue in that case was to be written in, and had not necessarily agreed with the assertion that the question of zero-rating should be determined by reference to that 'main function'. However, the judges considered that this was the only sensible interpretation of the judgment: the judge had concluded that the product did not qualify for zero-rating, and the only possible reason for that conclusion was that his finding that its main function was to be written in rather than read or looked at.

The precedent of *Ferrero UK Ltd* was not directly relevant but the CA decision was 'instructive' by analogy. The question there was whether something was a 'biscuit'; the CA held that, where there were sufficient characteristics of a product to place it in either of two categories, it should be placed in the category to which it is 'more akin'. That would also suggest that it is the 'main function' that counts.

The first FTT error of law was in holding that HMRC's practice in treating crossword books, exam study guides etc. as zero-rated was relevant in reaching a conclusion on this matter. As the FTT correctly

stated, that was set out in HMRC guidance, but that had no legal effect. The FTT had concluded that any item 'which has as its main function informing/educating or recreational enjoyment' was also a book; that was not justified.

The UT noted that the taxpayer continued to represent himself, and he only relied on Notice 701/10. 'Despite prompting from us' he made no reference either to the statutory provisions or to *Colour Offset* when making his written or oral submissions. He concentrated on HMRC's practice, but did not address the crucial legal question.

Given that this was an error of law, the UT had to consider whether to remit the case to the FTT or to remake the decision (or to confirm it, if they were satisfied that the decision was the right one in spite of the errors). As the issue depended entirely on the physical characteristics of the product, and the UT had before it all the evidence that the FTT had (including a blank copy of a planner), the judges decided that they could remake the decision.

They considered that the 'main function' of the planner was to be written in, based on the blank space being significantly greater at 52 double page spreads than the written material at 14 pages. The fact that it was directed at a particular calendar or academic year also suggested that the intention was to hold written entries relating to that year, after which a new one would be purchased.

The judges went on to consider the content of the first 16 pages (14 written and two blank covers) in case they had a main purpose that overrode the main purpose of the rest of the product. They described 8 of these pages as containing only 'general insights', and the 104 pages of blank space were more suggestive of the main function. 5 pages were effectively a guide to using the 104 pages, which again suggested that the 104 pages were where the main function was to be found.

As the FTT had found for the taxpayer on principle, it had made no findings about the quantum of the assessments or the penalties (such as whether the behaviour was 'careless' or might have been subject to a reasonable excuse defence). The UT had no material on which to make a decision in relation to these matters, so it remitted the case to a differently constituted FTT which should consider them on the basis that the product was not a book qualifying for zero-rating.

Upper Tribunal: *HMRC v Gardarsson*

2.4.3 Infringement proceedings

The UK provided in the *Terminal Markets Order* (SI 1973/173) for the zero-rating of certain supplies of goods and services in the course of dealings on specified terminal markets (mainly commodities markets based in London). This zero-rating has applied for the whole of the UK's membership of the EU. It was notified to the Commission in December 1977 as a special measure that the UK intended to retain following introduction of the 6th VAT Directive.

In March 2018 the Commission commenced infringement proceedings against the UK, claiming that changes made to the Order since 1973 extended the scope of the derogation which was requested in 1977; the Commission should have been notified of such amendments. The UK

responded, disputing the substance of the allegations, and a reasoned opinion followed in July 2018.

The main objection was that further terminal markets were added to the list in 1981 and 1987, and simplification measures were introduced to record-keeping requirements for certain other markets in 1997, 2004 and 2005. These relaxations were argued by the Commission to be "more than negligible" changes and would have a measurable effect on the overall amount of UK tax revenue collected at the stage of final consumption.

The UK government responded in September 2018, submitting that the amendments introduced since the notification did not extend the notified measure beyond its purpose but, on the contrary, made purely formal amendments, and offering other responses to the Commission's case. Nevertheless, the Commission decided to bring formal proceedings on 1 April 2019; the CJEU continues to have jurisdiction in such disputes, even after Brexit, in accordance with the Withdrawal Agreement.

The CJEU started its decision by rejecting the relevance of the alleged amount of tax revenue involved. That was relevant to an application to amend a derogation submitted by a Member State before 1 January 1978, in accordance with art.395(2) PVD; but the point of the dispute was that the UK had not made such an application. The only issue before the court was therefore whether such an application was required.

The court agreed with the Commission's contention that national derogations must be interpreted strictly and must be strictly proportionate to the aim of simplifying the charging of VAT. The court considered that a derogation which excepts certain transactions from the basic charging provision of PVD art.2 cannot be extended to transactions that were excluded from the derogated regime when it was first authorised; "That conclusion is all the more relevant in the case of markets covering types of transactions which did not exist at the time of such notification."

The fact that the extended measures served the same purpose as the original derogation could not justify such an extension. In the interests of transparency and legal certainty, notification should have been made. The amendments did not only extend zero-rating to new markets, but also to new types of transactions.

The question of whether an application for an extension to the derogation would have been approved did not affect the requirement to submit one. The court ruled that the UK was in breach of its obligations and awarded costs to the Commission.

CJEU (Case C-276/19): *Commission v UK*

2.4.4 Personal protective equipment

In response to the pandemic, an immediate temporary zero-rating was announced for supplies of personal protective equipment (PPE). The zero-rating covers to supplies of PPE made between 1 May and 31 July 2020 and which are recommended for use by Public Health England in its guidance dated 24 April 2020 titled 'Guidance, COVID-19 personal protective equipment (PPE)'.

The change was made by the *Value Added Tax (Zero Rate for Personal Protective Equipment) (Coronavirus) Order 2020*. This inserts a new group 20 into VATA 1994 Sch.8.

The change has also been noted in section 3.5 of the Notice *Health Professionals and Pharmaceutical Products* and in the *VAT Health Manual*.

Revenue & Customs Brief 4/20; SI 2020/458; Notice 701/57, VATHLT2021

2.4.5 EEA prescribers

Amendments have been made to the Notice *Health Professionals and Pharmaceutical Products* to add EEA health professionals to the list of relevant practitioners at paragraph 3.2.3.

Amendments have also been made to HMRC's *VAT Health Manual* confirming that guidance on the VAT zero rate and prescriptions prescribed by EEA health professionals will be issued at the end of the Brexit transition period, and to add a new section on *The Value Added Tax (Drugs and Medicines) Order 2020*.

VATHLT6030, VATHLT6020; Notice 701/57

2.5 Lower rate

2.5.1 Temporary rate cut

One of the measures on 8 July introduced in the Summer Fiscal Statement to stimulate the economy is a targeted temporary VAT rate cut, which is described in detail in a Revenue & Customs Brief. The following supplies will be charged at 5% instead of 20% from 15 July 2020 to 12 January 2021:

- food and non-alcoholic beverages sold for on-premises consumption, for example, in restaurants, cafes and pubs;
- hot takeaway food and hot takeaway non-alcoholic beverages;
- sleeping accommodation in hotels or similar establishments, holiday accommodation, pitch fees for caravans and tents, and associated facilities;
- admissions to the following attractions if they are not already eligible for the cultural VAT exemption:
  - theatres
  - circuses
  - fairs
  - amusement parks
  - concerts
  - museums

- zoos
- cinemas
- exhibitions
- similar cultural events and facilities

Where admission to these attractions is covered by the existing cultural exemption, the exemption will take precedence.

Revenue & Customs Brief 10/2020

Further information is available at www.gov.uk/guidance/vat-reduced-rate-for-hospitality-holiday-accommodation-and-attractions.

This will pose various challenges for eligible businesses, particularly if they have previously only made supplies that have been chargeable at the standard rate. They will have to identify those supplies that can be charged at 5% and make sure that the correct rate is charged on those supplies that are still charged at 0% (e.g. cold takeaway food) or 20% (e.g. alcoholic drinks). It may be necessary to reprogram tills, or to consider the effect on retail scheme calculations.

Businesses will also have to decide whether to adjust their selling prices to reflect the reduction in VAT. There is no obligation to do so: the idea of the tax cut is to stimulate demand, but if the trader is confident that the demand will be there, the result is to support profits because a higher proportion of the takings are retained. It is a commercial decision -not a tax rule – that may be affected by the cost or inconvenience of changing price lists, for example on printed menus.

If the business wishes to pass on the whole of the tax reduction to customers, the reduction from 20% to 5% represents a 12.5% cut in the VAT-inclusive price – a selling price of £10 falls to £8.75.

The most technically complicated rule on a change of VAT rate applies where the tax point for the supply has been advanced by the issue of a tax invoice or the receipt of payment. This could apply where businesses have received advance bookings before 15 July for supplies that will take place afterwards. The receipt of money or the issue of a tax invoice normally moves the time of supply to that date, which means that the liability of the supply would be fixed at 20%; however, under VATA 1994 s.88, the trader may ‘elect’ to apply the ‘basic tax point rule’ instead and account for only 5%. The timing of the liability to pay HMRC is still based on the date of receipt, but the amount due can be reduced. The trader ‘elects’ simply by applying the rule – there is no paperwork involved.

These rules are described in detail in the VAT Guide section 30 (Notice 700. If a VAT invoice has been issued showing tax at 20%, a credit note has to be issued, which means that the benefit of the reduction goes to the customer. If no VAT invoice has been issued, it is up to the trader to decide whether to make a refund to the customer – it is not required by the law. If standard rated VAT has already been accounted for on a VAT return that has been submitted, an adjustment to output tax can be made on the next return.

When the rate goes back up from 5% to 20%, it is normally permissible not to ‘elect’ to apply the changed rule, where an invoice or receipt falls

before the change. However, it is possible that the government will introduce 'anti-forestalling rules' to stop businesses benefiting from the reduced rate on advance bookings for supplies taking place after 12 January 2021. No indication of such rules has been announced yet.

The legislation introducing the change was published on 14 July. It includes a table of revised Flat Rate Scheme rates, which of course are significantly different for affected businesses that continue to use the FRS.

SI 728/2020

2.6 Computational matters

Nothing to report.

2.7 Discounts, rebates and gifts

2.7.1 Prompt payment discounts

The rules on prompt payment discounts were abruptly changed in the 2014 Budget, with immediate effect for supplies of telecommunications services and delayed implementation for other supplies one year later. In TC06730, the FTT considered a case that may indicate why HMRC sought to act. It concerned supplies made by Virgin Media Ltd (VML) between 28 August 2012 to 30 April 2014.

The company supplied 95% of its customers with telecommunications connections on a monthly payment plan (referred to as "FLR services" – Fixed Line fibre optic cable and Related telephony services). It supplied the other 5% on annual payments for a lesser sum (the "saver price"). The company argued that the saver price was effectively the monthly sum reduced by a prompt payment discount (PPD); under the rules then in force (Sch.6 para.4(1) before amendment), it was only liable to account for output tax on the lower amount. HMRC disagreed, and raised assessments for £63m of VAT and £3m of interest.

Judge Harriet Morgan considered the UK law and articles 73 and 79 PVD, as well as provisions on the timing of the charge to tax. She summarised the issues as follows:

- whether the saver price constituted a prompt payment discount;
- whether the exclusion in para.4(2) of "payment by instalments" applied;
- whether the saver price was a discount applicable to those customers who did not choose that option.

HMRC argued that the different groups of customers contracted for different supplies. Monthly customers were entitled to one month's service for a fixed sum; saver customers were entitled to 12 months' service for a sum that was less than 12 times the monthly sum. It was not refundable if the services were not required during that time. Because the contracts were different, it was not appropriate to regard the saver price as comparable to the monthly price but reduced by a PPD. HMRC considered that the 2014 amendment was made to remove an ambiguity in the law as previously written; however, the *Marleasing* principle required the UK law to be interpreted in accordance with the EU law, where it was ambiguous, and this required the whole consideration actually received to be brought into account.

The judge examined the contractual arrangements in detail, including the way in which a customer chose one option or the other, and the way in which that choice could be changed. She also considered the principles of construing contracts for VAT, as set out in particular in *SecretHotels2* and *Newey*. She summarised her conclusions as follows:

(1) It is necessary to assess (a) the contractual effect of the arrangements between VML and its customers in relation to the provision of the FLR services in the relevant period, (b) in the light of the contractual nature of the arrangements, what was supplied to whom for what consideration and on what terms and (c) in the light of that analysis, whether the FLR services "are supplied for a consideration in money and on terms allowing a discount for prompt payment" within the meaning of para.4(1).

(2) In assessing the nature of the contract between VML and its customers, as set out in Secret Hotels2 , the tribunal must consider the words used, the provisions of the agreement as whole, the surrounding circumstances in so far as they were known to both parties, and commercial common sense.

(3) In analysing the effect of the arrangements for VAT purposes it must be borne in mind that consideration of economic and commercial realities is a fundamental criterion for the application of VAT. Whilst the contractual position normally reflects that reality, the contractual position may be vitiated on the relevant facts if, for example, the contractual terms constitute a wholly artificial arrangement. This is also reflected in the principle that there is a supply for consideration only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance. It follows that a supply of services is objective in nature and applies without regard to the purpose or results of the transactions concerned.

Applying these principles, the judge concluded that HMRC were right: different contractual options were offered, and those who chose the monthly option were not paying a higher price that could be reduced by a PPD. They were receiving a different package of services and paying the full price for what they had chosen.

That was enough to dispose of the appeal, but the judge also considered the other arguments. In HMRC's view, a PPD could only apply if a supply was made before payment was due. In the present case, the tax point for the continuous supplies was always triggered by the receipt of payment. It was therefore not possible for there ever to be a price that could be reduced by being received earlier. The judge examined this argument in detail and concluded that HMRC were wrong. This interpretation created more difficulties and appeared to be out of kilter with the plain meaning of para.4(1). If she was wrong about the basic application of the PPD rule, this second line of attack would not assist HMRC.

She came to the same conclusion on HMRC's arguments about the "instalments exclusion" in para.4(2). The monthly payments were not instalments of a larger total debt. She also rejected HMRC's contention that para.4(1) should be interpreted in line with the *Marleasing* approach as only allowing the PPD to be taken into account for VAT where the discount was actually allowed to reduce the consideration. That was contrary to the plain intention of the provision, which was a "blunt instrument" (and contrary to EU law) that was, until 2014, intended to alleviate the practical difficulties faced by businesses in determining the VAT charge where there is doubt at the time of invoicing about how much will be received.

On the basic application of para.4(1), therefore, the appeal was dismissed. The other matters would only become relevant if the company successfully appealed against that part of the decision.

The company has now appealed to the Upper Tribunal against the FTT decision on the "different supplies issue", where the case came before Mr Justice Morgan and Judge Hellier. HMRC cross-appealed against the decisions on the "time of supply issue", the "instalments issue" and the "payment issue". Because the UT agreed with the FTT on the first issue, it was not necessary to consider HMRC's cross-appeals.

The judges considered the contracts and the arguments again in detail, but essentially came to the same conclusion as the FTT for the same reasons. In particular, they did not accept that the saver customers received a "discount for prompt payment":

'It is true that £120 is less than 12 times £13.90 and it is also true that the payment of £120 is made earlier than the dates of the monthly payments. However, the differences between the two sets of terms do not necessarily involve a "discount" and even if they did the discount is not "for prompt payment". As to the "discount", a payment of £120 for 12 months is not less than, for example, three payments of £13.90 in a case where the customer terminates the monthly arrangements at the end of 3 months. Further, given the different commitments by the customer (paying for 12 months rather than paying on a monthly basis with a right to terminate the arrangement) the difference between £120 and 12 times £13.90 must reflect the fact that the customer on the saver basis is committing himself to a longer period of taking the services and cannot be said to be exclusively due to the fact that the £120 is paid earlier than the dates of the monthly payments.'

The judges added the following comment which strengthened their conclusion:

'We add that the result contended for by VML itself suggests that VML's approach involves a misapplication of paragraph 4. VML's case is that the saver basis involves a discount for prompt payment as compared with the monthly payment basis. VML says that the discounted consideration is £120. However, VML does not pay VAT in relation to the consideration of £120 at the time when the £120 is paid to it but instead VML creates an entirely notional set of terms involving payments of £10 per month and then pays VAT on the notional basis that it has not received a one-off payment of £120 but instead it receives £10 every month for 12 months. But VML does not offer a set of terms which allows payment of £10 per month for 12 months. Paragraph 4 refers to a set of terms "allowing" a payment and cannot apply to a notional set of terms which VML does not allow.'

The appeal was dismissed again.

Upper Tribunal: *Virgin Media Ltd v HMRC*

2.7.2 Retrospective discounts

WCT, a Romanian company, entered into a distribution agreement for mobile phone products with N, a Finnish company. Mobile phones were delivered to WCT from Finland, Germany, Hungary and Romania. N used its registrations in Finland, Germany and Hungary to account for

supplies from each country, and issued VAT-free invoices to WCT in Romania for WCT to self-account for VAT on the purchases. For domestic deliveries within Romania, N issued invoices with its Romanian VAT number, and charged deductible Romanian VAT to WCT.

N granted WCT quarterly volume discounts that were granted when a minimum quantity was reached. This was calculated regardless of the delivery location of the goods. For these discounts, N issued a single quarterly invoice with a negative balance with a minus sign. This invoice included the Finnish VAT number, although some of the goods covered by these discounts had been delivered from Romania. WCT then booked the corresponding VAT using the reverse charge mechanism. WCT recorded the entire amount of the discounts received as intra-Community sales.

Following an inspection, the Romanian tax authorities decided that WCT had accounted for VAT incorrectly because it had failed to distinguish between domestic purchases and acquisitions in dealing with the discount adjustments. An assessment for just under €174,000 in VAT and interest followed. The company appealed, and questions were referred to the CJEU.

WCT argued that there should be no overall difference in the tax revenue, whichever method it used to adjust for the discount, and requiring a distinction between the two types of purchase was ‘excessive formalism’. The assessment breached the principle of fiscal neutrality. It was also impossible or excessively difficult to make the adjustment in the way the authorities wanted, because N had deregistered in Romania by the time the tax audit was carried out.

The questions referred asked for guidance on the adjustment of input tax deductions, particularly in the circumstance where the supplier had ceased to be registered in the country, and also whether art.90 required a Member State to have clear and explicit rules governing the adjustment of the tax base for a supply.

The CJEU suggested that the specific wording of the first question referred to the wrong provision: it was about input tax adjustments under art.185, not adjustment of the tax base under art.90. The court confirmed that it was necessary for discounts received after a purchase to be reflected in a reduction in the input tax claimed. The fact that a single invoice had been issued to record discounts on acquisitions and on domestic purchases made no difference. There should be a reduction in the input tax claimed.

The second question asked whether the deregistration of the supplier made a difference to the operation of art.185, because the output tax accounted for by the supplier would not be adjusted. The court replied that the obligation to adjust input tax arose regardless of any adjustment to the supplier’s output tax.

This appears to miss the point of the question, and it is regrettable that an Advocate-General’s opinion was not used to explore the issues more fully. WCT argued that there ought to be no net effect on Romanian tax revenue: if it had accounted for the discounts ‘properly’, it should have:

- claimed a refund of acquisition tax, netted off against a reduction of input tax, netting off to zero on the VAT return, in respect of the intra-community proportion of the discount;
- been repaid 'discount plus Romanian VAT' by N in respect of the domestic proportion, whereupon N would have reclaimed the output tax from the tax authorities and WCT would have reduced its input tax claim – once again netting off to zero, but in this case not on the same tax return.

If N had accounted for the output tax, and the authorities therefore had the money, this would appear to be a situation in which WCT might have *Reemtsma* rights against the tax authority; however, that issue is simply ignored in the decision.

CJEU (Case C-684/18): *World Comm Trading Gfz SRL v Agenţia Naţională de Administrare Fiscală (ANAF), Direcţia Generală Regională a Finanţelor Publice Ploieşti*

2.7.3 Manual change

HMRC have updated the *VAT Supply and Consideration Manual* to provide guidance on changes to the procedure for making VAT adjustments where there has been a change in consideration from 1 September 2019, to include information on self-billing.

The context is the change to SI 1995/2518 reg.38 that required a genuine reduction in consideration, including a return of consideration received, before output tax could be adjusted under the provision.

VATSC06635

2.8 Compound and multiple

2.8.1 HMRC guidance

An update to the VAT guide in May gives a cross-reference (by hyperlink, from the web version) to the *VAT Supply and Consideration Manual* which sets out HMRC's approach to distinguishing between compound and multiple supplies. This includes consideration of a number of precedent cases, including:

- *Telewest*, *Part Service* and *Lower Mill Estate*, on the question of whether there is more than one supplier;
- a list of 22 other cases, some dating back to before *Card Protection Plan* (in spite of courts saying that they are now of limited relevance) but including 11 CJEU decisions and the Upper Tribunal decision in *The Honourable Society of Middle Temple*, which has been extensively cited in recent cases on the issue.

Notice 700; www.gov.uk/hmrc-internal-manuals/vat-supply-and-consideration/vatsc11100

2.9 Agency

2.9.1 Services or staff?

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

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

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

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

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

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

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

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

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

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

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

First-Tier Tribunal (TC07690): *Mainpay Ltd*

2.9.2 Updated Manuals

HMRC have updated the VAT *Taxable Person* Manual in relation to the VAT consequences of supplies by nursing agencies to refer to most recent version of VAT Notice 701/57 *Health professionals and pharmaceutical products*.

