VAT UPDATE
JULY 2021

Covering material from April – June 2021

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1. INTRODUCTION

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

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

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

1.1 Appeals pending

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

The HMRC website section which reports the progress of appeals was updated on 6 May 2021.

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

- *Ampleaward Ltd*: HMRC have been granted leave to appeal against the UT decision that the company was not caught by the "fallback acquisitions" rule.
- *Anna Cook*: the taxpayer is seeking leave to appeal to the CA against the UT decision that her Ceroc dancing classes did not qualify for the "private tuition" exemption.
- *Beigebell Ltd*: HMRC succeeded in appeal (covered in July 2020 update) against the FTT decision that a company's directors did not have the means of knowledge of the connection of their company's transactions to a missing trader fraud: case remitted to a differently constituted FTT.
- *Bluejay Mining plc*: HMRC have been granted permission to appeal against the FTT decision that a holding company was entitled to input tax recovery.
- *Chelmsford City Council, Mid-Ulster District Council*: HMRC have been granted leave to appeal on particular points against the FTT's

decisions on local authority sports provision (no appeal against the related decision in *Midlothian Council*).

- *DCM (Optical Holdings) Ltd*: the taxpayer has been granted leave to appeal against the Court of Session's decisions in favour of HMRC (listed for 8 February 2022).
- *Netbusters (UK) Ltd*: HMRC are seeking leave to appeal to the UT against the FTT decision that the company's provision of sporting facilities was exempt.
- *News Corp UK & Ireland Ltd*: the company is seeking leave to appeal to the CA against the UT's decision that its digital newspapers did not qualify for zero-rating before the law was changed on 1 May 2020.
- *NHS Lothian Health Board v HMRC*: Court of Session allowed taxpayer's appeal on grounds that "no repayment" had to be the wrong answer; remitted to FTT for reconsideration of the amount; HMRC seeking leave to appeal to the Supreme Court.
- *Privin Corporation Ltd*: the FTT found in favour of a MTIC appellant. HMRC were granted leave to appeal to the UT, but it was agreed that the case would be remitted to a differently constituted FTT for rehearing (not on HMRC's list).
- *Revive Corporation Ltd*: MTIC case remitted by the UT to the FTT for rehearing.
- *Target Group Ltd*: company has been granted leave to appeal against UT decision that its supplies of loan administration services did not fall within art.135(1)(d) – CA hearing scheduled for May 2021 (not on HMRC's list).
- *The Prudential Assurance Company Ltd*: FTT decision in company's favour in the July 2021 update. HMRC are seeking permission to appeal to the UT.
- *Thorsteinn Gardarsson t/a Action Day A Islandi*: HMRC succeeded in their appeal against the FTT decision that a trader's products qualified as "books" rather than "stationery", and some issues have been remitted to a differently constituted FTT for further consideration.

1.1.1 Decisions in this update

- *Alan McCord*: UT disapproved the FTT's approach to a MTIC appeal involving cars and remade the decision, not entirely but mainly in HMRC's favour.
- *Pacific Computers Ltd*: MTIC case remitted by the UT to differently constituted FTT for rehearing (not on HMRC's list) – in this update, the FTT dismissed an application to allow the appeal summarily because of the long delay.
- *Royal Opera House Covent Garden Foundation*: CA dismissed taxpayer's appeal against the UT decision that opera production costs were only linked to exempt ticket sales.

- *Tower Resources plc*: HMRC's unsuccessful appeal to the UT on three grounds against the FTT's decision that a holding company was entitled to recovery of input tax on some overhead costs.

1.1.2 Other news on appeals

The Supreme Court has refused the taxpayer leave to appeal against the CA judgment in *Rank Group plc v HMRC* (July 2020 update). This case was about the offset of amounts overpaid and underpaid in different periods; the effect of the company's argument was that it should have been allowed to carry forward a credit of £67m from a period that was out of time into a period that was in time for a claim. The CA rejected the complex accounting exercise contended for by the taxpayer, and held that the situation was much simpler: three claims had been made in time and had been paid, and the fourth had been made out of time and refused. That was in accordance with EU law.

2. OUTPUTS

2.1 Scope of VAT: linking supplies to consideration

2.1.1 Grant-funded education

HMRC have issued a Brief on the VAT treatment of public funds received by further education institutions, in response to the UT decision in *Colchester Institute Corporation*.

The effect of the decision was that education funded through grants from government funding agencies was to be treated as a "business activity", because the grants were third party consideration for supplies of education. This created a risk that HMRC would deny zero-rating for buildings of grant-funded educational establishments and could also refuse reduced-rating for their power supplies.

HMRC's Brief acknowledges that they will not appeal the *CIC* case because they won it on other grounds, but it also confirms that they have not changed their policy and will not impose the effects of the decision on other taxpayers. They are seeking to challenge the decision through another appeal.

Institutions may choose to apply the decision by submitting error correction notices; HMRC will protect their position in order to secure tax revenues pending the outcome of the other appeal (possibly in the case described at 2.3.1 below).

Revenue & Customs Brief 8/2021

2.1.2 Parking penalties

Advocate-General de la Tour has given an opinion in a dispute that echoes the several UK cases of *Vehicle Control Services Ltd* (last in CA 2013) on the liability of charges for failing to comply with parking rules. The appellant is a private company that operates parking lots on private land in agreement with their owners. The agreement sets the conditions for the use of parking spaces, such as the prohibition of parking without specific authorisation, the maximum parking time and the possible payment of a fee in return for this. In the event of violation of the conditions of use, the company collects in addition a specific control fee. VAT is charged on fees for use in compliance with the terms and conditions of the parking lot; the dispute concerned whether the control fees were also subject to VAT, or were outside the scope as compensation for a breach of contract.

The control fee could be charged in the following circumstances:

1. Payment of an insufficient fee.

2. Valid parking ticket not visible on the windscreen.

3. Uncontrollable ticket, for example, if the parking ticket is incorrectly placed.

Cases 1 to 3 apply in the event of paid parking.

4. Lack of valid parking ticket, for example, in the context of residential parking for which permission to use specific parking spaces is required.

5. Parking in a place reserved for disabled people. This reason for charges only applies in the presence of a disabled parking sign, whether the parking is free or paid. To be able to park in these locations, the driver must have placed a documentary evidence on his windshield.

6. Parking outside designated parking spaces. This charge pattern applies to all types of parking spaces when a sign indicates to park inside the spaces.

7. Parking prohibited. This charge ground applies, for example, in the event of parking on a fire defense lane.

8. Reserved parking area. This charge pattern applies to all types of parking spaces for which parking in the specific spaces is required.

9. No visible parking disc.

10. Parking disc incorrectly set / indicated parking time exceeded.

11. Illegible parking disc. This charge pattern applies, for example, when the needles have come loose from the parking disc or if there is an error in an electronic disc.

12. Multiple parking discs. This reason for charges applies in cases where the motorist has placed several parking discs on the windshield in order to extend the parking time.

Fee grounds 9 through 12 apply in cases where parking is free for a limited time, but a parking disc is required as proof of when the car was parked.

13. Other. This reason for charges applies in the event of violation of the parking rules which are not described in any of the 12 points above. Point 13 applies, for example, when parking clearly obstructs traffic. If this reason for costs is used to justify the collection of control costs, it will be supplemented by a text describing the infringement.

The company argued that there was no "reciprocal performance", as in the *Tolsma* case. The question referred very simply asked whether the charges constituted consideration for a service and were therefore within the scope of VAT.

The A-G analysed the issues as:

- Is there a service?
- Does the amount due constitute effective consideration?
- Is there a direct link between these two elements?

The first question involved the distinction between the precedent cases of *Eugenie-les-Bains* (forfeited hotel deposits, outside the scope) and *MEO* and *Vodafone Portugal* (termination charges for phone contracts, chargeable). The Commission supported the taxpayer, but the A-G agreed with the Danish government. In his view, the control charges were part of the consideration for the overall service of providing customers with the possibility of parking their vehicles. The A-G suggested that the *Eugenie* judgment would only apply if there was no performance: in this case, the customer had parked a vehicle, and a service had therefore been provided.

Turning to the second point, the company argued that the charges were so much in excess of any benefit to the motorist that they could not properly

be regarded as consideration for a service. The A-G recalled that the amount of consideration is not a relevant criterion. There was a correlation between charging for irregular use and the costs of operating the car parks – customers who infringed the rules caused inconvenience and extra work, and the possibility of a charge was the economic return for this.

The direct link, according to precedent, existed where "two services are mutually conditional, the remuneration received by the service provider constituting the actual equivalent value of the service provided to the beneficiary, namely that one is performed only on condition that the other is also performed, and vice versa". That was the case here, as the charge was levied in the circumstances determined and advertised by the appellant company.

The A-G also opined that the tax charge could not depend on whether the customer complied with the rules or not. That would infringe the principle of fiscal neutrality: the charge related to parking, and was therefore taxable.

The A-G recommended that the court reply that the charges were within the scope of VAT.

CJEU (A-G) (Case C‑ 90/20): *ApcoaParking Danmark A/S v Skatteministeriet*

2.1.3 Updated Manual

HMRC have updated their *Supply and Consideration Manual* in various areas to remove references to the Principal VAT Directive: the underlying law, supplies of goods, and supplies of goods for no consideration.

VATSC02130, VATSC02210, VATSC03110 , VATSC03310, VATSC03321, VATSC03540, VATSC03610

HMRC have made a number of other amendments to the same manual, notably a contents page referencing summaries of the most important decisions that have influenced their policy on the treatment of grants. *Colchester Institute Corporation* is not listed.

VATSC06330

2.2 Disbursements

Nothing to report.

2.3 Exemptions

2.3.1 Management of special investment funds

Two cases about the management of special investment funds were joined together for consideration by the CJEU. One featured an appeal by a business which supplied tax statements on an outsourced basis to

companies that managed special investment funds. The other concerned a supply of software that was used for risk management and performance measurement, and was used by a different investment management company to assist in the management of special investment funds. Both the suppliers considered that their supplies should be exempt within the principles of the *Abbey National* decision: they "formed a distinct whole fulfilling in effect the specific, essential functions of the management of special investment funds". The tax authorities disagreed.

The CJ began by rehearsing the normal comments on exemptions: they must be strictly interpreted, but they should not be deprived of their intended effect. The purpose of the exemption of SIF management was to reduce the cost and so promote the access of small investors to the securities market. In deciding whether the outsourced services formed a "distinct whole", the referring court should consider whether the services were specific to and essential for the management of SIFs.

That in turn would depend on whether the services were general in nature or were truly specific to SIFs. The court referred to the problem in the *BlackRock* case: its software was used to manage general investments and SIFs, and therefore was not specific to SIFs. The court discussed the concept of "management" in this context, noting that it covers not only investment management, involving the selection and disposal of assets under management, but also administrative and accounting services such as computing the amount of income and the price of units or shares, the valuation of assets, accounting, the preparation of statements for the distribution of income, the provision of information and documentation for periodic accounts and for tax, statistical and VAT returns, and the preparation of income forecasts.

By contrast, services which are not specific to the activity of a special investment fund but inherent in any type of investment do not fall within the scope of that concept of 'management' of a special investment fund. The provision of software was not automatically excluded from exemption, and it appeared from the order for reference that the software carried out calculations and analyses that were required by Austrian law on SIFs.

It would be for the referring court to determine the application of the exemption to the specific supplies in line with these principles.

CJEU (C-58/20) (C-59/20): *K* and *DBKAG v Finanzamt Österreich, formerly Finanzamt Linz*

2.3.2 Supplies linked to education

A charity registered for VAT in 2011. It applied for that registration to be cancelled on 20 February 2018 on the grounds that it made no taxable supplies, and appealed against HMRC's refusal to cancel its registration. The charity argued that the supplies in its restaurant were closely linked to supplies of education and were therefore exempt; HMRC considered that the education was grant-funded and was therefore outside the scope, and supplies "closely linked to outside the scope education" did not fall within the exemption.

Judge Jeanette Zaman noted that she had taken into account the Upper Tribunal's decision in *Colchester Institute Corporation* and

representations about that decision submitted by HMRC after the date set for the matter to be settled on the basis of the papers (i.e. without a hearing). She also took into account accounts of the charity for two years that were not included in her bundles and had to be provided afterwards.

The restaurant is operated by the charity as a training environment for young people with learning disabilities to give them the qualifications, skills and experience to gain meaningful employment in the hospitality industry. The charitable objects included the advancement of education.

The restaurant was operated by students and by employees of the charity; its customers were members of the public. The students were enrolled with a college with which the charity had an agreement, which provided for service levels and remuneration from DfE grant funding providing that minimum standards were achieved.

The judge examined the accounts for three years, and noted that there were three sources of income: the operation of the restaurant (the biggest contribution each year), the provision of the training on the basis of the agreement, and other grants (e.g. from the local council).

The application to cancel the registration incorrectly referred to the supplies being “wholly or mainly zero-rated”. HMRC had correctly interpreted this as meaning “exempt”, but had nevertheless refused on the basis that it did not qualify for exemption and was trading above the registration threshold.

HMRC did not dispute that the training provided by the charity was capable of being exempt, and that the charity would qualify as an eligible body. The only point at issue was whether the education should be disregarded because it was not supplied for consideration, but rather was funded by outside-the-scope grants.

The judge agreed with the basic proposition that education must be within the scope but exempt for something to be exempt as “closely related” to it. Activities that did not constitute “supplies” had to be disregarded for VAT. The judge considered that the *Colchester* decision was both relevant and binding on her. HMRC argued that she had no evidence before her about the necessary link between the services provided and the payment of the grants; however, in her analysis, the situation was sufficiently similar to come to the same conclusion. The agreement clearly provided that in consideration for providing the specified services, the charity would be paid by the college. This was a “supply” for the purposes of the Act, and as a result the charity was both “carrying on an economic activity” and “making exempt supplies of education”.

The remaining question was whether the operation of the restaurant was “closely related” to the supplies of education. The relevant precedent was the CJEU decision in *Brockenhurst College*, which concerned whether the supply that was being made (i.e. a meal for a diner) was “for the direct use of the student”. The judge quoted extensively from the CJEU decision and derived three principles:

(1) both the principal supply and the supplies of services closely related to it must be provided by bodies referred to in Article 132(1)(i);

(2) those supplies of services must be essential to the exempt activities; and

(3) the basic purpose of those supplies of services must not be to obtain additional income for those bodies by carrying out transactions which are in direct competition with those of commercial enterprises liable for VAT.

The first question had been answered in the earlier discussion. The judge was satisfied that the second question should be answered in the same way as in *Brockenhurst*: without the practical experience of working in the restaurant, the trainees would not receive the same quality of training.

In relation to the third question, HMRC submitted that the Restaurant's opening hours and pricing were such as to compete with normal commercial cafes and that the restaurant was advertised in the press, on Facebook and had a website which was under development. The charity submitted in its grounds of appeal that the opening hours of the restaurant (9am to 4pm, Monday to Saturday) were shorter than what would be expected, and that these opening hours were not designed to compete with other commercial businesses.

The accounts showed that the restaurant operated at a deficit. Although that was not determinative of the question, it was indicative of the purpose of the operation being to provide training rather than to generate income. The purpose of operating the restaurant was to enable students to gain experience of working within the hospitality industry, whether in the kitchens or dealing with customers. To obtain that experience it was necessary that the restaurant had customers, and that would in turn lead to the generation of income for the charity. However, that was a consequence and not the purpose.

The overall conclusion, therefore, was that the only supplies made by the charity were exempt, and as a result HMRC's refusal to accept the application to deregister had not been justified. The appeal was allowed, and HMRC were required to re-make the decision.

First-Tier Tribunal (TC08038): *Step by Step (Northern Ireland) Ltd*

2.3.3 Daycare services

HMRC have published a Brief to confirm their views on unregulated daycare services following the Court of Appeal's decision in the joined cases of *The Learning Centre (Romford) Ltd* and *LIFE Services Ltd*. Because the services they provided were not required to be licensed under any relevant legislation, they could not qualify under item 9 Group 7 Sch.9 as a "state regulated private welfare institution or agency". Various arguments about fiscal neutrality, and other regulations that they had to comply with, failed to convince the courts.

The Brief advises providers of daycare services in England and Wales which are not charities and which have not accounted for VAT on supplies of these services to do so with immediate effect; if they have not accounted for VAT correctly in the past, they must make corrections.

The Brief does not affect charities, which qualify under item 9, nor daycare providers in Scotland and Northern Ireland, which are state regulated.

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2.3.4 Services linked to welfare

The last update reported Advocate-General Pitruzella's opinion in a case about how the conditions for exemption of welfare services should be interpreted, in particular the expressions "provision of services closely linked to social assistance" and "organisation having a social character". The dispute concerned a lawyer registered in Luxembourg who acted as an agent within the protection regime for incapable adults.

It appears that the Luxembourg authorities had treated his activities as not VATable from 2004 to 2013, but then assessed him to VAT. He argued that he should be treated as exempt within the local version of art.132(1)(g) PVD, and the change of view of the authorities was an infringement of the protection of legitimate expectations.

It was also questioned whether this was an economic activity, because the remuneration was determined by the court on a case-by-case basis, and was linked to the resources of the person concerned. It was not guaranteed to cover the service provider's costs. The questions also concerned the fact that the arrangement was a triangular relationship where one of the parties was an independent judicial authority which appointed the appellant to provide services to someone else.

The court asked the A-G to consider the questions about the scope of the exemption, rather than the questions on economic activity and legitimate expectations. It seems that the court regarded the other questions as not raising new questions of law, so it could answer them without reference to the A-G.

The court started by considering the questions on whether the activity was economic. According to precedent, this would be the case if there were transactions that fell within art.2 as "supplies for consideration" and also an activity that fell within art.9 as "economic". The court noted that various factors did not rule out a supply as being linked to consideration:

- the fact that it was an activity in the public interest;
- the fact that the payment might be set below cost;
- the fact that the state bore the cost rather than the recipient of the supply.

An activity might not be economic if it was not carried on in order to produce income on a continuing basis. It was therefore relevant to consider whether the income covered the costs. However, it was also necessary to consider the activities in their context: overall, the lawyer did earn remuneration from his activities, which were continuing, and there was therefore no reason to conclude that the particular assignment was not subject to VAT.

The A-G's opinion concerned the questions about whether the assignment could constitute "the supply of services closely linked to welfare and social security work", and whether the lawyer could be regarded as "a body recognised as devoted to social wellbeing".

The A-G considered what a lawyer in the position of "curator and supervisor" did. Some of the work appeared to fall within the principles of earlier cases on welfare such as *Kugler*, *Zimmermann* and *Les Jardins de Jouvence*. The appellant claimed that those elements were

“preponderant”, while the Luxembourg authorities acknowledged only that they formed “part” of the service.

The A-G suggested that to determine the social nature of these representation activities, certain elements provided for by the detailed provisions must also be taken into account:

a) the cost of these mandates, when the adult does not have sufficient financial means, is the responsibility of the State;

b) the compensation paid for the services, the amount of which must be fixed by the court, is calculated in particular on the basis of the income and the nature of the assets of the incapable person;

c) the representative is subject to review by the court;

d) the compensation paid is often a lump sum and rarely corresponds to the services rendered.

The A-G considered that elements of what the lawyer did had the necessary social character. However, there were other parts of the role that were instead within the framework of the exercise of a liberal professional of lawyer, rather than the performance of the social function of curator. It would be for the referring court to consider the question of the proportion of these activities: if the appellant was correct in describing the social activities as “preponderant”, the A-G considered that exemption could apply.

However, it was also necessary for the supplier to be “an organisation having a social character”. This was something that was for the Member State to recognise or not, subject to the principle of fiscal neutrality. The A-G did not accept that the mere status of lawyer, or the context of a profit-making professional activity, ruled out the classification of the appellant as “having a social character”. If the Member State ruled out the possibility of such a person being so treated, it might have exceeded the authority delegated to it by the Directive; the referring court might take it upon itself to “recognise” the appellant.

The full court essentially agreed with the opinion, putting the onus on the referring court to make a decision. The work was within the scope of “services closely linked to welfare”, and the fact that the taxpayer was a lawyer did not rule out “recognition as a body devoted to social wellbeing”. The court should grant that recognition if it concluded that the Member State had exceeded the limits of its permitted discretion by refusing to recognise the person itself.

The court rejected the lawyer’s argument based on the protection of legitimate expectations. The fact that a tax authority had, for several years, accepted a particular treatment did not preclude the tax authority from changing its view in a later period, even where the trader has assumed that the receipts were not VATable and would not be able to collect the VAT now assessed in addition to the amounts already received from customers.

CJEU (Case C-846/19): *EQ v Administration de l’Enregistrement, des Domaines et de la TVA*

2.4 Zero-rating

2.4.1 Juice cleanse programmes

HMRC have issued a Brief on the VAT liability of "juice cleanse programmes" following the success of *The Core (Swindon) Ltd* in the FTT and UT. HMRC's newly published policy paper provides information for businesses that sell juice cleanse programmes and their advisers. It states that generally, supplies of most food and some drinks are zero-rated. Beverages are however standard-rated, although some drinkable liquids (e.g. liquid foods) are not beverages and are zero-rated for VAT purposes. HMRC accept that products designed specifically as complete meal replacements can be zero-rated.

In the case, HMRC were concerned with the weight given by the FTT to the way in which the juice cleanse programmes were marketed as meal replacements, without testing the credibility of those claims. HMRC therefore appealed the FTT decision to the UT. The UT confirmed that it was necessary to carry out a multifactorial assessment, in which the way a product is marketed is potentially relevant; the weight to be attributed to it is case-specific. HMRC comment that "The UT has therefore endorsed a fact specific stance rather than the more expansive approach taken by the First-tier Tribunal." Because the decision was based on its own specific facts, HMRC have decided not to appeal; however, going forward, each case must be decided on its own facts.

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2.4.2 Cereal bars

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

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

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

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

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

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

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

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

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

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

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

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

It seems that Judge Redston had to taste samples of many of the products, and she concluded that they were nothing like cakes, even though the Nakd bars are given the names of cakes (e.g. "blueberry muffin", "lemon drizzle"). In her view, they were all confectionery and not cakes, and the appeal was dismissed.

First-Tier Tribunal (TC08087): *Wm Morrison Supermarkets plc*

2.4.3 Updated Manuals

HMRC have updated their *Relief for Disabled People* Manual in various areas: who is eligible for tax relief in relation to motor vehicles, exports and removals from the United Kingdom, imports into the United Kingdom and acquisitions from outside the UK.

VRDP01000, VRDP29100, VRDP45000, VRDP46000

HMRC have also updated the *Books* Manual, illustrating VAT liability at different stages of the production process of printed matter.

VBOOKS4600

2.5 Lower rate

2.5.1 Electric vehicles

HMRC have published a Brief giving their views on the VAT liability of charging of electric vehicles and the circumstances in which the VAT charged can be recovered as input tax.

In HMRC's view, the reduced rate that applies to "domestic" supplies of electricity under VATA 1994 Sch.7A Group 1 item 1(e) does not apply to charging of vehicles in public places. The standard rate will therefore apply when someone uses a public charging point.

A sole proprietor will be able to claim input tax on the cost, whether the car is charged at home or elsewhere, provided that the car is used for business purposes. Input tax should only be claimed to the extent that the electricity is used for business journeys.

Where an employee charges the car at home, the employer will not be able to claim input tax because the supply of electricity was made to the employee.

Where an employee charges an electric vehicle for mixed use at the employer's premises, it will be necessary to keep a record of business and private mileage so that the employer can apply an output tax charge on the deemed supply for private use.

Revenue & Customs Brief 7/2021

2.5.2 Updated Notice

HMRC have updated their Notice *Food products* with information in relation to the extension of the temporary reduced rate of VAT. It notes that the products subject to the temporary reduced rate will remain the same, but the rate will change from 5% to 12.5% on 1 October 2021, and will revert to the standard rate on 1 April 2022.

VAT Notice 701/14

2.6 Computational matters

2.6.1 Change of retail scheme

HMRC assessed a retailer to £2.35m in output tax, later reduced to £2.15m. This was an adjustment that HMRC considered necessary when the retailer changed from one bespoke retail scheme to another in March 2017. HMRC took the view that, in calculating the output tax for the final period under the old scheme (which it had operated since December 2002), the retailer needed to bring into account the closing stock in its stores at the end of the period.

Judge Jonathan Cannan set out the legislative background to retail schemes in PVD art.395, regulations 67 – 75 SI 1995/2518 and the series of Notices 727 – 727/5. He stated that "Retail schemes all have the same aim, which is to identify an estimate of the value of standard rated supplies made in an accounting period, thus saving the retailer from the

administrative burden of having to precisely identify the value of standard rated supplies on a transaction by transaction basis."

