VAT UPDATE
JULY 2023

Covering material from April – June 2023

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1. INTRODUCTION

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

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

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

1.1 Appeals pending

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

The latest update appeared on 21 June 2023.

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

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

- *Conservatory Roofing UK Ltd*: Upper Tribunal remitted case to FTT to consider further relevant information not taken into account when dismissing company's appeal.
- *Hippodrome Casino Ltd*: HMRC to appeal the FTT decision in the company's favour on partial exemption (listed for Upper Tribunal in October 2023).
- *Hotel La Tour Ltd*: HMRC have been granted permission to appeal the FTT decision in the company's favour on the deductibility of the incidental costs of selling a subsidiary (listed for Upper Tribunal in June 2023).
- *Innovative Bites Ltd*: HMRC have been granted permission to appeal the FTT decision in the company's favour to the Upper Tribunal (hearing listed for November 2023).
- *Sintra Global Inc & Parul Malde*: HMRC have been granted leave to appeal to the Upper Tribunal against FTT's decision to allow appeals against various assessments and penalties relating to alleged inward diversion fraud (listed for hearing July 2023).
- *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 (no longer on HMRC's list).

- *The Prudential Assurance Company Ltd*: taxpayer has been granted leave to appeal to the CA against the UT's decision in favour of HMRC's appeal on the interaction of the time of supply and grouping rules.
- *Wm Morrison Supermarkets plc*: the company's appeal on the liability of cereal bars was allowed by the UT and remitted to the FTT for reconsideration.

1.1.1 Decisions in this update

None of the decisions in this update have previously appeared on HMRC's list of outstanding appeals. It has been suggested that HMRC have applied for leave to appeal the FTT's decision in favour of the taxpayer in *Yorkshire Agricultural Society* (section 2.3).

2. OUTPUTS

2.1 Scope of VAT: linking supplies to consideration

Nothing to report.

2.2 Disbursements

Nothing to report.

2.3 Exemptions

2.3.1 Education arguments

Three different providers of higher education courses were regarded by HMRC as making taxable supplies because they were not "eligible bodies" for the purposes of VATA 1994 Sch.9 Group 6. They appealed, arguing that the VATA provisions did not properly implement PVD art.132, and also putting forward a number of more detailed contentions in support of the direct effect of the EU legislation. The period under review was December 2012 to August 2017.

Judge Jonathan Cannan considered the arguments in principle, leaving aside questions of quantum. He noted the difference between higher education (degree courses) and further education (post-secondary school but not involving degrees), and summarised the supplies made by the three companies (all of which were in the same group) as follows:

1. SPIC operated a further and higher education college in London providing, amongst other courses, a range of HNCs and HNDs in business management, tourism and hospitality, technology and health and social care.

2. LCCA was a provider of further and higher education courses in fashion, visual arts, media, business and hospitality. Until 2016 it was a school of another company in the GUS Group. From 2016 it operated in partnership with South Thames College and Walsall College, both of which are providers of further and higher education.

3. IMAN offered undergraduate and postgraduate degree courses as well as HNC and HND courses, professional programmes and certain English language courses. It was divided into four schools: an accountancy school, a business school, an English language school and a vocational school. Until 2016, IMAN also provided courses in collaboration with the University of Wales ("UoW"), London Metropolitan University ("LMU") and Grenoble Graduate School of Business ("Grenoble").

The issues varied between the appellants. The arguments put forward were:

1. Were the appellants entitled to rely on the direct effect of Article 132 PVD? This is a pure question of law. In broad terms, the appellants say

that the domestic provisions wrongly define eligibility for exemption by reference to the type of organisation, for example universities, rather than the nature of an organisation's objects. Further, they say that the UK has implemented Article 132 in a way which breaches the principle of fiscal neutrality. In broad terms, the appellants say that they made similar supplies to universities, colleges of universities and FECs but are being treated differently for VAT purposes.

2. If the appellants were entitled to rely on the direct effect of Article 132, did their supplies qualify for exemption because the appellants have similar objects to bodies governed by public law which provide education?