VTAXPER67500

2.10 Second hand goods

Nothing to report.

2.11 Charities and clubs

Nothing to report.

2.12 Other supply problems

2.12.1 Toolkit

HMRC have as usual updated the toolkits that are intended for agents to use when assessing the reliability of a client's systems for producing accurate VAT returns. They are a good guide to the risks of error that may arise, but the practicality of using them as an external VAT adviser is questionable. They are likely to be very useful for internal auditors.

HMRC Toolkit: *VAT Output Tax (2020)*

3. LAND AND PROPERTY

3.1 Exemption

3.1.1 Release of an option

For many years, HMRC's policy has been that the grant of an option to acquire land is an exempt supply (as stated in Notice 742). That policy was reconsidered and the conclusion drawn that it was a taxable supply of services rather than an exempt supply of land; the release of an option was the 'mirror image' of a grant, so it would also not be exempt. This led to an appeal in relation to a company's 12/16 tax return, where HMRC assessed for an underdeclaration of output tax of £237,500 on the release of an option for £1.425m. No option to tax had been exercised in relation to the land.

The judge (Guy Brannan) examined the contracts for the transactions concerned, then rehearsed the relevant law. This was agreed to be PVD art.135(1)(j), 'the supply of a building or parts thereof, and the land on which it stands'; and art.15(2)(a), which permits Member States to 'regard as tangible property' 'certain interests in immovable property'. This is transposed into UK law by Item 1 Group 9 Sch.9 VATA 1994, which exempts 'the grant of any interest in or right over land, or of any licence to occupy land'; and Note 1 which states '"Grant" includes an assignment or surrender and the supply made by the person to whom an interest is surrendered when there is a reverse surrender.'

Next the judge considered the CJEU precedent of *Staatssecretaris van Financien v Shipping and Forwarding Enterprise Safe BV* (Case C-320/88), in which for reasons to do with transfer duty a bankrupt company sold its rights under a contract to purchase land before taking title. The court held that a supply of goods for VAT purposes extended to any "transfer of the right to dispose of tangible property as owner", even though there might be no transfer of legal ownership. This was to ensure consistency of treatment across the EU, regardless of the local civil law of ownership.

HMRC submitted that the UK law had correctly transposed the EU law. Section 7.4 of Notice 742 stated that 'if you grant someone the right to purchase an interest in your land or building within a specified time you are making a supply of an interest in land'; the internal guidance manual at VATLP20000 (dated 7 July 2017) confirmed that this was an exempt supply. However, in their current view, the option agreement created an interest in land for domestic English land law purposes, but it did not give the holder the right to dispose of tangible property as owner. It was not therefore a supply of goods under art.14, and was not capable of exemption under art.135(1)(j).

HMRC's representative referred to the CJEU decision in *Marleasing*, and to the HL decision in *Sinclair Collis Ltd*, as authority for the proposition that UK land law could not extend the meaning of what would be exempt under EU law.

The taxpayer's representative argued that a call option, duly protected by a notice or a land charge, prevents the grantor of the option from selling the property unencumbered to a third party. Thus, the grant of an option

meant that the grantor's interest was taken away from him and prevented him from disposing of the property unencumbered to a third party – it also gave the grantee such as the appellant in this case) the right to dispose of it as owner. HMRC had failed to put forward any credible argument to the effect that, if the granting of an option to purchase land created an interest in land, the surrender of such an option was not also the transfer of an interest in land.

The FTT went on to consider the proposition that only a supply of goods could fall within art.135(1)(j). Although this had been assumed by the A-G in *Lubbock Fine* (where the CJEU held that a surrender of a lease was exempt as 'letting of immovable property'), the judge did not see any reason for this view. It would be consistent with the scheme of art.135 to exempt transactions involving lesser or derivative interests in land and buildings as well as the whole interest. The A-G had set out the rationale for exemption in the opinion on *Lubbock Fine*, which included the concept of exempting subsequent transactions in buildings after first occupation because they had already been "consumed". That would apply equally to lesser interests.

The judge also considered the irrational difference that would follow between the following transactions:

- vendor sells property to purchaser for £1m – exempt;
- vendor grants call option for £100,000 (according to HMRC, taxable) which carries an exercise price of £900,000 (exempt).

The history of the EU rules and their implementation in UK law was also considered, including the background notes proposing the drafting of the Sixth Directive. It appeared that the exemptions were drawn up with regard to the existing exemptions in the various Member States. The fact that the UK's law and HMRC's practice in this area had been unchallenged for over 40 years strongly suggested that Item 1 Group 1 Sch.9 and Note 1 were compliant with EU law.

The fact that HMRC's published practice regarded a call option as exempt, and Note 1 confirmed that the surrender of an interest was treated in the same way as the grant of an interest, would have given the appellant a reasonable expectation that its surrender would have been exempt. It would have had no reason to ensure that the contract stated that the consideration was to be regarded as VAT-inclusive. Had the FTT not considered that the transaction was exempt as a matter of law, significant unfairness would have arisen.

Although the case concerned an important and not altogether clear aspect of EU law, neither side had asked for a reference to the CJEU. The judge noted that such a reference was undesirable in view of the costs involved, and allowed the appeal.

First-Tier Tribunal (TC07706): *Landlinx Estates Ltd*

3.2 Option to tax

3.2.1 Option without rent

A couple bought a property in 2008 and opted to tax it. Over the next 7 years it was occupied by four different companies, none of whom paid any rent. It was sold for £1.5m plus VAT on 16 October 2015; on a final VAT return the appellants declared the output tax and deducted £68,541 in input tax. HMRC accepted that costs associated with the sale were deductible, but raised assessments to disallow costs that had arisen over the period of ownership.

The decision of the FTT starts with procedural problems arising from agreement of the bundles to be presented to the hearing. The hearing itself had been listed for one day but had to be extended to three. One of the appellants suffered from ill-health and was unable to complete her evidence because she was not well enough to attend the second and third days. The Tribunal decided to continue in her absence and to take into account the fact that her cross-examination had not been completed.

The judge (Anne Redston) then considered the history of the purchase and occupation of the building, and the relationship between the owners and the four tenants. After detailed examination of the available evidence, which included the husband's oral evidence to the Tribunal, the judge concluded that none of the tenants had ever actually paid any consideration for occupation, and the owners never intended or expected that they would.

The judge went on to consider the list of expenses that were the basis of the input tax claim on the final VAT return. These included legal expenses from several years before, and building costs said to be incurred for the benefit of the eventual purchaser of the building. The supporting evidence was sketchy, missing VAT invoices and proper descriptions to show a link to the business or even to the building, and containing figures that did not match up with those on the claim. The judge considered that none of the expenses related to the property other than the solicitors' fees and estate agents' fees on disposal, which HMRC had accepted as allowable.

The judge stated that the decision was based on simple findings of fact: the 'letting' of the property was not at any point an economic activity, because there was no supply for consideration. An argument that the claimed expenses somehow qualified as 'overheads' relating to the eventual sale was rejected – the taxpayers had not met the burden of proof that would have supported a deduction. There was no need to summarise the parties' extensive submissions based on case law, because the decision was based on the straightforward application of the legislation to the Tribunal's findings of fact.

The appeal was dismissed.

First-Tier Tribunal (TC07709): *Colin and Susan Slaymark*

3.2.2 Option to tax deadline

Because of the coronavirus pandemic, the deadline for notifying an option to tax land and buildings has been extended to 90 days from the decision to opt. This applies to decisions made between 15 February and 31

October 2020 (originally announced as applying up to 31 May, then extended to 30 June). This has been added to the Notice *Opting to tax land and buildings.*

HMRC have updated the Notice with information about who is an authorised signatory for the purposes of notifying an option to tax for a Community Benefit Society, and also new contact details for the Option to Tax Unit.

Notice 742A

3.3 Developers and builders

3.3.1 Reverse charge delayed again

Because of the many unexpected pressures caused by the coronavirus pandemic and the lockdown restrictions on construction businesses, predominantly SMEs, the implementation date for the VAT reverse charge for construction services has been deferred again, from 1 October 2020 to 1 March 2021.

There is also a technical amendment to require end users and intermediary suppliers, in order to be excluded from the reverse charge, to notify their sub-contractors of their end user or intermediary supplier status in writing. The effect of this, although it is not spelled out by HMRC's Brief, is that it allows end-users to opt in or out of the reverse charge at will. This may be a response to the previous complaints that the responsibility of deciding who was an end-user was unclear; it now appears to be optional.

Revenue & Customs Brief 7/2020

This change has been effected by the *Value Added Tax (Section 55A) (Specified Services and Excepted Supplies) (Change of Commencement Day and Amendment) (Coronavirus) Order 2020.*

SI 2020/578

The CIOT has welcomed this delay, commenting that the cash flow effect of the domestic reverse charge would have been significant, especially with reduced business activity due to COVID-19 restrictions.

CIOT Press Release 10 June 2020

3.3.2 Updated Notice

HMRC have updated their Notice *Buildings and construction* with information on changing the use of certified buildings as a result of coronavirus. If a business is subject to a self-supply charge under the change of use provisions, as a direct result of loaning its building due to coronavirus (COVID-19), it should contact HMRC through its customer compliance manager or the charities compliance team by email at wmbchfesector@hmrc.gov.uk.

Notice 708

3.4 Input tax claims on land

3.4.1 DIY claims time limit

HMRC asked for a full decision (implying they were considering an appeal) over the 28 days allowed for such a request, after a DIY claimant's appeal was allowed at the hearing. The judge (Alastair Rankin) decided to allow an extension of time and issued the decision.

The claim was for £6,012, made on 2 February 2018. It was refused on 13 September 2018 on the grounds that the claimants had occupied the property from April 2014, and the claim was therefore out of time. Most of the invoices were dated in 2013 or 2014.

In the claim form and in correspondence that followed, the claimants had stated that they had only occupied the property in February 2017; the completion certificate was not obtained until 3 November 2017 because of a lack of funds, which delayed the completion of works required by Building Control. HMRC's decision letter stated that the works carried out after April 2014 were insignificant, and the claimants had updated their address to the property at that time, suggesting that they had occupied it.

The judge considered the evidence and a number of precedents on "completion" of a building (not just in relation to VAT). The Tribunal accepted that the onus of proof lay with the claimants to show that they had made the claim withing the three-month window. He noted the HMRC guidance that the claimants were relying on, and found as a fact that the completion certificate was the main support for their claim. HMRC's guidance stated that "the three months will usually run from the date of the document you are using as your completion evidence." On that basis, the appeal was allowed.

First-Tier Tribunal (TC07659): *John McGarry and another*

An individual appealed against refusal of a DIY claim in relation to a project in which he had occupied the house in 2010 but did not regard the project as completed until a garage had been finished in accordance with planning permission. In the end, he did not complete the garage for lack of funds, and applied for the completion certificate in January 2019, when the claim was submitted.

HMRC initially submitted the wrong statement of case and had to apply for permission to amend it. The claimant's representative pointed out the irony of HMRC ruling against the claim for being out of time, then missing Tribunal deadlines themselves.

Judge Rankin noted that, if HMRC were correct, the claim could have been made in 2010 and would have resulted in a refund at that time of some £11,000, nearly the whole of the amount claimed. It was clear that the claimant relied on the completion certificate as his evidence of completion, and in accordance with the decisions in *Bowley*, *Dunbar* and *Farquharson*, the appeal was allowed.

First-Tier Tribunal (TC07660): *Andrew Fuller*

A DIY claimant was refused a completion certificate in April 2016 in relation to a property he had moved into in July 2013. After a protracted dispute with the local council, he received the certificate in June 2018,

and submitted a DIY claim for £17,641 on 1 September. This was refused for being out of time.

Judge Anne Redston reviewed the history of the project and the problems that had led to the dispute with the council. Once again, HMRC argued that "completion" of a dwelling was a multi-factorial test, which required considering when "all the main elements for it to function for its intended purpose were in place".

The judge considered the precedents of *Dunbar* and *Farquharson* and agreed with the Tribunals' reasoning in those cases, and also disagreed with the reasoning on the completion issue in *Hall* and *Fraser*. She went through the arguments again in detail, and concluded that the reference in the regulations to the certificate of completion was conclusive. As in the *Wedgebury* case, the judge commented that the claim should not now be revisited by examination of the individual invoices; although HMRC had reserved the right to contest the eligibility of the expenditure, having refused the claim outright only on the grounds of the time limit, the judge stated that she considered it would be disproportionate and unjust to extend the time, and increase the costs, expended by the appellant on the case. The appeal was allowed.

First-Tier Tribunal (TC07684): *Carl Sansom*

3.4.2 DIY claims – other

HMRC refused a claim for £19,229 made on 6 December 2018 in respect of a property in Norfolk. A dilapidated cottage had been renovated and made habitable by the project. There were two grounds for refusal established after some correspondence between HMRC and the claimants:

- evidence had not been provided that the property had not been occupied for residential purposes in the 10 years leading up to the commencement of works;
- a condition in the planning consent restricted occupation to purposes ancillary to the residential use of a neighbouring property.

However, the Tribunal's examination of the plans and correspondence showed that the project in fact created an extension to the existing property. The planning permission point was in effect irrelevant, because there was no separate dwelling to which the use was ancillary. The claimant's own submission to the Tribunal confirmed that she knew that the project extended the existing house; she sincerely believed that she was entitled to the refund, but she was wrong.

The claimant had provided as much information as she could to support the claim that the cottage had been unoccupied for 10 years, but she did not attend the hearing and therefore could not give evidence on oath and could not be cross-examined. The judge decided that she had failed to discharge the evidential burden on this point as well.

First-Tier Tribunal (TC07650): *Margaret Bailey*

3.5 Other land problems

Nothing to report.

4. INTERNATIONAL SUPPLIES

4.1 E-commerce

4.1.1 MOSS rates

From 23 April 2020, Spain introduced a new reduced VAT rate of 4% for books, newspapers, and magazines. The new rate will apply equally to physical and electronic versions of books, newspapers and magazines, thereby eliminating the difference in VAT rates between physical and electronic supplies.

From 1 May, the Czech Republic introduced a reduced VAT rate of 10% for e-books.

The HMRC guidance page on MOSS rates also announced that foreign traders will be able to benefit from the zero rate applicable to the following electronic supplies, unless they are mainly used for advertising, or audio or video content:

- books
- booklets
- brochures
- pamphlets
- leaflets
- newspapers
- journals and periodicals (including magazines)
- children's picture and painting books

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

4.2 Where is a supply of services?

4.2.1 Fixed establishments

The CJEU has now given its judgment in the *Dong Yang Electronics* case. As usual, the A-G's opinion contains a great deal more argument and background information, so the summary of that has been reproduced below, with additional points arising from the judgment added at the end.

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

The Advocate-General began her opinion by pointing out that this should make no difference to overall Polish tax revenue, because there was no doubt that any VAT charged to LGP would be deductible as input tax. However, it would make a significant practical difference if, for example,

DY was unable to collect the output tax from its customer but still had to pay the assessment to the authorities.

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

- in *C & E Commrs v DFDS A/S* (Case C-260/95), a UK subsidiary selling holidays on behalf of its Danish holding company was held to be acting as a "mere auxiliary organ" and was therefore a fixed establishment, making the holding company liable to registration in the UK and output tax on the supplies;
- in *Daimler AG and Widex A/S v Skatteverket* (Cases C-318/11 and 319/11), the fact that a German company had a Swedish subsidiary, which made supplies of testing services to its holding company, did not prevent the holding company making a cross-border refund claim for Swedish VAT;
- in *Welmory Sp. z o.o. v Dyrektor Izby Skarbowej w Gdansku* (Case C-605/12), a Cypriot company used the services of a Polish group company to provide various services in relation to an auction website in Poland. The CJEU reasserted the principle that the Polish company would only count as a fixed establishment of the Cypriot company if it had the human and technical resources present on a permanent basis that enabled it to receive and use the services supplied to it for its own business. The implication was that the Polish company did not meet these conditions.

The A-G cited the relevant EU law, being PVD art.44 and articles 21 – 22 of the Implementing Regulation. The Implementing Regulation was particularly significant because it set out (and therefore defined and limited) the obligations of a supplier (such as DY) in determining whether it was making a supply to "another fixed establishment" of a foreign business, and in determining who should be regarded as the proper recipient of a supply. She also noted Polish laws that required foreign established companies to operate in Poland through certain types of subsidiary undertakings that had to be incorporated locally. This was in accordance with the free trade agreement between the EU and the Republic of Korea, under which Korean investors can undertake and conduct economic activity only in the form of a limited partnership, limited joint-stock partnership, limited liability company, and joint-stock company (in the case of legal services only in the form of registered partnership and limited partnership).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The full court noted the rules in art.11 of the Implementing Regulation 282/2011:

1. For the application of Article 44 of Directive 2006/112/EC, a "fixed establishment" shall be any establishment, other than the place of establishment of a business referred to in Article 10 of this Regulation, characterised by a sufficient degree of permanence and a suitable

structure in terms of human and technical resources to enable it to receive and use the services supplied to it for its own needs.

…

3. The fact of having a VAT identification number shall not in itself be sufficient to consider that a taxable person has a fixed establishment.

and also art.22:

1. In order to identify the customer's fixed establishment to which the service is provided, the supplier shall examine the nature and use of the service provided.

Where the nature and use of the service provided do not enable him to identify the fixed establishment to which the service is provided, the supplier, in identifying that fixed establishment, shall pay particular attention to whether the contract, the order form and the VAT identification number attributed by the Member State of the customer and communicated to him by the customer identify the fixed establishment as the customer of the service and whether the fixed establishment is the entity paying for the service.

Where the customer's fixed establishment to which the service is provided cannot be determined in accordance with the first and second subparagraphs of this paragraph or where services covered by Article 44 of Directive 2006/112/EC are supplied to a taxable person under a contract covering one or more services used in an unidentifiable and non-quantifiable manner, the supplier may legitimately consider that the services have been supplied at the place where the customer has established his business.

2. The application of this Article shall be without prejudice to the customer's obligations.

The court noted that the free trade agreement prohibited a Korean business from carrying on economic activity directly in Poland. However, the legal form of the entity could not be the only determining factor: the conditions of the Implementing Regulation had to be considered in the context of the commercial and economic realities. The case law showed that it was possible for a subsidiary to act as a fixed establishment of its holding company (*DFDS*), but also that the identity of the recipient of the supplies had to be considered in its commercial context (*Welmory*).

The question of whether a supplier could be required to examine the contractual relationship between the holding company and its subsidiary/ local establishment was settled by the fact that this was not one of the requirements of art.22 Implementing Regulation. The contract between the supplier and the customer was the relevant contract; this conclusion was strengthened by the impracticality of imposing any other requirement, as noted by the A-G in her opinion.

The full court's answer was in line with the opinion, although slightly shorter, and without any reference to abusive arrangements:

[Art.44 PVD and arts.11 and 22 IR] must be interpreted as meaning that the existence, in the territory of a Member State, of a fixed establishment of a company established in a non-Member State may not be inferred by a supplier of services from the mere fact that that company has a subsidiary

there, and that supplier is not required to inquire, for the purposes of such an assessment, into contractual relationships between the two entities.

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

4.2.2 Consultancy

A company supplied career coaching and support to students of Chinese origin. It treated the supplies as outside the scope of VAT as "consultancy" supplied to persons belonging outside the EU; HMRC argued that the services were taxable in the UK as "services relating to educational activities", and raised assessments totalling over £1.25m for periods from 12/13 to 06/17.

As well as the issue about the correct classification of the supply, there was a further question as to who was the recipient of the supply. If it was the parents, who usually paid for it, it was accepted that they habitually resided in China. If it was the students, who received the advice, there was a potential argument that they "belonged in the UK" for the purposes of the law. The company argued that they were only in the UK for the temporary purpose of education, but that might involve a substantial presence over several years.

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

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

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

The taxpayer's representative argued that there was no directly applicable case law on what were "educational activities" for VAT, but there was case law on the meaning of "school or university education". For example, *Eulitz* (Case C-473/80) suggested that training of fire prevention officers could constitute education, but *A & G Fahrschule-Akademie* (Case C-449/17) held that vehicle driving tuition did not. He submitted that activity which may appear to be educational, because it involved the transfer of knowledge with a view to the development of skills or

knowledge, fell outside the meaning of educational activity on the grounds of being specialised so that it did not cover a diversified set of subjects characteristic of school or university education. He characterised the company's services as providing advice and guidance; the workshops were only an introductory and minor part of the services.

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

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

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

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

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

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

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

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

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

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

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

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

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

The judge considered that the correct test was that of "permanent address or usual place of residence" in accordance with art.13 of the Implementing Regulation, and HMRC were applying the wrong test, one for which there

was no authority. Usual residence did not include temporary residence for a specific purpose and a definite period of time, such as a degree course.