He described the operation of the Direct Calculation scheme 2, which requires an annual stock adjustment in the fourth quarter of each year, and also when ceasing to use the scheme. He noted the history of the schemes, which were overhauled in 1997, and the limited precedent case law, including *Norwest Co-operatives Ltd* (1999).

The scheme agreed by the retailer with HMRC in 2002 was a variation of the direct calculation scheme 1, which does not require annual adjustments for stock. The shop calculated the expected selling prices (ESP) of zero-rated stock purchased in a period; that was deducted from its daily gross takings (DGT) for the period to give standard rated sales, and that figure was used to calculate the output tax. The new scheme used electronic point of sale information to give a much more reliable figure for output tax.

The old scheme included a clause requiring a review "to ensure a fair and reasonable result". It provided for the parties to agree that the method was fundamentally flawed and should be replaced, in which case it would be possible to obtain settlement of the tax misdeclared by reason of that flaw. However, "fundamental flaw" did not include the simple fact that tax might have been calculated at a higher or lower figure using a different method.

The shop had discussed the possibility of changing scheme in 2006 and in 2015, but was put off by HMRC insisting that a closing stock adjustment would be necessary. This would involve deducting the ESP of closing stock of zero rated items in stores from the ESP of purchases in the period, thereby significantly increasing the standard rated DGT and therefore the output tax for the period. In 2016, HMRC directed that the old scheme should be withdrawn and that a closing stock adjustment would be required for the period 09/16. In the event, negotiations continued and the company started to use the new EPOS scheme; HMRC raised an assessment in September 2018 to give effect to the closing stock adjustment in March 2017.

Because the EPOS system was already in use, the shop was able to show that, using the new scheme, its output tax would have been £817,000 less than that declared under the old scheme. Nevertheless, HMRC maintained that they were entitled to assess over £2m more.

The shop's appeal was based on the grounds that:

- the old scheme did not understate the liability for the closing period, and there was no requirement for a stock adjustment under the old scheme;
- even if it had understated the liability, HMRC could not impose a stock adjustment when the scheme did not require one.

HMRC responded that the old scheme was "fundamentally flawed" in not requiring a stock adjustment. They argued that the lack of a stock adjustment would result in the closing stock being counted for zero rating twice – once when it was purchased, in the period using the old scheme, and once when it was sold, after the new scheme was in force.

The company criticised the logic of this argument: there was no question that the closing stock would "be double counted", or would reduce the standard rated sales in later periods (very accurately calculated using EPOS). Rather, the ESP of ZR purchases was simply used under the old scheme as a proxy for the ZR sales during each period. It was an approximation, as recognised by the bespoke agreement. There had been no adjustment for opening stock when the scheme was introduced, and HMRC's one-sided adjustment would distort the value of SR sales over the whole period.

The judge examined the logic underlying the arguments in some detail, and concluded that there was no fundamental flaw in the old scheme. The lack of a stock adjustment had been agreed between the parties as part of the approximate calculation that is fundamental to retail schemes. The appeal was allowed on this ground.

He also considered the way in which HMRC were supposed to deal with a fundamental flaw, in case he was wrong about the first ground, and concluded that the assessment that they raised was in any case excessive. He dismissed HMRC's arguments as illogical, and would have allowed the appeal on this ground as well. HMRC were effectively trying to "catch up" what they regarded as a cumulative understatement for every period over the life of the old scheme, and this was not justified.

The appeal was allowed.

First-Tier Tribunal (TC08138): *Poundland Ltd*

2.6.2 Updated manuals

HMRC have updated the *VAT Retail Schemes* Manual to remove references to the EU and the Principal VAT Directive.

VRS1150, VRS1200

HMRC have made a number of updates to the *VAT Valuation* Manual, also mainly in relation to removing references to the PVD. The guidance affected covers open market value directions, monetary consideration, currency conversion and non-business use of business assets.

VATVAL07300 etc.

2.7 Discounts, rebates and gifts

Nothing to report.

2.8 *Compound and multiple*

2.8.1 Cab hire and insurance again

In April 2017, a taxi hire business claimed a refund of £43,245 for periods from 12/2013 to 03/2016, stating that it had accounted for output tax on receipts that related to the provision of insurance to people hiring its cabs. It appealed against HMRC's refusal of the error correction. HMRC argued that it would be artificial to split up the supply of the taxi and the insurance, and that the insurance was for the better enjoyment of the taxi hire.

The Tribunal considered the usual precedents on compound and multiple supplies, and in particular *BGZ Leasing* (Case C-224/11), which deals with the directly comparable position of vehicle leasing and insurance. The CJEU held that "as a general rule, a leasing service and the supply of insurance for the leased item cannot be regarded as being so closely linked that they form a single transaction. The fact of assessing such supplies separately cannot constitute in itself an artificial splitting of a single financial transaction, capable of distorting the functioning of the VAT system." The UK Upper Tribunal had applied this decision in finding in favour of another taxi firm, *Wheels Private Hire Ltd*, in 2017.

The judge was satisfied that the facts were very similar to *Wheels*. In particular, the drivers had a genuine choice to arrange their own insurance; the fact that they did not do so was because the firm obtained a block policy which gave better cover at lower cost. HMRC's argument that the drivers paid a single sum that it would be artificial to divide was contradicted by the paperwork, on which the cost of insurance was itemised. The judge was satisfied that the typical driver would understand that there were two supplies at the same time. HMRC had not sought to argue that the amount charged did not reflect a fair apportionment.

HMRC had shown no material difference from *Wheels*, and the appeal was allowed.

First-Tier Tribunal (TC08141): *Black Cabs Services Ltd*

2.8.2 Value shifting consultation

The CIOT has responded to HMRC's consultation on value shifting and the possible introduction of mandatory rules for apportionment of consideration where different supplies are sold as a package. In summary, the CIOT's views are:

- HMRC have not demonstrated that there is sufficient 'value shifting' to warrant a wholesale change to the VAT rules which will affect all VAT-registered businesses that sell a number of goods or services for a single price;
- HMRC already have adequate resources to challenge such arrangements as many simply fail on technical merits, or on 'abuse' grounds. If any additional resources are considered necessary these should be targeted at the mischief they intend to prevent, without creating significant collateral damage for other taxpayers;
- in their current form, the proposed rules could create opportunities to manipulate the amounts attributable to bundled supplies, such as by

inflating individual selling prices of zero or lower rated components, and could result in a smaller proportion of the consideration being properly attributable to positive rated supplies, necessitating complex anti-avoidance measures;

- exceptions to any new rule should be considered; for example, non-profit making bodies which apportion their subscription income in accordance with Extra Statutory Concession 3.35, together with any other 'bespoke' agreements with HMRC, should be allowed to continue

www.tax.org.uk/ref751

2.9 Agency

2.9.1 Nursing agency concession

Two employment agencies applied for judicial review of HMRC's decision to raise assessments on their supplies of medical staff. The basis for the appeal had to be judicial review because the treatment they wanted depended on the application of a concession, which cannot be appealed to the FTT. An initial appeal to the FTT had been withdrawn and replaced by the application for judicial review; this was originally refused by a High Court judge on the basis that the FTT route was available, but this decision was later overturned by the Court of Appeal. There is also an outstanding appeal to the FTT on the grounds of exemption; the judge in the present case proceeded on the basis that the technical appeal was ill-founded, and considered only the question of whether HMRC's decisions were flawed.

One of the appellants (Delta) appealed against an assessment for £1.865m, raised in January 2017 for the period from 03/13 to 09/16; the other (1st Alternative) appealed against an assessment for £220,000 covering the period from 09/14 to 04/16. The claim was based on the protection of legitimate expectations, that the claimants said were derived from a letter written to Delta in January 2004, and also the ESC known as the Nursing Agency Concession.

The decision examines the correspondence between an officer and Delta in 2004. At that time, the agency was considering whether it should deregister on the grounds that it was supplying exempt medical care as a principal. The officer stated that it should continue to account for output tax on its commission, as it was supplying staff as an agent.

The staff hire concession was withdrawn by HMRC with effect from 1 April 2009. This allowed businesses that supplied staff as a principal to be treated for VAT as if they supplied them as an agent. Information Sheet 03/09 explained the terms of the withdrawal; this was further developed by R&C Brief 12/2010, which stated that employment businesses in the health and welfare sector would be treated as principals making exempt supplies of healthcare if they retained direction and control of its staff. The judge considered that this was inconsistent with the officer's letter of January 2004, which suggested that the agency would only be treated as an exempt principal if it employed its staff.

The Brief then set out the Nursing Agency Concession, which allowed the supply of registered nurses and midwives, and auxiliaries under the direct supervision of registered staff, and certain other unregistered staff supplied to hospitals and care homes to be treated as exempt supplies of healthcare, as long as the agency acted as a principal. The agency had to be registered with the Care Quality Commission in order to qualify for the concessionary treatment.

HMRC accepted that the claimants satisfied the criteria for the concession at all material times. However, they had not claimed the benefit of it at the time; they had accounted for VAT on their commissions on the basis that they were supplying staff as agent, and it was only when HMRC ruled that they were acting as a principal that they retrospectively claimed the concession.

There were a number of other developments in the area of employment agencies, including R&C Brief 32/2011 responding to the FTT decision in *Reed Employment Ltd*, and an update to Notice 700/34 made in June 2012. In all these developments, HMRC maintained the position (contrary to the January 2004 letter) that employment agencies could supply self-employed staff either as principal or as agent.

The claimants based their application on the assertion that HMRC's assessments, made on the basis that they were supplying staff as principals, and could not benefit from the concession, were in breach of a legitimate expectation created by the letter of 14 January 2004 that, unless and until they reorganised their businesses, HMRC would regard them as acting as agents who should account for VAT only on their fees/commission; or that if they commenced making supplies as principals, those supplies would be regarded as exempt.

The judge noted the precedent of *Elmeka* (Case C-181/04) as setting out the EU principle of protection of legitimate expectations. In his view, the claimants could not reasonably have had a legitimate expectation covering the period 2013 to 2016, based on a letter written in 2004, when HMRC had published several statements in the intervening period that called the letter into question. "A reasonably prudent trader would have sought clarification from HMRC and would very likely have been informed that the 14 January 2004 letter did not reflect HMRC's up-to-date position." The claimants' counsel made submissions as to why his clients could not be expected to have been aware of the more up-to-date guidance, but this was not supported by witness evidence to show that they had not been aware of it or taken advice on their VAT position. The judge described the submissions as "implausible".

An argument based on a claimed EU principle that "the Member State cannot be permitted to take advantage of its own wrong" was also dismissed. That arose in the context of direct effect of Directives, where a Member State could not benefit from its failure properly to implement EU law. The "wrong" in this case was the incorrect letter of 2004, and that was not something that should have created a legitimate expectation in the trader's mind.

There was also an argument based on the domestic law concept of legitimate expectations, as set out in the 2019 Court of Appeal judgment in *R (Aozora) v HMRC*. In that case, the claimants had relied on an explanation of the law in HMRC's internal manuals; the judge noted that

this was adverse to the present claimants, because it suggested that they ought to have followed more up-to-date HMRC guidance rather than an old letter. The judge had to consider whether it was unfair, "at a very high level", for HMRC to depart from the content of their letter. In his view, it was not. "The short point is that the assessments under challenge covered periods which fell a minimum of nine years after the letter and four years after the first of a series of publications which made clear to the informed reader that the position stated in the letter regarding agent status was no longer regarded by HMRC as correct."

The judge went on to consider whether the benefit of a concession could be claimed retrospectively, or whether it had to be elected for at the time, as HMRC argued. In line with the Court of Appeal decision in *ELS Group*, the judge concluded that HMRC were right.

The claimants' strongest argument was an appeal to basic fairness. They were not allowed to apply a concession retrospectively that would have resulted in them paying no VAT at all to the Exchequer; but HMRC were allowed to resile from a letter they had sent to the claimants and raise assessments retrospectively. The judge agreed that this was a little harsh, but the problem had arisen from the claimants' failure to pay attention to the various later statements emanating from HMRC.

Lastly, the judge considered a claim based on the principle of equal treatment. It was not possible for a valid claim to be justified solely because other taxpayers were treated too generously. The claim for judicial review was dismissed.

High Court: *R (on the application of First Alternative Medical Staffing Ltd and another) v HMRC*

2.9.2 Article

In an article in *Taxation*, Rachel Strother examines the Supreme Court decision in *Uber v Aslam* and considers whether it supports the view that Uber should be liable to VAT on the full amount paid by customers (which would carry a very large retrospective liability).

Taxation, 15 April 2021

2.10 Second hand goods

Nothing to report.

2.11 Charities and clubs

Nothing to report.

2.12 Other supply problems

2.12.1 Intra-group services

It is difficult to summarise a case which begins with the judge's reference to 10 days of hearings, two documents bundles of 3,057 and 1,377 pages and an authorities bundle of 1,102 pages. The decision starts with a table of contents that shows there are 21 pages of evidence, 13 pages of findings of fact, and 36 pages of discussion. This must therefore necessarily be a simplification.

The Jupiter group is a corporate group of companies that provides clients with a wide range of asset management products. Within its corporate group there were (as least) two VAT group registrations comprising different subsets of subsidiaries, one referred to as JAMG (Jupiter Asset Management Group) and the other JIMG (Jupiter Investment Management Group). The appeals related to the input tax and output tax consequences for the JAMG group of certain strategic and operational management services which were provided by members of the JAMG group to members of the JIMG group over a number of years. As the groups were deemed to be single entities for VAT purposes, it was not particularly relevant which companies actually supplied the services. The terms on which the services were provided were set out in a series of agreements which were varied and replaced over time.

The starting point of the appeal was the issue of a Sch.6 para.1 direction to the JAMG group on 23 May 2013, requiring it to account for output tax on the open market value of services supplied from 31 May 2010 onwards. The direction was to apply to any supply made for a consideration in money that was made to a connected person who could not fully recover input tax on that supply. The direction was followed in November 2013 and February 2014 with decisions and initial assessments for periods from 08/10 to 02/14. Further assessments had been issued covering periods up to 05/18; the appeals against those assessments had been stayed pending the outcome of the present appeal. The assessments were advanced on alternative bases, one assessing output tax and the other disallowing input tax.

The issues to be determined were listed as follows:

20. The parties have agreed that the two sets of assessments which are in issue in the appeals give rise to the following issues which need to be determined:

(1) what is the "open market value" of the supplies of Management Services which have been made by the Appellant (as the representative member of the JAMG group) to JIMG (as the representative member of the JIMG group) for the purposes of Article 80 of the Directive and paragraph 1 of Schedule 6 to the VATA? This involves the determination of the following sub-issues:

(a) how is a comparable service (i.e. one made under conditions of fair competition by a supplier at arm's length) in the specific context of management services provided by a holding company as required for the purposes of the first paragraph of Article 72 of the Directive to be determined?

(b) can a supply of services comparable to the supplies of the Management Services be ascertained for the purposes of Article 72 of the Directive and Section 19 of the VATA?

(c) if the answer to the question set out in paragraph 20(1)(b) above is in the affirmative, what and by reference to what methodology is the full amount that a customer would have to pay for such a service?

(d) in determining the answer to the question set out in paragraph 20(1)(c) above, is the concept of an "open market value", as relevantly defined in Article 72 of the Directive and Section 19 of the VATA, synonymous with the concept of an "arm's length price" for transfer pricing purposes (the "ALP") (thereby incorporating the approach adopted in the OECD Transfer Pricing Guidelines (the "Guidelines") to the question of valuation)?

(e) if the answer to the question set out in paragraph 20(1)(d) above is in the negative, are the Guidelines nevertheless relevant in determining an "open market value", as defined in Article 72 of the Directive and Section 19 of the VATA?

(f) if the answer to either the question set out in paragraph 20(1)(d) above or the question set out in paragraph 20(1)(e) is in the affirmative, then:

(i) to what extent are the Guidelines relevant;

(ii) if relevant, how are the Guidelines to be used; and

(iii) what modifications, if any, need to be made to them to make them compatible with European Union ("EU") law and/or Article 72 of the Directive?

(g) if the answer to the question set out in paragraph 20(1)(b) above is in the negative, what is the amount of the full cost of providing the supplies of the Management Services?

(h) in determining the answer to the question set out in paragraph 20(1)(g) above, and in the context of the purpose of the provisions of Articles 72 and 80 of the Directive, should the full cost include or exclude non-VAT bearing inputs?

(2) to what extent were the goods and services in respect of which the Appellant has deducted input tax "used for the purposes of" the Management Services (as required by Article 168 of the Directive)? and

(3) is there any relationship between the right to deduct arising under Article 168 of the Directive and the determination of "open market value" under Article 72 of the Directive for the purposes of Article 80 of the Directive and paragraph 1 of Schedule 6 to the VATA? In particular, is it permissible, as a matter of EU law, for a taxable person to claim to deduct input tax on the basis that it uses particular costs in order to make taxable supplies of management services, while at the same time accounting for output tax in respect of those supplies on the basis that a proportion of the same costs should be disregarded in arriving at an "open market value"?

The decision goes on to summarise witness evidence and a number of findings of fact. The judge notes (at para.106/108) that the nature of the management services being supplied was fundamental to the issues in the

case, but construing the definition of those services was made difficult by two features of the facts:

- first, that the division of the corporate group into two VAT group registrations was significant for VAT, but was not taken into account in any other way in the manner that the group operated and recharged for intra-group services;
- second, there appeared to be a misunderstanding on the part of the personnel that the contractual employer of the executive directors was the company that paid them, rather than the ultimate holding company – this mattered because some of the witnesses of fact considered that work done by the EDs did not need to be recharged, because they were already working for the group that paid them.

The issues were summarised as follows:

(1) our task of identifying the character of the Management Services necessarily entails unpicking the integrated activities of a single economic group and dividing it into its constituent parts;

(2) we do not accept the proposition that the mere fact that the EDs were directors of members of the JIMG group and were paid by the Payer means that, when the EDs carried out activities which ultimately benefited the JIMG group, they were necessarily working for that entity;

(3) the chosen structure compels us to identify which of the two VAT groups an ED was working for when carrying out any particular activity. The only way of deciding which of the two VAT groups it was when the activity in question benefited the JIMG group is to consider whether the activity in question falls within the scope of the language used in the definition of the Management Services;

(4) in construing the definition of Management Services, the supplies of the Management Services were not confined to the services of the NEDs and legal and professional services but were instead much more wide-ranging than that and, in particular, included the activities of the EDs when those activities involved any of the matters listed in the four bullet points of the definition; and

(5) that will have been the case even if, in carrying out those activities, the relevant ED was doing something other than participating in, or preparing for, a Board or strategy day meeting.

The discussion starts with a consideration of HMRC's alternative (i.e. not preferred) assessments, which were based on disallowing input tax incurred by the JAMG group. There was a disagreement between the parties on the fundamental issue of whether a holding company that had no exempt outputs was automatically entitled to recover all of its overhead input tax. Both sides cited numerous precedents, including *Cibo*, *Frank A Smart Ltd* and *Sonaecom*. HMRC relied in particular on the UT's decision in *JDI International Leasing Ltd*, in which VAT incurred on leasing tools intra-group for no consideration was held not to be recoverable as overhead input tax.

The judge accepted the taxpayer's argument that the CJEU precedents are authority for the proposition that, when it comes to a holding company whose only activity is a taxable economic activity, the necessary direct and immediate link between the costs and the economic activity can

automatically be assumed to exist. This involved the "oddity" that a holding company that makes no supplies of management services is regarded as unable to recover any input tax, because it is not carrying on any economic activity; but if it supplies some management services, the mere holding of the shares is not regarded as a separate non-economic activity, but rather is ignored. The facts were different from those in *JDI*, and the CJEU precedents were binding. The conclusion was that the input tax was recoverable, and if the appellant's appeal against the preferred (output tax) assessment had succeeded, so would its appeal against the input tax assessment.

The basic conditions for the Sch.6 para.1 direction were held to be met: there was a supply of services between connected persons for a consideration in money. The majority of the following discussion deals with the question of how the open market value of the supply should be determined. To start with, there was a dispute about how the OMV rule in VATA 1994 s.19(5) should be construed, and whether it properly reflected art.72 PVD.

The judge examined the arguments in detail and concluded that:

(1) the grain of Section 19(5) of the VATA is to identify the consideration which would have been given for the supply in the absence of a connection between the parties – in other words, to eliminate the impact on the consideration of the connection between the parties;

(2) in a case where a comparable transaction exists, it is easy to do so by basing the OMV on the price paid in the comparable transaction (the first paragraph of Article 72 of the Directive). That has the effect, in the context of a supply where there is a comparable transaction, of eliminating the impact on the consideration of the connection between the parties. However, it does so only by relying on the terms of the comparable transaction; and

(3) where no such comparable transaction exists, it is necessary to specify an alternative way in which the impact on the consideration of the connection between the parties is to be eliminated and the method for doing that is to identify the full cost to the supplier of making the supply (the second paragraph of Article 72 of the Directive).

The judge next considered whether an "arm's length price" (ALP) approach was the correct way to proceed. This was in effect an application of the first paragraph of art.72, and would be appropriate if there was a directly comparable transaction; but the second paragraph of art.72 required a "cost plus" approach where there was no such comparable transaction. HMRC's counsel argued that ALP was a direct tax concept that was relevant to distortion of taxable profits, not VAT: the judge agreed. There could be an overlap between the concepts of ALP and OMV, but it was not the correct starting point for the valuation process.

The judge referred to the UT decision in *Temple Finance*, which is the only recent case in which a Sch.6 para.1 direction has previously been tested in the UK Tribunals. That had considered the relationship between ALP and OMV, but in a much more restricted context. The decision did not support a general conclusion that they were necessarily the same.

For all these reasons, the OMV should be regarded as "the full cost of providing the service", in line with the second paragraph of art.72 (used to interpret s.19(5)). There was no precedent on the meaning of this expression. The "oddity" of the CJEU's view on overheads of holding companies resurfaced: the general overheads of a holding company were treated for input tax recovery as if they were directly used in making all of the holding company's taxable supplies, whereas in normal accountancy terms they were not. This was particularly acute in the costs of an IPO that were not, in an economic sense, "used" to supply the management services to the JIMG group. This was summarised as involving a choice between two propositions:

(1) the first is that the Appellant is right to say that, as the input tax-bearing general overhead costs were not actually used to make the supplies of the Management Services, those costs did not form part of the full cost to the JAMG group of providing the Management Services; and

(2) the second is that the Respondents are right to say that, if the input tax in respect of the input tax-bearing general overhead costs is recoverable, then that can be only because those costs were deemed to be cost components of the supplies of the Management Services and they must therefore necessarily form part of the full cost to the JAMG group of providing the Management Services.

210. The Appellant's approach has the benefit of according with the commercial reality. The Respondents' approach has the benefit of treating the input tax and output tax sides of the JAMG group in a consistent way. We find this to be a difficult question to determine. The answer can hardly be said to be clear and, were it still to be within our remit, this might well have been a question to be referred to the CJEU. However, on balance, we have decided that the Respondents' view is to be preferred.

The reasons for this were set out in detail, but included the principle that VAT should be regarded as a coherent whole, and the fiction that applied to support the input tax deduction should therefore be applied in determining the output tax liability.

It was also necessary to include non-VAT bearing costs in the "full cost". The legal fiction on input tax did not take account of exempt, zero-rated and outside-the-scope costs. The judge therefore proposed to include only those costs that were directly used by the JAMG group in supplying the services. This raised the question of whether the cost of the executive directors was part of the JAMG's cost (because they were contractually employed by the plc at the top of the group) or to be ignored (because they were paid by a member of the JIMG group and this was not recharged to JAMG). This was a "surprisingly difficult" question that required 16 paragraphs of analysis, but the conclusion was that the EDs' remuneration should be included to the extent that their work was used to provide the services.

HMRC's assessments to output tax were based on the "full cost" (according to their methodology) incurred in the preceding quarter. The appellant's counsel argued that this had no basis in law. HMRC's counsel justified it by observing that the company charged on a quarterly basis for the connected person supplies at the end of the calendar quarters, but the VAT stagger group did not match those quarters. The output tax

assessments were a "best judgement" attempt to produce a fair result. The judge considered that HMRC's method was both reasonable and the most practical one available in the circumstances.