3. Were SPIC and LCCA entitled to exemption in any event, pursuant to Item 5B? Those appellants say that where they supplied designated courses for students who were entitled to student loans, some of those supplies fell within the terms of Item 5B. In particular, the consideration payable for those courses was ultimately a charge to funds provided by the Secretary of State.

4. Was IMAN an "eligible body" within Note 1(b) on the basis that it was a college of a UK university?

5. IMAN was an "eligible body" within Note 1(f) on the basis that it provided some teaching of English as a foreign language. Was it therefore entitled to exemption for all its supplies of education?

The appellants' counsel and the judge dealt with issues (1) and (2) together as essentially relating to the application of fiscal neutrality. The judge began by reviewing the regulatory regime for higher education and the main ways in which it is funded. The appellants were "alternative providers" (APs) that did not fall within the same regulatory regime as universities. To qualify for student loan funding, their courses have to be designated each year in accordance with a quality assessment. The analysis of the system is detailed and will be useful to anyone who needs to research the subject.

The judge also examined the funding framework involving the payment for courses by means of student loans. This was particularly relevant to the argument that the courses were effectively paid for by the government – "ultimately a charge to funds provided by the Secretary of State". The rules requiring approval of courses were partly to protect the students, and partly to ensure proper use of public funds.

The decision goes on to analyse the activities of the different colleges and their relationships with other providers of education, in particular universities, before examining the arguments.

Fiscal neutrality

The fiscal neutrality argument was that the courses supplied were sufficiently similar to those provided by exempt universities to directly compete with them. The PVD envisages exemption applying to bodies which have similar objects to those governed by public law, but the conditions for an eligible body in Group 6 do not refer to the objects of the organisations.

The judge summarised a number of points on which he considered the parties were in agreement:

(1) If Group 6 Schedule 9 does not properly implement Article 132(1)(i) then the appellants can rely on the direct effect of the PVD.

(2) The appellants make supplies of education and have similar educational aims to universities, colleges of universities and FECs, which all fall within the definition of "eligible body" for the purposes of Group 6.

(3) The reference in Article 132(1)(i) to "bodies governed by public law" has a specific and very narrow meaning. Such bodies must be part of the public administration of the state. UK universities are not governed by public law because they are legally independent and autonomous institutions (see Cambridge University v HM Revenue & Customs [2009]). The reason why UK universities, colleges of universities and FECs are exempt from VAT on their supplies of education to students is because HMRC has recognised them as having similar objects to bodies governed by public law.

(4) The exemption must be interpreted strictly, but also in a way which is consistent with its objective. The objective of the exemption is to facilitate access to supplies of education by certain bodies, avoiding the increased cost that would result if those supplies were subject to VAT (see Minister Finansów v MDDP sp z oo Akademia Biznesu sp komandytowa Case C-319/12).

(5) Activities which are carried out on a for-profit basis may still be exempt. Parliament has chosen not to limit exemption to non-profit making institutions (See Lord Kitchin in SAE Education Ltd v HM Revenue & Customs [2019]).

(6) Institutions must fulfil the condition of pursuing objects similar to those of bodies governed by public law if their supplies of education are to be exempt (See MDDP at [35]). This may be described as a "supplier condition".

(7) HMRC has a discretion in laying down conditions by reference to which organisations will be recognised as having similar objects to bodies governed by public law. Member states are given such a discretion because they may have very different education systems (see Advocate General Kokott in MDDP at [19]).

(8) HMRC does not have an unfettered discretion in identifying which bodies should be treated as having such objects. Its discretion is limited by reference to the principles of equal treatment and fiscal neutrality (see MDDP at [38] and SAE at [45]).

(9) The principle of fiscal neutrality precludes economic operators carrying out similar transactions from being treated differently (see JP Morgan Fleming Claverhouse Investment Trust plc v Revenue and Customs Commissioners (Case C363/05)). It may be engaged where the supplies in question are sufficiently similar from the point of view of the consumer, where differences between them do not have a significant influence on the choice of the consumer and where they meet the same needs of the consumer (see Rank Group Plc v Revenue and Customs Commissioners (Joined Cases C-259/10 and C-260/10)).