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

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

First-Tier Tribunal (TC07714): *Mandarin Consulting Ltd*

4.2.3 Reverse charge

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

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

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

(1) Economic business activity,

(2) Non-economic business activity, and

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

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

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

Art.43 states:

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

1. a taxable person who also carries out activities or transactions that are not considered to be taxable supplies of goods or services in accordance with Article 2(1) shall be regarded as a taxable person in respect of all services rendered to him;

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

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

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

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

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

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

Having decided that W fell outside the reverse charge provisions on the basis of the PVD, the judge considered the UK law. VATA s.7A(4)(d) transposes the Directive with the words "received by the person otherwise than for private purposes". That did not draw the distinction that he had concluded was required by the words "acting as such". W's counsel suggested that a conforming construction could be achieved by interpolating the words "or non-economic" after "private". The judge agreed with this approach, as it "went with the grain" of the legislation and did not "create a wholly different scheme from any scheme provided by the legislation" (principles of conforming construction established by the *Test Claimants in the FII Group Litigation* and *Vodafone* cases).

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

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

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

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

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

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

Submissions were made to the court by the UK, Irish and Spanish governments and the Commission, all of whom considered that art.44 should apply to the appellant. The A-G considered that the decision in *Srf konsulterna* suggested that either art.44 or art.45 had to apply, if none of

the special provisions in the following articles did (as was agreed between the parties). As a general rule, an expression such as “a taxable person acting as such” should mean the same thing wherever it appeared (as in art.2 and art.44 PVD); however, it was also necessary to consider the context. The taxpayer’s argument focused on the words “acting as such” in art.44 in isolation from the surrounding words. The context included the purpose of the VAT Package reforms which were intended to modernise and simplify the rules on place of supply.

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

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

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

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

CJEU (A-G) (Case C-459/19): *HMRC v The Wellcome Trust Ltd*

4.3 International supplies of goods

4.3.1 Brexit news

On 19 May the government announced a new “UK Global Tariff” to replace the EU “Common External Tariff” on 1 January 2021. It is intended to be simpler and therefore cheaper and easier to operate than the EU rules.

www.gov.uk/government/news/uk-global-tariff-backs-uk-businesses-and-consumers

On 20 May the government published proposals for implementation of the Northern Ireland Protocol. The paper sets out four “key commitments that will underpin the UK Government’s approach to implementing the Protocol”:

- *There will be unfettered access for Northern Ireland’s producers to the whole of the UK market and this will be delivered through legislation by the end of the year.*
- *No tariffs will be paid on goods that move and remain within the UK customs territory*
- *Implementation of the Protocol will not involve new customs infrastructure – with any processes on goods moving from Great Britain to Northern Ireland kept to an absolute minimum so that the integrity and smooth functioning of the UK internal market is protected.*
- *Northern Ireland’s businesses will benefit from the lower tariffs delivered through our new Free Trade Agreements with countries like the United States, Australia, New Zealand and Japan – ensuring Northern Ireland firms will be able to enjoy the full benefits of the unique access they have to the GB and EU markets.*

www.gov.uk/government/news/uk-government-publishes-its-approach-to-the-northern-ireland-protocol

The Commission’s Task Force on Relations with the UK published a request for more detail on the Northern Ireland protocol on 30 April. Presumably there will be further debate before the UK’s proposals are considered acceptable by the EU.

ec.europa.eu/info/publications/technical-note-implementation-protocol-ireland-northern-ireland_en

On 29 June the European Scrutiny Committee of the UK Parliament wrote to Jesse Normal MP, Financial Secretary to the Treasury, asking for more explanation of the Northern Ireland Protocol. The letter expresses concern that its previous questions on VAT rules to apply from 1 January 2021 have not been answered fully:

“Given that businesses in Northern Ireland, and those in Great Britain involved in the movement of goods to or from there, urgently need clarity about the VAT rules that will apply and the systems they will need to use only six months from now, this is not acceptable. We therefore ask you to write to us again within 10 days to answer the individual questions.”

https://committees.parliament.uk/committee/69/european-scrutiny-committee/publications/3/correspondence/

4.3.2 Importing and exporting personal protective equipment

HMRC have updated their guidance on relief from import duty and VAT on imports of medical supplies, equipment and protective garments into the UK. Where goods are imported on behalf of a qualifying organisation, the importer must have arrangements in place to sell or donate the goods to the organisation at the time that they are imported into the UK.

www.gov.uk/guidance/pay-no-import-duty-and-vat-on-medical-supplies-equipment-and-protective-garments-covid-19

Meanwhile, there was a temporary requirement for exports of PPE to be authorised by a licence. This requirement expired and was not renewed on 25 May.

www.gov.uk/guidance/exporting-personal-protective-equipment-during-coronavirus-covid-19

4.3.3 Call-off stock rules

On 20 April HMRC published an updated policy paper and draft legislation covering the rules for call-off stock arrangements between the UK and EU member states. The law is included in Finance Bill 2020 but will take effect retrospectively from 1 January 2020; it will only apply to the end of the transition period. It will be contained in a new Sch.4B VATA 1994 and a new reg.22ZA in SI 1995/2518.

www.gov.uk/government/publications/changes-to-the-rules-for-call-off-stock-arrangements-between-member-states/changes-to-the-rules-for-call-off-stock-arrangements-between-member-states

4.3.4 Chain transactions

The *Herst* case has now received its full judgment. As in several previous CJEU cases, it concerned the identification of which transaction in a cross-border supply chain with multiple transactions is to be regarded as the exempt intra-Community supply if there is only one physical movement of goods. Because the applicant in the main proceedings was claiming deduction of input tax, it did not wish to have received an exempt intra-Community supply. The A-G's opinion contained more information and discussion than the full judgment, so the summary of the opinion is included below before going on to additional points from the judgment.

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

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

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

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

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

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

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

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

The full court judgment notes some factors that were not highlighted in the above summary:

- Herst's argument was that the transport was effectively two operations, one carried out by itself as a mere carrier for the intermediary supplier, and one carried out after the fuel was released for free circulation;
- the referring court agreed that Herst did not have the right to dispose of the goods as owner until they were released for free circulation, because it was not an operator authorised to receive goods under a duty suspension arrangement (which was the reason for the involvement of the intermediaries);
- as a result, there was a distinction between the physical control of the goods while Herst was transporting it, and the legal right to dispose of it as owner.

The court noted that an intra-Community acquisition takes place, within art.20 PVD, when the right to dispose of the goods as owner has been transferred to the purchaser, when the supplier establishes that those goods have been dispatched or transported to another Member State and when, as a result of that dispatch or that transport, they have physically left the territory of the Member State of origin.

The referring court appeared to believe that the "right to dispose of the goods as owner" was to be interpreted in accordance with national law; however, according to the court's case law, the transfer of the right to dispose of goods as owner is not restricted to the transfer in accordance with the procedures prescribed by the applicable national law, but covers any transfer of tangible property by one party which empowers the other party actually to dispose of it as if he or she were its owner. A transfer of the right to dispose of tangible property as owner does not require that the party to whom the property is transferred must physically possess it or that it must be physically transported to and/or received by that party.

It was therefore possible that there was a succession of transfers of the right to dispose as owner while the goods were in transit. The previous case law would not then determine which transaction was the exempt despatch (only the principle that no more than one transaction could be).

The court noted that Herst itself initiated the transport of the fuel by paying an advance invoice to the first economic operator in the chain of purchase and resale transactions before loading the fuel at the premises situated in the Member States of origin, transported the fuel using its own vehicles and did not invoice the cost of transporting it. It confirmed that the fact that the transport of fuel in question was carried out under an excise duty suspension arrangement is not a decisive factor in determining to which of the acquisitions that transport must be ascribed.

The court then gave the following opaque answers to the main questions on identifying the despatch:

Article 20 of the VAT Directive must be interpreted as meaning that a taxable person which carries out a single intra-Community transport of goods under an excise duty suspension arrangement with the intention of purchasing those goods for the purposes of its economic activity once they have been released for free circulation in the Member State of destination acquires the right to dispose of the goods as owner, within the meaning of that provision, provided that it has the right to take decisions which are

capable of affecting the legal situation of the goods, including, inter alia, the decision to sell them;

The fact that that taxable person had, at the outset, the intention to purchase those goods for the purposes of its economic activity once they have been released for free circulation in the Member State of destination is a circumstance which must be taken into account by the national court in its overall assessment of all of the particular circumstances of the case before it in order to determine to which of the successive acquisitions the intra-Community transport is to be ascribed.

The point appears to be that the taxpayer's argument is rejected: it could not rely on the duty suspension arrangement to establish that it had not "received the supply" until the goods were across the Czech border and released for free circulation. If it was capable of "receiving the supply" on loading the fuel into its tankers, then the supply to it was the one that involved the cross-border transport, and it was therefore not liable to Czech VAT.

The court considered the relationship between EU law and national law and concluded that the principle of *in dubio mitius* could not be applied in favour of a taxpayer where the CJEU had clarified the EU provision. There might initially be uncertainty in the interpretation of the Czech law, but if it had been resolved by the CJEU, the national court would have to apply the proper interpretation.

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

4.3.5 Fallback acquisitions

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

HMRC ruled that the use of the UK VRN triggered a "fallback" acquisition tax charge in the UK, which could only be avoided if it could be shown that tax had been accounted for in the country of arrival. The company's director argued that this was a matter for the tax authorities in the other country, and it was not for HMRC to police the tax system elsewhere. His failure to produce the requested information to show what had happened to the goods was ascribed to the expense of going through all the paperwork in relation to many transactions.

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

purposes of this Act as taking place outside the United Kingdom if the material time for any subsequent supply of those goods is also while the goods are subject to the warehousing regime and before the duty point."

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

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

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

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

The company appealed to the Upper Tribunal (Mr Justice Miles and Judge Jonathan Richards). The hearing was conducted by remote video link

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

(2) Ground 2 – The FTT was wrong to construe s18(3) of VATA as applying only to acquisitions into a bonded warehouse in the UK. In particular, whether or not the FTT was correct in its interpretation of Articles 155 to 162 of the PVD, the FTT was not entitled, given the clear statutory provisions, to "read down" s18(3) of VATA so that it applied only to acquisitions into UK bonded warehouses.

(3) Ground 3 – The FTT was wrong to conclude that the Appellant was not entitled to credit for any tax arising as a consequence of the operation of the fallback regime in s13(3) of VATA.

The judges agreed with the appellant that, if s.13 and s.18 are read without regard to the PVD and CJEU decisions, their meaning is clear: the whole

of s.13 is subject to s.18. The only reason for departing from this analysis would have to be based on a conclusion that the EU law required it under the principle of “conforming construction”. The judges analysed articles 155 –162 PVD in detail, then went on to examine a Court of Appeal precedent concerning corporation tax “controlled foreign companies” legislation (*Vodafone 2 v HMRC* [2009]). They concluded that their task when construing the UK statutory provisions was to apply the broad principles of purposive interpretation set out in the *Vodafone* decision; applying those broad principles, they should interpret the UK statutory provisions, so far as possible, in the light of the wording and purpose of the PVD. However, a conforming construction should “go with the grain” of the legislation, and cannot override the clear words of the UK law (“contra legem”).

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

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

Upper Tribunal: *Ampleaward Ltd v HMRC*

4.3.6 Authorised Economic Operator

HMRC have updated their guidance for the steps that must be taken when applying for Authorised Economic Operator (AEO) status.

www.gov.uk/guidance/authorised-economic-operator-certification

4.3.7 Import VAT certificate

HMRC have updated their guidance to clarify which import VAT certificates (C79) to use for March 2020. This is because some customers were not issued with a C79 for March 2020 or were issued with data for February 2020, rather than March 2020. HMRC advise businesses to use the most recent C79 they have received, and apologise for any inconvenience caused.

www.gov.uk/guidance/get-your-import-vat-certificates

4.3.8 Guidance on duty-free imports

HMRC have published new guidance on claiming relief to pay no Customs Duty or VAT on various categories of importation. The documents provide guidance on who can claim relief, the kind of goods on which relief can and cannot be claimed, when to claim and how, points to take care of before and after making a claim, and appealing against a decision made by HMRC. The areas covered are as follows:

- Importing museum and gallery exhibits.

www.gov.uk/guidance/pay-no-customs-duty-and-vat-on-importing-museum-and-gallery-exhibits

- Importing therapeutic substances of human origin, blood-grouping or tissue-typing reagents, or related packaging, solvents and accessories.

www.gov.uk/guidance/pay-no-customs-duty-or-vat-on-blood-grouping-tissue-typing-and-therapeutic-substances

- Importing miscellaneous documents and related articles into the UK from outside the UK and EU.

www.gov.uk/guidance/pay-no-import-duties-and-vat-on-miscellaneous-documents-and-related-articles

- Importation of substances for biological and chemical research.

www.gov.uk/guidance/pay-no-import-duty-and-vat-on-substances-for-biological-and-chemical-research

- Importing animals for scientific research.

www.gov.uk/guidance/pay-no-import-duty-or-vat-when-importing-animals-for-scientific-research

- Importing donated medical equipment from outside the UK and EU.

www.gov.uk/guidance/pay-no-import-duty-or-vat-on-donated-medical-equipment

- Importing visual and auditory goods from outside the UK and EU.

www.gov.uk/guidance/pay-no-import-duty-or-vat-on-visual-and-auditory-goods

- Transferring a business to the UK, i.e. the business has completely ceased its activities outside the UK and the EU and the new business being carried out in the UK or EU is of a similar nature. The relief is available on the import of capital goods and other equipment, such as office equipment and machinery.

www.gov.uk/guidance/pay-less-customs-duty-and-vat-if-you-are-importing-capital-goods

- Importing goods for testing, analysis or examination.

www.gov.uk/guidance/pay-no-import-duties-or-vat-on-importing-goods-for-testing

4.3.9 SIVA applications

HMRC have updated their guidance to reflect that due to the coronavirus pandemic, applications for Simplified Import VAT Accounting (SIVA) should be made by email and a supporting copy should be sent by post until further notice. More information has also been added on who can apply for SIVA to reduce the amount of the guarantee for a duty deferment account.

www.gov.uk/government/publications/notice-siva-1-simplified-import-vat-accounting

4.3.10 Customs intermediaries

On 12 June 2020 HMRC announced a new package of measures to accelerate growth of the UK's customs intermediary sector, covering customs brokers, freight forwarders and express parcel operators.

This was combined with the announcement that the transition period for the UK's exit from the EU will not be extended and controls for importing goods will apply from July 2021. The proposals to expand the intermediary section include a £50m grant fund for customs agent recruitment, training and IT, removal of barriers for intermediaries taking on extra clients by adapting the rules around financial liability, and creating new opportunities as industry grows. Applications for the new funding will be open from July 2020 and HMRC will publish more details in due course.

www.gov.uk/government/news/new-measures-to-support-customs-intermediaries

4.3.11 Article

In an article in *Taxation*, Mike Thexton reviews the rules on place of supply of goods. A subsequent article will deal with place of supply of services.

Taxation, 18 June 2020

4.3.12 HMRC manual changes

HMRC have added guidance to the *VAT Exports Of Goods From The UK Manual* on the conditions for zero rating exports/removals of goods from the UK which have been affected by the coronavirus.

VEXP30310

HMRC have added guidance to the *VAT Single Market Manual* on UK secondary law in relation to installed and assembled goods to add in reference to SI 1995/2518, reg 12.

VATSM5130, VATSM5140

4.4 European rules

4.4.1 Postponement of tax rules changes

On 12 May 2020 the European Commission decided to postpone the entry into force of two EU taxation measures to take account of the difficulties that businesses and Member States are facing at the moment with the Coronavirus crisis. First, the Commission has proposed to postpone the entry into application of the VAT e-commerce package by 6 months. These rules will apply as of 1 July 2021 instead of 1 January 2021, giving Member States and businesses more time to prepare for the new VAT e-commerce rules.

Second, the Commission has decided to propose deferring certain deadlines for filing and exchanging information under the Directive on Administrative Cooperation (DAC). Based on the proposed changes, Member States will have three additional months to exchange information on financial accounts of which the beneficiaries are tax residents in another Member State. Similarly, Member States will have three

additional months to exchange information on certain cross-border tax planning arrangements.

Depending on the evolution of the Coronavirus pandemic, the Commission proposes the possibility to extend the deferral period once, for a maximum of three further months. The proposed tax measures only affect the deadlines for reporting obligations.

The DAC postponement measure was adopted on 24 June. The e-commerce postponement was also agreed by member states' ambassadors to the EU; the postponement should be formally adopted by the Council, without further discussion, once the text has undergone a legal and linguistic review.

www.consilium.europa.eu/en/press/press-releases/2020/06/24/taxation-council-agrees-on-the-postponement-of-certain-tax-rules/

4.5 Foreign refund reclaims

4.5.1 Delayed repayment claims

HMRC have published a Brief to inform non-EU established businesses of the current delay in processing and refunding VAT claims submitted under the 13th Directive procedure. The affected claims are those for the prescribed year 1 July 2018 to 30 June 2019, submitted on or before 31 December 2019. The Brief also includes information on what HMRC are doing to make payments, when they expect to pay outstanding claims, and what a business can do if it is unable to obtain a certificate of status for 2019-20 claims.

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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 Production costs

TC07157 concerned HMRC's refusal of a claim by the Royal Opera House to recover £530,000 of input tax associated with the costs of staging productions between June 2011 and August 2012. It was common ground that the production costs were residual because of direct and immediate links to some taxable supplies that the ROH made (e.g. programme sales and production specific commercial sponsorship), while the ticket sales were exempt. However, HMRC considered that the standard method override significantly reduced the amount of recoverable input tax.

Before the FTT hearing, ROH conceded that there was no direct link between the costs and third party commercial income, licensing income and service recharges, and sales of CDs etc. of non-ROH productions; while HMRC conceded that there was a direct link with backstage tours. What remained at issue were the following taxable supplies:

(1) Catering income (bars and restaurants);

(2) Shop income;

(3) Commercial venue hire;

(4) Production work for other companies; and

(5) Ice cream sales.

Judge John Brooks listed a large number of precedent cases to which he was directed by counsel, but he noted from the *Mayflower* judgment of Carnwath LJ that the principles were well established:

(i) Input tax is directly attributable to a given output if it has a "direct and immediate link" with that output (referred to as "the BLP test");

(ii) That test has been formulated in different ways over the years, for example: whether the input is a "cost component" of the output; or whether the input is "essential" to the particular output. Such formulations are the same in substance as the "direct and immediate link" test;

(iii) The application of the BLP test is a matter of objective analysis as to how particular inputs are used and is not dependent upon establishing what is the ultimate aim pursued by the taxable person. It requires more than mere commercial links between transactions, or a "but for" approach;

(iv) The test is not one of identifying what is the transaction with which the input has the most direct and immediate link, but whether there is a sufficiently direct and immediate link with a taxable economic activity; and

(v) The test is one of mixed fact and law, and is therefore amenable to review in the higher courts, albeit the test is fact sensitive.

He added two more principles, one from *College of Estate Management*, and one from the A-G's opinion in *Abbey National*:

(vi) It may be necessary to determine whether, for tax purposes, a number of supplies are to be treated as elements in some over-arching single supply. If so, that supply should not be artificially split;

(vii) A transaction which is exempt from VAT will "break the chain" of attribution.

The judge examined the way in which the "direct and immediate link" test had been applied in a long string of cases, including *Mayflower*, *Dial-a-Phone*, *Lok'n'Store, Roald Dahl Museum and Story Centre, Chester Zoo, Sveda* and *Associated Newspapers*. The most recent cases cited were the *Cambridge University* case, where the CA has referred questions to the CJEU, and the CJEU decision in *VW Financial Services*. After quoting extensively from these precedents, the judge turned to the facts of the present case.

The production costs were those specific to each production, and not the costs of the ROH permanent staff or overheads. They included the fees for guest performers and conductors, creative teams, music copyright costs where relevant, the cost of sets, props, costumes, transportation, extras and actors. The costs varied considerably from one production to another, depending on the scale of the show and on whether it was an original production or a revival.

The essential argument for ROH was that the commercial and economic reality was that it could not incur production costs on the scale it did without those costs generating a level of income from the disputed sources. There was a "virtuous circle" that enabled the business to operate. HMRC dismissed this as the kind of "but for" link that was referred to in *Mayflower Theatre Trust*.

The judge listed a further ten points to apply in reaching a decision. Key among these were the need for an objective, fact-specific analysis of the extent of the link between the inputs and output supplies; a chain transaction that was exempt would "break the link" between inputs and outputs, but if there were separate chains linking to exempt and taxable outputs, there would be no break.

The judge considered that the link between the catering income and the production costs was similar to that between sales of ice cream and production costs in *Mayflower*. However, he was mindful of the more recent case law, in particular *Sveda* and *Associated Newspapers*, in which the question was whether there was a "necessary economic link between

the initial expenditure and the economic activities which follow". The productions were central to everything that ROH did: they brought the customers into the bars and restaurants. This was, according to the judge, more than a mere "but for" link. The production costs were essential to the catering supplies; objectively, the purpose was not merely to sell tickets, but to enable ROH to maintain its catering income. The judge noted that Patten LJ had appeared to come to a similar conclusion when commenting on *Mayflower* in the *Associated Newspapers* decision; and this extended to the sale of ice cream as well as catering.