The final conclusions, answering the questions set out at the beginning of this summary, were as follows:

(1) there is no service supplied between parties dealing at arm's length which is comparable to the supplies of the Management Services (see paragraphs 20(1)(a) and 20(1)(b) above);

(2) consequently, the questions posed in paragraphs 20(1)(c) to 20(1)(f) above do not arise;

(3) the "full cost" of providing the Management Services included all of the costs the input tax in respect of which was recovered by the JAMG group, together with those non-input tax-bearing costs which were incurred by the JAMG group and used to make the supplies of the Management Services (so that they were therefore cost components of those supplies), chief amongst which were the reimbursement amounts which PLC, a member of the JAMG group, became obliged to pay to the Payer in respect of the remuneration of the EDs to the extent that the EDs were performing activities in the course of the Management Services (see paragraphs 20(1)(g) and 20(1)(h) above);

(4) all of the goods and services in respect of which the Appellant deducted input tax were used for the purposes of making the supplies of Management Services either because they had a direct and immediate link with those supplies or because they had a direct and immediate link with the economic activity carried on by the JAMG group (see paragraph 20(2) above); and

(5) in a case where the OMV of a supply falls to be determined by reference to the "full cost" of making that supply, as required by the second paragraph of Article 72 of the Directive, there is a direct relationship between the right to deduct arising under Article 168 of the Directive and the determination of OMV under Article 72 of the Directive for the purposes of Article 80 of the Directive and paragraph 1 of Schedule 6 to the VATA and therefore it is not permissible, as a matter of EU law, for a holding company to claim to deduct input tax on the basis that it uses particular costs in order to make taxable supplies of management services, while at the same time accounting for output tax in respect of those supplies on the basis that a proportion of the same costs should be disregarded in arriving at OMV (see paragraph 20(3) above).

The appeals against the output tax assessments were dismissed. The input tax assessments fell away as a result.

First-Tier Tribunal (TC08079V): *Jupiter Asset Management Group Ltd*

2.12.2 Article

In an article in *Taxation*, Neil Warren reviews the range of supplies on which a reverse charge may now arise – ranging from postponed accounting for imports, goods purchased from abroad costing less than £135, services from abroad, construction supplies and the range of goods and services that are subject to domestic reverse charges to prevent evasion.

Taxation, 29 April 2021

2.12.3 Updated Manuals

HMRC have updated the *Government and Public Bodies Manual* with guidance on parking in a country park, and have added a 'guidance map' showing a list of all of the page headings within the manual.

VATGPB8640

HMRC have made a number of updates to the *VAT Transfer of a Going Concern* Manual, including the interesting statement in the introduction: 'Under the European Union (Withdrawal) Act 2018 and the Taxation (Cross-Border Trade) Act 2018 (TCTA) past European Court of Justice (CJEU) case law remains binding in UK law, and is therefore referred to in this manual where appropriate'. Nevertheless, other amendments are made to remove references to the Principal VAT Directive and to amend the guidance on fiscal neutrality.

VTOGC1100

2.12.4 Road fuel scale charges

HMRC have published updated road fuel scale charge tables for VAT which apply from 1 May 2021. Businesses can use the new scales from the start of the next prescribed accounting period beginning on or after that date. These scale rates are updated annually.

SI 2013/2911; www.gov.uk/guidance/vat-road-fuel-scale-charges-from-1-may-2021-to-30-april-2022

3. LAND AND PROPERTY

3.1 Exemption

3.1.1 Parking (1)

A company submitted a VAT 1 for a new business (running a fuel station) in November 2003. At the request of the company's solicitors, HMRC confirmed that the purchase of the business met the conditions for a TOGC in February/March 2004; in March 2004, its accountants submitted an option to tax notification form 1614, which HMRC acknowledged (described in the decision as "granted the option to tax", which is incorrect) in June 2004. The company claimed never to have received this acknowledgement.

On 25 March 2004, HMRC advised that the purchase of the business did not constitute a TOGC after all as the Appellant would not be carrying out the same business activity as the previous owner. This was because the previous owner of the business had let the premises out to another business, whereas the Appellant would be running the business and this therefore constituted a new business. Following exchanges of correspondence, HMRC decided not to pursue the VAT on the sale of the business as it was accepted that the Appellant had acted in good faith due to the earlier conflicting correspondence from HMRC.

In November 2016, an officer visited the company and noted that it was treating the rental of a car park area for a car wash as exempt. She confirmed with the option to tax unit that the option had never been revoked. The accountants claimed that the option had been withdrawn and the income was therefore "zero rated", but no documentary evidence of this was produced. HMRC assessed the company to output tax of £8,000 for periods 12/13 to 09/17.

HMRC's argument before the Tribunal was that the supply was of "facilities for parking a vehicle" and was therefore standard rated in any case, regardless of the option to tax. The company submitted that the lease was for a space in which a business could be carried on, even though it referred to "the car park" throughout the document. It specified that the tenant was only permitted to use the car park "as a car wash business" and for no other purpose. The company also argued that HMRC had visited in 2008 and had accepted the exempt treatment.

The judge (Natsai Manyarara) decided that the FTT had no jurisdiction to hear an appeal against a decision of HMRC that an option to tax was still in place, because it was not listed in s.83 VATA 1994. That decision does not appear to be crucial to the assessment, because the rest of the argument is about whether the lease was excluded from exemption in any case.

HMRC argued that the case was "on all fours" with *Fareham Borough Council* (TC04129), in which a letting to an ice cream vendor was held not to be a licence to occupy land. The appellant responded that the facts were different – in the present case, a designated area of the car park was set aside for the car wash business, and that was all it was used for.

The judge made a number of findings that favoured HMRC, including the obvious fact that a car needs to be parked in order to be washed. No

evidence had been presented to show that cars could not or would not be left in the car wash area while their owners went into the shop or did something else. The tenant did not appear to have rights to exclude people, which undermined the argument that the lease granted a licence to occupy land. The overall conclusion, that the agreement was "the grant of a car wash facility within a car park" and was a taxable supply, is not completely clear about whether the basis for that decision is that it was not within Sch.9 Group 1 at all, or whether it was excluded by item 1(h). The option to tax is not referred to as in any way significant.

Even though the decision refers to a documents bundle of 198 pages and an authorities bundle of 273 pages, the judge noted that no plan of the car park area was included.

First-Tier Tribunal (TC08053): *R K Fuels Ltd*

3.1.2 Parking (2)

A NHS Trust argued that it should not have to account for output tax on parking charges for visitors, hospital staff and others at some of its sites. It put forward two grounds:

- the provision of parking was not an economic activity and therefore was outside the scope of VAT (art.13 PVD and s.41A VATA 1994);
- or the provision of parking was a supply that was incidental to the supply of healthcare, and was therefore exempt (art.132(1)(b) PVD and Item 4 Group 7 Sch.9 VATA 1994).

It was agreed that the Trust was not a taxable person in respect of its primary healthcare functions. However, HMRC maintained that the provision of car parking was an economic activity in its own right.

Judge Greg Sinfield considered the policy of the Trust on the provision of car parking, which was issued in line with guidance by the Department of Health. This included measures to ensure that the car park contributed financially to the provision of healthcare rather than the reverse, and also measures to ensure that the car park would not be abused by people who were not visiting the hospital premises.

The judge considered the "economic activity" argument first. HMRC's position was that the provision of car parking services by the Trust constituted an economic activity, involving a supply made for consideration and remuneration in a market alongside commercial operators. The guidance emphasised that car parking was an income generating activity; the Trust's accounts showed that it contributed a profit on a recurring basis. The situation was not similar to the case of *Gemeente Borsele*, and the CA ruling in *Wakefield College* supported HMRC's case.

There was a separate argument that the Trust should still not be regarded as a taxable person in respect of these supplies, on the basis that it was a public body acting as such (art.13 PVD). The judge considered the regulations under which NHS bodies provide car parking, and concluded that it did not constitute a "special legal regime" for these purposes. The Trust therefore had to be considered to be a taxable person in respect of these supplies.

Although that was enough to dispose of that ground of appeal, he also discussed the argument that art.13 was excluded because the treatment would lead to a risk of significant distortions of competition. The precedent was *Isle of Wight Council*, and the judge concluded that the CJEU decision in that case supported HMRC again: the Trust participated in the market for car parking in areas where it provided parking, and there was actual competition between the Trust's car parks and parking provided by private operators in or near those areas. The judge noted that this would also apply to other Trusts "whose appeals are stayed behind this one."

Art.132(1)(b) PVD exempts "hospital and medical care and closely related activities undertaken by bodies governed by public law or, under social conditions comparable with those applicable to bodies governed by public law, by hospitals, centres for medical treatment or diagnosis and other duly recognised establishments of a similar nature". This was subject to art.134, which imposed two alternative reasons for excluding exemption:

(a) where the supply is not essential to the transactions exempted;

(b) where the basic purpose of the supply is to obtain additional income for the body in question through transactions which are in direct competition with those of commercial enterprises subject to VAT.

Item 4 Group 7 only refers to supplies of "goods" in connection with hospital care, and as car parking is a service, the Trust could not succeed on the UK law alone. The judge rejected a submission by HMRC that the VATA correctly implements this provision of the Directive, which refers to "activities". The parties did not agree on the consequences of this, although both referred to the *Marleasing* approach requiring "conforming construction". The judge considered the precedents on the application of *Marleasing* and concluded that he should simply read the UK provision as covering "any supply" that was closely related and essential to hospital and medical care, and where the basic purpose of the supplies was not to obtain additional income.

The precedent on "closely related and essential" was the CJEU decision in *Ygeia* (Case C-394/04), which concerned the supply of telephone services and televisions to hospital patients. The CJEU had restricted "closely related" to supplies that were involved in the achievement of therapeutic objectives. Although the judge acknowledged the force of the Trust's argument that the ability to park and therefore to access the hospital site could be regarded as important for achieving the healthcare objective, it was not sufficiently part of the process to meet the test in *Ygeia*.

Finally, the judge noted that he had already decided that the earning of additional income for the Trust was one of the basic purposes of the provision of car parking, in line with the national guidance. That also ruled out exemption under art.134.

The Trust's appeal was dismissed on every ground.

First-Tier Tribunal (TC08056): *Northumbria Healthcare NHS and another*

3.1.3 Consultation

HMRC have launched a consultation on "Simplifying the VAT Land Exemption", following an OTS review in 2017. The consultation document summarises some of the complexities in the VAT treatment of supplies of land and property, including exemption and the option to tax, and considers a number of ideas for potential simplification. The consultation closes on 3 August 2021.

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

3.2 Option to tax

3.2.1 Circular rules

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

The property was then leased to an optician's business that was connected to the owner. VAT was accounted for on the rentals; in 2007 following a VAT visit the owner became aware that the rentals should have been exempt, and HMRC appear to have allowed repayment of the previous three years' worth of output tax without revisiting the original recovery.

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

The FTT judge (TC06539) pointed out that there is a potential circularity in the legislation: if the asset is no longer a capital item for the vendor, the OTT is not disapplied so the sale becomes taxable; but it then creates a capital item for the purchaser, which may affect the treatment of the sale. This is noted in *Scammell on VAT on Construction, Land and Property* as a long-standing anomaly on which there is no consensus of the correct approach.

The judge also noted that the purpose of the law is hard to discern or apply. HMRC's internal guidance states that it is an anti-avoidance provision, but its operation is mechanistic. The relevant law in para.12 states:

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

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

b) the exempt land test is met.

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

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

Judge Anne Scott analysed the legislation in line with the recent Tribunal decision in *PGPH Ltd*. She concluded that the "intention or expectation that the property will become a capital item in relation to any relevant

transferee" was a subjective test, as to what would be a genuine or real, not a hypothetical, intention or expectation as at the time of the grant.

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

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

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

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

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

The appeal was refused again.

Court of Session: *Moulsdale (t/a Moulsdale Properties) v HMRC*

3.2.2 Failure to notify

In early 2014 the tenant landlord of a pub was offered the freehold. He bought it and sold it on the same day (22 May 2014), paying £1.3m plus VAT of £234,000 to the vendor and issuing an invoice showing £1.8m plus VAT of £360,000. As he had not notified an option to tax within the required 30 days, HMRC ruled that he could not deduct the input tax, but still owed the amount described as VAT on the invoice he had issued.

The judge noted that the evidence left some “gaps in the tale”. It appeared that the publican’s accountant had said he would deal with the “appropriate VAT return and election”. The contracts specified that VAT would be charged on each sale. The accountant prepared a VAT invoice for the buyer. The return was not filed on time, and the publican was apparently not advised to pay the £126,000 net output tax on the transaction to HMRC. A nil return was later filed, and in November 2014 the accountant applied for the publican to deregister.

The judge pieced together the ensuing correspondence between the publican, the accountant and HMRC through 2015 and 2016. There were references to “applying to opt retrospectively” (which is not possible); even so, in November 2015 HMRC recognised that what was being applied for was delayed notification rather than retrospective permission, and asked for a signed statement from the trader: (i) confirming the date the election was made, (ii) confirming that all VAT had been accounted for and (iii) confirming that no exempt supplies had been made of the property in the last 10 years; in addition copies of the sales invoices were sought. This paperwork was not provided to HMRC by the accountant, and there followed three changes of advisers, none of whom appeared able to rectify the problem.

An appeal against the assessment was finally made to the Tribunal on 5 February 2019. HMRC applied for the appeal to be struck out on the grounds that there was no right of appeal against an assessment of a debt due to the Crown (i.e. the “VAT” on the invoice that was not VAT). This came before Judge Mosedale in July 2019: she sought clarification of the grounds of appeal, and appears to have pointed the appellant in the direction of “belated notification of the option”.

The appellant responded by setting out the history of the matter, but not properly addressing the fact that the appeal was very late – it should have been made within 30 days of HMRC’s decision in November 2015. HMRC objected to the lateness of the appeal.

The judge said that it was clear that the matter had been mishandled by the trader’s advisers. It appeared that they had misunderstood the legislation both in failing to do what they should have done at the time, and then when trying to correct the matter afterwards.

He went on to consider whether the trader had in fact made an effective election before the sale. He concluded that he did so: the references to VAT in the sale contract and a meeting note recorded by the solicitors in April 2014 showed that this was the case. The trader did not understand the VAT law as it applied to property sales, but he had delegated authority to his advisers to make the election on his behalf. This they had failed to do, and throughout the period since, no one appeared to have properly grasped what they needed to ask HMRC to do (accept a belated notification) or what they needed to appeal to the Tribunal (apply for permission to appeal late, offering reasons, and appeal against HMRC’s refusal to allow extra time).

Although the judge had some sympathy with the trader, he did not consider the poor advice he had received to be a good enough reason for the delay. In the circumstances, he had no choice but to strike out the appeal. However, he did observe that the power to allow extra time for notification was not time limited; if HMRC were satisfied that they had

received the VAT that was properly due on the transactions if they had been correctly accounted for (net output tax of £126,000), he suggested that they might even now consider accepting a belated notification.

First-Tier Tribunal (TC08147): *William Newman*

3.3 Developers and builders

3.3.1 Non-compliant building work

HMRC raised assessments on a building company for a total of £59,167 for periods 09/13, 03/14 and 06/14. The company had zero-rated its charges, and the work comprised the construction of a new dwelling; however, at the time, the planning consent had only permitted the alteration or enlargement of an existing dwelling, and therefore the work had not been carried out in accordance with the consent.

Judge Nigel Popplewell reviewed the history of the HMRC enquiry and the resulting dispute, and also the planning history of the project. The company argued that the project was authorised by a combination of the planning consent and a building warrant. The judge required further submissions after the hearing in relation to Scottish planning and building warrant law, following which he concluded that the warrant could not comprise statutory planning consent for the purposes of Group 5 Note 2(d). He gave detailed reasons for this, including the observation that it was possible to obtain retrospective planning consent (as had happened in this case) but it was not possible to get a retrospective warrant. They were different in nature.

After a very detailed discussion of the precedents and the arguments, the judge concluded that he had to construe the zero-rating provision strictly (albeit not restrictively): the expression “statutory planning consent” for the purposes of note 2(d) “means just what it says on the tin”. The time he had to consider was when the work was done, and no planning consent for demolition and reconstruction was in place at that time.

The appeal was dismissed.

First-Tier Tribunal (TC08140): *CMJ (Aberdeen) Ltd*

3.3.2 Building materials

HMRC have issued a Brief on the VAT liability of installation of blinds following the FTT decision in *Wickford Development Co Ltd*. HMRC now accept that manual blinds can be considered to be building materials for input tax deduction on construction services. This revises a policy that was set out in Brief 02/2011, and is stated as being effective from 5 October 2020. The Brief does not invite retrospective claims, even though the FTT decision was based on the law overriding HMRC’s policy.

The Brief also notes that motorised blinds remain excluded from the definition of building materials because they are “electrical equipment”.

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3.4 Input tax claims on land

Nothing to report.

4. INTERNATIONAL SUPPLIES

4.1 E-commerce

Nothing to report (the new rules on sales through online marketplaces are covered under 4.3 and 4.4).

4.2 Where is a supply of services?

4.2.1 Roaming services

The full court has now given its judgment in a case on “use and enjoyment provisions”, following Advocate-General Saugmandsgaard Oe’s opinion. The case was referred from Austria on art.59a PVD which provides for optional place of supply measures to avoid double taxation and non-taxation. The taxpayer was a telecoms company established in South Korea which provided mobile telephone roaming services to South Korean residents who were staying temporarily in Austria. The Austrian tax authorities considered that they could transfer the place of supply to Austria, making the supplies chargeable to Austrian output tax.

The relevant law in art.59 PVD (now art.58, following the renumbering in 2015) placed supplies of telecommunications services to persons residing outside the EU as “outside the scope”; however, art.59(a) allowed member states to consider services within art.59 to be supplied within their territory if the effective use and enjoyment of the services took place there. Art.59b required member states to apply a use and enjoyment provision to B2C telecommunications services supplied by a person established outside the EU, where the consumer customer had a permanent address or ordinarily resided in the EU. Austria had enacted a use and enjoyment provision in accordance with the Directive; the disputed transactions took place in 2011, which was only just after the mandatory introduction date of the relevant provisions. Art.59b was repealed with the introduction of the MOSS rules in 2015, so that part of the decision is no longer particularly relevant.

The Korean company paid a fee to an Austian network operator to enable its consumer customers to have access during stays in the country. The operator charged Austrian VAT, which the Korean company reclaimed from the Austrian authorities. This was refused, on the basis that the company was liable to account for output tax on the revenue charged to the customers.

An Austrian court allowed the company’s appeal, interpreting art.59a and 59b as only allowing the use and enjoyment provision to shift the place of supply to Austria where the customers were non-taxable persons established within the EU. If the Korean company’s supplies were outside the scope, it would be entitled to a refund. However, this was not the argument put forward by the company, which claimed that it should not be subject to tax in Austria because the transactions were subject to a comparable tax in South Korea (at 10%).

The decision in the company's favour was overturned on appeal, and questions were referred to the CJEU. These covered two points:

- first, whether the use of roaming services, by a non-taxable end customer who does not ordinarily reside in the EU, could be subject to the use and enjoyment provision in art.59a where the supplier was also established outside the EU;
- second, whether this transfer of liability was possible simply because the telecommunications services in the third country were not subject to a tax comparable to VAT under EU law (in effect, asking whether the "avoidance of non-taxation and double taxation" in the heading of the article was a guiding principle).

Advocate-General

The A-G started with an analysis of the transactions involved in a mobile telephone roaming service, which involved:

- a B2B supply from the network operator (in Austria) to the Korean mobile operator;
- a B2C supply from the Korean operator to its customers, "subletting" the access to the network that was obtained by the B2B transaction.

The questions referred related to the second of these supplies, but they were only relevant because of the VAT charged by the supplier on the first supply, which the Korean company was attempting to recover. The Commission expressed some reservations on whether the first transaction should have been charged, given that it was a B2B supply that would normally be treated as outside the scope; however, the A-G declined to discuss it, as the order for reference did not contain any information about that part of the transaction. It did not undermine the validity of the questions referred, so the court could provide answers.

The company argued that it would be artificial to split supplies made on the same SIM card. It regarded its supplies to customers as a single continuous supply of services that was situated in South Korea. The A-G noted that the "normal rule" is that every supply is distinct and independent and should be given its own natural liability. Roaming services which consist in offering access to a mobile telephone network in a country other than the country of origin are objectively separable from mobile telephone services provided in the country of origin. Bills sent to users usually identify roaming services as a distinct supply, and itemise individual calls and the amount of data use. The A-G agreed with the Spanish government's submission that this was a separate and non-incidental service.

The A-G noted that art.59b, which was a mandatory provision, had no application in the present case because it only applied to consumer customers who were established in the EU. The optional provision in art.59a had been implemented by Austria; the scope of that optional provision was wider than that of the mandatory provision in art.59b. The question was whether the conditions set out in art.59a had been correctly implemented and were applicable in this case:

- First, the ‘effective use or enjoyment’ of the services must take place within the territory of the Member State concerned. That condition was the subject of the first question asked by the referring court.
- Secondly, Member States may make use of that option ‘to avoid double taxation, non-taxation or distortion of competition’. That condition was the subject of the second question.

The company pointed out, and the A-G regretfully agreed, that there were inconsistencies between the different language versions of the Directive: in some, art.59a referred to “use or enjoyment”, and others have the expression “use and enjoyment”. In the proposal to recast the 6th Directive, which led to the 2006 PVD, the Commission appears to have recommended harmonisation of a longstanding discrepancy by advocating the use of “or”; however, the English, Dutch and Swedish versions of the PVD still use “and”. Implementation of the VAT Package Directive (2008/8), which changed the place of supply rules, appears to have changed the Italian and Portuguese versions to “and” as well. The A-G recommended that this disparity should be resolved, because the provisions of EU law should be interpreted and applied in a uniform manner across the EU.

In his view, there were four reasons for preferring the application of the rule in accordance with “use or enjoyment”:

- the Commission had expressly stated this intention in proposing the recast of the 6th Directive;
- it was consistent with the general principle of taxation at the point of actual consumption;
- it was necessary from a semantic point of view, because something could not be “enjoyed” without being “used” – if the inclusion of the second word added anything, it had to extend the meaning of the expression, which suggested that “or” made more sense;
- the A-G considered that “use *and* enjoyment” would tend to exclude B2C services from the scope of art.59a, on the grounds that they do not “enjoy” the services (this point is not immediately obvious to me, but it appears that the A-G considers “enjoyment” to have an economic sense that would not apply to a non-economic recipient) – the context of the legislation suggests that this is not what is intended.

If the wording “use or enjoyment” is preferred, the A-G considered that the answer readily followed: the roaming services were clearly “used” by the customers in Austria. “First, the mobile telephone network used is located in that Member State. Second, the users who are granted access to this network are temporarily staying in that Member State. Third, and as the Spanish Government has pointed out, such roaming services can only be used in the territory of that Member State. Indeed, in the context of the main proceedings, their presence in Austria is the only reason why users from South Korea request access to an Austrian mobile telephone network.” The customers accessed the Austrian network in exactly the same way as an Austrian customer, which clearly indicated “use in Austria”.

The A-G therefore recommended that the court should answer the first question in the affirmative: the services were within the scope of art.59a as "used or enjoyed" in the territory, and were properly chargeable to Austrian output tax.

Turning to the second question, the A-G considered that the tax treatment in the third country was irrelevant to the treatment under the Directive. The expression 'double-taxation, non-taxation or distortion of competition' refers to tax treatment *at EU level*. In other words, use by a member state of the options offered by art.59a is subject to the existence of a case of double-taxation, non-taxation or distortion of competition *at EU level*. As it was clear that the disputed transactions were not taxable in any other member state, the Austrian rule was within the purpose of the provision – to prevent non-taxation of a supply that involved consumption within the EU, and double taxation was not an issue.

Full court

The full court observed that the rules in art.59b (which are restricted to persons established in the EU) should not be interpreted as placing a limit on a Member State's options under art.59a. Austria had chosen to implement the "transfer regulation", which meant that use and enjoyment of telecommunications services within Austria were subject to VAT there.

Next, the court noted that the company levied separate charges for use of the services in Austria, confirming that the natural position for VAT – that all supplies were distinct and separate – applied.

Even so, the transfer option could only be exercised where this had the effect of preventing double taxation, non-taxation or distortion of competition, in line with the objectives of art.59a. This should only take account of the tax position within the EU; an international trade agreement with a third country might provide otherwise, but the order for reference did not refer to any such agreement. It could not be right that the EU tax treatment would depend on the third country's domestic tax law.

CJEU (Case C-593/19): *SK Telecom Co. Ltd v Finanzamt Graz-Stadt*

4.2.2 Fixed establishment

A property management company was registered and established in Jersey. During 2009 and 2010 it let, subject to tax, a property which it owned in Vienna to two Austrian traders. These were the company's only activities in Austria. It appointed local agents to act as intermediary between the Jersey company and any service providers and suppliers, to invoice rental payments and operating costs, to maintain business records and to prepare the VAT declaration data. Those services were carried out by the agent in premises which were not the property belonging to the principal.