Although it was agreed that HMRC and the UK government did not have unfettered discretion in recognising or refusing to recognise particular

suppliers, there were issues between the parties as to how that discretion was limited by the principle of fiscal neutrality. The judge noted some precedents relied on by HMRC (*Finance & Business Training Ltd* [2016] and *Essex International College Ltd [2018]*) and distinguished them on the basis that those appellants had not produced convincing evidence that their courses were sufficiently similar to those provided by exempt suppliers. The judge considered that the present applicants might satisfy that condition.

However, the judge also considered that the regulatory regime for universities was significantly stronger than the regime applicable to alternative providers, even though they had to apply for designated status for their courses. The differences were not simply a matter of detail but were a matter of degree and substance. The focus is not only on whether the supplies are similar from the perspective of the consumer, but also on whether the suppliers are comparable. In *Rank* and *Pro Med* the CJEU was solely concerned with the perspective of the consumer because the exemption in those cases did not involve a "supplier condition".

In the judge's view, the exclusion of the appellants from exemption by virtue of Note 1(b) did not breach of the principle of fiscal neutrality. The UK was entitled to recognise universities and their colleges as having similar objects to bodies governed by public law. That was established by the Court of Appeal in *FBT*. The regulatory regime for DAPs and university title did not apply to the appellants. As such, they were not in a comparable position to a university or a college of a university, unless it can be said that they are a college of a university. Similarly, Note 1(c) extended exemption to charities, but none of the appellants were charities; it was clearly within the UK's power to apply such a restriction under art.133(a) PVD.

State funding

This argument turned on the fact that the courses are effectively paid for at the time by the government in providing student loans via the Student Loans Company, and may in due course be a permanent charge on government funds if the loan is written off without being repaid.

The judge considered that there was a fundamental difference between a present liability to fund the courses and a contingent liability to fund the courses. At the time of the supply, which is when exemption has to be considered, the liability of the Secretary of State is only contingent. That was not enough to bring the supplies with Item 5B.

College of a University

Some APs have in the past succeeded in gaining exemption because of their close links with universities, effectively acquiring the benefit of the university's eligible status for their own courses. The judge quoted the conditions for this to apply set out by Lord Kitchin in *SAE Ltd*:

(i) whether they have a common understanding that the body is a college of the university;

(ii) whether the body can enrol or matriculate students as students of the university;

(iii) whether those students are generally treated as students of the university during the course of their period of study;

(iv) whether the body provides courses of study which are approved by the university; and

(v) whether the body can in due course present its students for examination for a degree from the university.

He considered each of the five factors in turn as they applied to IMAN in its relationship with UoW and LMU. In respect of UoW, (i) was not present and (iii) was not particularly applicable to the circumstances of that university, but (ii), (iv) and (v) were present. However, the UoW courses were only a small proportion of IMAN's courses. The judge was not satisfied that there was such a level of integration that IMAN could be regarded as a college of UoW. The relationship with LMU was "more difficult to characterise", but the conclusion was the same: on balance, the judge was not satisfied that it could be regarded as a college of that university.

Item 1(f)

It was common ground that IMAN qualified for exemption in respect of Teaching English as a Foreign Language. It argued that its status as an "eligible body" by reason of supplying TEFL courses should extend to the whole of its educational supplies. This was because Parliament had recognised TEFL providers as "having similar objects to bodies governed by public law which supply education".

The taxpayers' counsel accepted that the decision of the Court of Appeal in *Pilgrims Language Courses Ltd* [1998] was "technically binding" in relation to the proposition that a TEFL provider was only exempt in relation to TEFL courses, and not in relation to other educational supplies. Her attempts to persuade the judge that subsequent authorities could override that precedent failed.