The same could not be said of the shop income, apart from sales of recordings of ROH productions. Similarly, venue hire was only to be taken into account where it specifically related to a production. For example, the Wimbledon Champions' Gala Dinner of 2014 was not sufficiently linked to any production. Production work for other companies was also not related to the costs of ROH productions.

The appeal was allowed in part; the financial effect of recalculating the standard method override, taking into account only the "linked" revenues, was not set out in the decision.

HMRC appealed to the Upper Tribunal, where the case came before Mr Justice Morgan and Judge Timothy Herrington. There was no appeal against the FTT's findings in relation to shop sales, commercial venue hire and production work for other companies (i.e. those items where the FTT found no link), so the UT was only concerned with the FTT's decision in relation to catering supplies and sales of ice cream.

The UT summarised the FTT's findings of fact and reviewed relevant precedents, including *Rompelman*, *BLP Group*, *Abbey National* (Case C-408/98 – inputs related to a TOGC), *Southern Primary Housing Association*, *Mayflower Theatre Trust*, *Sveda*, *Associated Newspapers*, *Iberdrola Immobiliaria* and *University of Cambridge*.

The judges adopted the terms "initial transaction" and "downstream transaction" from the Supreme Court judgment in *Frank A Smart* to describe the first transaction to which the inputs are obviously attributable and the later transactions to which they were claimed to be linked. For example, in the present case, the ticket sales would be the "initial transaction" to which the production costs were clearly linked; the "downstream transactions" would be the catering and ice cream sales. They drew a distinction between the principles that allowed input tax by reference to particular transactions (whether "initial" or "downstream") and those which allowed them as overheads, linked to the whole economic activity of the entity. The principles applicable to overheads were different and were more restrictive; it was common ground that the taxpayer was not arguing for the "overhead" approach, because its claim was based on attribution to particular outputs – not "the whole operation".

For completeness, the judges commented on the *Chester Zoo* decision, where costs of maintaining the animals were held to be attributable in part to downstream supplies of catering. The UT considered that this was a special case decided by the FTT on its particular facts, at a time between the CA judgment in *Mayflower* and the CJEU ruling in *Sveda*. The judges therefore considered it to be of limited assistance in deciding this case.

In setting out HMRC's grounds of appeal, the judges noted that the "cost component test" was only one way of establishing a "direct and immediate link" between inputs and outputs. It was possible for a particular input to be a cost component of more than one output, in which case it would be apportioned between them – but that would require the input to be directly and immediately linked to both. The only issue to be determined was therefore whether there was a direct and immediate link between the production costs and the catering and ice cream supplies; it was not necessary to consider HMRC's stated grounds of appeal in their own terms.

HMRC argued that the FTT had been wrong to conclude that the catering supplies were separate from the ticket sales so that the costs of production could be attributed to both. Rather, they were both in the same chain of supply: customers bought an exempt ticket (a link-breaking exempt initial transaction) and then bought catering (a downstream taxable transaction). The FTT had fallen into error by applying a "but for" test, which was not enough to establish a direct and immediate link.

The UT agreed that the FTT had erred in concluding that the "but for" comment of the CA in *Mayflower* no longer held good after *Sveda*. The UT was satisfied that there had been no change of approach; there was a distinction between direct attribution cases such as this, and overhead cases such as *Sveda*. The error was to consider that a "necessary economic link" was enough to establish a "direct and immediate link", if the costs concerned were not general overheads.

Having found errors of law in the FTT decision, the UT went on to remake it. The judges rejected HMRC's argument that the ticket sales and the catering supplies were in a single chain of supply: there were two supplies that were operated in parallel, and the production costs were linked to both. However, those costs were only cost components of the exempt supply of tickets, and were not cost components of the catering supplies. They were not directly and immediately used to make supplies of champagne in the ROH bars.

HMRC's appeal was allowed, with the following summing up: "This case shows that the requirement of a direct and immediate link between the two supplies is an important qualification which must be satisfied if the input tax is to be deducted. It was always clear that a but for test of causation was not sufficient in itself to satisfy the direct and immediate requirement. It is not enough to express the but for test in economic terms and then contend that the link must be considered to be direct and immediate. A requirement that the link be direct and immediate will produce the result in some cases that an indirect link or a non-immediate link will not meet the requirement. The present is such a case. We do not consider that the conclusion in this case is in any way a departure from economic reality."

Upper Tribunal: *HMRC v The Royal Opera House Covent Garden Foundation*

5.3.2 HP finance

HMRC have at last issued a Brief in response to the CJEU judgment in *VW Financial Services*, which was issued in late 2018. They summarise the decision as follows:

- VWFS's overhead costs were a component of the overall supply of goods – by way of a hire purchase agreement;
- there is a right to recovery even when the overheads are only set against the exempt element for costing purposes;
- a member state cannot exclude the value of the goods in a values-based apportionment method, as that method would be less accurate than the standard method.

VWFS's proposed special method was to apportion overhead input tax according to the number of transactions involved in HP – one taxable supply of goods, one exempt supply of finance, giving 50% recovery. HMRC say that their view "is that a business supplying goods on hire purchase should be allowed input tax recovery on its overheads where the recovery is fair and reasonable. It does not follow that the recovery will simply be fifty-fifty."

HMRC cite *Baumarkt* (Case C-511/10) as authority for the proposition that something other than a values-based apportionment should be used only where it can be demonstrated that it produces a more accurate reflection of use of the inputs. That has not been possible in relation to HP, so HMRC propose the following values-based calculation, for which they give an example:

Value of the asset plus any taxable additional charges or fees received, multiplied by 100, divided by value of the asset plus value of the credit granted - that is the value of the asset, plus consideration for the credit as per the credit agreement and any additional charges, related commission or other fees received.

Example

The value of asset is £10,000 and the value of credit provided is £8,000 at 5% interest over 5 years plus additional charges of £100 (for example an exempt arrangement fee).

The value is reduced to credit amount = £8,000.

Charge for finance (interest amount) is = £1,033.79.

Additional charges (exempt arrangement) = £100.

That is, £8,000 divided by (£8,000+£8,000+£1,033.79+£100) multiplied by 100 = £8,000 divided by £17,133.79 multiplied by £100 = 46.69%.

This approach, of including the value of the credit granted, is consistent with the approach of the CJEU in case C-183/13 Banco Mais where the Court noted the distortion caused by including the full value of the asset but only the charge for the credit.

In that case the answer was to remove the value of the asset in order to make the transactions comparable, however the CJEU has made it clear that this is not the correct approach for a hire purchase agreement transaction. Adding in the value of the credit granted is an alternative means of eliminating this distortion.

HMRC invite e-mails where traders have:

- recovered no overhead VAT on hire purchase supplies;

- submitted error correction claims for overhead VAT on hire purchase supplies;
- requested revisions to their partial exemption methods;
- submitted proposals for a new partial exemption method.

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5.3.3 Retrospective special method

A case referred by Portugal has considered the rules for deduction of input tax by a partly exempt trader. The taxpayer is a provider of postal services which has public service obligations and is therefore exempt. It had received a binding tax ruling that postal bill-payment services were also exempt; that ruling expired on 31 December 2012. However, it was only in 2015 that the status of these services was questioned; the company started to account for VAT on them from April 2015 and applied for an updated ruling in June 2015. The authorities ruled in November 2015 that they no longer fell within the scope of the exemption, following the CJEU's 2009 decision in *TNT Post UK* (which confirmed that only the "universal service obligation" of public postal services fell within art.132(1)(a)).

In calculating back tax due for 2013 – 2015, the company changed the method it used for calculating input tax deductions from the standard proportional method to the "actual use" method. The tax authority objected to this on two grounds: in its view, once the deduction was final it could not be changed, and the company was out of time to make amendments, because the Portuguese law did not permit any changes once the PE proportion for the year had been fixed (even within the normal four year time limit for other amendments); and there was no legal basis for a change from one method to another retrospectively.

The company appealed, and questions were referred to the CJEU to establish whether the principles of neutrality, effectiveness, equivalence and proportionality precluded national legislation that effectively restricted the right of a taxpayer to put itself in the position it would have been in, had it known the correct liability of its supplies at the time they were made.

The Portuguese authorities objected to the questions referred on grounds of admissibility, in that they effectively asked the CJEU to rule on national law, rather than on the interpretation of EU law. The court agreed that a literal reading of the questions gave that impression, but said that there is nothing to prevent the Court from giving an answer that will be of use to the national court, by providing the latter with guidance as to the interpretation of EU law which will enable that court to rule itself on the compatibility of national rules with EU law.

The first question effectively asked whether art.173 PVD permitted the tax authority to prohibit a taxable person from changing its deduction method retrospectively. The court considered that imposing a requirement for prior agreement of special PE methods was a proportionate measure and did not go beyond what is necessary for the correct collection of VAT. The *VW Financial Services* case confirmed that special methods had to be "more precise" than the standard method, but they were not

required to be "the most precise method" [possible]. The company's argument based on fiscal neutrality appeared to rely on a principle that "the most precise method" was so important that it justified amendments after the final proportion for a year had been determined.

The principle of legal certainty also ought to protect both the tax authority and the taxpayer from amendments without time limit. All of these considerations confirmed that the member state was entitled to refuse a retrospective change in deduction method.

The second question effectively asked whether arts.184 – 186 could justify later changes to tax deductions based on a change of PE method. At this point the court noted that the tax authority's change of view in 2015 was in question – it had decided that the postal bill-payment services were no longer exempt within art.132(1)(a), but the company maintained that they were in any case exempt within art.135(1)(d) as transactions concerning payments. It would be for the referring court to ascertain whether this was the case.

For the purposes of answering the question, the court proceeded on the assumption that the transactions were taxable from 1 January 2013, and this was only appreciated in 2015. It would also be for the referring court to consider whether the company had acted in good faith in this period, and had had no reason to question its use of the exemption earlier than 2015.

Here, the court appeared to support the position of the taxpayer: if it had known at the time that these supplies were taxable, it would have reconsidered the appropriateness of its deduction method. Denial of an adjustment to its input tax deductions was disproportionate in effectively penalising the taxpayer and it contravened the principle of effectiveness. The two answers appear to contradict each other, but the answer to the second question (in permitting a retrospective change of method) is hedged with a number of conditions:

- the Member State concerned authorises taxable persons to deduct VAT on the basis of the use made of all or part of the goods and services used both for transactions in respect of which VAT is deductible and for transactions in respect of which VAT is not deductible, pursuant to art.173(2)(c) PVD [because allowing special methods at all is at the discretion of the Member State];
- the taxable person was unaware, and acting in good faith, when choosing the deduction method, that a transaction which it regarded as exempt was in fact taxable
- the general limitation period fixed by the national law for the purposes of adjusting deductions has not yet expired, and
- the change in the deduction method makes it possible to establish more precisely the proportion of VAT relating to transactions in respect of which VAT is deductible.

CJEU (Case C-661/18): *CTT – Correios de Portugal v Autoridade Tributaria e Aduaneira*

5.3.4 Toolkit

HMRC have as usual updated the toolkits that are intended for agents to use when assessing the reliability of a client's systems for producing accurate VAT returns. They are a good guide to the risks of error that may arise, but the practicality of using them as an external VAT adviser is questionable. They are likely to be very useful for internal auditors.

HMRC Toolkit: *VAT Partial Exemption (2020)*

5.3.5 Association of British Factors and Discounters

The Notice *Administrative agreements with trade bodies* has been updated to reflect the withdrawal of an administrative agreement with the Association of British Factors and Discounters with effect from 1 May 2020.

VAT Notice 700/57

The VAT *Partial Exemption* guidance manual has been updated by adding guidance on partial exemption for invoice factoring and discounting following withdrawal of this agreement.

PE73700

5.4 Cars

Nothing to report.

5.5 Business entertainment

Nothing to report.

5.6 Non-business use of supplies

5.6.1 No link to supplies

An entity registered for VAT in January 2018, describing its business activities as "translating, interpreting, publishing, events (reading, book presentations) and award ceremonies." HMRC disallowed a claim for input tax of £1,299 for the appellant's 03/18 VAT return. This related to an awards ceremony held at the House of Lords, sponsored by Lord Wrigglesworth and the Kazakh National Company.

HMRC gave three reasons for disallowing the VAT:

- the expenses were incurred by an individual, not by the registered entity;
- if they were incurred by the registered entity, they did not relate to a taxable supply;
- if they did relate to a business, they constituted business entertainment.

The event at the House of Lords was a cultural event and those attending were drawn from organisations such as universities and libraries. A number of individuals personally interested in this as a cultural event were also invited. The attendees were not potential customers, directly, of Aitmatov Academy. It was possible that further work may have come to the Academy through the institutions of some of those attending, but it was clear the overall purpose of the event was cultural and not advertising.

The evidence of whether the organisation or the individual incurred the expenses and received the supplies was inconclusive. However, the lack of any overlap between the customer base and those attending the event made that there was no direct or indirect link to the taxable supplies made or intended to be made by the appellant, and therefore the input tax was not deductible.

It was not necessary to consider the question of business entertainment. An argument raised by the individual that previous claims had been made and allowed by HMRC in respect of predecessor organisations was rejected: any earlier action by HMRC in relation to processing a VAT return containing a similar claim did not bind them, nor did it create a legitimate expectation for the appellant.

The appeal was dismissed.

First-Tier Tribunal (TC07673): *Aitmatov Academy*

5.7 Bad debt relief

5.7.1 Due date for payment

Under VATA 1994 s.26A, input tax that is claimed on the basis of an invoice must be reversed if the invoice is unpaid at the later of six months following "the relevant date", which is the later of the date of the supply or the due date for payment. This effectively mirrors the bad debt relief provision for the creditor.

HMRC sought to apply this rule to a company in respect of its 04/18 period, disallowing £81,227 of input tax and resulting in an assessment for £26,315. The company appealed.

The company was owned by an individual who also jointly owned two other companies with his wife. The appellant company was a new venture started in October 2012; the other companies were well-established traders operating as wholesalers of electrical goods. The new company had cash flow difficulties arising from the terms of trade set by its mainly Chinese suppliers, so the individual procured that the other companies incurred expenditure for it (using their better credit status) and recharged those costs without requiring immediate payment. The date on which payment might be required was not shown on the invoices.

It was common ground that there had been a large number of supplies from the older companies to the new one from July 2013 onwards; these were evidenced by invoices and the consideration was recorded in the books of account; some invoices had been settled by the payment of

consideration, but others had not; and the tax point for the supplies was the date shown on the invoice.

The company's witnesses – the owner and the current managing director (appointed in 2016) gave oral evidence that the consideration was payable no later than ten years from when the company commenced business in July 2013. The suppliers had accounted for output tax and had not claimed bad debt relief, so there was no loss to the exchequer. The support for the start up business was a commercial arrangement. As the due date had not yet passed, s.26A was not engaged.

HMRC argued that there was no evidence of an agreement about the due date, and the "ten year" date had not been put forward by the companies in correspondence. In their view, if there was no specified due date, the only date that could be used for s.26A was the date of the supply. They cited an internal manual in support of this argument, and also Notice 700/18, which states: "*If your supplier allows you time to pay, for example 30 or 60 days, then you are not required to repay any input tax until 6 months from this later date. In the absence of any separate agreement you can use the invoice date as the due date for payment and so use this as the time at which the 6 months starts.*"

The judge started with what he called a "prior question" – whether there was in fact any requirement for the appellant company to pay the consideration (given the very easy terms that applied). In his view, the balance of probabilities supported this. The accounting records recognised the liabilities and were consistent across the three companies; significant amounts of consideration had been paid for some of the supplies made, and the witness evidence was credible.

Turning to the question of whether the due date had passed, the judge considered that "the oddity of the arrangements must be understood in the commercial context". The connection between the companies, and the need for support for the start-up business, were credible reasons for the due date being "about ten years from the commencement of trade with the option to pay earlier if desired". Although it could not be said with precision when that date was, the judge was satisfied that it was later than the date of supply, and had not yet occurred. The law was not engaged.

The HMRC guidance cited was not of assistance – it had no legal authority, and was not directly relevant to the situation. The judge also noted that the result was fair, in that the output tax had been paid and not reclaimed (an assertion by the appellants that HMRC had not disputed), and the result was the same as if the appellant had borrowed money from its sister companies and used that money to pay for the supplies. These were not reasons for the decision, but were noted "as postscripts". The appeal was allowed.

First-Tier Tribunal (TC07653): *The Premspec Group Ltd*

5.7.2 Updated Notice

HMRC have updated their Notice *Relief from VAT on bad debts* to add information on the use of form VAT427 to claim bad debt relief after deregistration. The address to send completed forms along with original invoices has also been added.

Notice 700/18

5.8 Other input tax problems

5.8.1 2013 MTIC decision overturned

In late 2017, the Court of Appeal remitted the long-running MTIC case of *CCA Distribution Ltd (in administration) v HMRC* back to the FTT. The FTT has now issued its reconsidered decision.

On the first occasion in the FTT, there was a rare success for a MTIC appellant: the dispute concerned claims for £6.3m in periods 04/06 and 05/06, and £3.5m in relation to 06/06. The initial hearing of the appeal took place in early 2012, but the release of a decision was stayed pending criminal proceedings which took place in the summer of that year.

The company clearly had a genuine trade which had been going on for some years and had been closely monitored by HMRC. The control officer was apparently unaware, when arranging an annual inspection in June 2006, that other HMRC officers were about to raid the premises with a search warrant and remove all the records – some of which seem then to have disappeared altogether.

In April 2013, the FTT (TC02667) was split: the judge found the director a convincing witness, an honest businessman whose trading had many of the indications of carousel frauds (including rapid growth and banking with First Curacao International Bank), but who had co-operated with HMRC throughout and had carried out genuine due diligence. His side member concluded that the *Kittel* tests were satisfied, and that on the balance of probability the company was a willing participant in a fraudulent scheme. The appeal was allowed on the casting vote of the chairman.

HMRC applied for leave to appeal to the Upper Tribunal, putting forward 8 different grounds. There followed a UT hearing in late 2015, where the judges criticised HMRC's grounds but nevertheless allowed their appeal, remitting the case to the FTT for reconsideration. The company appealed against that decision to the CA, which heard the case in late 2017 and confirmed the UT decision. There were errors of law in the FTT decision, in that there was insufficient information to follow the FTT's reasons for rejecting HMRC's case in relation to evidence from banking records, and the FTT judge drew unwarranted conclusions from the outcome of the criminal investigation. It was clear that the judge had placed some reliance on it, and it could not be known what his conclusion would have been if he had not. That was an error of law. Both the UT and the CA found for the company in some respects, but the overall decision to remit was confirmed.

The new hearing was conducted by Judge Barbara Mosedale over 12 days in April/May 2019. She starts her decision by rehearsing different types of VAT fraud – 'acquisition' fraud and MTIC fraud, including its 'carousel' variety, and contra-trading. The appellant's case was that there was a fraud, but it was carried out by someone who wanted to hide the nature of the transactions from the director of the appellant; 'the fraudster took active steps to preserve CCA's innocence'. The judge rejected an argument based on a claimed logical reason for the fraudster to want to

deal with innocent brokers: although this appeared logical at first sight, it was not convincing. It was also not appropriate to decide the case on the basis of assumptions about what an unidentified fraudster would or would not prefer. The specific facts of the case should determine the outcome.

The judge went on to consider the relationship between this appeal and cases involving the counterparties with which the company had dealt. In one, HMRC had been barred from continuing the case for failing to comply with Tribunal directions; in the other, they had not alleged fraud because they did not need to do so in order to sustain their assessments. The judge decided that, in spite of the absence of findings of fraud in respect of these counterparties in their own appeals, it was not an abuse of process for HMRC to maintain in the current proceedings that those companies were knowing parties to the fraud.

There were then arguments about the admissibility of various pleadings and also evidence "brought forward" from the 2012 hearing. The judge considered that such evidence should be admitted unless there was a strong reason not to do so: it mainly comprised earlier statements about the facts by persons who were also witnesses in the current hearing, and those facts remained relevant to the current hearing.

The judge then carried out the exhaustive examination of the evidence that is typical of her decisions (this runs to 483 paragraphs). She states that she based her decision on findings that the company knew that its deals and its banking arrangements were dictated to it: the director knew that his company was not trading as a free agent in a genuine grey market, but must have known that it was participating in transactions orchestrated for the purpose of VAT fraud.

Even without those findings, the judge would have found against the company on other grounds: the deals were too good to be true, and the director acted in a manner consistent with being involved in fraud. The due diligence was inadequate and there was no inspection; negative factors were ignored, and insurance was also inadequate or absent. None of the explanations offered by the company countered these findings.

The appeal was dismissed on the basis of actual knowledge; had it been necessary to consider the question, the judge also held that the director had the means of knowledge.

First-Tier Tribunal (TC07708): *CCA Distribution Ltd*

5.8.2 FTT overturned in MTIC case

In *Beigebell Ltd* (FTT TC07163), HMRC denied a company £144,000 of input tax in its 10/15 accounting period. HMRC decided that the company's transactions in memory cards were connected with fraud, and the company ought to have known of that connection. The company did not normally trade in memory cards; it argued that, although there was a defaulting supplier in the chain, it had not been fraudulent.