The tax authority took the view that the rented property constituted a fixed establishment of the Jersey company in Austria, and assessed it to VAT. The company appealed on the grounds that it did not have personnel in Austria, and the property on its own could not be a fixed establishment. It seems that it believed that the trader tenants could and should apply the reverse charge under art.194 PVD; however, that is an optional provision that Member States do not have to apply to land-related supplies. Art.196

is the mandatory reverse charge on "general rule" B2B supplies within art.44 PVD.

The referring court was unsure whether, given the passive nature of letting, the requirement for personnel was essential for there to be a fixed establishment. The Austrian government argued that the question was inadmissible on the grounds that whether the company had a fixed establishment was irrelevant to whether it was liable for VAT in Austria – as the supply was land-related within art.47 PVD, art.194 was the operative provision rather than art.196, and it was within Austria's right to require it to account for output tax. Nevertheless, the CJEU decided to consider the question, on the grounds that it was for the referring court to decide on its questions, and there is a presumption of relevance. Both art.194 and art.196 refer to the place where a person is established, so the question referred was potentially relevant to those articles as well.

Having set out the law and the preliminary arguments at some length, the CJEU made its decision very quickly: the Implementing Regulation requires that a fixed establishment should have personnel present on a permanent basis, and the rental property in this case clearly did not satisfy that condition. It would not constitute a fixed establishment either for the receipt of B2B services or for the making of B2C services.

The consequence of that for this appellant is unclear – as the Austrian government argued, it may still be liable to account for output tax in Austria.

CJEU (Case C‑931/19): *Titanium Ltd v Finanzamt Österreich, formerly Finanzamt Wien*

4.2.3 Updated manuals

HMRC have updated their *VAT Insurance Manual* to clarify that the Specified Supplies Order has been amended with effect from 1 January 2021 so that "exempt with recovery" treatment applies to supplies where the customer is in the EU, and to replace references to "outside the EU" with "outside the UK".

VATINS6040 – VATINS6050

HMRC have updated their *VAT Place of Supply Transport Manual*, partly to reflect the end of the transition period (removal of references to EU law, effect of the Northern Ireland Protocol) but also to include guidance on the place of supply of transport and related services from 1 January 2010 (the implementation of the VAT package).

VATPOSTR2300, VATPOSTR1100, VATPOSTR2120, VATPOSTR2200, VATPOSTR1100, VATPOSTR3640, VATPOSTR3120, VATPOSTR3620, VATPOSTR3630

HMRC have made extensive amendments to the *Place of Supply of Services Manual* to reflect changes to the statutory authority for various treatments following Brexit (even if the result in many cases is the same – references to the EU and the Directive have been removed).

VAT Place of Supply Services Manual

HMRC have made similar updates for similar reasons to their *VAT Transport Manual*.

VTRANS050000, VTRANS060100 – VTRANS060200, VTRANS070100 – VTRANS070400

HMRC have updated their *VAT Reverse Charge Manual* to replace references to the EU and remove guidance on EC law.

VATREVCHG12000, VATREVCHG13000, VATREVCHG21000

4.3 International supplies of goods

4.3.1 Export evidence

A company appealed against decisions to disallow input tax for period 09/16 and to deny zero-rating for the next three periods. The total amount in issue was about £65,000. The problem was that HMRC were not satisfied with the evidence provided as a basis for allowing input tax, or for showing that the goods concerned had been exported. The business was involved in buying used clothing to export to customers in Africa, who could sell it on at a profit.

The problem was that HMRC's expectations of documentation were based on a different sort of trade. The judge (Heather Gething) was more understanding of the absence of some of the normal paperwork – contracts, insurance and evidence of communications with customers – in the context of this type of business.

The judge considered the arguments of the parties and the alternative evidence that had been provided that the transactions were genuine. She also noted that the director of the company had complained that the officer was discriminating against him, possibly because he had been involved with a previous business that had gone into liquidation owing HMRC money. She concluded that:

- with regard to the disallowance of input tax, the officer had failed even to consider the possible exercise of discretion. That meant that his decision had to be unreasonable, and the Tribunal could set the assessment aside.
- with regard to the decisions to deny zero-rating, the considerable body of evidence provided by the taxpayer should have been accepted. The judge was satisfied that failure to accept it was not a reasonable decision, for various reasons that possibly included the allegation of prejudice.

She set aside all the assessments, apparently considering it within her jurisdiction to allow the appeals absolutely, rather than remitting the unreasonable decisions back to HMRC to consider the matter again. That is something that might be the subject of an appeal.

First-Tier Tribunal (TC08150): *BJ Trading Ltd*

4.3.2 Northern Ireland protocol

The Northern Ireland protocol remains an area of practical difficulty and uncertainty, and it is not possible to cover it adequately in this update. We will have to wait for further developments later in the year that may bring clarity.

4.3.3 Northern Ireland – guidance

HMRC have published new guidance on various transactions involving Northern Ireland, including claiming VAT relief on goods imported from outside the EU for onward supply to the EU.

www.gov.uk/guidance/how-to-claim-vat-relief-on-goods-imported-for-onward-supply-to-an-eu-country

The *VAT Personal Exports Retail Exports Manual* has been updated to make it clear that it now only applies to Northern Ireland.

VATRES1000–VATRES1200, VATRES2000–VATRES2350

4.3.4 Northern Ireland – legislation

The *Taxation Cross-border Trade (Northern Ireland) (EU Exit) (Amendment) Regulations 2021* removed customs requirements, customs duty and VAT that currently apply for domestic goods that return to Great Britain, after temporarily moving to Northern Ireland. This addressed an omission in earlier legislation, and ensures that there will be no customs duty chargeable (and in most cases no customs formalities applicable), and VAT will be relieved, when these goods return to Great Britain. The regulations came into force on 22 April 2021.

SI 2021/483

The *Value Added Tax (Miscellaneous Amendments and Repeals) (EU Exit) Regulations 2021* and the *Value Added Tax (Amendment) (EU Exit) Regulations 2021* make amendments to VAT legislation to address errors and omissions identified as a result of a review of the EU exit legislation. The amendments, which took effect on 1 July, include:

- removing the inadvertent extension of a zero rate for supplies of transport, handling and storage of imported and exported goods to movements of goods between NI and GB
- introducing a zero-rate for movement of own goods from GB to NI, that are wholly or partly for non-business purposes
- ensuring the correct taxation of goods supplied from the EU to GB that are transported via NI
- miscellaneous textual amendments to correct minor errors in VATA 1994, and
- repealing legislation which is redundant following a change of policy between exit day and the end of the transition period (in relation to the entry of goods into the United Kingdom in a postal packet).

SI 2021/714, SI 2021/715

4.3.5 IOSS and OSS

HMRC have published new guidance for businesses that are registered for the EU Import One Stop Shop (IOSS). From 1 July 2021, businesses that sell low value goods in consignments not exceeding £135 in value into Northern Ireland and are registered for the VAT IOSS in the EU, must tell HMRC their IOSS registration number. Such businesses need only make a notification of their IOSS registration number once.

www.gov.uk/guidance/tell-hmrc-youre-registered-for-the-vat-import-one-stop-shop-in-the-eu

At the same time, HMRC have published new guidance on how to report and pay VAT due on the distance sales of goods from Northern Ireland to consumers in the EU using the One Stop Shop (OSS) Union scheme. Businesses who sell goods from Northern Ireland to consumers in the EU and go above the distance selling threshold, will need to pay VAT on

these sales in the country the goods are sent to. This could mean businesses would need to register for VAT in up to 27 EU countries. Businesses can choose to use the One Stop Shop (OSS) Union scheme to manage the VAT on their distance sales of goods from Northern Ireland to the EU all in one place.

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

HMRC has published a policy paper on the effect of the introduction of the EU e-commerce package from 1 July 2021, in particular on movement of goods from Northern Ireland to the EU and imports of low value goods into the EU or Northern Ireland.

www.gov.uk/government/publications/eu-e-commerce-package/eu-vat-e-commerce-package

4.3.6 Protest at end of VAT-free shopping

A group action by airports and retailers sought judicial review of the abolition of VAT-free shopping from 1 January 2021. This had previously operated through the statutory Retail Export Scheme and ESC 9.1. The High Court and the Court of Appeal both refused the application, so the government's decisions have been confirmed.

Court of Appeal: *Heathrow Airport Ltd and others v Her Majesty's Treasury and another*

4.3.7 Personal exports

HMRC has updated *VAT Notice 707* with information in relation to the conditions to use the personal export scheme for zero-rating the supply of a motor vehicle that is removed from the UK by the purchaser.

Notice 707

4.3.8 Postponed accounting

HMRC have updated their online guidance with information on identifying the problems some importers may have when trying to access their monthly VAT statements. HMRC are also aware of issues with January 2021 and February 2021 statements and have now added information on completing monthly and quarterly VAT Returns for the affected accounting periods.

A new section "How to complete your VAT return if you have problems with your monthly statements" has been added to provide further details on what the taxpayers should do depending on whether they can or cannot access their statements. If reasonable care is taken in following the guidance there will be no penalty if an error is made completing the return.

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

4.3.9 Valuing goods for import VAT

HMRC have published new guidance on valuing goods for import VAT purposes. To work out the value, the following amounts need to be added together and then the total be added to the customs value of the goods:

- all charges payable on importation into the UK, such as Customs Duty or levy and Excise Duty
- the cost of any incidental expenses

The following costs should not be included:

- costs that are taxable under the reverse charge or international service arrangements such as – royalties, licence fees and buying commissions;
- costs in relation to the transmission and provision of information by satellite, phone, telex, facsimile and so on;
- the buyer’s premium on auctioneer commission; and
- costs for certain software products.

www.gov.uk/guidance/how-to-value-goods-for-import-vat; www.gov.uk/guidance/goods-you-do-not-include-when-valuing-for-import-vat

4.3.10 Staged declarations

The Taxation (Cross-border Trade) (Miscellaneous Amendments) (EU Exit) Regulations 2021 have extended the period during which importers can delay submitting supplementary declarations up to 175 days from importation for imports made until the end of 2021. This transitional post-Brexit relaxation was due to end on 30 June.

SI 2021/697

4.3.11 Article

In an article in *Taxation*, Neil Warren discusses some practical VAT issues with selling goods in the EU after Brexit. This includes registration in other countries and what to do about recovering VAT incurred in the EU.

Taxation, 3 June 2021

4.3.12 Trading abroad?

A company appealed against a decision by HMRC that it should have been registered for VAT during 2012 in respect of sales of alcohol. It claimed that all its transactions had been carried out in a bonded warehouse in France. The company paid £27.7m to Elbrook Cash & Carry for the purchase of the alcohol in cash, and claimed that it sold all the goods on to one purchaser. HMRC maintained that this was more likely to be an inward diversion fraud, and raised an assessment for £4.6m on the basis that the goods were all sold in the UK.

The Tribunal took evidence from HMRC officers and from those involved in running the business; the officers were consistent and credible, while the traders were held not to be. At the end of a long examination of the

business and the evidence, the judge concluded that the company had not satisfied the burden of proof to show that it supplied its goods outside the UK. Its appeal was dismissed.

First-Tier Tribunal (TC08118): *Gooch Technology Ltd*

4.3.13 Online marketplaces

HMRC have updated their guidance on sales by foreign traders to UK customers either direct or through online marketplaces. If the goods are zero-rated, the overseas seller has a choice to register for VAT or apply for exemption from registration. The guidance provides information on how to find out the liability of different types of supply.

www.gov.uk/guidance/vat-and-overseas-goods-sold-to-customers-in-the-uk-using-online-marketplaces; www.gov.uk/guidance/vat-and-overseas-goods-sold-directly-to-customers-in-the-uk

There is also guidance for online marketplaces on goods that are returned to the seller for a refund, both before and after 1 January 2021.

www.gov.uk/guidance/vat-and-overseas-goods-sent-to-the-uk-and-returned-to-the-seller

4.3.14 An extraordinary case

There was a small VAT aspect to the strange case of Stephen Mullens, who was assessed to various taxes in respect of enormous payments he had received from the wife of Bernie Ecclestone. One of the matters for which he was held to be liable was VAT on the importation of some diamonds. The technical question before the Tribunal was whether a post-clearance demand had been issued in time; as he had accepted that he had been involved in fraud, the normal three-year time limit did not apply, and the liability was confirmed.

First-Tier Tribunal (TC08112): *Mr Stephen J Mullens*

4.3.15 Updated Manuals

The guidance on the free export of goods in the *VAT Charities Manual* has been updated to remove references to the EU.

VCHAR3250, VCHAR8000

There have been extensive amendments to the *VAT Place of Supply Goods Manual* to reflect Brexit, but also to add guidance on distance selling after the *Krakvet* decision (Case C-276/18).

VAT Place of Supply Goods Manual

4.4 European rules

4.4.1 Emergency exemptions

In response to experience gained during the pandemic, the Commission has proposed to exempt from VAT goods and services made available by the Commission, EU bodies and agencies to Member States and citizens during times of crisis. This measure will cover a range of goods that may be required in emergencies. The Directive is to be adopted by Member States and applied from 1 January 2021.

https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1642

The Commission also decided to extend the temporary waiver of customs duties and VAT on imports from non-EU countries of medical devices and protective equipment used in the fight against COVID-19. This was due to expire on 30 April but has been extended to 31 December 2021.

https://ec.europa.eu/taxation_customs/news/commission-decides-extend-customs-and-vat-waiver-imports-medical-and-protective-equipment_en

4.4.2 E-commerce rules

The Commission has published new guidance on the e-commerce package and One Stop Shop that was brought in on 1 July. It has the optimistic description "future proof". The detailed guidance was covered in the April update.

https://ec.europa.eu/taxation_customs/news/new-future-proof-vat-rules-e-commerce-made-easy-2021-04-27_en

4.4.3 Action against fraud

Europol has reported an international operation involving 5 countries (Spain, Netherlands, Belgium, Slovakia, Romania) to arrest 22 suspects belonging to an organised crime group that has caused over €26.5m in tax losses through VAT fraud. The scheme appears to be an "inward diversion fraud" – creating paperwork to show exempt despatches, but actually selling the goods within the country.

www.europol.europa.eu/newsroom/news/europol-helps-spanish-authorities-break-€265-million-vat-fraud-scheme

On 1 June, the Commission announced the launch of the European Public Prosecutor's Office. It will be a "supranational" organisation responsible for investigating and prosecuting crimes such as money laundering, corruption and cross-border VAT fraud. The announcement includes the note that "*In 2019 alone, Member States reported fraud affecting EUR 460 million of the EU budget.*"

https://ec.europa.eu/commission/presscorner/detail/en/statement_21_2755

4.4.4 Margin scheme for land?

A-G Athanasios Rantos has given an opinion in a case referred by France. The taxpayer in the dispute claimed a refund of output tax accounted for on the sale of "building land" to individuals. It claimed that, as it had not been entitled to deduct input tax on the cost of the land, it should be

entitled to apply the margin scheme in art.392 PVD, reducing the output tax to the VAT fraction of the margin rather than the VAT fraction of the selling price.

The sale of building land, even on an occasional basis, can be regarded as an economic activity under art.12 PVD. Building land is excluded from exemption under art.135(1)(j), and art.73 provides the general valuation rule (the whole consideration). Art.392 allows Member States to apply a margin scheme to sales of building land where a taxable person selling it was not entitled to deduct input tax on the purchase. It appears that France has implemented such a provision.

The appellant had purchased bare land from persons not subject to VAT (individuals or local authorities), carried out infrastructure works, and sold individual plots to natural persons for the construction of dwellings. The appellant accounted for output tax on the margin, but then claimed that output tax back, on the basis that the transfer of building land to individuals for the construction of residential buildings was exempt.

The appellant had unsuccessfully argued in the French courts that art.392 only applied where the acquisition of the land had been VATable but the trader had not been allowed to claim it, or that it only applied to a sale in the same state rather than following alterations. Questions were referred to the CJEU.

The A-G noted that the CJEU has never previously had to rule on the application of art.392. It appeared that only France has taken advantage of the option available under that article. The A-G proposed to undertake a "literal, contextual and teleological interpretation of art.392" to support his initial view that this transaction did not fall within it.

The problem with the literal interpretation was that the French and English language versions of the article suggested different outcomes. The French version simply referred to there being no right to deduct at the time of purchase, which covered both the situation where VAT was charged but was not deductible, and also the situation where there was no VAT; the English version carried an implication that there was VAT that could not be recovered. Where there is a divergence between the different language versions, it is necessary to consider the general scheme of the rules and the purposes of the provision in its context.

After detailed consideration of the context and the purpose of the provisions, and the competing arguments of the parties, the A-G recommended that the questions should be answered as follows:

- the French government's argument that art.392 could apply to both types of acquisition (VATable but blocked, and not VATable) was correct;
- however, he agreed with the applicant's argument that the sale of land to which substantial work had been done was not within the rule. If it had merely been divided into separate lots, it would still be capable of falling within the margin scheme; but the construction of roads and the networks for water, electricity, gas, sanitation and telecommunications took it outside the provision.

CJEU (A-G) (Case C-299/20): *Icade Promotion SAS v Ministry of Action and Public Accounts*

4.4.5 Allocation of assets to a business purpose

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

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

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

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

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

The A-G considered that art.168a, introduced by an amending Directive with effect from 15 January 2010, was relevant: this specifically referred to VAT incurred on immovable property and stated that it was deductible up to the extent to which it was used for business purposes. The right to deduct arose immediately on the incurring of input tax for business purposes; the German government was correct in stating that the right should be exercised immediately, but that did not mean that EU law permitted Member States effectively to cancel the right in the event of non-compliance with a time limit set for claiming it.

Although it would be for the referring court to determine the question, the A-G noted that there was nothing in the order for reference that called into question the actual intention to use the expenditure for economic

purposes. There was a relatively short time between the cost and the use. In both cases the expenditure was fit for economic use.

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

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

4.4.6 Third party liability

A-G Kokott has given an opinion in a case referred from Bulgaria. As she observes, it is one of a string of cases concerning the balance between the effective collection of VAT by Member States and the rights of persons in conjunction with the principle of proportionality.

In this case, the rules concerned were those that entitle Member States to specify that, in relation to particular transactions, the customer may be made liable for the VAT. Art.193 imposes the primary liability on the supplier of goods or services but allows for the exceptions set out in articles 194 to 199 and article 202; article 205 allows Member States to take the necessary measures to ensure that those persons made jointly and severally liable for the VAT comply with their obligations. Bulgarian law not only transferred the liability for the VAT to the customer, but also default interest.

The transaction in the case featured agricultural machinery purchased by a Bulgarian company from a UK supplier and sold on to the appellant. The appellant had paid and deducted input tax; the intermediary company had declared acquisition tax on the goods but had not paid all of it. The tax authorities raised assessments on the customer company, which appealed against the whole of it, but in particular against the imposition of default interest for the period between the due date for the original liability to be paid by its supplier and the issue of the joint and several liability notice. It argued that it had not failed to comply with any VAT obligation during that period.

The A-G referred to the fundamental principles of legal certainty and proportionality as limiting the rights of Member States when considering enforcement powers. After considering principles and precedents, the A-G concluded that it was not permissible for a Member State to impose on a third party anything more than liability for the VAT itself on the transaction. Default interest could be imposed in the circumstances envisaged by art.207 PVD, but these did not appear to exist in the present case.

The A-G also drew a distinction between a third party being aware that a tax debt had not been paid, and being aware that a tax debt had not been properly declared. Non-payment of duly declared tax cannot be regarded as fraudulent deception of the tax authorities. The situation would be different if an intermediate supplier without assets had been used in order to avoid paying tax, but in this case the customer had paid the supplier the

full VAT-inclusive amount, so it had been in theory capable of settling its VAT liability.

The question referred only refers to the transfer of the default interest under art.205, which the A-G rules out. However, it seems that the A-G also considered that the VAT itself should not be transferred, as the customer appeared not to be involved in any fraud.

CJEU (A-G) (Case C-4/20): *'ALTI' OOD v Direktor na Direktsia 'Obzhalvane i danachno-osiguritelna praktika' Plovdiv pri Tsen-tralno upravlenie na Natsionalnata agentsia za prihodite*

4.4.7 Definition of catering

A dispute arose between a McDonald's franchisee and the Polish tax authorities about the application of the reduced rate. In accordance with art.98 and Annex III PVD, Poland has separate reduced rates for "catering and drinking services" (8%) and "prepared meals" (5%). In effect, this is a similar distinction to the UK's charging of VAT on "eat in" and allowing zero-rating of "cold takeaways" (prior to the current temporary reduced rate on eating in and hot takeaways); however, it comes from a different legislative source, being the distinction between Annex III item 1 ("foodstuffs") and item 12a ("restaurant and catering services"). The fact that the two categories come under different parts of Annex III means that different rates can be applied to them.

The questions referred to the CJEU asked whether "restaurant service" included the situation in which:

- the seller provides buyers with an infrastructure enabling them to consume their meals on site (separate consumption area, access to toilets);
- there is no specialized service provided by waiters or waitresses;
- there is no service in the strict sense;
- the ordering process is simplified and partially automated;
- the customer has limited possibilities to personalize his order.

Further questions asked about the relevance of the manner in which the meals were prepared, and the relevance of whether the customer actually used the infrastructure provided, or merely had the possibility of using it.

The Advocate-General noted that the fast food operation lay on the border between "supply of goods" and "supply of services" that was considered in the cases of *Faaborg-Gelting Linien* (Case C-231/94) and *Manfred Bog* (Case C-497/09). The A-G proposed that this was the key question that the CJEU should address. He considered the background to the reduced rate, the options available to Member States and the importance of the principle of fiscal neutrality for similar supplies.

The Directive that introduced item 12a to Annex III in 2009 stated as its purpose the promotion of job creation and to combat the underground economy. Art.6 of the Implementing Regulation also defines restaurant and catering services: "Restaurant and catering services mean services consisting of the supply of prepared or unprepared food or beverages or both, for human consumption, accompanied by sufficient support services allowing for the immediate consumption thereof. The provision of food

or beverages or both is only one component of the whole in which services shall predominate. Restaurant services are the supply of such services on the premises of the supplier, and catering services are the supply of such services off the premises of the supplier."

The A-G considered that this indicated that it was not the method of preparation of the food that mattered, but the provision of related services that "must be sufficient and predominant to ensure the immediate consumption of the prepared foods". If that did not apply, the supply would be of foodstuffs – goods, rather than services.

The A-G went on to consider the *Faaborg* and *Bog* decisions in some detail, and related them to the article in the Implementing Regulation. In his view, the answer to the question depended on whether the food was to be "eaten in" (services) and "taken out" (goods). Restaurant and catering services would cover the supply of food in a place under the control of the taxable person in which material and human resources are organized and implemented to guarantee the quality to the consumer sufficient services to ensure their comfort and safety for the immediate consumption of these foods on site.

He noted the practical difficulty of applying this distinction to the various different aspects of the particular appellant's business (walk-through, drive-through, eat-in, sales in a food court), and gave his views on each one in turn. Where no infrastructure was provided, or customers chose not to use it, that would constitute a supply of goods; where infrastructure was provided and the customers used it, even if it was shared with other outlets (as in a food court), that would constitute a supply of restaurant services.

The full court noted that the referring court was concerned that the category of "catering services" to which the Polish law applied the 8% rate appeared to be wider than that envisaged in Annex III. It was therefore possible that the PVD had been incorrectly transposed. It was clear from the file before the court that the heading in the Polish law included some supplies that would fall under the heading "foodstuffs" (item 1 of Annex III) and some that would fall under "restaurant and catering services" (item 12a).

That meant that items falling in two separate categories of Annex III would be treated the same in Poland (not a problem), but also that items falling in a single category of Annex III might be treated differently in Poland (potentially a problem). However, precedent cases showed that it was open to Member States to choose to restrict the application of reduced rates within categories of Annex III, and it was not wrong in principle to apply different rates within the items; the only restriction was that the principle of fiscal neutrality must not be infringed, in treating differently products that are in direct competition with each other. It was for the national court to determine that on the facts of the case.