The FTT examined the deals involved and the history of the defaulting trader, which was not connected to the appellant. Although the director of the defaulter did not give evidence, the Tribunal concluded on the balance of probabilities that he was not merely bad at business: he had acquired the company and carried on its activities in a way to avoid scrutiny from HMRC, and it appeared that the company was a fraudulent defaulter.

The history of the purchases of the memory cards was examined in detail. The deal was offered to the directors of the appellant by a long-standing friend with whom they had subsequently fallen out; they felt they had been let down by someone they trusted. The director who took the decision had no knowledge of MTIC fraud before HMRC carried out a visit after the transactions. That was only one factor to be taken into account; it was still possible that he ought to have known that there was something wrong with the deals. The director accepted that, after the completion of the deals, they did not "sit well with him", and he had refused the offer of further transactions.

The judge concluded that the "no other reasonable explanation" test from *Mobilx* was not met. The deal had been suggested by a long-standing friend who had given plausible explanations for the arrangements and who had given the company genuine and profitable business in the past. The director had been somewhat naive but was a sensible businessman with sound moral standards.

The appeal was allowed, and HMRC appealed to the Upper Tribunal. They argued that the decision was inadequately reasoned, in that no one reading it would be able to understand why the Tribunal had declined to draw the inferences of knowledge or means of knowledge that HMRC had put before it. They also argued that the FTT had applied a subjective test to "should have known" rather than an objective one, and had incorrectly stated that HMRC were not challenging one of the key assertions made by the director about the way in which intermediaries were routinely inserted in deal chains in the IT industry.

The UT agreed that the FTT had failed to give any reasons for finding that the directors did not know of the connection to fraud. The judge had said that he had seen "no evidence"; however, the evidence was in the form of description of features of the deals which invited the inference of knowledge. In the absence of a signed confession, this was the only evidence that HMRC were likely to be able to submit in such a case. "A necessary component of explaining to HMRC why they had lost involved demonstrating that HMRC's case had been addressed."

In addition, the FTT had said that it had seen "no evidence which proves or even suggests" that the director had actual knowledge. Clearly, HMRC's evidence suggested that knowledge, and it appeared that the FTT had misunderstood the nature of HMRC's case. It was not enough simply to say that it accepted that the director was an honest witness who denied actual knowledge. The FTT's decision was therefore inadequately reasoned.

Further, the FTT did not give adequate reasons for accepting that the "other possible explanations" for the transactions were "reasonable". The test of "no other reasonable explanation apart from connection to fraud" required the FTT to consider not only whether the trader could offer an alternative explanation, but also to consider whether that alternative was reasonable.

The FTT had referred to the director as "a suitable surrogate for the hypothetical reasonable man" in considering whether "a reasonable businessperson with ordinary competence in the appellant's position" would have known of the connection to fraud. The UT accepted HMRC's argument that this amounted to applying a subjective test – rather than

considering what a hypothetical reasonable person would have done and thought, they considered what the director did and thought. There was no analysis of why the FTT considered it reasonable for the director to have accepted his long-standing friend's explanations.

On the third ground of appeal, the UT noted that the FTT did not appear to fully understand "the sales channel in the IT industry" that was the basis of the "other reasonable explanation", but appeared to believe that HMRC were not challenging its existence. In fact, it was not clearly explained by the director in his evidence or in the previous correspondence; it was therefore not surprising that HMRC had not made a particular attack on the existence of something that had not been defined. They had not accepted its existence or the director's reliance on it. Once again, this was an error of law.

The UT considered whether to remit to the same FTT or to a differently constituted panel. In the interests of justice being seen to be done, the judges decided that a new panel would be free of accusations of either defending their earlier flawed decision or over-compensating in HMRC's favour. The case was remitted for a full reconsideration, save for a small number of findings of primary fact about the counterparties in some of the deals, which had not been criticised by either side. In particular, without drawing any conclusions on the credibility of the director as a witness, the first FTT's findings on that question could not be taken as binding on the new panel.

Upper Tribunal: *HMRC v Beigebell Ltd*

5.8.3 MTIC and agency

A partnership, registered for VAT from March 2007, traded in scrap metal. In February 2013 it began to trade in more valuable "primary metals". In its 02/13 period and its final period to 31/03/13, the partnership entered into 56 transactions involving the purchase and immediate resale of parcels of primary metals. The transactions were entered into by an individual who acted as agent for the firm and was authorised to buy and sell primary metals on its behalf. There was no documentary agreement of the scope of the agent's authority, but he was not authorised to carry out a fraud; he knew that the transactions were connected with fraudulent evasion of VAT. HMRC decided to disallow the input tax claims on the 56 transactions, and raised assessments for £1.93m.

The partnership appealed to the FTT (TC0765). It was accepted that the transactions were connected with fraud, so the only live issue was whether the trader knew or ought to have known of that connection. The FTT decided in favour of HMRC on the basis that the agent's actual knowledge had to be attributed to the principal. However, the FTT concluded that the partners themselves neither knew nor had the means of knowing of the connection; although they failed to take reasonable care in supervising their agent, the FTT did not consider that this was enough on its own to meet the *Kittel* test.

The partnership appealed to the Upper Tribunal, arguing that the FTT had been wrong to attribute the agent's knowledge to them for VAT purposes. The UT noted that it was certainly possible for an agent's knowledge to be attributed to the principal, but that the context should be considered. For

example, if a principal sued an agent for fraud, the agent could not simply plead that the principal "must have known".

The judges (Mr Justice Miles and Judge Jonathan Richards, conducting the hearing remotely) considered precedents on attribution of knowledge in a company context. The taxpayer's representative argued that the circumstances of the case were "truly exceptional", in that a business with an impeccable reputation had been comprehensively deceived by an ingenious fraudster. However, the judges considered that "fairness" could not determine the outcome: it was necessary to make the decision in a purely legal context, defined by the *Kittel* tests of actual or means of knowledge.

The judges pointed out an inherent contradiction in the appellant's argument: they were willing to acknowledge the authority of the fraudster in binding them to transactions that gave rise to credit for input tax, but wished to distance themselves from his knowledge of fraud. According to precedent (*Mobile Sourcing Ltd v HMRC* UT 2016, denial of the authority of the agent would also invalidate the input tax claims.

This inherent contradiction, together with HMRC's argument that allowing the appeal would create an opportunity for people to engage in MTIC fraud by using agents, persuaded the UT to dismiss the appeal again.

Upper Tribunal: *Sandham and another, t/a Premier Metal Leeds v HMRC*

5.8.4 Toolkits

HMRC have as usual updated the toolkits that are intended for agents to use when assessing the reliability of a client's systems for producing accurate VAT returns. They are a good guide to the risks of error that may arise, but the practicality of using them as an external VAT adviser is questionable. They are likely to be very useful for internal auditors. This year there have been some minor changes to the content of the input tax toolkit.

HMRC Toolkit: *VAT Input Tax (2020)*

5.8.5 Updated Manuals

HMRC have updated the *VAT Government And Public Bodies Manual* with the current list of bodies which are eligible to claim refunds under VATA 1994 s.33E.

VATGPB9660

6. ADMINISTRATION AND PENALTIES

6.1 Group registration

Nothing to report.

6.2 Other registration rules

6.2.1 Joint venture

A-G Kokott has given an opinion about a situation in which two people carry on a joint venture in property development, but only one of them is actively involved in running the business with respect to outsiders. The "silent partner" contributed 70% of the costs, was involved in overall decisions and took a share of profits, but was not "visible" to outsiders. The question arose of liability to output tax, and also the right of the customer to deduct input tax if the documentation did not accurately identify the taxable person making the supply.

The parties had entered into their joint venture in 2010. A parcel of agricultural land was acquired and the "active" partner obtained a construction permit in his own name. Five residential properties were constructed; the first was sold on completion in 2010; the other four were divided between the partners on termination of their joint venture agreement in 2011; the active partner sold his two properties in May 2011 and November 2012; in due course, in February 2013, he also sold one of the others, in his own name but on behalf of the silent partner, and paid him the proceeds. None of these sales was declared for VAT. The tax authorities carried out an audit for income tax and VAT and concluded that there was a single taxable activity. The active partner appealed against assessments; he lost at all stages in the domestic courts, and questions were referred to the CJEU.

In Lithuania, a partnership is not regarded as having legal personality and is not capable of being a taxable person. The questions therefore ask whether the reference to carrying on an activity "independently" in art.9 PVD meant that the person assessed should not be regarded as liable for all the tax; and if that is the case, whether and how it should be allocated between the two under art.193; and how the exemption threshold for small enterprises should be applied in such a circumstance.

A-G Kokott analysed the first problem as the identification of the taxable person in accordance with art.9. It could be the applicant alone (according to the Lithuanian tax authorities), the partnership between the applicant and the business partner (in part, according to the Commission), the applicant and his business partner collectively (in the opinion of the referring court) or, in part at least, the business partner alone (in part, according to the Commission). The answer depended on which of them qualified for recognition as a taxable person under art.9, and if more than one did, which should be so recognised.

The question of whether a particular legal form was recognised as having personality under national law was not material to the question of whether

an economic activity was being carried out in an independent manner. However, economic activity requires the respective national legal system to recognise the capacity to act (in an economic sense) in legal transactions. Only structures which are able to have rights and obligations can act in legal transactions and therefore have legal capacity. In this case, either the applicant or the business partner alone or the applicant together with his business partner could easily have that capacity by reason of the fact that they are natural persons and thus have legal capacity. However, what was unclear in this case was whether the form of cooperation between the applicant and the business partner had that capacity. If the national legal system did not recognise that form of cooperation as having legal capacity, it could not be a taxable person.

In deciding who should be liable for the tax, the A-G referred to case law precedents that confirmed that it is necessary to examine whether the person concerned performs his activities in his own name, on his own behalf and under his own responsibility, and whether he bears the economic risk associated with the carrying-out of those activities. In her opinion, where there are several possible taxable persons, only one taxable person can ultimately fulfil those criteria.

Referring back to the facts of the case, the A-G was confident that the applicant acted alone; everything was done in his name, and third parties would have been unaware of the existence of the silent partner. The profit share allocated to the partner did not alter the fact that the applicant had acted outwardly independently. Nor did the allocation of some of the profit to the partner under income tax law: VAT and income tax rules pursue different objectives.

Because the A-G concluded that the applicant alone was the taxable person, it followed that the turnover limit should be applied to him alone. However, in case the full court disagreed on the first conclusion, the A-G considered the application of the turnover threshold, which is an administrative simplification for the benefit both of taxpayers and the tax authorities. In her view:

- a single taxable person, whether a natural person or a partnership (if it had capacity) would have a single threshold applied to it;
- if the two parties were regarded as separate individual taxable persons, then in the absence of abusive arrangements (of which there was no evidence here), they should each be given their own exemption limit.

CJEU (A-G) (Case C-312/19): *XT, Lithuanian Republic intervening*

6.2.2 Registration decision

An individual ran a nailbar. In March 2018, HMRC decided on the basis of a period of "self-invigilation" (recording of receipts from each customer for a week, while she was also being observed by officers) that she should have been registered for VAT from January 2013, and issued an assessment for £90,979. The decisions were confirmed on review, and the trader appealed to the Tribunal.

At the first hearing in October 2019, HMRC argued that she could not appeal against the assessments because she had not filed returns. After that hearing, she filed returns and applied to appeal against the

assessments out of time. The judge decided to allow the appeal to be consolidated with the appeal against the registration decision. HMRC then objected on the grounds that the VAT had not been paid. The judge noted that a hardship application had been made but had possibly been delayed by the pandemic. He therefore decided to proceed with the registration appeal, and to leave the assessment as a separate issue.

The trader's appeal was based on evidence that had not previously been seen by HMRC, including letters from clients saying how long their treatments took, and CCTV footage showing how many clients visited the premises each day. This all dated from the period after the self-invigilation, and its relevance would depend on further evidence that the business operated in the same way throughout the period.

Judge Charles Hellier examined in detail the evidence for the number of people who worked in the shop, the number of customers who were treated in a day, the number of days the shop was open in a week, and the average spend per customer. On the basis of his conclusions, he was satisfied that the turnover would never have been above £76,500; the declared annual turnover for income tax purposes (£42,000 – £52,000) was credible in comparison with the owner's expenditure.

The judge noted that his task was only to consider the correctness of the decision, not to conclude on HMRC's conduct. However, as there had been submissions from both sides about this, he commented that he did not believe that HMRC had acted capriciously, vindictively or wholly unreasonably; the information they had at the time appeared to show under-recording of income and the calculations they made based on that information were not wholly unreasonable in the circumstances.

Nevertheless, the appeal was allowed.

First-Tier Tribunal (TC07705): *Ly Nguyen*

6.2.3 Updated Manuals

HMRC have updated the guidance in the *VAT Registration Manual* in relation to VAT representatives for non-established taxable persons.

VATREG37410

6.3 Payments and returns

6.3.1 Deferral of VAT payments

This VAT guidance was updated on 6 April to clarify that the right to defer VAT payments because of the coronavirus (COVID-19) pandemic does not include payments for VAT MOSS or import VAT. However, separate guidance allows negotiation of time to pay for import VAT.

The guidance was further updated in June to clarify the ending of the VAT deferral period. As this ends on 30 June, deferral does not cover most liabilities for quarterly return periods to 31 May, because they are due for payment on 7 July. Businesses that have cancelled direct debits in order to defer payments should set them up again in enough time for

HMRC to take payment, submit VAT returns as normal, and on time, make VAT payments due after 30 June 2020 in full and make VAT payments for any amounts deferred between 20 March and 30 June 2020 on or before 31 March 2021.

www.gov.uk/guidance/deferral-of-vat-payments-due-to-coronavirus-covid-19

6.4 Repayment claims

6.4.1 Group claims

The Supreme Court refused the various taxpayers leave to appeal against the Court of Appeal ruling in the *Lloyds Banking Group* case (quarterly update April 2019). This means that the litigation is at an end: no reference to the CJEU was considered necessary.

The CA held that HMRC had not erred in deciding that the person entitled to make a claim to a repayment of overpaid VAT was the representative member of the group that had overpaid the tax in the past, rather than the "real world supplier" who made the supplies, if the RWS had left the group in the meantime.

Various hypothetical problems were held not to affect the decision in the actual situations under dispute, in particular the possibility that the RWS was being sued by a customer for the return of the overpaid VAT. Lady Justice Rose noted that a future court might have to consider this issue, and might decide that the RWS had a claim against the representative member, but in the circumstances of the cases before the court, no such situation arose.

Supreme Court: *Lloyds Banking Group plc and others v HMRC and another*

6.4.2 Historic claim to be reconsidered

FTT decision TC05971 concerns a Scottish NHS Board that made a claim for repayment of input tax incurred on taxable supplies by its laboratories during the period 1974 to 1997. Its appeal was heard in 2015 and 2016 by Judge Kenneth Mure, who unfortunately died before giving a decision. The decision was, with the agreement of the parties, prepared by the side member of the Tribunal, Peter Sheppard. His decision records the evidence and discussion in considerable detail.

The first contention by HMRC was that the claim now under dispute was "new", i.e. made after March 2009 and therefore time-barred. The Tribunal disagreed. The calculations and revisions had been made in the course of correspondence and discussion in the period since March 2009, but they all remained valid clarifications of an existing valid claim.

Next, the FTT accepted that the Board did make taxable supplies in the course of business throughout the period of claim. There were specific supplies that were not covered by the exemption, in line with the *d'Ambrumenil* decision of the CJEU.

However, it was not possible to draw a conclusion about the calculation of the claim. A figure had been agreed for the 2006/07 year (14.7%) in relation to a non-*Fleming* claim, but the Tribunal could not accept that extrapolation of this figure back into the distant past could be justified. Extrapolation might be valid over a long period if there were at least some contemporaneous figures from prime records – for example, over a 25-year period, the Tribunal suggested that verified calculations could be carried out every 5 years and applied to the intervening periods, if there was no great variation. However, to take a figure from 2006/07 and apply it without any other evidence to all the years from 1974 to 1997 could not satisfy the balance of probabilities.

The appeal was therefore dismissed by the FTT; the Board appealed to the Upper Tribunal, where it came before Lord Tyre. The grounds of appeal were essentially that the FTT had applied the criteria appropriate to a dispute about partial exemption (where the law prescribes the method of calculation, including direct attribution) rather than business/non-business (where the only requirement is for a fair result).

The judge accepted, on the basis of the CJEU precedent *SECURENTA* (Case C-437/06), that the distinction between partial exemption and business/non-business methods was valid. It would therefore constitute an error of law if the FTT had purported to apply partial exemption methods in reaching a decision on a business/non-business split. However, the judge considered that the FTT had been quite clear about the distinction between the two, and had applied the correct test. Comments about partial exemption at the end of the decision were not part of the reasoning that had led to the refusal of the appeal, and did not indicate an error of law. Nor was it incumbent on the FTT to carry out alternative calculations to those supplied by the appellant with a view to arriving at an acceptable figure, because there was insufficient material before it to do so.

The appeal was refused, and the Board appealed again to the Court of Session. By the time of the hearing the claim had been quantified by the Board at £929,874.69; the only question was whether this quantification was sufficiently accurate to justify the claim. It was accepted in principle that there was input tax that ought to be recoverable in respect of business activities.

The main ground of appeal was that the EU doctrine of effectiveness required that an acknowledged claim for input tax should be honoured. It was argued that HMRC should assist the taxpayer and the FTT in ascertaining a fair and just amount of under-recovered VAT to be repaid to the taxpayer. Alternatively, effectiveness required the FTT, or the UT on appeal, to find sufficient facts to enable an appropriate methodology to be determined to secure that a fair and just amount of under-recovered VAT could be ascertained for repayment.

The court agreed that HMRC and the FTT could not reject completely a claim for repayment solely on the basis of difficulties in identifying a satisfactory methodology or difficulties of proof. Given that under EU law a claim for input tax must not be made excessively difficult or practically impossible, HMRC and the Tribunals should adopt a flexible approach to the burden and standard of proof in connection with historical claims for repayment.

The FTT had erred in concluding that the 'reasonableness' of the amount claimed could not be determined in the absence of the primary records. They would have made it possible to determine the accuracy of the claim; the question of reasonableness should be considered in the light of secondary evidence and inferences that could be drawn from such evidence. The reasons given by the FTT for rejecting the claim were examined and held to be wrong in law: the correct question, of whether the secondary evidence could establish the reasonableness of a claim, was not properly addressed. Given that it was acknowledged that some repayment was due, it would only be in exceptional circumstances that it would be impossible to calculate a reasonable figure.

The appeal was allowed, and the case was remitted to a differently constituted FTT for reconsideration. The FTT must attempt to identify a satisfactory methodology to permit quantification of the amount of input tax that was due, given that it was accepted that this was more than zero. The absence of primary evidence was not the taxpayer's fault, and it could therefore not be held against the taxpayer.

Court of Session: *NHS Lothian Health Board v HMRC*

6.4.3 Offsets in claims

In TC06483, the FTT had to consider the validity of one of many claims that the company had made. The FTT decision opened with a summary of earlier claims, showing in a table that HMRC had accepted three "bingo" claims and paid out £98m, representing overpaid output tax net of overclaimed input tax.

HMRC had rejected a fourth claim as being made out of time. This related to the periods from 12/96 to 12/02, and the net amount involved was £67m. An appeal against the refusal of this claim was rejected. In June 2013, and followed up in June 2014, the company made a further claim for this amount, arguing that it should not have had to reduce its earlier repayment claims by so much input tax – £67m – when it was effectively "in credit" to that amount. The company argued that this was the application of the principles of the *Birmingham Hippodrome* case, and the claim was made under s.80(1B).

The argument continued that s.81(3) was the relevant operative provision of VATA 1994 that permitted HMRC to set off sums that the appellant was "liable to pay" to HMRC against the gross amount of output tax that fell to be repaid. Ordinarily, the appellant would only be "liable to pay" HMRC an amount in respect of input tax wrongly credited if HMRC made an assessment to recover that input tax and, at the time HMRC dealt with the three claims they had settled, they were out of time to make such an assessment. However, even though HMRC were out of time to assess the appellant for overclaimed input tax, s 81(3A) required HMRC to set that overclaimed input tax off against the appellant's claim for repayment. According to the *Birmingham Hippodrome* case, HMRC should then take into account all the consequences of the same mistake, and deal together with all other overdeclarations and underdeclarations whenever they had occurred.

HMRC had therefore been wrong to offset all the input tax overclaimed in the periods relating to the three claims – £68.8m. They should have given credit for the overpayment for the period covered by the fourth claim, and

only offset £1.8m, leaving a further £67m to be repaid. The company claimed that the incorrect offset amounted to a "payment" by the company at the times HMRC made the repayment (May 2010, February 2011 and March 2011), so the claim made in June 2013 was in time.

The judge noted that there was no agreement between HMRC and the taxpayer about the "architecture" of s.80 and s.81. Following a detailed examination of the law, Judge Jonathan Richards concluded that the offset of input tax against output tax when settling a s.80 claim did not constitute "payment" of the input tax to HMRC by the claimant. If there had been no "payment" in 2010/11, there could be no s.80(1B) claim, and the appeal had to be dismissed.