The court went on to consider *Faaborg* and Implementing Regulation art.6, and concluded that for the purposes of classifying a supply as "restaurant and catering services", the legislature wished to attach decisive importance not to the method of preparation of the foodstuffs or their delivery, but to the supply of support services accompanying the supply of the prepared foodstuffs, such services having to be sufficient for the immediate consumption of those foodstuffs and predominant in

relation to their supply: “In that regard, the Court takes account, inter alia, of factors such as the presence of waiters, the existence of a service consisting, in particular, in the transmission of orders to the kitchen, the subsequent presentation of the dishes and their service to the customers at the table, the existence of enclosed rooms at an appropriate temperature specially dedicated to the consumption of food, or the presence of cloakrooms and toilets and the provision of crockery, furniture and cutlery.”

The predominant element of a transaction must be determined from the point of view of the consumer. It would be for the referring court to determine whether the particular supply fell within “restaurant and catering services” according to this definition, but it should be borne in mind that this would not necessarily determine the applicable rate, given the freedom of Member States to apply different rates according to their own classification. “Where the end customer chooses not to benefit from the material and human resources made available by the taxable person to accompany the consumption of the food supplied, it must be concluded that no support services accompany the supply of that food.”

CJEU (Case C-703/19): *J.K. v Dyrektor Izby Administracji Skarbowej w Katowicach*

4.4.8 Interest on reclaim

Following on from A-G Kokott’s opinion in the last update, the full court has now considered the question of whether a trader should have a right to interest on a late repayment of VAT. The PVD does not confer any such right, and Austria had not provided for it in its domestic legislation; however, the question was raised whether such a right could be inferred by analogy from Directive 2008/9, the Refund Directive, which did create such a right in respect of cross-border claims.

Art.27 states: “Interest shall be calculated from the day following the last day for payment of the refund pursuant to Article 22(1) until the day the refund is actually paid. Interest rates shall be equal to the interest rate applicable with respect to refunds of VAT to taxable persons established in the Member State of refund under the national law of that Member State. If no interest is payable under national law in respect of refunds to established taxable persons, the interest payable shall be equal to the interest or equivalent charge which is applied by the Member State of refund in respect of late payments of VAT by taxable persons.”

There were two applicants in the case. One was a sole trader who had challenged a reduction of a VAT repayment return for August 2007, and had been paid out in full in May 2013. The other applicant claimed bad debt relief on 2003/04 transactions in its return for May 2005, which was eventually paid out after several appeals in May 2013. The tax office only awarded interest from January 2012 to April 2013.

The A-G considered that there was no explicit right to interest in the PVD. However, the principle of fiscal neutrality requires that the financial losses incurred by the taxable person owing to the unavailability of the sums of money at issue are compensated through the payment of default interest. The A-G considered that the principles applied equally to the two different claimants.

The Austrian government submitted that the wording of art.27 of the Refund Directive suggested that it was permissible for Member States not to award interest on repayments to established traders. The A-G disagreed. That was a catch-all provision to bind all Member States in an area where there had been significant divergence in national laws. It was not possible to extrapolate from that to the conclusion that the Austrian government drew. The principle of fiscal neutrality overrode it.

The A-G agreed with the Austrian government that there was nothing in art.183 and art.90 PVD that explicitly conferred a directly enforceable right to interest, nor was it permissible to apply a provision of a different directive by analogy. It was only the general principle of fiscal neutrality that required a rule that awarded interest.

The full court agreed with the A-G that it was only fiscal neutrality that required an obligation to pay interest where traders had incurred financial loss for which they should be compensated. Directive 2008/9 was not relevant: even though it referred to a situation in which the Member State's law did not provide for interest to be paid, it could not be inferred from that that this was acceptable. It was also not possible to apply that provision by analogy to domestic reclaims, because it was not applicable to such claims and the Member States had freedom (within the principles of effectiveness and equivalence) where there was no Directive to set down the law.

The overall conclusion, then, was that interest ought to be paid where a repayment was unduly delayed (either of input tax or of output tax); it would be for the national court to come up with a solution within the whole scheme of the national law, interpreted consistently with EU principles.

CJEU (Case C-844/19): *CS and another v Finanzamt Österreich, Dienststelle Judenburg Liezen and another*

4.4.9 Grouping rights

Questions were referred from Germany following an application by a limited liability partnership to be grouped with a company that was one of its limited partners. That company had voting control over the partnership's affairs (apart from on a limited range of issues where unanimity was required). It considered that it was financially integrated with the partner from December 2017 and therefore did not submit its own VAT return for that month. It received an assessment, which it appealed, and questions were in due course referred to the CJEU.

The tax authority did not consider that the level of financial integration was sufficient in the circumstances. The German Federal Finance Court considered that the principle of legal certainty required extra conditions for grouping, although the terminology appears to be peculiar to Germany: "partnerships are only capable of being organically linked companies if their partners, alongside the apex body, are only persons integrated into the corporate financial plan of the umbrella body within the meaning [of the relevant section of the German statute]." This possibly means that all the partners are themselves companies that are within the VAT group, in which case the partnership that they belong to could also join it.

The referring court was not sure whether the German law complied with the PVD in restricting grouping to "legal persons" (i.e. companies). It was possible that the restriction was intended to reduce the risk of fraud, in which case it would be necessary to consider its proportionality. It was also possibly an infringement of fiscal neutrality, in that very similar arrangements might qualify or not qualify for grouping on a relatively arbitrary basis.

The court recalled the *Larentia + Minerva* and *Marenave* cases in which the restrictive nature of grouping rules was considered and rejected. The case law on art.11 PVD showed that the conditions relating to "close financial links" should not be restrictively interpreted, and had to be regarded as an EU-wide concept that should not be limited by the interpretation of a particular Member State's tax authority. The German government's argument that the circumstances did not comply with the principle of legal certainty was rejected: it was clear that the ability to exercise voting control on most issues indicated a close financial link.

It would be for the referring court to assess whether the exclusion of partnerships was actually intended to prevent abusive practices. The German legislature had not stated that this was its intention when enacting the measure. The CJ ruled that the automatic exclusion from grouping of all partnerships which had natural partners went beyond what was necessary to achieve that objective, and disapproved of the German law.

CJEU (Case C-868/19): *M-GmbH v Tax office for corporations Berlin*

4.4.10 Proportionality of penalty

A Polish company made an error in the VAT liability of a real estate transaction and claimed input tax which it could not deduct. The vendor of the property showed VAT on its invoice, when the transaction should have been exempt. This was pointed out following an inspection, and the company corrected its return, reducing the amount of excess input tax it was claiming; in spite of the correction, the tax authorities imposed a penalty of 20% of the amount overclaimed in the original return.

The company appealed, arguing that there had been no loss of tax revenue, and that both parties to the transaction had made a mistake. The penalty was "repressive rather than preventive". The court expressed some concerns about its jurisdiction in such a matter, but decided that it was appropriate to consider it as a question of neutrality and proportionality of a measure within art.273 (measures to prevent evasion, avoidance and abuse).

Measures adopted for this purpose by the Member States should not go beyond what is necessary to achieve the objectives of ensuring the correct collection of the tax and avoiding fraud. In order to assess whether a sanction complies with the principle of proportionality, account should be taken, in particular, of the nature and seriousness of the infringement which this sanction seeks to penalise and of the procedures for determining the amount of that sanction.

The Polish law applied the 20% penalty automatically, without regard to the seriousness of the offence or giving any possibility of mitigation. The court held that this was contrary to the principles of EU law, because there

should be an assessment of the sanction necessary to achieve the objectives.

CJEU (Case C-935/19): *GrupaWarzywna Sp. Z oo v Dyrector Izby Administracji Skarbowej we Wrocławiu*

4.4.11 Insolvency proceedings

Romanian law disallowed input tax claimed where a trader subsequently became insolvent. This was based on the principle that a trader in insolvency proceedings is not carrying on an economic activity, even if assets are sold with a view to paying off the creditors and liquidating the company. A company and its liquidator appealed against assessments charging approximately €132,000 for periods in 2013/14 after it had entered insolvency proceedings in 2015. They argued that it had been carrying on an economic activity when the input tax was incurred, and was still doing so in the course of the liquidation, so there was no reason to disallow the deductions.

The question before the court was whether the liquidation fell within the circumstances envisaged by articles 184 to 186 (change in circumstances giving rise to the right of deduction). The court held that a number of precedents showed that the Romanian law was wrong: the transactions in insolvency still fell within art.9, because the "purpose or results" were to be disregarded; and the principle of fiscal neutrality confirmed that sales of assets by an insolvent company should not be treated differently from similar transactions by one that was not in an insolvency procedure.

CJEU (Case C‑ 182/20): *BE and DT v Administraţia Judeţeană a Finanţelor Publice Suceava and Others*

4.4.12 Partial exemption in Italy

In a curious case referred from Italy, the Italian court questioned whether it was fair that an Italian healthcare business should be treated as a final consumer and unable to deduct input tax, when similar businesses in several other Member States (Belgium, Bulgaria, Germany, Greece, Spain and France) were treated as taxable persons with a right to deduct.

The CJ ruled that the prohibition of deduction by an exempt business was in accordance with the Directive; the allegation of unfair treatment was outside the remit of the court.

CJEU (Case C-573/20): *Casa di Cura Città di Parma SpA v Agenzia delle Entrate*

4.4.13 Consequences of VAT fraud

In a case referred from Germany, a married couple were connected to a supply chain in which there was a VAT fraud. The wife appealed against refusal of the deduction of input tax, arguing that the fraud took place "upstream" in the supply chain and she was therefore not a participant in it. The CJ considered that the connection to a fraudulent supply chain was enough to justify the refusal of deduction.

CJEU (Case C-108/20): *HR v Finanzamt Wilmersdorf*

4.5 Foreign refund reclaims

4.5.1 Reissued invoice

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

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

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

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

The time limits therefore only started to run when both articles (167 and 178) were satisfied. The A-G explicitly stated that the possession of an invoice was a substantive, rather than a formal, condition for deduction. Where the CJ has considered shortcomings in invoices and referred to them as mere formal requirements, this is always in relation to the detailed content, never to the possession of an invoice as such. For example, it has been held that a tax authority cannot refuse a deduction only on the ground that the invoice does not precisely describe the supply (*Barlis–06* Case C-516/14), or does not show the supplier's VAT number (*Senatex* Case C-518/14), or does not show an invoice number (*Pannon Gep Centrum* Case C-368/09). The correct time for the deduction was when the invoice was held.

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

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

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

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

4.5.2 Updated Notice

HMRC have updated their Notice R*efunds of UK VAT for non-UK businesses or EU VAT for UK businesses to cover EU VAT refunds for UK businesses* following the end of the Brexit transition period, and adjustments to previous UK VAT refund claims by non-UK businesses where an overpayment has been received.

The deadline for claiming VAT incurred on expenses in the EU on or before 31 December 2020 using the electronic refund procedure expired on 31 March 2021.

For VAT incurred on or after 1 January 2021, UK and Isle of Man businesses can claim refunds of VAT from the EU but they will have to use the 13th Directive procedures. These vary across the EU so businesses will need to follow the procedure set out by the country from which they are claiming VAT. UK businesses may be required to provide a certificate of status to support the claim.

Businesses established outside the UK which need to adjust a previous UK VAT refund claim made before 31 March 2021, must include the adjustment in their claim under the scheme for refunds of UK VAT for businesses established outside the UK. If they are not making such a claim by 31 December 2021 and the adjustment means that an overpayment of VAT has been received, they must inform HMRC by submitting a Form VAT 65B ('repay overclaimed VAT if your business is established in the EU') by 31 December 2021. HMRC will then contact the business to provide details of how to pay back the overclaimed VAT.

Notice 723A

5. INPUTS

5.1 Economic activity

5.1.1 Holding company decision confirmed

In TC07256, a company appealed against a decision to deny input tax credit of £613,000 for 12/14 to 12/15 and an assessment for £843,000 for periods 06/12 to 09/14, both based on the grounds that the company did not make taxable supplies for consideration. In April 2019 HMRC amended their statement of case to include an additional argument, that if the company did make supplies for consideration, it was doing so other than in the course of an economic activity.

The company's operations involved the acquisition of licences to explore for and produce oil in sub-Saharan Africa. These activities were undertaken by local subsidiary companies, while the holding company was a UK AIM-listed entity.

No written agreements in relation to the services provided to subsidiaries, or consideration for those services, could be found for periods before 2015. HMRC had visited the holding company in 2008 and in 2014 and had clearly not appreciated that the exploration activities were undertaken by subsidiaries; on a further visit in February 2015, this point was identified and led to the decisions under appeal.

The FTT judge considered various precedents on consideration and on holding companies, including *Wakefield College*, *Cibo*, *Larentia + Minerva* and *MVM*. He also noted and agreed with the conclusion of the judge in the FTT decision in *W Resources plc*: "in the case of a holding company supplying management services to its subsidiaries, a finding that those management services are being supplied for a consideration for the purposes of Article 2 PVD must lead inexorably to the conclusion that the holding company is also carrying on an economic activity for the purposes of Article 9 PVD."

Turning to the facts, he noted that it was necessary to consider the contractual position and the commercial and economic realities in determining whether there was a supply for consideration. HMRC's counsel contended that the absence of written agreements before 2015 led to the conclusion that either there were no agreements for services or, if there were, they were contingent on the subsidiary being able to repay the intercompany debt arising.

However, the judge accepted the evidence of the company's chairman and also the audit partner that the commercial and economic reality was reflected in the company's accounts: amounts were debited to the subsidiaries in respect of services provided, and were treated as repayable on demand. The formalisation of the loan agreements in 2015 did not make a significant difference.

The judge distinguished the situation from that in *Norseman Gold* on the grounds that there was more than a "vague intention to levy an unspecified charge at some undefined time in the future": this company actually did charge its subsidiaries for the services that it provided to them. The judge in *W Resources* had accepted that book entries could constitute consideration, provided that the risk of default was not so great

that the obligation to pay was effectively illusory. The judge rejected HMRC's contention that there was not "as a matter of economic reality" any obligation for the subsidiaries to pay; the company's representative argued that HMRC had confused the commercial possibility that a debt might not be repaid due to lack of resource with a legal contingency. The judge agreed that fact that a debt is not discharged does not mean that there has not been consideration for the relevant supply. He concluded that there was, both before and after 2015, a legal obligation on the subsidiaries to pay, and that constituted consideration for the supplies.

The judge went on to consider other arguments raised, although this conclusion was enough to decide the case in favour of the appellant. He agreed with the company that a failure subsequently to pay consideration could not undermine the fact that a supply had been made for consideration – the supply and the actual payment were different things.

HMRC relied on the CJEU case of *Bastova*, which concerned prizes for horses winning races, as analogous to the company's likelihood of being paid or not by successful or unsuccessful exploration subsidiaries. The judge agreed with the taxpayer that the situations were different – the outcome of the race was clearly uncertain, whereas the subsidiary was under an immediate and unconditional obligation to pay, even if it subsequently proved unable to do so.

HMRC's argument that the supply of management services was ancillary to a non-economic activity of holding shares in subsidiaries was examined and rejected. In line with the judge in *W Resources*, it was held that a holding company has to be assumed to satisfy art.9 PVD if it satisfies art.2. That is the conclusion to be drawn from the many CJEU cases on management services, where the court has regularly rejected arguments that input tax should be restricted in some way because the costs could easily be funded by outside-the-scope dividend income.

The appeal was allowed, and HMRC appealed to the Upper Tribunal, where it came before Mrs Justice Bacon and Judge Jonathan Cannan. The grounds of appeal were that:

- the FTT had misunderstood HMRC's case and had therefore failed to make material findings of fact regarding the agreement between Tower and its subsidiaries;
- it had erred in law in finding that Tower was making supplies for consideration within art.2 PVD;
- it had erred in law in finding that Tower was making supplies in the course of an economic activity within art.9 PVD.

The UT examined the first argument at some length and rejected it. The FTT had considered the findings that HMRC argued for and had rejected them. It had not failed to consider the point or to make findings on it. It had carried out the normal and correct analysis of the agreements that existed as a matter of contract, and found the debts were payable on demand and not contingent; although HMRC's representative tried to make something of the fact that "in practice" the debts were not enforced, this did not undermine the FTT's findings that the commercial and economic reality was consistent with the contracts.

The second ground was likewise dismissed for the same reason – if the consideration was not contingent, as found by the FTT, the necessary direct link was established. The fact that the debts were added to the inter-company loan accounts did not undermine that conclusion, because the FTT had found that those loan accounts were repayable on demand.

The third ground was considered in the light of precedents from *Polysar* to *Marle* in the CJEU and *Wakefield College* and *W Resources* in the UK courts. The UT rejected HMRC's view that the FTT had concluded that art.9 PVD was "inexorably" satisfied if the holding company was supplying management services for consideration; rather, it had considered all of the circumstances, as it was bound to do. The judge noted that "Factors such as whether the activities are ancillary to the principal activities of the service provider, whether earnings from the activity by reference to actual receipts cover the cost of the services, whether the charges were fixed by reference to the means of the recipient of the services, whether the services are supplied to the general market, and whether the services are provided in comparable circumstances to those of a commercial provider may be relevant in particular contexts. It is clear from the case-law set out above, however, that they do not form a relevant part of the assessment of whether the involvement of a holding company in the management of its subsidiaries constitutes an economic activity."

HMRC's appeal was dismissed.

Upper Tribunal: *HMRC v Tower Resources plc*

5.1.2 Effect of subsidies

A Northern Irish trader received subsidies under the Renewable Heat Incentive scheme. In his business he generated hot air from burning wood chips and used it to dry materials which he sold or retained for use himself. He claimed input tax on all his expenses, and HMRC raised assessments for periods from 01/15 to 04/18 on the grounds that a restriction was appropriate because of the receipt of outside-the-scope subsidy income.

The subsidy payments were substantial: 47.37% (£679,937) of total receipts between 1/11/2014 and 31/01/2017, and 28.96% (£283,873) of receipts between 01/02/2017 and 30/04/2018. The assessments to disallow input tax were in the region of £150,000 in total.

The judge reviewed the history of the RHI scheme, which had received bad publicity because of the potential for abuse. She accepted the trader's evidence that the abuses had been exaggerated by the media, and the supposed malpractices made no commercial sense. She was satisfied that he was not engaged in any abuse. She went on to note that this was a Northern Irish appeal, and therefore cited law from the PVD rather than the VAT Act.

It was common ground that:

(1) the trader made only taxable supplies.

(2) The PSPs under the RHI scheme were not subsidies directly linked to the price of the supply, nor were they consideration received from a third party for supplies made to customers.

(3) The PSPs were income which is outside the scope of VAT.

The appellant relied on cases including *Kretztechnik*, *Commission v Spain* and *Frank A Smart Ltd* to support the contention that outside-the-scope income should not restrict input tax. HMRC relied on the CJEU decision in *University of Cambridge* and the UT decision in *Vehicle Control Services* in support of the argument that expenditure incurred in order to generate outside-the-scope income did not give rise to a right to deduct: the business activity was here carried on partly to generate sales and partly to generate subsidies.

The judge characterised the difference between the parties as "whereas Mr Small [for the appellant] characterised the PSPs as subsidies which were outside the scope income received without Mr Newell having conducted outside the scope activities, Mrs McIntyre [for HMRC] submitted that there was an activity which was involved in the generation of the heat which gave rise to the entitlement to the PSPs". The judge found as a fact that the appellant did not burn chips and generate heat purely to qualify for RHI payments, as that did not make commercial sense.

The judge weighed the arguments carefully, and favoured those put forward for the taxpayer. The situation was more similar to the cases he relied on, and there were significant distinctions between the present situation and HMRC's precedents. In particular, this trader did not accept (as Vehicle Control Services had) that he carried on his activities with the specific intention of generating the subsidy income. His activities were all within the scope of VAT, and there was no reason to restrict his input tax.

The appeal was allowed.

First-Tier Tribunal (TC08149): *Colin Newell*

5.1.3 Input tax with no output

A company appealed against assessments totalling over £80,000 to disallow input tax claimed for periods from 05/15 to 05/17 and 11/17. The company had claimed input tax on the purchase of doors and of advertising, but HMRC decided the inputs were not used for the purpose of making onward taxable supplies.

The judge (Jeanette Zaman) noted that the company, in filing its appeal, had written "I am not sure" beside the question "Is the appeal in time?" She found this surprising, given that the company was professionally advised by someone who was described as a specialist. It appeared that the company's accountants had written to HMRC stating that the company wished to appeal – the wrong approach, as the appeal should have been made to the Tribunal – but HMRC had no objection to the appeal proceeding. While commenting that only the Tribunal could give permission for this, the judge decided to allow it.

She went on to note that the company had failed to provide a skeleton argument, as required by Tribunal directions, and had failed to provide copies of other material that should have been included in the Tribunal bundle. This was prejudicial to HMRC as they were unable to prepare for the case they were to meet; this turned out to be the situation, as the argument put forward in the hearing was not one that had previously been

advanced. The judge decided it was not in the interests of justice to adjourn the hearing, but clearly considered the company to be in the wrong.

The appellant was registered for VAT from 1 April 2004. Its main activity was commercial letting; it had two properties let subject to options to tax, a number of others let exempt, and some derelict properties. It bought doors from a supplier in China, and transferred them for no payment to several other connected companies trading under the general name "Just Doors". They were not in a VAT group registration, and no evidence was presented about whether they would have been eligible for group registration.

HMRC's case was that the company's only outputs were in relation to commercial letting. It could not claim input tax on the purchase of doors that were not used in any business activity. At the hearing, the company's representative claimed that it relied on guidance in HMRC's manuals concerning "business gifts" as justification for the input tax claims. The essence of his argument was that HMRC ought to assess for output tax on deemed supplies of the doors, rather than seeking to disallow input tax. HMRC objected that this was a completely new argument that should not be advanced at such a late stage; the judge agreed that, whatever the original ground of appeal had been (it was hard to tell), it was not this. Nevertheless, she decided to consider the argument.

HMRC relied on the precedents of *BAA Ltd* and *JDI International Leasing Ltd* to support their argument that there was no entitlement to input tax where there was no connection with a taxable output. The company's representative cited various passages from HMRC's manuals and from Notice 700 and Notice 700/7 (Business Promotions) to support his contention that "gifts can be supplies".

The judge was not persuaded. There was no evidence of any link between the purchase of doors and any taxable supplies made by the appellant in its business. HMRC guidance could not override the legislation or the authorities. In any case, the passages were taken out of context, and did not support the conclusion that the representative contended for. He suggested that allowing the input tax and assessing output tax would produce the symmetry that HMRC wanted, but they were out of time to assess output tax, and there was no evidence that the Just Doors companies had accounted for output tax on their onward supplies (the judge made no finding in that regard).

The company had not produced evidence to establish that it was entitled to input tax on the purchases, and its appeal was dismissed.

First-Tier Tribunal (TC08132): *The Door Specialist Ltd*

5.2 Who receives the supply?

5.2.1 Company and partnership

A married couple operated a farm and were both partners in a partnership and shareholders in a limited company. The partnership registered for

VAT in 2017 and sought to recover input tax on two invoices that related to supplies of building works carried out at the farm in 2014. The company had previously claimed to recover the VAT, but had been denied the deduction because it was registered under the Flat Rate Scheme. The amount of VAT involved was £9,856.

The company ran a horse-riding holiday business. The couple had acquired it in 2012 and had spent a considerable sum on building works to provide accommodation for their guests. They had been advised by their accountants that they would be able to recover the VAT on this expenditure because it was "capital and over £2,000". That advice was incorrect, because the expenditure was on services, not goods.

It appeared that the registration of the partnership (and possibly the establishment of the partnership) was suggested by the accountants as a way of resolving the problem after HMRC had disallowed the deduction. The partnership charged fees to the company for services supplied in relation to the accommodation at the farm and other matters, and accounted for output tax on them.

Judge Nigel Popplewell summarised the partnership's arguments as follows (TWT is the company and DMJ are the accountants, who provided evidence and argument in the form of a witness statement from Mr Lewis):

- the VAT in the invoices reflects genuine work undertaken at the farm and which was paid for;
- the appellants have made a genuine mistake;
- they commissioned the work in the name of TWT and paid for it out of the TWT account on the basis of the advice from DMJ that TWT could recover the VAT notwithstanding that it operated a flat rate scheme;
- DMJ submitted to HMRC that it was always intended that this cost would be recharged to the partnership but that bookkeeping exercise was never undertaken;
- TWT did not have a proprietary interest in the farm and received no benefit from the works which were undertaken to it;
- therefore the only entity which could have commissioned the works was the partnership;
- DMJ accept that their advice was wrong;
- Mr Lewis's evidence is that DMJ should have advised Mr and Mrs Turner to transfer the funds from TWT to the partnership and that the builder should have been asked to re-invoice the partnership for the works that had been undertaken;
- HMRC have allowed input VAT recovery on certain invoices reflecting VAT paid by the partnership in their March 2017 VAT return notwithstanding that those invoices were not made out to the partnership but to a number of associated entities (even though the invoices were paid by the partnership);
- this reflects sentiments expressed in a letter dated 28 September 2018 in which HMRC say that having considered these invoices which do

not quite meet the legal standard for VAT recovery, recovery is being allowed because there is sufficient supporting evidence of the supplies having been made to the partnership;

- if Mr and Mrs Turner had known that TWT could not recover the VAT on the supplies of building works, then they could have, for example, appointed a non VAT registered builder; or commissioned the works in the name of the partnership and registered the partnership for VAT at that time;
- stepping back, the cost of the building works was clearly a cost of works done to the farm and the VAT system allows recovery of VAT for a genuine business expense;
- and here there was a genuine business expense, and that was an expense of the partnership;
- the attempt to explain away the situation by way of some form of loan repayments was suggested by DMJ in an effort to rectify the situation given that they had made the mistake in the first place of telling them that TWT could recover its VAT on costs of the building works.

The judge summarised the conditions for deducting VAT: "a trader must meet two fundamental criteria. The first, and most important, is that the person seeking to recover that VAT must be the person to whom the relevant supply has been made. The second is that that person must also hold a valid VAT invoice (or other evidence of having been charged VAT by a supplier as HMRC might direct)." It was "abundantly clear" that the company had received the supplies on the basis of conscious decisions by the taxpayer and explicit advice by the accountants, and it was not possible to change that afterwards. The judge stated "The fact that this advice was spectacularly incorrect does not change the fact that the supply was made to TWT."

The judge set out his reasoning for dismissing the appeal in considerable detail, emphasising that he was satisfied as a matter of fact that the builders made their supplies to the company; he suggested that any claim should be directed against the accountants, not against HMRC.

First-Tier Tribunal (TC08134): *Blaenau Bach Farm*

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.

Upper Tribunal

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."

Court of Appeal

The taxpayer appealed again to the Court of Appeal, where the leading judgment was given by David Richards LJ. He summarised the facts found by the FTT, which were not in dispute, and the principles of the law. The taxpayer contended that there was a "direct and immediate link" between production costs and catering outputs; HMRC argued that the most immediate link was with ticket sales (which the taxpayer did not dispute), and it was not permissible to use a less direct and less immediate link to justify a deduction (which the taxpayer did dispute). According to HMRC, the "economic link" between inputs and taxable supplies they merely promoted was not sufficient to constitute "use".

The taxpayer's grounds of appeal were summarised as follows:

1) The UT failed to apply the correct objective economic link approach required by the test of a direct and immediate link, in particular rejecting that the use of inputs (the Production Costs in this case) to attract customers to purchase taxable supplies (the catering services) could amount to a direct and immediate link, either as a matter of law generally or a matter of law on the facts of the present case.

2) The UT erred in concluding that there had been no development in the case law relevant to the specific attribution of inputs to particular outputs (as opposed to the law relevant to overhead costs) since the decision of the Court of Appeal in Mayflower Theatre Trust Ltd v HMRC [2007]. In particular, it erred in holding that the developments in case law in, and prior to, Sveda and recognised by this court in Associated Newspapers Ltd were immaterial to this case.

3) The UT erred in law in treating the requirement for a direct and immediate link as significantly different in specific attribution cases and overheads cases.

4) The UT erred in concluding that the FTT had erred in its reliance on Sveda and ANL and had applied a "but for" test of causation.

The taxpayer accepted that the correct test for deduction was not a "but for" test of causation, satisfied when the inputs are "necessary" or "essential" for the relevant output supply to be made. It submitted that the correct test is one of "objective use in the economic sense, not one of incorporation in a supply of goods or services". The taxpayer's counsel referred again to the "virtuous circle" that had convinced the FTT: the production costs attracted customers to spend money on catering, which in turn generated money to support future productions.

The judge went on to analyse a line of precedent cases, including *Dial-a-Phone Ltd* (CA 2004), in which advertising costs were held to be directly linked to both taxable sales of airtime contracts and exempt supplies of insurance. This contrasted with the *Mayflower* decision, where the Tribunal had decided that there was no direct and immediate link with taxable outputs; although the link was a mixed question of fact and law, the judge noted that "this illustrates the importance of the precise findings of fact in any particular case".

The judge went on to review other precedents, including *BLP*, *Kretztechnik*, *Sveda* (on which the taxpayer placed heavy reliance), and *Associated Newspapers Ltd*. After extensive analysis of *Sveda*, the judge summarised its principles as follows:

"*There was, in principle, a direct and immediate link between the construction costs of the path and the supply of chargeable services, such as drink and refreshments, to visitors to the path. That link would not exist in two circumstances. The first would be if the path was made available for consideration but it was an exempt transaction (as in BLP): see [50]. The second would be if Sveda's primary use of the path was a non-economic activity: [52]. Neither applied on the facts of Sveda. By contrast, HMRC submitted, the first applies in the present case, just as it did in BLP.*"

In his discussion, the judge stated that the focus on economic links in *Sveda* and *ANL* did not create a new and broader test: they merely explained the nature of the connection required to satisfy the basic test of an immediate link in cases where there was also a link to a non-economic activity (free access to the tourist attraction or free gifts of vouchers). In the present case, there was no suggestion of a non-economic activity.

The developments in the law since *BLP* also dealt with a different situation: *Kretztechnik* concerned inputs which were true overheads, in that they had no link with any particular output, but were nevertheless necessary for taxable supplies in general. The CA in *Mayflower* had correctly distinguished between the use of the production costs in programmes ("as much part of the costs as the cost of the paper and ink") and in promoting catering sales (only indirect).

The judge ended by agreeing with the UT that the "commercial necessity" identified by the FTT was not the correct test: it did not establish a direct and immediate link for the purposes of VAT. There was no such direct and immediate link, and the appeal was dismissed. The other two judges agreed.

Court of Appeal: *Royal Opera House Covent Garden Foundation v HMRC*

5.3.2 Free "supplies"

A Further Education College appealed against HMRC's refusal of a claim for input tax not previously credited. It argued that the inputs were overheads of an economic activity, and the special method that had been agreed with HMRC entitled it to greater recovery. It occupied a rural site and specialised in agricultural and other rural subjects.

The majority of the students on the college's courses did not pay fees to the college: their education was paid for by funding grants from government bodies. The college made some supplies that were within the scope of VAT, including education provided for fees to the minority, but also sales of produce, blacksmith and equestrian services, hire of buildings for weddings and conferences, and operation of a campsite.

The dispute between the parties centred on whether the provision of grant-funded education constituted "supplies for consideration" within the scope of VAT, and if it did, whether the input tax claimed constituted "residual input tax" that was partly recoverable as attributable to both taxable and exempt supplies. The decision is very long and detailed, with examination of a great deal of precedent case law going back to the 1970s, as well as the accounts and activities of the taxpayer and the terms and operation of its partial exemption special method.

Judge Harriet Morgan considered the terms of the 1998 PESM agreement. This appeared to require an apportionment of VAT between business and non-business according to the ratio of "guided learning hours which relate to students under the age of 19" (assumed to be grant funded and therefore non-business) and "total guided learning hours". The college had applied this to its residual VAT and had not claimed it; it now argued that its supplies without charge were part of its business activities, and that none of the VAT incurred was exclusively used in making training supplies. This was based on *Wakefield College* and articles 2 and 9 PVD. It had one single economic activity, and no part of its input tax was exclusively used to make exempt supplies; on that basis, the PESM entitled it to recover all of its input tax.

The judge analysed the precedents on the issue of "linking supplies with consideration" at length, concluding with extensive details from the UT decision in *Colchester Institute Corporation*, and could see no material distinction between them. she was therefore obliged to follow the UT decision in that case and accept Shat the "free" education was supplied for consideration in the form of grants. This meant that all of the training activities constituted economic activity and all of the VAT on costs was "input tax". However, she did not agree that all of it was "residual input tax" rather than "input tax attributable exclusively to exempt supplies".

She examined the way in which grant funding was provided in detail, and compared the training activities with the other commercial activities that generated taxable income. There was some overlap between the two, in that students might be involved in the commercial activities. She also considered details from the college's accounts, analysing the income and expenditure over the period of the claim. However, it was clear that the training services and the commercial activities were separate. They were not ancillary or closely linked in the sense of the *Card Protection Plan* and *Levob* cases.

A detailed examination of precedents on input tax recovery led the judge to the conclusion that the appellant had not established that the input tax was residual. That meant that its appeal must fail, both in principle and on application of the 1998 PESM.

First-Tier Tribunal (TC08108): *Kingston Maurward College*

5.3.3 Updated Manual

HMRC have updated the *VAT Partial Exemption Guidance* Manual, in particular to deal with the Court of Justice's judgment in *Volkswagen Financial Services* (Case C-153/17) and attribution of input tax on overheads in finance houses.

PE73200, PE36400, PE77750

5.4 Cars

Nothing to report.

5.5 Business entertainment

Nothing to report.

5.6 Non-business use of supplies

Nothing to report.

5.7 Bad debt relief

5.7.1 Ancient claim (1)

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

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

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

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

(d) compound interest for each of these periods.

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

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

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

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

High Court: *British Telecommunications plc v HMRC*

5.7.2 Historical claim (2)

TC07142 concerned another claim for old bad debts, not going back quite as far as the BT case. It has now proceeded to the Upper Tribunal. In May 2014 a company submitted a claim for bad debt relief in respect of supplies made between 1 April 1989 and 18 March 1997. The claim had been varied during the course of the dispute, but at the time of the hearing it stood at around £9.9m plus statutory interest. The judge agreed to give a decision in principle, leaving them to agree the quantum.

The FTT judge rehearsed the history of the bad debt provisions in the UK, noting the conditions that were repealed because they were held to be incompatible with EU law. The 2017 *GMAC* decision, followed by R&C Brief 1/2017, recognised that the UK law had not complied with EU law; however, HMRC imposed conditions on claims resulting from that decision. In particular, a business claiming for historical bad debts would have to satisfy HMRC that it had not already claimed relief. The Brief suggested various ways in which this could be done.

The company's witnesses gave evidence about the preparation of reports for the board during the claim period. They considered that, although there was no direct evidence proving a negative, there would have been a record if the company had claimed bad debt relief. In the company's argument, it had been prevented from claiming BDR at the time because of the UK rules on retention of title, and it would therefore not have claimed BDR.

HMRC argued that retention of title clauses on building materials, such as the company supplied, would normally be ineffective at law because the builders would supply the goods on. That would mean that title would have passed and the defective law would not have prevented a BDR claim. The complete absence of evidence about BDR claims meant that the company could not satisfy the burden of proof or the statutory requirements for a BDR claim. HMRC also argued that s.78 interest did not apply to BDR.

From precedent cases about *Fleming* claims, the judge decided that the correct approach was:

(1) The taxpayer bears the burden of proving, on a balance of probabilities, that:

(a) There were historical bad debts;

(b) BDR was not previously claimed thereon; and

(c) The amount of the BDR claim can now be reasonably and sustainably estimated or approximated by the taxpayer.

(2) Practical difficulties may be encountered in attempting to substantiate historical claims, but the passage of time and consequent lack of records does not absolve the taxpayer from the obligation of proving the above matters.

The judge agreed with HMRC's analysis. The majority of the goods would have been incorporated in building projects, which would have negated the effect of the retention clauses. The company was doing no more than making very late claims for relief, in the absence of the requisite evidence.

HMRC put forward some evidence relating to another taxpayer in the same industry that had made a similar claim, but was found to have made BDR claims in the past. The judge gave little weight to this. Far more important was a share sale warranty from 1997 that referred to one of the companies in the group having made bad debt claims. The company contended that this had only limited relevance, but the judge concluded that it weighted the balance of probabilities towards the company having made BDR claims during the claim period.

The claim therefore failed, and the appeal was dismissed. The company appealed to the Upper Tribunal, where it came before Judges Swami Raghavan and Guy Brannan. There were a number of grounds of appeal, gathered under three main headings:

(1) "Legal" error: a claim that the FTT's construction of the guidance in the VAT Notices was wrong;

(2) "Logical" error, namely that even if it was correct that the appellant could have claimed BDR, the FTT was wrong to infer from that that the appellant did claim BDR;

(3) Various factual errors.

The judges examined each argument in turn and rejected them all. In particular, the "logical" error faced the difficulty that it was for the appellant to show, on the balance of probabilities, that no claim had been made; the FTT's conclusion that the evidence was insufficient could not be recharacterised as an inference that a claim had been made. None of the alleged factual errors amounted to an error of law.

The appeal was dismissed again.

Upper Tribunal: *Saint-Gobain Building Distribution Ltd v HMRC*

5.8 Other input tax problems

5.8.1 Article

In an article in *Taxation*, Rachel van der Merwe discusses the role of AI in helping businesses to claim the VAT that they are entitled to. She quotes a startling statistic that "over 54% of eligible VAT is going unclaimed" – tracking this to the research report (tinyurl.com/28akxzpk – a survey of businesses by the writer's employer, SAP Concur), it relates specifically to VAT on travel and expense costs.

The article refers specifically to post-Brexit claims, where it is likely that many businesses will not bother to try to recover VAT incurred in other countries. However, it appears that the fear of overclaiming also limits eligible claims for VAT incurred in UK travel and employee expenses.

Taxation, 13 May 2021

5.8.2 A different MTIC fraud

A company appealed against disallowance on "knew or ought to have known" grounds of input tax of £2.2m on 802 purchases of printer consumables between 11/14 and 08/16. The decision starts with a description of the business, which was well-established, substantial and financially healthy. The disputed transactions were a relatively small part of its business and were not unusually profitable.

The history of the dealings with the defaulting traders was examined, along with HMRC's arguments that there was a lack of commerciality that suggested the company actually knew of the connection to fraud. The judges disagreed. In the context of the company's business, there was nothing particularly unusual about these transactions; there was certainly not enough evidence to draw an inference that the company was knowingly engaged in fraud.

The judges went on to consider whether a prudent businessperson would have drawn the conclusion that the only reasonable explanation for the transactions was a connection to fraud, and concluded once again that this was not made out. Although the company ought to have been aware that there was a risk that the counterparties were engaged in nefarious activity, that was not the only possibility, and the mere risk was not enough to engage the *Kittel* principle. The appeal was allowed.

First-Tier Tribunal (TC08057): *DMC Business Machines plc*

5.8.3 FTT "ambush"

In TC06812 (late 2018), a Northern Irish car dealer appealed against the refusal of input tax on a number of purchases, also on "*Kittel*" grounds. The judge examined the background to the business and agreed with HMRC that some of the deals, which involved newly registered traders selling him cars and purchasers turning up from the Republic looking for those cars at exactly the right time, were "too good to be true" and he ought to have formed the conclusion that they would be connected with fraud. However, there were other transactions in which he bought the vehicle, took it into stock, and later sold it to a UK customer and accounted for output tax on it. The fact that the same missing trader had

sold him the vehicle would not necessarily have made the transaction appear suspicious.

The appeal was dismissed in relation to the sales to the Republic of Ireland, but allowed in relation to the domestic sales. HMRC appealed to the Upper Tribunal, which was strongly critical of the FTT decision. It was fundamental to that decision that HMRC had not proven that one of the suppliers was responsible for a tax loss; however, this had been expressly conceded by the appellant before the hearing, which meant that HMRC did not expect to, and did not have to, prove that aspect of their case.

The Upper Tribunal reviewed the "difficult procedural history" of the case, which went back to HMRC's statement of case issued as long ago as 6 February 2015, and numerous Tribunal directions that followed before the 2018 hearing. The FTT had issued what are known as "*Fairford* directions" which restrict the trader's right to question the tax loss at the hearing, in order to speed up the process where the evidence is very strong. The company did not object to these directions; its defence was based purely on lack of knowledge or means of knowledge, not on a claim that there was no tax loss. The judges stated that "'The word "ambush" is sometimes overused in litigation. We do not consider it an overstatement to say that in these proceedings regrettably HMRC were ambushed, not by their opponent, but by the FTT itself."

The FTT decision was therefore flawed, and the UT had to decide whether to remit it or remake it, and if the second, how to remake it. It would not be appropriate to remake it by releasing the appellant from its concessions on the tax loss; instead, the UT considered the effect on the decision below of assuming that the tax loss point was conceded. This meant that several more of the deals should lead to denial of input tax recovery; however, there were still some transactions where the FTT's conclusion was based on the "means of knowledge" limb of the *Kittel* test, and these were not subject to the same criticism or revision. HMRC's appeal was allowed in part.

Upper Tribunal: *HMRC v Alan McCord T/A Hi-Octane Imports*

5.8.4 Fraud dispute

A company is involved in a dispute with HMRC over allegations of fraudulent use of a VAT registration and disallowance of £1.8m in input tax on supplies of mixed waste to the company. HMRC's case is based on alternative arguments – "*Kittel*" and "no supply was made".

Judge Zachary Citron presided over a case management hearing in which the appellant sought disclosure of various document in relation to HMRC's case. After considering the arguments, he granted the application: HMRC should either disclose the documents or confirm that they were not in HMRC's possession or control.

First-Tier Tribunal (TC08096): *VNS Waste Solutions Ltd*

5.8.5 More MTIC fraud

A company appealed against decisions to assess for output tax or disallow input tax totalling some £4.9m over periods from 06/11 to 06/14. The company's director appeared on the first day of the hearing and stated that

he would not attend the rest of it, because he believed the Tribunal had already reached a decision and he would be wasting his time. The judge explained that no decision had been reached and he would lose the opportunity to give innocent explanations for transactions or to cross-examine HMRC's witnesses, but he did not change his mind.

The Tribunal examined a great deal of evidence, including e-mail exchanges leading to some of the disputed transactions. The Tribunal found against the company in principle on all the points: the transactions were connected with fraudulent tax losses, and the company knew or ought to have known that. In respect of the zero-rating assessments, the company had not done all that it reasonably could have done to prevent its own participation in a fraud.

There was, however, a reduction in the amount assessable of about £1m in respect of transactions that were found to be outside the scope of UK VAT. Other than that, the appeal was dismissed.

First-Tier Tribunal (TC08135): *Turkswood Ltd*

5.8.6 Updated Manuals

The *VAT Government and Public Bodies Manual* has been updated to remove various references to the EU and the Directive, and also to update guidance on s.33 refund arrangements.

VATGPB4120

The *VAT Joint and Several Liability Manual* has been updated to state that MTIC fraud is now described as "Missing Trader or Supply Chain fraud".

JSL1200 etc.

The entire *VAT Fraud Manual* has been placed under review following Brexit.

6. ADMINISTRATION AND PENALTIES

6.1 Group registration

6.1.1 Company leaving a group

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

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

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

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

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

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

He also considered the *Thorn Materials Resources* case, which directly concerned the grouping provisions. A VAT avoidance scheme depended on a transaction that was 90% paid for while companies were members of the same VAT group, then completed once they had ceased to be in the group. The idea was that only 10% of the transaction would be subject to output tax (which the purchasing company could not recover), but the vendor company could recover all of its input tax because it was making a

taxable supply. The House of Lords held that there was a taxable supply when the companies were not part of the same group, and s.43 did not prevent the whole consideration for that supply being taken into account.

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

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

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

The appeal was allowed.

First-Tier Tribunal (TC08036): *The Prudential Assurance Company Ltd*

6.1.2 General service companies

A number of financial groups are in dispute with HMRC about whether a type of company known as a "general service company" can be removed by HMRC from a VAT group. HSBC is subject to an appeal before the Upper Tribunal about a degrouping decision (effectively a judicial review application). The April update reported the decision of the Upper Tribunal that other disputes would not be joined with the HSBC case because it would delay the hearing; HMRC applied for a dispute concerning Barclays to be stayed until 60 days after the release of the Upper Tribunal's decision in *HSBC*. Judge Christopher McNall considered the arguments and agreed HMRC's application on the basis that the UT decision would provide "material assistance" and it would be "expedient" to grant a stay.

First-Tier Tribunal (TC08120): *Barclays Services Ltd and another*

6.2 Other registration rules

6.2.1 Updated Notice

HMRC have updated their Notice *Agricultural Flat Rate Scheme* to add that farmers must not and have not been in the last 24 months:

- eligible to be registered for VAT in the name of a group under VATA 1994, s 43A;
- registered for VAT in the name of a division under VATA 1994, s 46(1); or
- associated with another person.

This change brings the guidance up to date with the changes made to the VAT regulations 1995 (SI 1995/2518) with effect from 1 January 2021.

HMRC have also updated section 7.2 'When to leave the scheme' and section 7.3 'When can HMRC compulsorily remove you from the scheme' to add the following information for farmers within the flat-rate scheme. Where the business, at the end of any month, has turnover for farming activities of more than £230,000 for the prior 30-day period:

- it must leave the scheme, and
- HMRC have the power to cancel the flat-rate certificate and remove the business from the scheme.

This replaces the 'protection of revenue' condition, where a farming business would be required to leave the scheme (or HMRC could compulsorily remove it) if it was recovering substantially more as a flat-rate farming business than it would if it were registered for VAT in the normal way.

These revisions reflect the changes to the SI 1995/2518 reg.206 (and the addition of new reg.206A) which were introduced by SI 2020/1384 with effect from 1 January 2021.

Notice 700/46

6.2.2 Feedback on registrations

An accountant writing to *Taxation* magazine complains:

"I am flabbergasted that HMRC has the nerve to make a public statement that registration delays have now been dealt with (News update, Taxation, 13 May 2021, page 5).

I am a small practitioner and have VAT applications that take almost six months to process. I have a VAT transfer of going concern application from January 2021 that has not yet been processed.

I have a client whose name has changed on their VAT registration, for no apparent reason, and clients whose bank account details have been changed without protocols being properly observed.

The online query simply does not work and the people try to be helpful on the telephone helpline but once they cannot deal with a query, it just dies a death, as there is no way to re-contact them. Clearly writing to the written enquiries team is the work of a very patient man.

Somebody needs to face up to the fact that the whole system is in absolute turmoil and is not functioning and is causing a lot of stress. The idea of moving forward to the other aspects of making tax digital is laughable.

It is hoped that if this information appears in Taxation magazine, someone at the senior level might take some action or admit that there are enormous issues."

Taxation, 17 June 2021

6.3 Payments and returns

6.3.1 Post-Covid debt collection

HMRC have issued a briefing on their approach to collecting debts after the pandemic. The introduction to the document states:

As the UK emerges from the COVID-19 pandemic and economic activity resumes, we are restarting our debt collection work and will be contacting customers who have fallen behind with their tax during this difficult time.

At all times, we will take an understanding and supportive approach to dealing with those who have tax debts or are concerned about their ability to pay their tax.

This issue briefing sets out:

- *what we will do when a customer has a tax debt*
- *the extra support that we have put in place for customers*
- *what we will do when a customer does not get in touch or refuses to pay.*

www.gov.uk/government/publications/hmrc-issue-briefing-collecting-tax-debts-as-we-emerge-from-coronavirus-covid-19

6.3.2 Agent Services Account

On 4 May the ATT passed on the following message from HMRC about improvements to the Agent Services Account homepage (only VAT-relevant contents included):

1. An amendment to the text of the 'Track your recent authorisation requests' link to clarify it's for authorisation requests within the past 30 days. The link will read, 'Track your recent authorisation requests from the last 30 days'

2. A new Help & Guidance page, collating helpful GOV.UK guidance for agents, will be accessible from the very top of the agent services account homepage (next to 'Account home').

3. Two new links will be added to the collapsible list for Making Tax Digital for VAT. These are:

'Copy across your authorisation'

'Requesting an authorisation'

This will align Making Tax Digital for VAT's collapsible list with the other collapsible lists, so they all follow the same format making them easier to understand.

When a + is selected the options for that section are displayed in a list. To collapse the list again select –

www.att.org.uk/technical/news/agent-services-account-upcoming-changes

6.3.3 VAT direct debits

The ATT has publicised the fact that HMRC will be writing in June to businesses who currently pay their VAT by direct debit, but for whom they do not have an email address. To comply with UK banking regulations, HMRC need an email address in order to take payments by direct debit.

The letters will inform the recipient that their VAT direct debit will be cancelled between July and November, and advise them that, if they want to continue to pay by direct debit, they will need to set up a new instruction via their Business Tax Account.

Where businesses have joined the VAT deferral new payment scheme, the direct debit via which they pay off their deferred VAT is separate and will continue unaffected by this change.