The judge declined to express a firm opinion on the implications of the *Birmingham Hippodrome* case, although it was argued extensively by both sides. He considered that the effect could be significant, so it would be better if it was only ruled on by a Tribunal where it had a bearing on the outcome.

The company appealed to the Upper Tribunal, which opened by analysing the contrasting positions of HMRC and the company in relation to the various claims. The decision went on to consider three issues:

- whether it was correct that HMRC had underpaid the first three claims by £67m;
- whether that constituted a "payment" by Rank to HMRC for the purposes of s.80(1B);
- whether the further claim represented an illegitimate re-opening of the first three claims.

In relation to the first question, the UT considered the operation of s.81(3A) VATA 1994 in detail. The company argued that HMRC were not allowed to "cherry-pick" out-of-time liabilities; once they had decided to bring one out-of-time liability into a set-off calculation, that effectively re-opened all other liabilities that arose from the same mistake. This was illustrated by the following example:

Row	Description	Over-declared OT	Associated IT	Net position	Amount payable by HMRC
a	Claim	£100	(£25)	£75	£100*
b	Out of time P1	£100	(£100)	£0	
c	Out of time P2	£150	(£100)	£50	
d	Out of time P3	£75	(£100)	(£25)	
	Totals	£425	(£325)	£100	

* no reduction because there is no "liability" to set off.

(a) In this hypothetical case, a taxable person makes a claim for over-declared output tax in the amount of £100. The associated input tax of £25 cannot be set off by HMRC because HMRC is out of time to make an assessment.

(b) HMRC therefore relies upon s.81(3A) VATA to bring the out-of-time liability of £25 into account, which HMRC are entitled to do.

(c) However, that brings into play all of the cross-claims between the taxable person and HMRC. In this case, the net position – taking account of all transactions – is that the sums owed to the taxable person by HMRC exceed (by £100) the sums owed by the taxable person to HMRC. The taxable person cannot, of course, claim these sums, but the effect is to reduce HMRC's set off to nil. As a result, the taxable person recovers £100, the full amount of his or her over-declared output tax.

HMRC argued that the legislation required a different construction: that only liabilities to HMRC should be considered for the offset. The argument is complex, but their view of the above table was that they would be able to offset the £25 in the claim period and the net £25 from period 3 while ignoring the £50 from period 2. They did not regard this as "cherry-picking" but simply the operation of the law.

The UT rejected HMRC's first contentions about the operation of the law: Rank was correct that s.80(1) considered only the overpaid output tax, without at that stage taking input tax into account; and s.80(2A) requires set-off of liabilities due under *other* provisions of the VAT Act, rather than containing any set-off requirement itself.

Turning to the offset rules, the UT considered that *Birmingham Hippodrome* was not of direct assistance because of the significant difference between the two situations – the offset in the earlier case led to the taxpayer's claim failing in full, whereas the result in the present case would be to create a larger credit for the taxpayer.

Analysing the earlier decision of the Court of Appeal, the UT concluded that Rank's approach was to be preferred. HMRC's argument amounted to "asymmetric set-off", in that it took into account underpayments by the taxpayer but left out of account overpayments. That seemed contrary to principle and wrong. As a result, the UT concluded that HMRC had indeed made an underpayment in respect of the first three claims amounting to £67.05m.

The FTT had concluded that the outstanding amounts were not a "payment" for the purposes of s.80(1B) because "set-off was not payment". The UT disagreed: there was no set-off at all. Rather, the underpayments were simply unpaid debts of HMRC that could only have been extinguished by HMRC litigating to show that they were not due.

After all that, the UT gave a very brief decision that the s.80(1B) claim failed because there were no payments that it could apply to. If there had been such payments, the UT did not believe that a claim would have constituted an illegitimate re-opening of the earlier claims. However, the appeal was dismissed.

The company appealed again to the Court of Appeal. Patten LJ examined the interaction between the parts of s.80 and s.81 and concluded that the offset accounting exercise that Rank contended for was not permissible or required. The company had made four separate claims; three had been paid and the fourth had been rejected as made out of time, and that was permitted under EU law. The attempt to recover the amount of the fourth claim by way of offset in relation to the other periods involved 'a distortion of basic VAT accounting principles for which there is no warrant in the provisions of either s.80 or s.81.'

The appeal was dismissed again.

Court of Appeal: *Rank Group plc v HMRC*

6.4.4 Deduction of VAT that should have been charged

Zipvit's argument about input tax implicit in charges treated as exempt by Royal Mail has been referred to the CJEU by the Supreme Court. The judges noted that the company's own claim was for £415,746 plus interest, but the claims standing behind this test case totalled between £500 million and £1 billion.

Background and FTT

In 2014, the FTT (TC03773) dismissed an argument that a company should be entitled to input tax as the VAT fraction of money paid to Royal Mail in respect of supplies which were regarded by the UK law as exempt, but which were of a kind held by the CJEU not to qualify for exemption under EU law. The particular claim related to consideration paid of £120,000, but there are a number of other similar claims with a large amount of money riding on them. Judge Mosedale gave her decision acknowledging that it would surely be subject to appeal, and probably an eventual reference to the CJEU. She therefore set out the facts and her understanding of the law, and her reasoning for her decision, with the stated intention of making everything clear for those who would review the decision later.

First, she accepted the taxpayer's argument that the supplies concerned were taxable. It was necessary to apply a conforming construction of UK law where possible; although the UK law was understood at the time to mean that all supplies by the Post Office were exempt, it was possible to interpret the exemption as covering only those supplies that the CJEU held were included (the "universal service obligation", not individually negotiated contracts such as those at issue). The doctrine of direct effect would also entitle the appellant to claim against HMRC that the supplies were taxable, but the conforming construction of the UK law meant that this was not required.

The question was then whether the customer was entitled to deduct VAT. Under EU law, VAT is deductible if it is "due or paid". This has widely been interpreted as covering the situation where an amount of consideration has been paid by a customer to a supplier, and that consideration "included VAT" because the supply was taxable. HMRC argued that the claim would only succeed if the appellant now paid VAT to Royal Mail in addition to the agreed consideration, and Royal Mail issued a VAT invoice. This goes against the normal view of HMRC where VAT has not been accounted for on a taxable supply – if the contract does not mention VAT, the consideration includes it, and the supplier must account for it.

By contrast, Judge Mosedale carried out a detailed analysis of the law – one that appeared to go beyond what HMRC's representatives put to her – and concluded that the European law is really referring to VAT that is "due or paid [by the supplier]", i.e. has been or will be accounted for as output tax to the authorities. In this case, Royal Mail had not paid VAT on these supplies, and in the absence of an assessment being raised by HMRC, it would not do so. It was by no means clear that HMRC could raise such an assessment, given that the UK law and administrative practice was to treat such supplies as exempt.

The judge went on to consider whether HMRC should exercise their reg.29 discretion to allow a deduction for input tax without insisting on the normal condition that the claimant holds a tax invoice. The company argued that there was compelling evidence that the company had paid for a supply that ought to have been treated as taxable. However, the judge concluded that it was relevant to HMRC's decision that making the repayment would create a windfall for the appellant: it had not expected to receive that repayment at the time it entered into its contracts, and it would effectively receive a pure profit at the expense of other taxpayers. Although refusing the deduction would create a sticking cost in the chain of supply (because Royal Mail had passed on irrecoverable VAT in its own costs), that sticking cost was much smaller than the windfall. It could not be said that refusing to allow such a large windfall was an unreasonable decision, even if the result was a small windfall to HMRC.

These factors had not explicitly been considered by HMRC in making the decisions. That would make them "unreasonable" for the purposes of the Tribunal's supervisory jurisdiction. However, the judge was satisfied that the result would have inevitably have been the same if the proper factors had been taken into consideration.

This last point – the absence of a VAT invoice, and the reasonable exercise of discretion – was the ground for Judge Mosedale's decision that the appellant was not entitled to the claim. She recognised that all parts of her decision were likely to be reviewed on appeals, possibly by both parties, or by other appellants in other cases.

Upper Tribunal

The company appealed to the Upper Tribunal. In 2016, Mrs Justice Proudman rehearsed the legislative background to the claim in the PVD, the VAT Act and the regulations. She went on to state the two issues before her: whether VAT was "due or paid" within art.168(a) PVD; and whether, in the absence of invoices, HMRC should nevertheless exercise discretion in the company's favour. It was accepted by all sides that the UT had jurisdiction to consider the exercise of HMRC's discretion.

The judge noted a number of CJEU precedents, but in particular *PPUH Stehcemp sp. J. Florian Stefanek, Janina Stefanek, Jaroslow Stefanek v Dyrektor Izby Skarbowej w Łodzi* (Case C-277/14). The court had ruled that the right to deduction was based on VAT due or paid by the customer, not by whether it had been paid over to the authorities by the supplier. Both sides said that Judge Mosedale had gone off on a "frolic of her own" in reasoning otherwise. Proudman J declined to comment further, other than to follow the CJEU precedents.

The appellant's case was simple. Because VATA 1994 s.19(2) calculates VAT as a fraction of the consideration paid, then the customer must have "paid" VAT if the transaction was in principle taxable. HMRC's representative argued that s.19(2) was merely about calculation, and whether the consideration included VAT depended on the agreement between the parties: in his view, the customer could not now claim that it had paid VAT after years of not challenging invoices that stated the transaction was exempt. He relied on the opinion of the A-G in the *T-Mobile* case on the grant of telecommunications licences by Austria. The judge was not convinced that this was correct, but said that her view on the VAT invoice question rendered the point academic.

The judge noted that there was some uncertainty about the basis of the company's appeal in this area. It was explicitly not based on an alleged failure of HMRC to follow their own policy as set out in their statement of practice on *Input tax deduction without a valid VAT invoice*. However, that statement did appear to provide a reasonable explanation of how HMRC would and should exercise their discretion.

The judge also noted that there were three possible outcomes to a consideration of discretion:

- if the decision maker reached a decision that no reasonable decision maker could have reached, the appeal should be allowed and the appellant's claim for input tax should be upheld; but
- if HMRC's decision would inevitably have been the same had it been properly undertaken, then the appeal should be dismissed;
- in any other case HMRC should be required to reconsider their decision, taking into account such matters as they should take into account and leaving out of account those matters which they ought not to have taken into account.

The judge agreed with the reasoning of the FTT. Although the economic burden of the VAT was not relevant to the question of entitlement to recover, it was relevant to the decision to exercise discretion. Even though the officer had not considered the matter, it was clear to the judge that an officer would have inevitably rejected a claim that would lead to a repayment of 15% to 17.5% of the price on the basis that an economic cost of about 2.5% had been suffered (the amount of Royal Mail's irrecoverable input tax that led to higher prices).

As a result, the company's appeal failed on the matter of VAT invoices, regardless of the conclusion on "due or paid".

Court of Appeal

The company appealed further, arguing first that new evidence should be considered by the CA. This is unusual for an appellate court, but the judges considered that it would be right to admit new relevant material in a case on which litigation of possibly £1 billion depended. It was not clear who was to blame for the fact that this material (relating to details of the contracts entered into between Zipvit and Royal Mail) had not been put before the FTT. Henderson LJ held that it was appropriate to admit it, but also to consider the position on the alternative hypotheses with and without the new material.

The judge notes the confusing wording of VATA 1994 s.19(2), which appears at first sight to be a grossing up provision: "the value of a supply is such amount as, with the addition of the VAT chargeable, is equal to the consideration". The judge comments that this is not what it means – it is a rewording of art.78(a) PVD, which excludes the VAT from the taxable amount. He goes on to say:

"There is no difficulty in principle with this analysis if the consideration for a taxable supply is agreed to be £100 plus VAT, or if the agreement says nothing about VAT, with the consequence that the agreed consideration of £120 must be treated as inclusive of VAT. But what if the parties agree a price which is *exclusive* of VAT, perhaps because it is unclear whether VAT is properly chargeable on the supply? In that kind

of case, it will be a matter of construction of the agreement between the parties to determine whether the customer is contractually liable to pay an amount equal to the VAT, if and when it turns out to be properly chargeable. Assuming that to be the correct construction, and if it emerges that VAT is chargeable on the supply, the supplier will probably then send a VAT-only invoice to the customer (which would be for £24, if the agreed VAT-exclusive price were £120).

Does s.19(2) then have the effect that the original payment of £120, made on a VAT-exclusive basis, must be retrospectively split into a taxable amount of £100 plus VAT of £20, and that the subsequent payment of £24 (assuming that the customer honours his contractual obligation) must likewise be split into a further taxable amount of £20 and VAT of £4? As a matter of first impression, there is much to be said in favour of an affirmative answer to this question. There is still only one supply, and a single overall consideration for it, albeit paid in two instalments; and since the supply is (on this hypothesis) taxable, each of the sums paid on account of the total price should be regarded as including VAT at the appropriate rate. The function of s.19(2) is to ensure that the total consideration is split into a taxable value of £120 and tax of £24, not to treat the first payment of £120 as exclusive of VAT and the second payment of £24 as consisting entirely of VAT. That may be how the supplier and the customer view the matter in commercial terms, but the correct analysis for VAT purposes could well be that there has been a single taxable supply for a total consideration for £144, comprising a taxable amount of £120 and VAT of £24, paid in two instalments."

This construction was put forward by the taxpayer, supported by the 2013 decision of the Court of Session in *Simpson & Marwick v HMRC*. That concerned a situation in which a firm of solicitors had failed to account for unpaid "VAT only" invoices, and sought to argue that it was entitled to bad debt relief on the full amount – if the amount involved was £120 gross, £100 had been paid by an insurance company, and the whole amount outstanding (£20) was the VAT. The CS held that the £100 received from the insurance company included some VAT, and bad debt relief could not operate in this way.

The judge noted that this case turned on the construction of the bad debt relief rules, and did not settle the question on which the present case depended. That was the consequence for VAT of an agreement between the parties that a price was "VAT-exclusive", followed by the determination some time later that VAT should have been charged. This had not been addressed by the CJEU, and the judge considered that a reference might have been necessary on the following question: "whether the original purchase price paid by the customer to the supplier should be treated as VAT-inclusive, in circumstances where the supplier has a contractual right to obtain payment of the VAT from the customer, but (for whatever reason) has failed or chosen not to enforce that right."

He then summarised his conclusions on whether VAT had been "due or paid" for the purposes of art.168. If Royal Mail had a contractual right to recover the VAT from Zipvit, a reference would have been necessary. If it clearly had no such right, the price paid would have had to be treated as VAT-inclusive, and Zipvit would have had a right of recovery. This followed from the CJEU decision in *Tulica* (Cases C-249/12 and 250/12), even though that dealt with the position of a supplier, and would have

been "acte clair". Similarly, if the contract had stated explicitly that the price was VAT-inclusive, that would confirm the right of recovery.

The judge moved on to the second question, which was whether the absence of a VAT invoice was fatal to the claim. This was required by PVD art.178, with further details provided in art.226 and art.219; articles 180 and 182 empower Member States to authorise a deduction without an invoice, as enacted by the UK in SI 1995/2518 reg.29.

The company argued that the invoices supplied by Royal Mail were defective VAT invoices that ought to have been corrected in accordance with the CJEU decision in *Barlis 06* (Case C-516/14). All that was missing was the VAT element that should have been included in the consideration.

The judge disagreed. In *Barlis*, the question was whether the description of the services was adequate. There was no dispute about the liability to VAT, or about whether the VAT had been accounted for by the suppliers. In the present case, the invoices described the supplies as zero-rated or exempt, and there was no doubt that Royal Mail had not accounted for output tax. The judge noted that the function of the VAT invoice, as confirmed by CJEU case law, was to enable the authorities to monitor the payment by suppliers of the VAT claimed by purchasers. It was not a mere formal requirement, as the company argued.

The absence of a VAT invoice was fatal to the claims whether or not the new contractual material was admitted, and there was no need for a reference to the CJEU. The other two judges agreed, and Zipvit's appeal was dismissed again.

The company appealed to the Supreme Court, which has unanimously decided to refer questions to the CJEU. The company maintains that the CA had come to the wrong decision both on the question of whether the VAT was "due or paid", and of whether there was adequate alternative evidence for HMRC to allow the appeal. The Supreme Court decided that neither point was "acte clair" and has referred the following questions:

"(1) Where (i) a tax authority, the supplier and the trader who is a taxable person misinterpret European VAT legislation and treat a supply, which is taxable at the standard rate, as exempt from VAT, (ii) the contract between the supplier and the trader stated that the price for the supply was exclusive of VAT and provided that if VAT were due the trader should bear the cost of it, (iii) the supplier never claims and can no longer claim the additional VAT due from the trader, and (iv) the tax authority cannot or can no longer (through the operation of limitation) claim from the supplier the VAT which should have been paid, is the effect of the Directive that the price actually paid is the combination of a net chargeable amount plus VAT thereon so that the trader can claim to deduct input tax under article 168(a) of the Directive as VAT which was in fact "paid" in respect of that supply?

(2) Alternatively, in those circumstances can the trader claim to deduct input tax under article 168(a) of the Directive as VAT which was "due" in respect of that supply?

(3) Where a tax authority, the supplier and the trader who is a taxable person misinterpret European VAT legislation and treat a supply, which is taxable at the standard rate, as exempt from VAT, with the result that the

trader is unable to produce to the tax authority a VAT invoice which complies with article 226(9) and (10) of the Directive in respect of the supply made to it, is the trader entitled to claim to deduct input tax under article 168(a) of the Directive?

(4) In answering questions (1) to (3):

(a) is it relevant to investigate whether the supplier would have a defence, whether based on legitimate expectation or otherwise, arising under national law or EU law, to any attempt by the tax authority to issue an assessment requiring it to account for a sum representing VAT in respect of the supply?

(b) is it relevant that the trader knew at the same time as the tax authority and the supplier that the supply was not in fact exempt, or had the same means of knowledge as them, and could have offered to pay the VAT which was due in respect of the supply (as calculated by reference to the commercial price of the supply) so that it could be passed on to the tax authority, but omitted to do so?"

Supreme Court: *Zipvit Ltd v HMRC*

6.4.5 Calculations

In TC05257, a company appealed against an assessment for £460,630 to reverse an adjustment it had made to its output tax for the period ending 12/12. The appeal was a lead case for two other taxpayers with similar issues. The issue related to the calculation of participation fees for bingo. HMRC had published a Brief (07/07) which suggested that the correct approach was to calculate the participation fees on a "session by session" basis rather than "game by game". The companies believed that their adjustment reflected this approach, and entitled them to make an adjustment under reg.38 SI 1995/2518 because there had been a "decrease in consideration for a supply, which includes an amount of VAT".

Customers pay a fixed sum to participate in a session of bingo which entails the right to play in several separate games of bingo, each of which offers a cash prize. For the purposes of VAT, this sum is divided into a stake and a participation fee. The stake is the element of the sum which is paid by the customer that is used to fund the prize for the winner. It is not consideration for any supply.

The company had historically accounted for output tax on participation fees on a game basis, in accordance with HMRC's published guidance at the relevant time. HMRC's Brief 07/07 indicated that it should have been accounted for on a session basis. The effect of the Brief and the session basis allowed the company to reduce the value of the participation fees (on which VAT was payable) where the participation fees for games within the session were added to the stake money (which was outside the scope of VAT) received from customers to guarantee a certain level of prize or to create additional prize money for other games within the session.

The company argued that a change in calculation of the apportionment between stake and participation fee resulted in a change in the amount of consideration for the supply – if the participation fee had gone down, then more of what the customer paid was stake money; that meant that the

consideration for the VATable supply had reduced, and reg.38 was engaged. The company issued an internal credit note to adjust the VAT.

HMRC argued that the amount paid by the customer had not changed, so any claim had to be made under s.80 VATA 1994, and it would therefore be out of time. In HMRC's view, the apportionment between stake and fee must be known by the end of the session; it was therefore not possible for there to be an adjustment to consideration after the end of the relevant period, which is what reg.38 requires.

The FTT noted that a similar issue had been decided in the taxpayer's favour in the case of *Carlton Clubs plc* (TC01389). HMRC had not appealed that decision, but argued that it was not binding and had been wrongly decided. In their view, the company had made a mistake in its earlier periods (albeit because it had followed HMRC's policy), and could only correct it by making a s.80 claim.

The decision considered the detailed arguments of the taxpayer about the relationship between the valuation provisions which deem part of a mixed payment to be consideration for a supply, and HMRC's response that art.90 PVD and reg.38 require an "event between customer and supplier" subsequent to the original supply.

The judge (W Ruthven Gemmell) explained in considerable detail why he preferred the company's arguments. He did not agree that art.90 required a repayment to the customer; reg.38 provided for "adjustments in the course of business", which covered this situation. The appeal was allowed.

HMRC appealed to the Upper Tribunal, arguing that the FTT judge had erred in his interpretation of the legal provisions, in particular in relation to "decrease in consideration". HMRC continued to maintain that the amount paid by the customer had not changed, so there could be no "decrease". There were in total 8 different grounds of appeal.

The Upper Tribunal ruled that HMRC's arguments were misconceived. The focus of the VAT legislation was on "consideration for the supply". The single payment from the customer did not change, but the amount of it that constituted consideration did change. The company had not made a mistake when using a lawful method of apportionment on the "game" basis, and was acting properly when instructed to change to a different lawful basis; HMRC had invited retrospective claims by reference to s.80, but that did not prevent the taxpayer from making any other lawful claim, including one under reg.38. An argument that the FTT should have regarded the "session payment" as a "single supply" was rejected because, once again, the focus should have been on consideration, not supply. The FTT had come to the correct decision, and HMRC's appeal was refused.

HMRC appealed again to the Court of Session, which overturned the decisions below. The crucial question was whether the circumstances of the case met the terms of reg.38. In the court's view, the conditions of reg.38 were more specific and narrower than those of s.80. The conditions were:

- there had been an increase or decrease in consideration for a supply which included an amount of VAT; and

- the increase or decrease occurred after the end of the accounting period of the original supply; and
- the increase or decrease must be evidenced by a credit or debit note.

That suggested that the standard situation for the regulation to apply was a commercial transaction in which a price was renegotiated and adjusted between the parties. That limited scope was supported by the context in which the regulation appeared, and also by CJEU decisions such as *Goldsmiths (Jewellers) Ltd* and *Freemans plc.*, These cases confirmed that what is now PVD art.90 was concerned with the consideration actually paid and received, not other adjustments to a trader's VAT liabilities.

The recalculation of the proportions of the customers' payments that were stake and consideration did not make any difference to the rights and obligations of the taxpayer and the customers in the real world. Those were settled in the past, and this was merely a different way of working out the VAT liability. That could only fall within s.80, not within reg.38.

The taxpayer also relied on VATA 1994 s.19(4), which required an apportionment where a single payment related to more than one thing. It argued that such an apportionment could be reconsidered over a period of time where the underlying calculation was difficult, citing the *First National Bank of Chicago* case as authority for the proposition that the CJEU supported such an approach. The company argued that HMRC's notices on the subject of apportionment constituted an exercise of a power to determine the correct way of carrying out the calculation. The court accepted this as a general proposition, but did not agree that it brought the matter within reg.38. HMRC's instruction to use a different method of calculation related to the internal accounting of the taxpayer, and did not change the consideration in the sense required by reg.38.

HMRC's appeal was allowed, and the company appealed to the Supreme Court. Lord Leggatt gave the leading judgment, in which he emphasised that the "session basis" set out in R&C Brief 07/07 was not merely a different valid way of calculating the VAT – it was the only correct way of doing so. Customers paid to take part in a session, not individual games – so the guaranteed prizes were allocated out of the takings for the session, and reduced the taxable amount for that session.

That meant that the taxpayer's claim suffered from an inherent contradiction. If the VAT liability on the "game basis" was incorrect, then the taxpayer had paid amounts to HMRC that were not due as VAT, and the reclaim had to be made under s.80. The time limits therefore applied. If the "game basis" had been valid, and the Brief was merely a change of policy between two valid ways of making the calculation, then there was nothing to justify a reclaim. In fact, the reclaim was valid, and the "in time" periods had been correctly repaid; there was some unfairness in the time limit, but it was justified by the need for legal certainty.

In the judge's view, "there can only be one correct method of calculating the taxable element". If there were different methods, that would create a fiscal distortion within the country, and more so between different EU states. The judge discussed the only precedent in which a choice between different lawful methods had been considered – the 1996 High Court decision in *Victoria & Albert Museum Trustees*. That concerned the

apportionment of VAT on costs between business and non-business activities, and was not directly relevant to the present case. Even so, it confirmed that, if there were different lawful methods available, a later change of method did not justify a reclaim of past tax paid under the previous method.

That was sufficient to dispose of the appeal, but the judge went on to consider the argument based on reg.38. In his view, the "reduction in consideration" referred to in art.90 PVD required something more than a change of calculation. "Nothing has happened since the time of the supply to reduce the consideration actually received at that time. All that has happened is that the taxpayer has had second thoughts about how the consideration received at the time of the supply should be analysed for tax purposes." Reg.38 and art.90 were both concerned with actual returns of consideration to the customer, not with recalculations.

The judge concluded by commenting on the status of the Business Brief. He characterised the taxpayer's argument as claiming that it was required to calculate the taxable proportion on the "game basis" under HMRC's previous policy, then required to change to the "session basis". The judge described this as a "misconception". Guidance issued by HMRC was not the law; it could in some cases create an expectation on the part of a taxpayer that a particular policy or practice or course of action will be followed which the law will protect by preventing HMRC from acting in a way which will frustrate that expectation. However, that was not relevant: it might have been, had the game basis been more favourable to the taxpayer than the session basis, and the taxpayer was trying to resist an assessment for earlier periods. However, that was the opposite of the present situation.

The taxpayer's representative tried an argument that the Brief "invited" taxpayers to make an adjustment through their returns; the judge did not agree that it could be reasonably interpreted in that way, and if HMRC had offered to repay tax that they were not liable to repay, they would have been acting outside their powers.

The appeal was unanimously dismissed.

Supreme Court: *K E Entertainments Ltd v HMRC*

6.4.6 Award of interest

Until 1 April 2009, VATA 1994 s.84(8) allowed the VAT Tribunal to award interest "at such rate as the tribunal may determine". This was replaced by s.85A with effect from 1 April 2009, which imposes a rate of interest set under FA 1996 s.197.

The appellants in the present case won an appeal in 2013 about the disallowance of input tax from two periods in 2006. They were repaid the disputed tax along with repayment supplement and interest, which was apparently intended to be calculated at Bank of England base rate plus 1%, but seems to have been overpaid at base rate plus 2%. Nevertheless, they maintained that they should have been paid at a higher rate based on s.84(8), because the cause of the appeal arose before the provision was repealed. The application of the law was accepted by HMRC, but they disputed the appropriate rate.

The judge considered evidence from expert witnesses on both sides and from accounting information provided by the companies. It seems unlikely that this legislation will be applied in the future, so the details are of mainly academic interest. The judge concluded that the companies should be awarded more than the "plus 1%" that HMRC argued for, but rather less than the rates of interest for which they contended. She specified the calculations to be carried out at the end of her decision. The repayment supplement already paid should be deducted from the award.

First-Tier Tribunal (TC07677): *Unistar Trading Ltd (in liquidation) and another*

6.5 Timing issues

Nothing to report.

6.6 Records

6.6.1 Making Tax Digital

HMRC have updated the *Making Tax Digital* Notice to reflect the extension of the 'soft landing' period during which digital links between software programs will not be required until the first VAT return period starting on or after 1 April 2021.

VAT Notice 700/22

6.6.2 Error Correction

In order to support individuals and businesses through the short-term impacts of the coronavirus pandemic, HMRC have updated their VAT error correction guidance to reflect that they will temporarily accept error correction notices from VAT registered businesses via email and not by post. After sending a VAT 652 by this means, businesses are advised to ring to check it has been received if there has been no acknowledgement within 21 days.

www.gov.uk/vat-corrections/report-error

6.6.3 Correction of errors

A taxable person was the subject of an inspection by the tax authorities. Having identified errors with regard to a given transaction in which that taxable person acted as supplier, the tax authorities issued a tax assessment requesting the taxable person to pay additional VAT. The taxable person complied with the tax assessment and paid the additional VAT requested.

Subsequently, however, new facts came to light which triggered a different tax regime (the reverse charge mechanism) with regard to the transaction at issue. The Romanian tax authorities refused to allow the taxable person to correct the relevant invoices, and thus, in effect, denied the taxable person the right to a tax adjustment, because the invoices related to transactions carried out during a period which was the subject of a tax inspection, and the resulting tax assessment was not challenged by

the taxable person at that time. The taxpayer appealed, and questions were referred to the CJEU.

The original assessment (March 2014) was based on a finding that the company could not produce the required documentation to show that despatches had been made to a customer in Germany (October 2013). The customer confirmed to the appellant that the goods had not left Romania, and asked for corrected invoices identifying the customer's tax representative in that country. These were issued by the appellant in relation to 180 transactions; as failed despatches they were subject to output tax at 24%; however as domestic transactions they were subject to the reverse charge in accordance with art.199a PVD, which Romania was authorised to apply to transactions in certain cereals, including rapeseed.

The company therefore deducted an adjustment in relation to these corrective invoices from the VAT due for its current return period (March 2014). The claim for a repayment of VAT led to another tax audit (November 2016 to February 2017), and a further assessment was issued (February 2017), which was appealed.

A-G Bobek considered that the principles of fiscal neutrality, effectiveness and proportionality precluded the actions of the tax authority in this case. According to the law in force at the time, the customer was liable for the VAT on these transactions. The first assessment was therefore incorrect.

Case law precedent shows that a taxable person must be able to correct errors and to recover tax incorrectly paid. The Romanian authorities argued that this did not apply here because the trader had failed to appeal against the first assessment within the appropriate time limit, and because the trader had not acted in good faith.

The A-G accepted that an assessment that has been raised and has become final cannot be reopened. That is in accordance with the principle of legal certainty. However, in this case the assessment was correctly raised, based on the invoices that had been issued by the supplier at the time; the customer's request for revised invoices introduced new facts that had not previously been taken into account. As the company had already complied with the tax assessment, correction through the tax return was the most obvious mechanism for adjusting the VAT improperly invoiced.

The A-G considered that the imposition of a time limit in this way when new facts have come to light would elevate legal certainty over fiscal neutrality and effectiveness to an unacceptable degree. In general, a national rule stating that what has already been reviewed (administratively or judicially) is not to be reopened is sound and proper. However, that principle can logically only be applied with regard to those matters, of law or fact, that were indeed the subject matter of a review. By contrast, the effect of being time-barred cannot extend to new elements that were not and could not have been subject to any such review, because they were not present at the relevant time.

The A-G went on to consider the allegations of bad faith, which included suggestions that the goods were the subject of suspicious transactions by the customer. It seems that the Romanian authorities never attempted to collect the tax from the customer, and could provide no explanation for this failure. The tax authorities can only invoke a lack of good faith if

they expressly allege negligent behaviour on the part of the taxable person, explain the reasons in law and fact that support that view, and, where appropriate, submit evidence that corroborates those allegations. That was not present in this case. Similar considerations applied to an allegation of abuse of rights.

The suspicious transactions after the event could only be relevant if the authorities had evidence that the company knew, or had the means of knowing, that it was party to a fraudulent scheme. Once again, that required evidence, and the Romanian authorities produced none. At the hearing, they made some allegations of inadequate bookkeeping, but the A-G considered that was arguably minor and purely formal – it could not justify a complete loss of the right to adjust and obtain a refund.

The A-G recommended that the court should find that the Romanian authorities' actions were not in accordance with the PVD: a Member State can refuse the tax adjustment and the refund of the tax unduly paid by the supplier only where the tax authorities can, based on objective factors, establish to the requisite legal standard that the correction of the invoices triggering the application of the reverse charge mechanism was made in bad faith, constituted an abuse of rights, or was connected with a tax fraud of which the supplier was aware or should have been aware. It is for the referring court to ascertain whether that is the case in the main proceedings.

CJEU (A-G) (Case C-835/18): *SC Terracult SRL v Romanian Tax Authorities*

6.7 Assessments

6.7.1 Alcohol problems

In TC06744 and TC06783 (which appeared to be identical decisions issued under different numbers), a company appealed against assessments totalling more than £6.5m for periods between 12/10 and 06/13 in respect of deposits of cash of some £32.6m which the company maintained related to sales of alcoholic drinks from a bonded warehouse in France to cash and carry operators in France. HMRC maintained that there was an "inward diversion fraud" and the supplies were made in the UK; however, HMRC did not make any allegation of fraud against the company. The company was connected with Ampleaward, the appellant in the case considered at 4.3.5 above.

The type of fraud was described as follows in *Dale Global Ltd* (2018):

In outline, alcohol diversion fraud is used to evade excise duty and VAT through abuse of the Excise Movement and Control System ("EMCS"), which permits authorised warehouse keepers to move excise goods from warehouse to warehouse within the EU on behalf of account holders, in duty suspense. Any movement requires the generation of an Administrative Reference Code ("ARC") within the EMCS, which must travel with the goods. The system has operated in electronic form since January 2011. An ARC number will typically last for a few days, and

expires when the load is recorded on the system by the receiving warehouse as having been being delivered.

Inward diversion fraud, which is the type of fraud potentially relevant in this case, operates as follows. Alcohol originating in the UK is supplied under duty suspension to tax warehouses on the near continent, principally in France, the Netherlands and Belgium (what follows uses the example of France). Once in the tax warehouse they will usually change hands a number of times and will often be divided up before being reconstituted. A supply chain is set up with a purported end customer based in France. Some of the goods will be consigned back to the UK in duty suspense using an ARC number. This is the "cover load". Within the lifetime of the ARC number further consignments of goods of the same description will purportedly be released for consumption in France, attracting duty at low French rates, but will in fact be smuggled to the UK using the same ARC number. These are the "mirror" loads, and this will carry on until the ARC number expires or one of the loads is intercepted by Customs, following which a new ARC number will be generated in a similar manner.

Mirror loads are typically sold immediately following their arrival in the UK for cash. This process is known as "slaughtering". The UK customers may create false paper trails to generate the impression that the goods were supplied to them legitimately.

The judge (John Brooks) considered the burden of proof in a case where there was a dispute about the facts but no allegation of fraud. He commented that he had found the company's director an unreliable witness, because his statements were contradictory and not credible.

The company had been registered as a High Value Dealer under the Money Laundering regulations from 2004, shortly after it was formed in 2002. It received visits from HMRC in connection with compliance with the Money Laundering rules, and was noted not to be fully compliant with "know your customer" procedures and keeping of detailed records of all high value transactions. Discussion of the requirements and the company's failure to comply with them continued over a number of years.

The company made 1,311 separate deposits of cash into 42 different branches of Barclays Bank, with each deposit averaging about £22,500. The branches were all over the country; on one day, separate deposits were made in Birmingham, South Wales and Eltham, even though the director stated that only one cash courier was used for the customer who was said to have been responsible for all these sales. French customs authorities said that there was no record of any cash being declared to them by this company.

The judge noted that there had been at least one seizure of goods apparently being returned to the UK for "slaughtering". There was insufficient evidence to link any of the deposits with any of the sales that were claimed to have taken place; there was no credible explanation to support the unlikely assertion that French customers couriered cash to banks all over the UK at their own expense.

In the absence of any evidence to displace the basic assumption of HMRC that the deposits represented UK sales, the assessments were held to be made to best judgement, and the appeal was dismissed.

The company appealed to the Upper Tribunal, arguing that the FTT erred in law in concluding that Award could have made supplies of the goods after it had divested itself of possession and control of the goods while they were outside the UK (as evidenced by what were referred to as "the French Transaction Documents, or FTDs), and also that it gave insufficient reasons for its decision.

The UT judges noted that permission to appeal had been given on limited grounds that did not allow for any challenge to the FTT's findings of fact. A new ground of appeal relating to place of supply was introduced in a supplementary skeleton argument filed in the week before the UT hearing, but the judges refused permission for it to be advanced.

In respect of the first ground of appeal, the judges summarised the reasoning as follows:

(1) As a matter of law, a necessary pre-requisite of a supply of goods for VAT purposes is that the putative supplier has possession and control of those goods (according to a 1980 precedent *Customs & Excise v Oliver*).

(2) The FTDs prove that Award divested itself of possession and control of the goods in this case in France, meaning that Award could not then have supplied the same goods in the UK.

(3) The FTDs were unchallenged, by either HMRC or the FTT, and since any challenge would necessarily have implied dishonesty or fabrication on the part of Award, such challenge would have had to have met the established requirements for a pleading of dishonesty.

(4) Points (1) to (3) were either not considered at all by the FTT, or the decision which the FTT reached on them was unreasonable or perverse.

The judges went on to consider the case law principles concerning the burden of proof, pleadings and cross-examination where issues of dishonesty arise, and the principles surrounding when and how evidence is challenged, and the consequences if it is not. From precedents concerned with direct taxes (*Brady v Lotus Car Companies plc* and *Ingenious Games v HMRC*), the Tribunal derived these principles:

(1) The burden of showing an assessment is incorrect remains on the taxpayer throughout the appeal. This is so even if the circumstances of the case are such that there either must, or may, have been some fraudulent conduct on the part of the taxpayer which is relevant to the tax liability.

(2) The allegation that a witness is dishonest must be put fairly and squarely to the witness in cross-examination before the tribunal can find the witness is dishonest, but does not need to have been pleaded in advance in cases where the burden is on the taxpayer.

The company argued that HMRC's position, and the FTT decision, were self-contradictory: there must have been a fraud, but HMRC refused to accuse Award of involvement in it, which meant that it was logically not possible for Award to have smuggled the goods back into the UK. The judges dismissed this argument as not following from the precedents. The assessment was at all times for the appellants to dislodge; HMRC did not need to allege fraud for the FTT to reach a conclusion that involved Award retaining possession and control of the goods.

HMRC also disputed whether, as the company claimed, the FTDs "were unchallenged" in the FTT. The judges concluded that it was not necessary for HMRC to have argued, or the FTT to have concluded, that the FTDs were "dishonestly concocted", in order to decide that they were not reliable evidence of the facts. After detailed consideration of how the arguments were put in the FTT and how the conclusion was reached, the UT reached the opposite conclusion to the appellant's argument: if the FTT had relied on the documentary evidence alone, in the face of all the evidence weighing the other way, and concluded that the company had lost possession and control of the goods in France, that would have been an unreasonable decision.

Turning to the second ground of appeal, the UT accepted that the reasons for rejecting the face value evidence of the FTDs was a minor error of law. That was justification for setting aside the FTT decision, and required the UT to decide whether to remit the case or to remake the decision. The judges considered that the FTT had applied the correct legal test, and no challenge had been made to the FTT's assessment of the witness's credibility or its other factual findings. The UT therefore remade the decision by adopting it in its entirety, with the addition of the reasons it had itself given for rejecting the FTDs.

The appeal was dismissed again.

Upper Tribunal: *Awards Drinks Ltd (in liquidation) v HMRC*

6.7.2 Time limits and best judgement

An individual was assessed to VAT for periods 09/13 to 03/16 totalling £102,168. This was reduced on review to periods 03/15 to 03/16 and £46,440. The reduction was based on a decision that the earlier periods were out of time to be assessed. Penalties were assessed in addition but were not appealed. The trader applied for hardship and HMRC accepted that the appeal should be heard without payment of the VAT.

The dispute related to when the trader had ceased to trade: it appeared that invoices had been raised after he had told HMRC that he was no longer in business. HMRC raised estimated assessments based on the evidence they held of invoices issued, and allocated the same amount of VAT to each return period in the period. The flat rate for hauliers was applied in calculating the VAT due.

The taxpayer's representative argued that this was a "global assessment" and was therefore out of time, because the beginning of the period was too long ago at the time it was raised. HMRC said that it was a list of assessments for individual periods, summarised on a single sheet of paper. Only the earlier periods were therefore out of time. The judge agreed with this, and said that nothing turned on the fact that the VAT due for each period was the same amount.

The trader further argued that the assessments could not have been made to best judgement because there was so little material on which to base them. The judge was not impressed: the reason for that was the total failure of the taxpayer to engage with HMRC during the course of the enquiry. He did not believe that the trader was too ill to do so, as he appeared to have discussed the matter with his representative. The assessment had been fairly raised on the basis of the material available

and was to best judgement. The trader had failed to produce evidence that it was wrong, and the appeal was dismissed in relation to the later periods where the assessment was in time.

First-Tier Tribunal (TC07682): *Sean Convery*

6.7.3 More best judgement

A sole trader running an Indian restaurant and takeaway appealed against discovery assessments for income tax and best judgement assessments for VAT, with related penalties, in respect of underdeclared sales between 08/10 and 11/13. The total in dispute was a little over £50,000.

The decision records the procedure for investigation – it was relatively simple in comparison to some accounts, in that observations were carried out simply counting the numbers of people who entered the premises and either stayed long enough to eat a meal (then compared with recorded covers) or left with takeaway containers (compared with recorded takeaway sales). The later comparisons with the records showed significant shortfalls in recording the number of sales.

The judge examined the evidence and rejected the arguments raised by the taxpayer's representative. On the balance of probabilities, the trader had omitted income, and HMRC's estimates were based on best judgement; the conduct appeared to be "deliberate, not concealed". The appeals were dismissed.

First-Tier Tribunal (TC07707): *Mr Nazrul Miah T/A The Spice*

A publican appealed against a best judgement assessment for periods 03/04 to 09/17. During the course of an enquiry that started in February 2017, the trader accepted that he had understated his VAT liability for the whole period of his registration, that his accountant had told him on a regular basis that his takings were understated in his VAT returns, and that his actions had been dishonest. This justified the extended period covered by the assessment.

There were a number of unusual factors in the assessment, including a lack of any adjustment for inflation going back over ten years. HMRC gave reasons for this, and the judge considered that the trader had not produced a convincing argument for any other methodology. There was no dispute that an assessment was appropriate; given that it had been raised on logical grounds and the trader had not produced evidence to displace it, the appeal was dismissed. Dishonesty penalties had not been appealed against, and were confirmed.