The letters will not be copied to agents. However, HMRC have provided the ATT with examples of the letters which will be sent to MTD and non-MTD businesses, which can be found by following the link from the announcement below.

www.att.org.uk/technical/news/cancellation-vat-direct-debits-where-no-email-address-—-hmrc-letters

6.3.4 Amendment to Finance Bill

The Government tabled amendments to the FB 2021 on 20 April, including one affecting the new entitlement to repayment interest on VAT in FB 2021 Sch.28. The Bill as originally drafted included amendments to Sch.54 FA 2009 that would have prevented an amount of VAT credit from carrying repayment interest under FA 2009 Sch.54 for a period referable to the raising and answering of an inquiry by HMRC or the correction by HMRC of errors or omissions in a VAT return. This has been deleted.

The exclusion of repayment interest for periods of enquiry was presumably connected to the rules for excluding repayment supplement under VATA 1994 s.79 by "stopping the clock" during HMRC enquiries, but no such rules exist in corporation tax and income tax. The rule has been deleted so that the approach will be the same across the taxes.

www.gov.uk/government/publications/finance-bill-2021-public-bill-committee

6.3.5 Incorrect MTD messages

The ATT has publicised a problem with VAT filing being reported by members. HMRC have commented as follows:

"As you may be aware, HMRC recently started moving VAT customer records from the legacy VAT mainframe to the newly integrated Enterprise Tax Management Platform (ETMP).

This activity has led to an issue for some Agents with non-MTD clients, who have been receiving an incorrect message in the Agent Online Self-Service (AOSS) account.

This happens when an Agent logs to their AOSS, selects VAT, sees the VAT Client list, and selects a client whose record has been unknowingly moved on to ETMP.

Agents are receiving an incorrect message informing them that the client has signed up to Making Tax Digital (MTD), even when the client has not yet done so.

This message will direct Agents to log into the Government Gateway (GG) using their Agent Services Account (ASA) credentials. Any Agent whose client has not joined MTD that sees this message should continue through the screens to sign into their ASA (or create an ASA) to file their client's non MTD VAT return.

This issue will affect around 190,000 businesses whose account has been migrated or will be migrated in the coming months.

We apologise for any confusion this may cause – we are currently working on a solution to prevent this incorrect message."

HMRC provided the following additional information on this issue on 25 May:

"The issue won't prevent Agents filing returns for their clients. They need to log into their ASA and submit via the 'view and change' link for their clients who have been moved onto ETMP but who haven't been signed up to MTD.

The issue is that the message that they see in their AOSS is incorrect as it states that their client has signed up to submit MTD returns. This is not the case. We are working on making the message correct and more user friendly."

HMRC have indicated that they will help if the above approach does not work and members continue to have problems filing returns.

www.att.org.uk/technical/news/incorrect-mtd-vat-sign-messages-hmrc-update

6.3.6 VAT deferral

On 20 May HMRC issued a reminder to businesses that had deferred VAT from 2020 under the Covid-19 scheme that they had until 21 June to apply to pay the outstanding amount by instalments: "*Businesses may be charged a 5% penalty and/or interest if they don't join up to the scheme online by 21 June, or pay in full by 30 June, or contact HMRC to make an arrangement to pay by 30 June 2021. Businesses should also contact HMRC by 30 June 2021 if they need to agree extra help to pay.*"

The announcement also stated that: "*HMRC data to 30 April 2021 shows 228,850 businesses that deferred their VAT last year have already paid their VAT in full. This, along with instalments already made under the new payment scheme and other payment plans, totals £15.1 billion. Since the online service opened on 23 February 2021 another £11.5 billion has already been committed to future instalment payments by 134,627 businesses.*"

www.gov.uk/government/news/one-month-left-to-join-vat-deferral-new-payment-scheme

6.4 Repayment claims

6.4.1 Repayment supplement and interest

In a case with a peculiar procedural history, Judge Nigel Popplewell dismissed an appeal against a refusal by HMRC to pay repayment supplement and interest to a trader. The main point of note is the operation of the rule in s.79 which means that HMRC do not have to pay repayment supplement at all if an original claim to repayment has been reduced by 5%. This applied to all the periods in which the trader considered he was due a repayment supplement. He also failed to identify any HMRC errors that would entitle him to interest under s.78.

First-Tier Tribunal (TC08048): *Red Kite Art and Jewels Ltd*

6.4.2 Time bar (1)

A golf club made a *Fleming* claim for repayment of £492,000 on 27 March 2009 in respect of green fees. The claim was rejected on 26 August 2009; a review confirmed this decision on 6 November 2009. The club appealed, and its case was stood over behind that of *Bridport & West Dorset Golf Club*. The appeal appeared to have been settled by HMRC in 2018.

On 29 January 2015, the club's accountants made a further claim for £746,429 following *Bridport* and covering the period from 1 January 2009 to 31 December 2013. On 18 July 2018, HMRC rejected the period from 1 January 2009 to 31 December 2010 (amounting to £229,872) on the grounds that it was claimed out of time. The club appealed against this decision, arguing that it had been clear at all times that it wished to apply "the *Bridport* treatment" to its affairs to the maximum possible extent; the 2015 claim should therefore be regarded as an amendment of its existing 2009 claim, rather than a new claim.

Judge Richard Chapman held that the 2015 claim was a new claim. The 2009 claim clearly referred only to the periods it purported to cover, which meant that the later claim had to be a separate matter. He then considered various arguments about the power of HMRC or the Tribunal to set aside the four year time limit, and also arguments based on the Human Rights Act and EU principles of effectiveness and equivalence. He did not consider that any of them assisted the club, and dismissed the appeal.

First-Tier Tribunal (TC08055): *Royal County Down Golf Club*

6.4.3 Time bar (2)

Judge Guy Brannan heard an appeal on a similar point. A city council submitted a *Fleming* claim in respect of the provision of sports facilities on 25 March 2009. Claims were made for later periods within the 4-year time limit; following the CJEU decision in the *Ealing Council* case (Case C-633/15), HMRC settled most of the claims in 2019. However, in March 2017 and April 2018 the council made further claims in respect of golf course income and the provision of sport in parks. HMRC ruled that the April 2018 claims were out of time because they were new claims. The council maintained that they were amendments of existing claims.

The judge examined the history of the claims made by the council and a number of precedent cases on claims, including *Reed Employment*, *Vodafone* and *Bratt Autoservices*. He concluded that the earlier claims had been made in terms that were broad enough to encompass the subject matter of the later claims, but the actual supplies of services involving golf courses and sports on parks was different from the actual supplies in the earlier claims. He cited the Upper Tribunal in *Vodafone*: "The taxpayer's claim under section 80(2) is likewise not, we consider, simply for a sum of money, but is for a sum or money related to particular transactions in respect of which output tax has been accounted for."

In the judge's view, the April 2018 claims constituted an extension of the facts upon which the earlier claims were based; claims in respect of golf courses and parks were not in contemplation when the earlier claims were made, and were not mentioned in them. This meant that they were further claims "arising out of similar but not the same circumstances".

The appeal was dismissed.

First-Tier Tribunal (TC08060): *Leicester City Council*

6.5 Timing issues

Nothing to report.

6.6 Records

6.6.1 Updated Notice

HMRC have updated their Notice *Making Tax Digital for VAT* with new examples of when digital links are required, the end of the soft-landing period for digital links, and the closure of the digital links extension application process.

Notice 700/22

6.7 Assessments

6.7.1 Best judgement (1)

A company and its director appealed against assessments and penalties raised on a fish and chip shop for alleged exclusion of takings from the VAT returns. The assessments totalled £109,670 for periods from 08/10 to 04/17, and the penalties were £87,736. The PLN attributed 100% of the penalty to the director.

The Tribunal decided that the company had been deliberately suppressing its sales for this period, and the behaviour was deliberate and concealed; the inaccuracies were attributable to the director. However, there were two other issues: whether some of the assessments were out of time, and if so, whether the penalties should also be reduced.

The Tribunal accepted that the assessments for periods 08/10 to 07/15 were made more than a year after evidence of facts sufficient to justify the making of the assessment had come to HMRC's knowledge. Those assessments were out of time. The later periods were within the normal "2 years from end of return period" rule.

It would seem natural to reduce the penalties accordingly, but the Tribunal (Judge Anne Redston) noted precedents that showed that this did not follow. A penalty did not depend on HMRC having a valid assessment for the underlying VAT. The PLN was therefore confirmed in full.

The decision provides a detailed examination of the process of an enquiry and best judgement exercise where the till rolls were illegible because the trader repeatedly reused them. On the basis of the evidence available, the assessments were raised to best judgement and could not be displaced. HMRC had uplifted the till rolls in July 2016, but only raised the assessments on 9 August 2017. Their representative did not mention the time limit issue in her skeleton argument or on the first day of the hearing, even though it was part of the appellant's grounds of appeal. On the second day, HMRC's representative proposed to call the HMRC officer to give evidence explaining why he considered the assessment to be in time. The appellant's counsel submitted that this would be an "ambush": HMRC had had plenty of time to respond to the time limit question, which had been "front and centre throughout". The judge agreed: the Tribunal had issued directions on 27 June 2018 requiring witness evidence on which the parties intended to rely at the hearing to be served no later than 7 September 2018. The hearing was two years later.

Judge Redston went on to analyse the law in relation to the validity of the PLN in spite of the reduction in the assessments, and made some small adjustments to the calculation of the amount charged. The appeal was allowed in part.

First-Tier Tribunal (TC08083): *Albany Fish Bar Ltd and another*

6.7.2 Best judgement (2)

A company applied to register with effect from 21 August 2013. An enquiry started in February 2016 and resulted in assessments to deny input tax from the outset (£324,065); the company appealed, but did not comply with Tribunal directions, resulting in strike-out and reinstatement before eventually coming before Judge Tracey Bowler in early 2021.

She began by reviewing the history of the dispute, and noted that some of HMRC's decisions had never been appealed. She considered whether to "admit some form of implied appeal", but decided against doing so. In any case, she was satisfied that the appellant would not succeed in any such appeal.

The company was involved in renovation of property. Its grounds of appeal were that the assessments were not raised to best judgement and were illogical or spurious. The judge examined the basis of the officer's assessment at length and concluded that the company had not shown that it was wrong, and had not provided strong enough evidence to displace it. The only possible outcome was to dismiss the appeal.

First-Tier Tribunal (TC08076): *Endeavour Strategic Developments LLP*

6.7.3 Balance of probabilities

The Upper Tribunal heard an appeal against a FTT decision that resulted from a long-running investigation into an individual's tax affairs. The situation is complex, but one point of importance is a consideration of the meaning of "burden of proof on the balance of probabilities". The taxpayer's representative argued that the FTT had not considered whether his account of certain receipts (that they were loans or transfers from other accounts) was more likely than HMRC's view (that they were trading receipts). The Upper Tribunal did not agree that this was what "the balance of probabilities" meant. Rather, it was for the FTT to balance the taxpayer's explanation against the negative of that explanation. HMRC did not have to put forward a case at all.

Nevertheless, the FTT had failed to take into account an important part of the taxpayer's case, and had not apparently considered it at all: that there was no evidence of any trading activity that could have given rise to the trading receipts. A number of other grounds of appeal were rejected, but for this failure the case would be remitted to the FTT for reconsideration.

Upper Tribunal: *Golamreza Qolaminejite (aka Anthony Cooper) v HMRC*

6.7.4 Right to assess "what was not input tax"

In TC07158 (July 2019 update), a NHS Trust claimed £115,000 of VAT incurred on new IT equipment. HMRC raised an assessment under s.73 VATA 1994 to recover this, ruling that the trust was not entitled to it under s.41. The Tribunal had to consider a preliminary issue of whether a s.73 assessment was valid in the context of VAT that had been claimed under s.41.

HMRC's position was that s.73 was clearly applicable to any amounts of VAT wrongly recovered by the appellant and there was nothing in the EU or UK VAT systems, the case law, or Parliament's presumed intentions, that suggested otherwise. The matter came before Judge Mosedale, who had to consider the EU VAT system and the UK VAT system, including relevant case law, and Parliament's presumed intentions as represented by the taxpayer.

It was true that VAT claimed under s.41 was not "input tax" and was not within the normal rules of EU VAT. The UK's scheme for refunds was not authorised by the Directive, but neither was it forbidden. The judge agreed with HMRC that the answer to the question had to lie within the

scope of s.73 itself. The words of that section are quite clear: “where there has been paid or credited to any person an amount of VAT that ought not to have been paid or credited”, HMRC had the power to raise an assessment. Although the Trust attempted to make something of the special nature of VAT under s.41, the judge was satisfied that it fell squarely within s.73.

She went on to consider arguments about Parliament’s intentions, and concluded “none of the reasons put forward by the appellant for suggesting that I should not interpret s.73 literally support its case. I consider that I should interpret s.73 literally as that is likely to be Parliament’s intent.”

The preliminary issue was decided in favour of HMRC, and the substantive question of whether the VAT had been properly claimed would have to be considered by the Tribunal on another day.

The Trust appealed to the Upper Tribunal (October 2020 update). The UT provided the following rationale for the right to claim under s.41:

Under the EU’s Principal VAT Directive, only taxable persons have a right to recover VAT which they incur. A public body such as a Government department, acting in its capacity as a public body, does not have that right (subject to certain exceptions in the Directive which are not relevant here) because it is not acting as a taxable person.

This might cause public bodies to undertake activities in-house which in business terms could most sensibly have been outsourced, simply to avoid the VAT charged by external contractors. In order to avoid such a bias, the UK, in common with some EU Member States, has enacted a regime which permits the reclaim of some such VAT on certain terms. The Directive does not provide for this, but nor does it prohibit it.

The Trust’s counsel argued that the FTT had erred in not accepting that s.41 VAT was not within s.73 and could not be assessed under it, as it was not input tax; s.73 only applied to taxable persons; and the FTT also treated the interpretation of s.73 as essentially a question of semantics, when it should have considered the structure of the VAT system in the EU context (as there is no separate UK VAT system). HMRC responded that the FTT had been correct to apply a plain literal reading of s.73, and the VATA was the only relevant “system” to be applied.

The UT agreed with HMRC. The claim under s.41 was for “VAT charged to” the claimant Trust; s.73 referred only to assessment of incorrect amounts of VAT refunded. There was nothing in s.73 to restrict its application to taxable persons only. There is a distinction between taxable persons and “persons” in general in s.3 VATA; s.73 only refers to “persons”, not “taxable persons”. Where the legislation intends to refer to a narrower class of persons, it does so.

A number of other arguments raised by counsel for the Trust were considered and rejected. There was no distinction between “the EU system” and “the UK system”. Although s.41 dealt with an unusual situation, it was not unique, and attempts to treat it as exceptional still did not have any bearing on the plain words of s.73.

The appeal was dismissed, and the Trust appealed again to the Court of Appeal. The court confirmed again that the assessments were valid. A

public body had to be registered for VAT and had to make returns in order to participate in the refunds scheme: it was therefore a "taxable person", and the VAT that it reclaimed (to too great an extent) did not lose its nature as "an amount of VAT that had been overclaimed".

There was no public policy reason to allow a public authority to retain an excessive refund of VAT. The appeal was dismissed.

Court of Appeal: *Milton Keynes Hospitals NHS Foundation Trust v HMRC*

6.7.5 Extrapolation reduced

A Turkish restaurant owner appealed against assessments based on alleged suppression of takings. His representative accepted that the assessments were raised to the officer's best judgement based on information available to her at the time, but maintained that there was no suppression; if the Tribunal found that there was, the amounts should be reduced for various reasons put forward at the hearing.

The Tribunal examined the evidence and the arguments and allowed the appeal in part, setting aside assessments for some of the periods and directing HMRC to reduce others. During the enquiry HMRC had also raised corporation tax assessments on the company running the business, but these were dropped before the hearing, and the appeals against them were formally allowed without discussion.

First-Tier Tribunal (TC08153): *Huseyin Acar (trading as Fez Mangal) and another*

6.7.6 Updated Manual

HMRC have updated the *VAT Assessments and Error Correction Manual* concerning the procedure for recovering a debt due to the Crown because VAT has been shown on an invoice by an unregistered trader or on a non-VATable supply.

VAEC9690

6.8 Penalties and appeals

6.8.1 PDF bundles for appeals

The Tribunals service has updated guidance, originally issued in June 2020, to advise that a party wishing to send a PDF file that is larger than 36MB to the Tribunal should contact the Tribunal in advance by e-mail or telephone to request permission to use the HMCTS Document Upload Centre ('DUC'). The DUC allows large bundles to be transferred to the Tribunal.

www.judiciary.uk/publications/first-tier-tribunal-tax-chamber-general-guidance-on-appeals/; https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/887109/Document_Upload_Centre_-_Professional_User.pdf

6.8.2 Penalties

A trader registered for VAT from 1 February 2018. She only filed her VAT returns for the four periods ending 12/18 on 24 May 2019. The returns filed showed that the central assessments she had accepted and paid were significantly less than the actual VAT due for the periods. HMRC charged a penalty under FA 2007 Sch.24 para.2 on the basis that the taxpayer had failed to take reasonable steps to notify HMRC that an assessment was inadequate within 30 days from the date of the assessment. The trader appealed, claiming that she was new to VAT and did not understand the assessments; she had relied on her accountants and had been let down by them; and she had been pregnant. She had not realised that the assessments were inadequate until the returns were submitted.

The judge (Anne Fairpo) considered that that a reasonable and prudent taxpayer in the same position as the appellant, receiving an assessment from HMRC, would take steps to understand the significance of the document and would have considered whether the assessment was correct. The appellant provided no evidence that she paid any particular attention to the assessments other than to pay them. The explanations of the problems with the accountants did not amount to a reasonable excuse, and HMRC's refusal to grant a reduction for "special circumstances" could not be overturned.

The penalty was confirmed in full.

First-Tier Tribunal (TC08092): *Faye Elizabeth Harrison*

An individual appealed against an assessment for VAT of £37,228 for period 10/12, and "deliberate and concealed" penalties totalling £75,962. This related to an enquiry into a car rental business that she had run as a sole trader and through a company.

The judge first considered an application by the appellant that her appeal should be summarily allowed on the basis of "no case to answer". He did not accept the arguments put forward that HMRC had failed adequately to describe their case and supporting evidence.

The appellant's first line of defence was that HMRC had assessed the wrong person: the assessment was raised on her personally, when the trade had been carried on by the company. She contended that her accountant had either acted negligently or "on a frolic of his own" in registering her for VAT. However, the judge noted that the company had been incorporated after she had started to trade, so it was not possible for the company to have been registered on the date that her registration took effect. Other actions by the taxpayer were inconsistent with her claim that she had not known that she was registered and should have been accounting for VAT.

The taxpayer's representative argued that the assessments were not raised to best judgement because there was no evidence to support them, and they were "disproportionate to the value of any supplies that could have been made". The judge rejected this: the officer had collected evidence that appeared to support the assessment, and the taxpayer had provided no evidence to contradict it. The appeal against the assessments was dismissed.

The penalties were assessed in June 2014. The judge acknowledged the taxpayer's argument that "deliberate and concealed" penalties are effectively "criminal" in nature for the purposes of human rights law. The burden of proof lay on HMRC. The appellant argued that the required conditions for a penalty were not met; according to her, she had not "given HMRC a document that contained an inaccuracy which amounts to, or leads to, a false or inflated claim to repayment of tax." The judge was satisfied that a document had been given to HMRC by the appellant or her agent, and the agent was not acting "on a frolic of his own".

The judge next considered what was meant by "deliberate". He noted the decision of the CA in *Tooth*, which related to direct taxes; but preferred to follow the decisions of the FTT in *Auxilium Project Management* and *Anthony Leach*, which were more directly relevant to penalties levied under FA 2007 Sch.24. After the hearing, the Supreme Court's revision of the *Tooth* decision supported the conclusion the judge drew on this point. He quoted Judge Redston from the *Leach* case:

"The Notes for Sch 24 refer repeatedly to the level of penalty being based on 'behaviours', with the most serious penalties being reserved for 'deliberate and concealed behaviours'. The Notes say that the concepts set out in the Schedule provide 'a uniform language for behaviours', and that 'where a person has taken reasonable care in completing their return…no penalty will arise' In our judgment, this behaviour-based approach shows that the meaning of 'deliberate' cannot extend to purely mechanical errors, where there is no intention to mislead."

The definition of a deliberate error in *Auxilium* was: "a deliberate inaccuracy occurs when a taxpayer knowingly provides HMRC with a document that contains an error with the intention that HMRC should rely upon it as an accurate document. This is a subjective test. The question is not whether a reasonable taxpayer might have made the same error or even whether this taxpayer failed to take all reasonable steps to ensure that the return was accurate. It is a question of the knowledge and intention of the particular taxpayer at the time."

The judge considered that it was more likely that the taxpayer had provided the false invoices to the accountant, intending them to be used to prepare the VAT return, than that the accountant had himself fabricated them to benefit her, without her knowledge or involvement. No evidence had been put forward to support such a conclusion.

The appeal against the penalties was also rejected.

First-Tier Tribunal (TC08133): *Shaneika Clarke*

A trader was assessed to a "deliberate and concealed" penalty of £83,151. By the time of the hearing, the trader had accepted "careless" and HMRC had accepted "not concealed". The penalty demand had been reduced to £58,205.

The decision starts with a discussion of an application by the taxpayer's counsel to have part of HMRC's statement of case struck out, on the basis that it insinuated that a fire at the taxpayer's premises had been started deliberately. The judge declined either to strike it out or to agree that it was more than an explanation of why the trader had been unable to produce some documents; he noted that the directors of the company had appeared in court in connection with a suspicious fire at the company's

premises and an allegation of insurance fraud and would be appearing again later, but he drew no conclusions from that as they had not been convicted of any offence.

The company acquired commercial premises which it opted to tax and let to a connected company. It claimed back input tax on the acquisition of the property in period 08/14. On 22 March 2016 it applied to deregister, and in response to the question "do you have, or have you had, an option to tax on any property?" the "no" box was crossed. A zero value was entered in the relevant box; the form VAT 7 was signed by a director. A handwriting expert gave witness evidence that the signature did not match the rest of the form, which must have been completed by someone else.

The final VAT return for the period from 1 March to 23 March 2016 did not include a deregistration charge on stock or on the value of the opted property. HMRC visited the trader (and the associated company) on 12 April 2018 and raised questions about the deregistration form. The director said he could not remember the reasons for its completion without the value of the property. There followed assessments and penalty charges, and a lack of response from the taxpayer. In due course, the penalty explanation letter set out the following mitigation:

(1) Telling – 0% as the business had not actively engaged with HMRC to provide the records or discuss the reasons for the errors. Answers given were generally vague.

(2) Helping – 15% as the business had provided some information verbally to allow HMRC to conclude the quantum of the assessment. No records were provided.

(3) Giving – 0% as access to records were never provided.

The company appointed advisers who wrote to explain that the directors had relied on a former chartered accountant who had acted as their bookkeeper, and who had recently suffered a brain haemorrhage. They had trusted him, but he had been unwell and had made mistakes as a result. They wished to cooperate fully in putting the matter right.

The HMRC officer responded that the directors were experienced business people who ought to have read and understood the form before signing it. She considered the representations with her manager and decided to uphold the penalty. She listed 15 reasons for this in her submissions to the hearing: in particular, when she had dealt with the appellant company, she had only dealt with the director, and there had never been any mention of the involvement of the bookkeeper. In short, she did not believe the explanation.

The judge considered the competing arguments and came down on the side of the HMRC officer. He did not find the director a credible or a reliable witness. He gave several reasons for this, and concluded that the director's knowledge and understanding of accountancy was significantly greater than he pleaded. He did not accept that the bookkeeper was solely responsible for the appellant's VAT affairs; he found as a fact that the director dealt with them. He prepared the final VAT return and filed it, knowing that the property had been opted, and knowing that he should enter a deregistration charge on the return.

The judge discussed the legal concept of "blind-eye knowledge" – the behaviour of someone who deliberately does not ask questions to avoid knowing something that they would rather not know. If the director had avoided reading the VAT 7, it was for this reason. That was enough to satisfy "deliberate" behaviour for Sch.24 FA 2007.

The judge ruled that HMRC had been too generous in allowing 15% for "helping" – the information given by the company had been "minimal". He reduced the percentage to 5%, and confirmed the penalty as "deliberate, not concealed, prompted disclosure". The resulting discount was 1.75% from 70%, leaving a penalty to be charged of £61,352.

First-Tier Tribunal (TC08146): *Chohan Management Ltd*

6.8.3 Procedure

The case of *Pacific Computers* was first heard by the FTT in 2014, where the company succeeded in an appeal against disallowance of £435,000 of input tax on MTIC grounds (TC04239). The Upper Tribunal allowed HMRC's appeal in 2016; the case was remitted to the FTT to be heard again. The company now argued as a preliminary issue that the long delay (the transactions took place in 2006 and the appeal was first notified to the Tribunal in 2008) breached its rights under the Charter of Fundamental Rights of the European Union to a hearing within a reasonable time.

Judge Zachary Citron had to consider whether there had been a breach of the company's fundamental rights, and if so, what the appropriate remedy would be. The company contended that its appeal should be summarily allowed. There were some precedents both on the issue and the appropriate remedy both in EU and UK case law, which the judge summarised.

The UK precedents dealt with the situation in which judgment has not yet been given, and established an "acid test" of whether or not a fair trial can still be held: if it can, then staying proceedings is not the appropriate relief for breach of the right to a hearing within a reasonable time. Summarily allowing the appeal would only be the appropriate remedy where the judge was satisfied that the delay meant that the appellant would now lose the case, when he would have won if the hearing had been held in good time.

The company argued that its witnesses would appear less credible as their memories faded, and the long delay would therefore have the effect of making the Tribunal more likely to find against the company. The judge was not convinced that this was an overpowering impediment to the presentation of the appeal:

"On the other hand, the witnesses have had reason to recall the 2006 transactions and their circumstances at regular intervals since they occurred. In particular:

(a) they produced witness statements in 2011 and 2014;

(b) they gave oral evidence and answered cross examination questions, in some cases at great length (see the Appendix for details), at the first FTT hearing in 2014;

(c) there are transcripts of their 2014 evidence in the tribunal, to which they have access; and

(d) they produced supplementary witness statements in 2018."

The judge considered the history of the appeal, and while he accepted that the length of time was unfortunate, there were good reasons for most of it; the Tribunal had to balance the interests of the various parties and apply a fair process that would deliver a just result. There was only one event (the cancellation of a hearing listed for December 2019) that appeared to be the Tribunal's fault, and that had added just 10 months in the delay of 13 years. That was not enough on its own to make the whole period unreasonable.

For both reasons, the application for summarily allowing the appeal was dismissed.

First-Tier Tribunal (TC08070): *Pacific Computers Ltd*

6.8.4 Reinstatement

A Subway franchisee appealed against assessments issued in relation to supplies of hot takeaway food between 03/06 and 09/08. Its appeal was struck out by the FTT in 2015 for failing to comply with an unless order: it had not responded to various letters about the consequences of the Court of Appeal's 2014 decision in *Sub One Ltd*, which HMRC considered left this appellant with no reasonable prospect of success.

HMRC's debt management department wrote to the appellant on 16 September 2020 seeking payment of the £151,000 outstanding from the failed appeal. The company filed an application to reinstate the appeal on 2 October. The company claimed that it had misunderstood the process in 2015 and had believed that the appeal was still ongoing until it received the debt management letter.

The judge considered the length of the delay and the reasons given, and concluded that the application to reinstate should not be granted.

First-Tier Tribunal (TC08032): *Happy Customer Ltd t/a Subway*

An adviser was appointed to make an appeal on behalf of an import agent against a post-clearance demand for £3m of import VAT. The underlying issue related to entitlement to Onward Supply Relief and the liability as importer of record. In filing the notice of appeal in December 2016, the adviser included by mistake an e-mail address that he had no access to (it had been set up for him by an IT adviser who had then disappeared, and he did not have the password). All HMRC and Tribunal correspondence was sent to this address, and the adviser was not aware of what was going on. There was also a period during which the Tribunal did not recognise him as an authorised agent for the company, so it did not send him information in any case. Although he had chased up progress in May 2017 and discovered that the Tribunal was using the wrong address, and asked for it to be corrected, correspondence continued to be sent to the wrong one. The Tribunal struck out the appeal for failure to comply with directions on 22 November 2017.

The adviser finally followed this up from his other e-mail address on 14 September 2018, and was told that the appeal had been struck out (by a letter dated 9 October 2019 but apparently arriving on 12 October 2018). On 12 October 2018 the adviser applied for permission to make a late application for reinstatement.

The FTT heard this application and granted it in April 2020. HMRC appealed to the Upper Tribunal, arguing that the FTT had erred in law in taking an approach that was more generous than the binding precedents of *Martland* and *Data Select* allowed. One of the grounds was "the FTT erred in law by failing to follow the general principle that well-intentioned incompetence, for which there is no good reason, should not usually attract relief from a sanction unless the default is trivial."

The UT (Judge Jonathan Richards and Judge Jonathan Cannan) considered the FTT reasoning in detail and agreed that it was flawed. The FTT had expressed the view that "no particular weight had to be given" to the efficient conduct of litigation and time limits being respected: that was incorrect, following the case law precedents. The UT judges decided that they had sufficient information to remake the decision; it was closely balanced, but there were factors in favour of the application. HMRC and the Tribunal had continued to use the wrong address after they had been notified; the adviser had followed up the case of his own initiative, even though nearly a year after it had been struck out, and had not been prompted to do so by the company receiving a demand for the money. The judges characterised the reasons for the delay as "understandable" rather than either "good" or "poor".

The judges decided that the mistake itself (putting the wrong e-mail address on the form) was minor, even though serious consequences flowed from it. In the balancing exercise required, denying the company an opportunity to argue its case was a disproportionate sanction; proportionality and fairness remain at the heart of the overriding objective set out in Rule 2 of the FTT Rules.

The decision of the FTT was flawed and was remade, applying the correct principle. The appeal was reinstated, arriving at the same result as the flawed FTT decision.

Upper Tribunal: *HMRC v BMW Shipping Agents Ltd*

6.8.5 Strike-out

A company objected HMRC's application to have its appeal struck out for having no reasonable prospect of success. The company had in 2011 acquired various rights relating to a film that had been intended to be produced by another company, BFS. Various supplies had been made to BFS by a Spanish company, which appeared to have charged 20% VAT (even though the Spanish VAT rate was 18% at the time), and the benefit of these supplies was transferred to the appellant company in exchange for assuming BFS's liability to pay a third party. The appellant then claimed input tax on VAT returns in 2016 for the sterling equivalent of the VAT in the supplies to BFS.

The judge explained to the director of the appellant that the acquisition by his company was not, as he thought, a "barter transaction" – it was a straightforward supply by BFS in return for the assumption of liabilities by his company. As BFS had never been registered for VAT, that supply could not give rise to input tax credit for the appellant; the supplies had also taken place more than four years before the input tax was claimed. For these reasons, the appeal had no prospect of success, and HMRC's application was granted.

The judge described it as "fortunate" that this meant it was unnecessary to try to work out the place of supply of some of the underlying intellectual property, some of which might be located outside the UK.

First-Tier Tribunal (TC08071): *MovieVentures Ltd*

In September 2017 HMRC issued a decision to a company cancelling its registration on the basis that it appeared to be registered to facilitate fraud. It had reported exports of cars, but HMRC's investigations suggested that the cars were still in the UK. The company appealed against assessments that had been raised on the basis that it did not qualify for zero-rating.

In TC07843 (September 2020), an appeal against those assessments was struck out as having no reasonable prospect of success. This followed an attempt by the company to introduce different grounds of appeal, having effectively negated its own original grounds of appeal during the correspondence.

The company applied to register for VAT again on 3 July 2020, stating that supplies in May 2020 exceeded the registration threshold (an export of a high value vehicle and the sale of a minibus to a charity). HMRC did not dispute that these supplies took place, but refused registration on the basis that an appeal against a deregistration decision was in progress. This was in fact incorrect, as the elements of the appeal that dealt with the deregistration decision had been struck out in August 2019; only the assessments themselves were still unresolved in July 2020.

The company appealed against the new decision, arguing that it was wrong in law and based on a "very serious allegation" which "not only impeaches past conduct but seeks to impeach future conduct too". At the hearing, HMRC's counsel argued that the company had chosen not to appeal against the original deregistration decision, which was taken precisely to protect the revenue against the possibility of future abuses.

Judge Alexsander considered arguments and precedents about striking out and abuse of process. In his view, the failure to appeal in 2017 had tacitly admitted that the deregistration decision was correct. That meant that the new application had to be supported by objective evidence that the risk of abuse was no longer present: it was not enough simply to state that economic activities were being undertaken.

In effect, most of the current appeal was an attempt to relitigate the 2017 decision, and that was an abuse of process. Some of the other grounds of appeal were irrelevant. In each case, the appeal had no reasonable prospect of success, so the judge struck it out.

First-Tier Tribunal (TC08110): *GB Fleet Hire Ltd*

An Irish company appealed against a decision by HMRC to refuse input tax on supplies of cables to a UK customer in a chain transaction:

(1) Supply from Spanish associate company (Spain) to PCSL (UK);

(2) Supply from PCSL (UK) to CUC (Republic of Ireland) – the appellant;

(3) Supply from CUC (ROI) to BEL (UK).

The goods moved directly from PCSL's Spanish associate to BEL in Northern Ireland. That company zero-rated its supply to PCSL, but PCSL charged UK VAT to CUC. CUC took advice and established that its

supply was outside the scope of Irish VAT, but failed to appreciate that its supply to BEL gave rise to a registration liability in the UK. It claimed back the input tax using the cross-border refund procedure. HMRC ruled that UK VAT should have been charged, so the refund procedure was not available.

CUC tried without success to collect the VAT from the customer, which had by now deregistered in the UK. It asked HMRC to allow the VAT claim on an exceptional basis, and appealed when they refused. HMRC applied to have the appeal struck out on the basis that it had no reasonable prospect of success.

The judge considered that the original ground of appeal was indeed bound to fail. However, the company's representative made extensive written submissions raising other arguments, and the judge considered these as well. They were based on attempts to move the place of supply outside the UK or rely on triangulation, and none of them succeeded.

The judge held that there was no basis in any of the company's submissions that would justify the company's failure to charge UK VAT on its supply of cables, and he struck out the appeal.

First-Tier Tribunal (TC08122): *Caracavi Utility Cables Ltd*

6.8.6 Late appeals

HMRC issued a notice of requirement to provide security to a company's business address on 21 November 2017, and to the director's home address on the following day. An appeal was brought 16 months and a day late; HMRC objected to the late appeal, which the appellant accepted was serious.

The director claimed that neither letter had arrived, but HMRC had sent them by recorded delivery. They also had a record of a telephone conversation about the notice on 4 December 2017 in which the director acknowledged that she had understood the notice and had passed it to her solicitor. The director stated that she had no recollection of this, although she accepted that the balance of probabilities suggested that it had happened.

In the intervening period, HMRC had prosecuted the director for trading without security. There had been several adjournments of the case, but eventually it had been heard in her absence after she had gone to Jamaica because her father was very ill (he died before she arrived); while she was making funeral arrangements her aunt in Jamaica also died. She became unwell and did not return to the UK until January 2020. The consequences of the criminal conviction would be very serious.

The evidence clearly showed that the director had received the original notice at her home address, even though the judge criticised HMRC for continuing to use the same business address after efforts by the director to change it (it was a post box business that closed in December 2017). The judge found as a fact that the director had not understood the notice and had passed it to her solicitor.

The judge applied the criteria for considering a late appeal from *Data Select*. The delay was serious, and the judge had decided that the notice had been delivered. However, it appeared that the director had tried

throughout to engage with HMRC; she had appointed professional advisers who appeared to have let her down by not appealing, or advising her to appeal. Following the case of *Katib*, that was not in itself a reasonable excuse for a late appeal, but in the present case, taking into account all the circumstances and in particular the serious consequences for the appellant of the criminal conviction, the judge decided that the full facts of the appeal should be heard. She therefore allowed the application to make a late appeal.

First-Tier Tribunal (TC08050): *Eunoia Initiatives Ltd*

In a dispute about whether a product was "confectionery" (standard rated) or "cakes or biscuits" (zero-rated by statute) or "flapjacks" (zero-rated by HMRC policy), a hearing took place in August 2019 in the absence of the appellant or its agent. They had made a late application for an adjournment on the basis of "new evidence that had come to light"; the application had been refused, and the decision was given in favour of HMRC.

The appellant changed agents and made a late application for the summary decision to be set aside. The Tribunal applied the tests in *Martland*. The delay was five months, which was both serious and significant. The new agent argued that the applicant had not received the previous decision or any information about it from his previous agents; they continued to assure him that the decision had been set aside and he "would get his day in court".

The judge noted the impact of the *Katib* decision: "in most cases, a litigant seeking permission to make a late appeal on the grounds that previous advisers were deficient will face an uphill task and should expect to provide a full account of exchanges and communications with those advisers." In the present application, no evidence had been put forward about the correspondence with the previous agents. The judge recognised that there would be prejudice to the appellant in not being allowed to have the decision set aside and reargued, but extending time was the exception rather than the rule, and the facts did not justify it.

In case he was wrong about that, the judge went on to consider whether the decision should in any case be set aside under Rule 38 of the Tribunals Rules. He considered the arguments put forward by the previous agents in their application for set aside, and also arguments put forward by the current agents, and could find nothing in either of them that fulfilled the conditions of Rule 38. There were no procedural irregularities, and no overriding circumstances that required the decision to be set aside in the interests of justice.

The applications were dismissed.

First-Tier Tribunal (TC08068): *Oatein Ltd*

An individual applied to make a late appeal against personal liability notices in respect of penalties for corporation tax of £78,400 and VAT of £134,000. The original assessments had been raised on a company of which he was the sole shareholder and director. The *Martland* approach was adopted, starting with the length of the delay: after considering some arguments about whether the individual had actually requested a review at the time, the judge decided that the appeal was in fact made 16 months late.

As with the earlier two cases, the argument was that the individual had been misled by his representative. The appellant was struggling with mental health issues at the time, and had relied on his accountant; nevertheless, he and his son had enquired about the progress of the matter, and were told that it was "in hand and not to worry". He only became aware of the unresolved problem when the Insolvency Service started disqualification proceedings in July 2018. He argued that he was different from *Katib* in that he had regularly followed up the matter with the accountant. HMRC argued that he had not produced any copy correspondence to give evidence of this.

Judge Anne Fairpo carried out the required balancing exercise and concluded that this was not an appropriate case for permission to be granted to bring a late appeal. The application was dismissed.

First-Tier Tribunal (TC08064): *Shafique Uddin*

Another individual applied for leave to appeal out of time against VAT and income tax assessments and associated penalties (the total amount was just over £190,000). Judge Heather Gething considered the *Data Select* and *Martland* principles:

(1) Establish the length of the delay

(2) Establish the reasons for the delay

(3) Evaluate all the circumstances of the case, which will involve a balancing exercise that will essentially assess the merits of the reasons given for the delay against the prejudice which would be caused to both parties by granting or refusing permission.

The problems had mainly arisen because the trader only spoke Mandarin and could neither read nor understand English. He had appointed advisers on recommendations and had been reliant on them, but had changed to a different firm twice when matters did not progress.

The judge considered the history of the enquiry and the trader's attempts to respond to it, and concluded that he was particularly vulnerable, a fact that HMRC must have been aware of from the outset. Although there was a not insignificant delay, she did not believe that there was much more that the trader could have done in all the circumstances. Given the balance of prejudice between HMRC freeing up time to investigate other traders, and this individual having no alternative but to declare bankruptcy, the judge concluded that the public interest lay in allowing the appeals to proceed late. The application was granted.

First-Tier Tribunal (TC08062): *Youli He*

A company appealed about 11 months late against a decision to deny a credit of £55,849 claimed in period 04/18. The company's tax agent appeared at the hearing, arguing that the delay had been due to his ill health; however, he did not provide a clear chronology to explain this, nor evidence to support it. The judge set out a history of the appeal process, highlighting numerous delays and failures by the appellant and its agent.

The decision related to costs involved in converting a care home into residential units. The tax agent appeared to believe that the classification of the care home as "commercial property" would justify zero rating on disposal as a "non-residential to residential conversion"; HMRC held that

the previous use within the last 10 years was residential, so any disposal would be exempt.

The judge applied the *Martland/Denton* process. It was clear that the delay was both significant and serious. The agent had not given any good reason for delaying the filing of the appeal. Although he had been ill, he was working at various points during the delay period and could have made the appeal. It appeared rather that he continued to hope to resolve the matter in correspondence, and this was not a good reason for failing to observe the statutory deadline. The directors of the company did not provide any evidence or argument to show that they could "distance themselves" from the failure of the tax agent. The application to make the appeal late was dismissed.

First-Tier Tribunal (TC08115): *Westmore Group*

6.8.7 Disclosure

A company appealed against refusal of input tax claims totalling just under £400,000 for its return periods from 05/16 to 11/16. The claims related to purchases of face-value gift vouchers from Harrods that it offered for sale. The company applied for an order requiring HMRC to produce information and documents that they had obtained from third parties in relation to their enquiry; HMRC were willing to provide redacted copies, but refused to provide unredacted copies on the basis that the third parties had only agreed to produce the information on the basis of confidentiality.

Judge Brooks examined the law on confidentiality as it applied to HMRC, as well as GDPR and the Tribunals Rules. The decision itself is quite brief: the judge was satisfied that HMRC were not prohibited from disclosing information "for the purpose of, or in connection with, legal proceedings". He issued a number of directions to progress the matter further.

First-Tier Tribunal (TC08041): *Lucky Technology Ltd*

6.9 Other administration issues

6.9.1 Finance Act 2021

The FA 2021 received Royal Assent on 10 June. Among the changes to the Bill at report stage were the insertion of four new clauses and a schedule:

- Clause 95 (Distance selling: Northern Ireland);
- Clause 96 (Distance selling: power to make further provision);
- Clause 97 (Supply of imported works of art etc.);
- Clause 98 (Continuing effect of principle preventing the abuse of the VAT system);
- Schedule 18 (VAT and distance selling: Northern Ireland).

https://bills.parliament.uk/bills/2835

6.9.2 Consultation on avoidance disclosures

In May, HMRC launched a consultation on draft regulations to enable them to act more quickly where promoters fail to provide information on avoidance schemes, and to inform taxpayers at an earlier stage in cases where the department suspects that an avoidance scheme is being sold. The consultation closed on 13 June; the regulations, which cover the DOTAS, DASVOIT and POTAS regimes, are expected to take effect on 9 September 2021.

The changes to the regulations follow on from substantive amendments to the disclosure rules included in the Finance Act 2021.

www.gov.uk/government/consultations/draft-regulations-dotas-dasvoit-and-potas-regimes

6.9.3 Consultation response

The Law Society has responded to HMRC's consultation on a range of new measures to disrupt the business models relied on by promoters of tax avoidance. The government is proposing four new measures:

- a new power for HMRC to seek a court order to secure a promoter's assets to pay tax avoidance regime penalties, where the promoter has moved or hidden those assets in order to avoid paying penalties;
- additional penalties for UK entities who are involved with an offshore promoter;
- winding-up orders targeting companies involved in promoting or enabling tax avoidance and the power to disqualify directors at the earliest point possible;
- powers for HMRC to publish information about avoidance schemes that it is inquiring into and to correct false statements, to help taxpayers avoid or exit such schemes.

The Law Society supported the government's objectives but wanted to make sure that the measures were appropriately targeted and their use would be properly supervised.

www.lawsociety.org.uk/en/campaigns/consultation-responses/clamping-down-on-promoters-of-tax-avoidance

6.9.4 Gig economy

The OECD has published a report on how digital platforms can play an important role in the application of VAT (or GST) policies in the sharing and gig economy. The report:

- analyses the key features of the sector and its main business models;
- identifies the challenges it creates for VAT/GST collection and administration; and
- presents a range of measures to address these challenges.

The report includes detailed guidance on effective solutions for platforms in providing information to tax authorities and in collecting the turnover taxes on the activities that they facilitate. This builds on the OECD's Model Rules that require digital organisations to collect information on

the income realised by those offering accommodation, transport and personal services through their platforms and to report that information to the tax authorities.

www.oecd.org/tax/consumption/digital-platforms-have-an-important-role-to-play-in-value-added-tax-policy-in-the-sharing-and-gig-economy.htm

6.9.5 Liability for VAT fraud

A number of companies entered into transactions connected with fraudulent trading in emissions trading allowances. After HMRC had refused credit for input tax and the companies entered insolvent liquidation, their liquidators sued RBS and a subsidiary of the bank (RBS SEEL), arguing that breaches of fiduciary duty by the directors had been dishonestly assisted by traders employed by the bank. The claimants alleged dishonest assistance and knowing participation in fraudulent trading. Two traders employed by RBS SEEL caused RBS to buy very large quantities of EUAs from an intermediary called CarbonDesk Ltd. It was alleged that, against a background of rumours of VAT fraud in the emissions trading market, the two traders had clear suspicions from 17 June 2009 about the legitimacy of the very significantly increased volume and nature of the very profitable trading which they were doing with CarbonDesk; but that instead of raising their suspicions with the compliance department at RBS SEEL or with CarbonDesk directly (as the traders later contended that they did), in fact the two traders dishonestly turned a blind eye and carried on trading regardless.

Early in 2020, the High Court decided for the claimants. On the evidence, by 24 June 2009, any reasonably attentive trader would have had the most acute suspicions about CarbonDesk's business, and how it was obtaining a seemingly unending source of large volumes of EUAs to sell to RBS. The traders had not asked questions of CarbonDesk because they had had a clear suspicion that the EUAs which they were being sold were connected with fraud, but they had decided together that it would be best not to ask and thereby risk learning the truth. By continuing to trade with CarbonDesk thereafter, they had acted dishonestly. The bank and its subsidiary were liable for dishonest assistance and knowingly being party to fraudulent trading from 26 June 2009 to 6 July 2009.

The bank appealed to the Court of Appeal against the findings of vicarious liability, and the claimants cross-appealed, arguing that the liability ought to have covered a longer period (from 17 June). The main grounds of appeal related to criticism of the way the judge had gone about his task: the defendants alleged that he had ignored key documents and had effectively made up his mind that the traders were dishonest before he considered the defence submissions to the contrary. A significant part of the problem was that the HC judgment had been handed down on 10 March 2020, when the trial had taken place over five weeks in June and July 2018. In the light of this delay, the defendants argued that the judgment ought to be re-examined by the Court of Appeal.

There was a further ground of appeal put forward by RBS SEEL alone, that the judge had misinterpreted the legal effect of the agreement between the parties and it should not be held vicariously liable for any dishonest actions of the traders; RBS's representative accepted that this

was the case, but argued that it made no difference to the decision, and the claimants agreed with that.

The cross-appeal contended that the judge should have found that the dishonesty covered at the very least the trading on 25 June, and also that the concerns should have been raised with the compliance officer as early as 18 June, but they were not.

The CA commented that a delay of the magnitude in the present case was "inexcusable". The judgment says "It should not have happened and should not have been allowed to happen, particularly in a case where there were allegations of dishonesty, and the reputations and future employment prospects of the individuals concerned were at stake. Nevertheless, it is quite clear from the authorities that delay alone will be insufficient to afford a ground for setting a judgment aside. However, the delay will be an important factor to be taken into account when an appellate court is considering the trial judge's findings and treatment of the evidence, and the appellate court must exercise special care in reviewing the evidence, the judge's treatment of that evidence, his findings of fact and his reasoning."

The judges concluded that the correct course of action was to remit the case to the High Court to be re-tried by a different judge. This was a "highly unpalatable prospect", but it was not possible for the CA to tell what the right decision would be, based on the flaws in the judgment arising from the delay. The judges recognised that this would lead to an even longer distance of time from the relevant events.

The claimants' cross-appeal did not need to be considered in such detail, because the retrial would necessarily consider the period (if any) that was covered by the dishonesty. On the other hand, the specific appeal by RBS SEEL was considered and dismissed. The judge's approach to the question of vicarious liability could not be impugned.

Court of Appeal: *NatWest Markets plc and another v Bilta (UK) Ltd (in liquidation) and others*

6.9.6 Confiscation order

A man who was sentenced to 9 years for VAT fraud in March 2018 has been ordered to repay £1.1m within three months, or face a further seven years in prison and still owe the money, with interest. The fraud was based on forged purchase invoices to back up large input tax claims.

www.mynewsdesk.com/uk/hm-revenue-customs-hmrc/pressreleases/jailed-tax-fraudster-ordered-to-repay-1-pounds-1-pence-million-3095628

6.9.7 Director's ban

The Insolvency Service publicised a ban of 11 years from acting as a director imposed on an individual who had been the sole director of a company that had gone into liquidation owing substantial sums to HMRC. Proper records had not been kept, in spite of the size of the operation (£37 million had passed through the bank account in the 11 months of the company's existence). The company played an active role as an umbrella company in a tax avoidance scheme. The length of the ban reflected the individual's lack of cooperation as well as the failure to discharge his responsibilities as a director.

www.gov.uk/government/news/11-year-ban-for-payroll-boss-in-tax-avoidance-scheme