First-Tier Tribunal (TC07692): *Kelvin Lamb and another*

6.7.4 Article

In an article in *Taxation*, Robert Maas discusses the Court of Appeal's decision in *Aria Technology Ltd* (reported in the last update). He comments that it is unsatisfactory that it is not clear what constitutes an assessment, because:

- until an assessment has been issued (or a decision), the taxpayer cannot appeal to the Tribunal;

- once an assessment has been issued, there is a 30-day deadline to do so.

In his view, the Court of Appeal's decision does not clarify the rights or position of taxpayers in general, and there is an implication that the decision is unfair on the taxpayer in the case.

Taxation, 30 April 2020

6.7.5 Updated guidance

HMRC have updated their *VAT Assessments and Error Correction Manual* to refer to the VAT Pro Forma Nil Return form instead of Form VAT127 (pro forma nil return) in relation to final period assessments.

VAEC2520, VAEC2530

6.8 Penalties and appeals

6.8.1 Pandemic appeals procedures

In response to the impact of COVID-19, some temporary changes to the working arrangements at the FTT administrative centre in Birmingham have been announced. Appellants should, where possible, submit notices of appeal online or by e-mail.

www.judiciary.uk/coronavirus-covid-19-advice-and-guidance/

Judge Greg Sinfield explains how the Tribunals have responded and are responding to the pandemic in an article in *Taxation*. He emphasises that, although some appeals are stayed, the Tribunal is not struggling to cope, and the number of outstanding appeals at the end of March 2020 was lower than at the end of any of the previous six years, and was also lower than at the end of December 2019.

Taxation, 25 June 2020

HMRC have updated the June 2007 version of their Notice *Barristers and advocates* with details of the temporary changes introduced in response to the pandemic. Until further notice, any forms, returns or correspondences must be sent to HMRC by email instead of post. Any payments, including payments of VAT on professional fees, should be made electronically until further notice. HMRC later confirmed that because of the current situation they are not able to process paper forms, returns or correspondence. A solution is being worked on and this notice will be updated when more information is available.

VAT Notice 700/44

6.8.2 Default surcharge

In an article in *Taxation*, Mike Thexton examines the problems that led to the default surcharge of £270,000 levied on *Medivet Group*, and the Tribunal's decision to allow the trader's appeal.

Taxation, 30 April 2020

A company appealed against surcharges totalling just over £16,000 imposed for seven periods in 2016 and 2017. It claimed that it had a reasonable excuse because a compulsory purchase of some land it used for storing its vehicles created financial difficulties. The judge noted that the correspondence included a letter asking for a list of evidence about the company's financial position, but no reply had been received; the director gave evidence in person, but brought no documents to the hearing and was vague about dates and facts.

The judge applied the approach in *Perrin* in deciding whether there was a reasonable excuse:

- to establish the facts that were asserted to give rise to a reasonable excuse;
- to consider whether those facts were proven;
- to consider whether, viewed objectively, those facts amounted to an objectively reasonable excuse for the default.

The test set out in *ETB (2014)* required an insufficiency of funds to be unavoidable, even if the appellant had exercised reasonable foresight and due diligence of a person in the appellant's circumstances and with the appellant's experience.

The judge summarised the witness's view of the effect of the compulsory purchase process (which had gone on for some 7 years) on the business, and accepted that it was proven to the required standard, in spite of the lack of evidence. However, he went on to set out what he considered a reasonable person might have done about the problems:

(1) understanding the legal rights and obligations of the appellant company and each of the related Buckstone companies (as separate legal entities) as regards the CPO and as regards their various creditors;

(2) monitoring the anticipated cash flow of each such company at the time the VAT obligations in question became due;

(3) making reasonable efforts to ensure the legal rights of the companies concerned – including to CPO compensation – were enforced;

(4) considering carefully, where cash was insufficient on a due date for payment of a VAT liability, the options for (and consequences of) paying one creditor rather than another, ensuring that HMRC were treated on an equal footing with other creditors;

(5) contacting creditors other than HMRC to see if alternative arrangements for payment could be agreed;

(6) approaching alternative providers of funding, once it became clear that RBS would not advance new loans.

The lack of evidence about the underlying facts meant that there was no evidence that any of this had been done to any extent at all. The evidence that HMRC had requested, and that the company had not provided, might have cast some light on the matter, but without any evidence it was not possible to conclude that there was a reasonable excuse.

The judge noted the witness's view that he was being 'penalised twice' because the compulsory purchase order was exercised by a different arm of government. The judge pointed out that he had no jurisdiction in relation to the CPO, only to the default surcharge. The appeal was dismissed.

First-Tier Tribunal (TC07654): *Buckstone Group Ltd*

A company appealed against surcharges totalling £115,474 for 6 periods from 07/16 to 04/18. The grounds were that the finance director (M) from 2016 to 2018, who had been the chief accountant up to his appointment as director in 2016, had carried out a fraud and had concealed the VAT defaults from his two fellow directors. M had resigned in September 2018 and was now being sued by the company.

HMRC argued that the other directors should have exercised greater supervision and should have detected the problems. A VAT adviser had said in correspondence that M had sole control of the filing of VAT returns; the Tribunal accepted the evidence of the other directors that this was not the case. One of them reviewed the returns before submission, but did not physically observe M 'pressing the send button on the computer'. It was credible that, in a small company, M could intercept all

correspondence from HMRC and conceal the incurring of and payment of surcharges from his fellow directors.

The company was also taking legal action against its auditors, who appear to have submitted audit correspondence criticising M and the lack of internal controls only to M. The judge noted that the fact that this legal action had not been instantly dismissed was supportive of the company's assertion that the auditors had not brought the problems to the attention of the other directors, as the other directors might have expected them to do.

The judge decided that the other directors had acted reasonably in carrying out their reviews and relying on the auditors to alert them to problems. M's deliberate and fraudulent manipulation of the accounting records – which appeared to be carried out in order to sustain the company's overdraft facility rather than to steal money from the company – was not something that they could, with reasonable diligence, have foreseen or detected.

The appeal was allowed.

First-Tier Tribunal (TC07689): *E.W.G.A. Ltd*

A company appealed against a surcharge imposed for its period 05/19. The company was incorporated in the Netherlands and registered in the UK through a representative. It traded in smartphones. It was issued with a Payment on Account letter dated 28 November 2018, requiring payments on account from its 02/19 period. Payments were due, in accordance with a schedule set out in the letter, on 31 January and 28 February; those two payments were made together on 5 March, and were therefore defaults. The balancing payment and return were submitted on time on 29 March. These defaults led to the issue of a surcharge liability notice.

The POA were received on the due dates for the 05/19 quarter, but the balancing payment was paid in two parts, £235,030 arriving only on 1 July. As POA traders do not benefit from the 7 day extension, this resulted in a 2% surcharge – £4,700.

The grounds of appeal included the assertion that the company had paid both parts of the liability on 28 June and therefore had an expectation that it would arrive in time. However, part of it was paid from a euro bank account and the "value date" was clearly shown as 1 July in the bank documents provided in connection with the appeal.

The other ground of appeal was "we didn't work out the accurate amount of VAT payable for Q2 until the due date". Not surprisingly, the Tribunal did not consider this to be a reasonable excuse. This late calculation was the reason for a cash flow problem – the company did not have enough sterling to settle the liability in full and had to transfer money from its euro account – but that also could not be a reasonable excuse.

First-Tier Tribunal (TC07696): *Reflection Investment Business*

6.8.3 Late appeals

HMRC appealed against a FTT decision (not apparently published) allowing a trader to bring a late appeal against a decision to refuse a claim for overpaid output tax under s.80 (a *Rank* claim based on fiscal neutrality in relation to gaming machines). The claim had been refused by a review

decision dated 21 December 2011, but the appeal was not lodged until 9 August 2018. Judge Christopher Staker gave leave for the appeal to proceed on 9 April 2019.

HMRC argued that the FTT decision was wrong in law because it did not make any findings of fact about the length of the delay or the reasons for it. The essential reason for the decision was that HMRC would not be prejudiced because the appeal would in any case be stood behind a lead appeal. HMRC argued that this did not give sufficient weight to the importance of litigation being conducted efficiently, proportionately and in accordance with the rules.

The company accepted that there were problems of law with the first decision and it should be set aside. The question before the Upper Tribunal was therefore whether it should remake the decision (as HMRC wanted) or remit it to the FTT for reconsideration (as the company wanted).

The judges noted that the FTT had erroneously concluded that it did not matter whether the review decision had not been received by the company (as the company contended). As a result, the FTT had not made a finding of fact about whether the appeal was late, and had not examined the reasons for that lateness. The evidence before the FTT had not been sufficient to determine on the balance of probabilities whether the review decision had been served. It was not possible for the UT to reach a conclusion on the matter on the basis of the evidence presented to the FTT, nor would a reconsideration of that same evidence by the FTT be of assistance; this was a rare case in which the matter should be remitted to a differently constituted FTT and the parties should be allowed to make further submissions concerning the key questions:

- whether the review decision was sent to and/or received by either the company or its representative;
- if the review decision was received, the reason for the delay in filing the notice of appeal.

The appeal was allowed and directions for the rehearing were issued, recognising that it would be harder than usual to arrange that because of the pandemic.

Upper Tribunal: *HMRC v Websons (8) Ltd*

An individual appealed against an assessment to VAT for £10,458 and a “failure to notify” penalty of £5,490 in relation to a period of VAT registration from 25 October 2014 to 15 May 2015. The Tribunal pointed out that he could not appeal against the assessment as he had not filed a return for the period; he could only appeal against the decision to register him. HMRC objected to any appeal being brought on the grounds that it was out of time.

HMRC had issued a registration decision on 10 June 2016 and issued the assessment to VAT at that time. The penalty assessment was raised on 5 September 2016. The appellant had moved from his address at the end of April 2016 and did not receive the letters. He knew nothing of the proceedings until he received a statutory demand dated 5 July 2018, addressed to the place he was then living. He instructed accountants who

wrote to HMRC with some evidence that the business was being run by a company, not by the person assessed.

Correspondence continued, but it appears that the accountants and HMRC were at cross purposes: the accountants were engaged in the type of argument that ought to predate an appealable decision, whereas HMRC considered that an appealable decision had been taken some time before. At the hearing, the taxpayer’s representative argued that HMRC had effectively reopened the enquiry when the accountants had responded to the statutory demand, or else had carried out a late review; in either case, the time for making an appeal to the Tribunal ran from the closure of either of those procedures by a letter sent on 9 April 2019. If that were the case, the appeal was not late.

The Tribunal applied the law on serving of assessments and rejected the representative’s arguments. The registration decision had been sent to the last address of the taxpayer at the time; that did not apply to the penalty, but the appeal window started with the serving of the statutory demand. The correspondence with HMRC did not suspend or extend the time limits for appealing, and only the Tribunal could give permission for an appeal to be made out of time.

The Tribunal considered the tests in *Martland* to decide whether to allow the appeal to proceed out of time:

- establish the length of the delay;
- establish the reasons for the delay;
- consider all the circumstances of the case, balancing the merits of the reasons given and the level of prejudice to each party.

Both the delays were considered significant and serious, at 2.75 years and 8 months respectively. The reason was the non-receipt of the initial decision; that ceased when the statutory demand arrived. From that point, the reason for the delay was the accountants’ incorrect belief that they could negotiate with HMRC without making an appeal.

After weighing up the circumstances in some detail, the judge decided that the accountants’ misapprehension was not a good enough reason; however, HMRC’s penalty letter did not set out the required offer of a statutory review, and this was a serious matter that tipped the balance in favour of permitting a late appeal.

Permission was therefore granted for a late appeal against the penalty, but not against the registration decision (and therefore presumably the assessment must stand).

First-Tier Tribunal (TC07686): *Abdul Vahab Kharadi*

6.8.4 Penalties

An individual appealed against a penalty of £531 imposed in connection with an alleged dishonest attempt to smuggle tobacco products into the UK from the Canary Islands. The goods had been seized by the UK Border Force, and the individual was only notified that HMRC were considering a penalty nearly a year later.

The individual had walked through the Green channel at East Midlands airport and had been stopped with more than the non-EU duty-free

allowances of tobacco and alcohol. He claimed in correspondence that this was merely a misunderstanding and he had not been dishonest. He did not attend the hearing and therefore could not be questioned by the judge, who noted a number of discrepancies and anomalies in his account of events. The judge was satisfied that HMRC had demonstrated dishonesty; the only ground of appeal that succeeded at all was an argument for more mitigation in relation to cooperation and disclosure. The penalty was reduced from £531 to £455.

First-Tier Tribunal (TC07688): *Gino Cifaldi*

6.8.5 Costs

Judge Christopher McNall described a dispute as "a strange case". HMRC made a decision; that decision was appealed by the taxpayer; and the appeal was resisted by HMRC. The appellant then filed additional evidence shortly before the appeal; HMRC decided to concede the appeal; the appellant applied for its costs under Rule 10; and HMRC also applied for their costs under Rule 10.

Each party contended that the other acted unreasonably "in bringing, defending or conducting the proceedings" (Rule 10(1)(b)) albeit that each party pointed to different aspects of the other's conduct, and each party alleges that the unreasonableness of the other was manifest at different times:

- the appellant argued that HMRC should never have made the decision in the first place and/or should never have resisted the appeal;
- HMRC argued that the appellant should have provided them sooner with the information that put them in a position to decide that the decision should be withdrawn.

The judge considered the facts and dismissed both applications. The disputed decision was notified on 21 March 2018 to cancel the taxpayer's registration with effect from 1 December 2017. The taxpayer asked for a review, which varied the original decision by backdating the deregistration to 1 August 2013 (the EDR – so cancelled completely). The dispute proceeded through the appeals process, and ADR was refused. The taxpayer complied with Tribunal directions generally on the last available day, and applied to file an additional and very substantial witness statement 16 days before the hearing date listed for 22 May 2019. HMRC reserved their position, but having examined the new material, on 13 May they withdrew their case as the new material had demonstrated that there was economic activity.

The appellants submitted a range of allegations of unreasonable behaviour by HMRC, relating to knowledge they had from a criminal investigation to refusal of ADR. HMRC's cross-application for costs was based on the much more limited point that the evidence required to make the decision was submitted very late.

The judge noted that "the proceedings" started on 15 June 2018 when the notice of appeal was issued. Nothing before that date could be relevant to the question of unreasonable conduct. It was also necessary to consider the handling of the case rather than the quality of the original decision. The jurisdiction to award costs is intended to be exercised in a

straightforward and summary way and should not trigger a wide-ranging analysis of HMRC's conduct relating to the applicant's tax affairs.

The judge went through each of the taxpayer's complaints and dismissed them. There was no evidence to support allegations of improper conduct in relation to the criminal enquiry. Refusal of ADR was hardly unreasonable based on the evidence that the taxpayer had produced at the time. It did not appear that, as the taxpayer claimed, the material in the second witness statement had been made available any earlier: the judge concluded that someone, late in the day, had realised that insufficient evidence had been put forward to convince the Tribunal, and decided to rectify that situation. HMRC's withdrawal of their case was reasonable conduct at a reasonable time.

HMRC's application was also dismissed. The appellant had appealed, and had provided additional evidence in support of its appeal rather late. That was not unreasonable conduct that would lead to a costs order.

Both applications were dismissed.

First-Tier Tribunal (TC07725): *Wammee Holdings Ltd*

6.8.6 Article

In an article in *Taxation*, Nicholas McLeman and Anthony Rose discuss the issue of personal liability notices to company officers for deliberate conduct penalties attributable to their conduct, and emphasise the rights of the officers to receive due process and the need for HMRC to present proper evidence to support the notices.

Taxation, 25 June 2020

6.9 Other administration issues

6.9.1 Finance Bill

The Finance Bill 2020 has proceeded through its Parliamentary scrutiny during and after lockdown. No significant amendments have been made to the VAT measures included in it.

https://services.parliament.uk/Bills/2019-21/finance/documents.html

6.9.2 Articles

In an article in *Taxation*, Paula Tallon discusses the regulation of tax agents in Australia and compares it with the UK situation. HMRC are currently engaged in a call for evidence about the possibility of regulating tax advisers in the UK, and foreign comparators may guide what happens here.

Taxation, 4 June 2020

In an article in *Taxation*, Mala Kapacee discusses the impact of remote working by clients, advisers and HMRC on such matters as monitoring the arrival of post and dealing with it, and the carrying on of existing enquiries.

Taxation, 9 April 2020

In an article in *Taxation*, Harriet Brown discusses the effect of the pandemic on proceedings in the First-Tier Tribunals, and questions whether the deferral of all hearings until 30 June is preventing access to justice. A recent freedom of information request by the law firm, Pinsent Masons, showed that the backlog of tax disputes before the FTT had reached 27,280 in the past quarter. This was before the 'general stay of proceedings was issued on 24 March 2020 to comply with government measures related to coronavirus. This is a huge number of cases with a substantial amount of tax in dispute.

Taxation, 7 May 2020

In an article in *Taxation*, Rob Durrant-Walker discusses range of anti-avoidance and anti-abuse measures available to HMRC, and considers the boundaries between avoidance and evasion in some common interactions between adviser and client. He describes the requirement to notify schemes to HMRC and the provisions for penalising promoters of tax avoidance schemes, where the maximum penalties can reach £1m.

Taxation, 21 May 2020

In an article in *Taxation*, Ian Whitehurst discusses the process by which HMRC decide whether or not to prosecute in cases of tax fraud, which may take account of cost, time and litigation risk, and the availability of alternative methods to recover tax and penalties.

Taxation, 4 June 2020

In an article in *Taxation*, Neil Warren considers a possible scenario arising out of the pandemic – a clothes retailer who has to scale back activities and therefore sublets part of the premises, and hopes to make more online sales. Not surprisingly, there are VAT catches that the unwary will fall foul of.

Taxation, 11 June 2020

6.9.3 Coronavirus measures

The CIOT has gathered together on its website a range of helpful information about the indirect tax measures the government has taken in response to the pandemic. This covers in particular deferral of VAT payments, responsibilities for making returns and payments, international supplies and purchases and other indirect taxes.

www.tax.org.uk/policy-and-technical/covid-19/indirect-taxes

On 28 April the government announced an extension to a number of consultation periods to allow for the impact of the pandemic. However, consultations on duty-free and tax-free goods carried by passengers and on the VAT treatment of overseas goods were held to the original timetable (closing for responses on 20 May). This is to provide businesses with clarity as early as possible on the policies that will apply from the end of the transition period, and enough time to prepare.

www.gov.uk/government/news/covid-19-update-on-tax-policy-documents

On 31 March the Chancellor announced that duty and VAT would be waived on vital medical supplies including ventilators, coronavirus testing kits and protective clothing.

www.gov.uk/government/news/chancellor-waives-duties-and-vat-on-vital-medical-imports

On 21 May, the government announced that recent VAT revenue from PPE donated to the NHS and care homes will be given to healthcare charities. The donation will cover the period between 1 March 2020 and 30 April; PPE became zero-rated on 1 May.

www.gov.uk/government/news/government-to-give-vat-from-donated-ppe-to-healthcare-charities

In an article in *Taxation*, Stuart Pibworth and Jenny Doak discuss the management of cash flow problems arising from the pandemic, with particular reference to the management of tax cash flows.

Taxation, 28 May 2020

The CIOT has issued information about the procedure for Duty Deferment Account holders who are experiencing severe financial difficulties to apply to extend payment periods for customs duty and import VAT, normally due on the 15th of the month following the month of import.

www.tax.org.uk/potential-extend-payment-period-customsimport-vat-duty-due-15-june

The Summer fiscal statement on 8 July included the announcement of the 'Eat Out to Help Out' scheme. A restaurant will have to register to participate, and can then offer a discount of up to £10 per person, or 50% of the cost of food and non-alcoholic drink, on sales made from Monday to Wednesday throughout August 2020.

Money received from the government under the scheme will count as 'takings' in the normal way, so it will be subject to VAT (at 5%, or 1/21 of the gross amount) and to income tax or corporation tax as revenue.

www.gov.uk/guidance/register-your-establishment-for-the-eat-out-to-help-out-scheme

6.9.4 Alternative Dispute Resolution

HMRC have updated their guidance to reflect that ADR can now be applied for at any stage of an enquiry and at any stage of tribunal proceedings. This follows the publication of a practice statement by the FTT which made the same statement.

www.gov.uk/guidance/tax-disputes-alternative-dispute-resolution-adr

6.9.5 Office of Tax Simplification

The OTS ran a 'call for evidence' in relation to tax claims and elections up to 8 May and the responses are now being analysed. The questions relating to VAT were as follows:

The OTS VAT review 'Value Added Tax: routes to simplification' was published in November 2017 and an evaluation update was published in October 2019. This work identified concerns regarding the process for

submitting claims for the repayment of UK VAT incurred by overseas businesses, DIY House builders, and the option to tax.

Do these or other areas of VAT which involve claims or elections cause particular difficulties for your business? If so, do you have any suggestions as to how these could be addressed?

www.gov.uk/government/consultations/claims-and-elections-call-for-evidence

6.9.6 Follower notices

HMRC have updated their factsheet *Compliance checks for tax avoidance schemes – penalties for follower notices* with revised percentages in the Stage 2 table for the reduction to the penalty range if the follower notice relates to an appeal case.

CC/FS30a