The overall conclusion was that all the appellants failed on all the grounds advanced.

First-Tier Tribunal (TC08813): *St Patrick's International College Ltd and others*

Lecture 1

2.3.2 Change to healthcare exemption

HMRC have issued a Brief and updated the relevant Notice to reflect the change, announced at the Spring Budget 2023, in relation to the VAT treatment of medical services carried out by non-registered staff directly supervised by pharmacists. From 1 May 2023 such supplies are exempt. This change brings the VAT treatment of pharmacists in line with other registered health professionals providing medical services to the public (e.g. opticians).

Revenue and Customs Brief 5/2023; *Notice 701/57*

2.3.3 Fundraising exemption

The Yorkshire Agricultural Society (YAS) is a charitable company that organises and runs the annual Great Yorkshire Show. It appealed against a decision that the supply of admission to the 2016 and 2017 shows were taxable, rather than exempt as relating to a fund-raising event under

VATA 1994 Sch.9 Group 12 item 1, read compatibly with PVD articles 131 and 132.

Judge Christopher McNall concluded that the assessments appealed against were out of time. However, he also examined the substantive issue in detail. He noted that HMRC offered "very little by way of substantive challenge" to the taxpayer's evidence, and the officer concerned gave no evidence himself, even though HMRC had said that the decision-maker would give evidence.

The starting point appears to have been a voluntary disclosure on 30 April 2020, claiming back the net overpayment of output tax in relation to the 2016 show on the basis that it should have been treated as exempt. The claim was for £201,949 (being made up of £285,471 over-declared output tax minus £82,022 over-claimed input tax). On 24 November 2020, YAS confirmed to HMRC that it had treated the 2017 show income as exempt.

HMRC refused the repayment claim by letter of 7 May 2021, and YAS appealed to the Tribunal on 17 May. On 27 May, HMRC wrote to YAS asking them to calculate the VAT due for the periods from 1 April 2017 to 31 March 2021. HMRC raised an assessment for just over £90,000 on 5 December 2021, relating to the return period 12/17. This was upheld after a departmental review on 27 May 2022. That was also appealed to the Tribunal on 13 June. Further protective assessments were issued for later periods and stood over until the determination of the appeal.

The judge examined the evidence and made a number of findings of fact about the objects of YAS and the way the annual show is run. YAS accepted that the show was not "promoted primarily for the raising of money", as required by the VATA, but the records showed that it was always intended to generate a surplus and that was used for the society's charitable objects. The fliers and tickets did refer to fund-raising, carrying the words "*The Great Yorkshire Show raises funds for the Yorkshire Agricultural Society to help support farming and the countryside*".

Time limit

One interesting detail of the time limit issue is that YAS argued that there was a legitimate expectation that HMRC would apply the time limit as set out in s.73(6) based on the date HMRC notified the assessment and not the date on which it was made. This has been the subject of controversy in the past; the legal test has been held to be that an assessment is "made" when an officer records it in HMRC's internal records, but HMRC do not normally apply the rules in that way.

It was accepted that the relevant time limit was "12 months from knowledge of the facts". HMRC relied on YAS's representatives' letter of 5 May 2021 as "starting the clock" and thereby validating an assessment raised within 12 months of that date. The judge pointed out that HMRC's reliance appeared to reverse the statutory test: the letter provided no new information, and HMRC appear to have concluded from the absence of anything new that they were justified in making an assessment. HMRC's departmental review "glides over this, without any real substantive argument"; no new information was identified by HMRC's representative before the FTT.

This meant that the failure to call the assessing officer to give evidence fatally undermined HMRC's case. The officer might have been able to explain the information that was required to raise the assessment, but HMRC had taken a positive "litigation decision" not to call him. The assessment was therefore out of time.

Substantive issue

The judge noted the conditions for exemption in Group 12 Item 1, all of which must be satisfied:

The supply of goods and services by a charity in connection with an event:

(a) that is organised for charitable purposes by a charity or jointly by more than one charity,

(b) whose primary purpose is the raising of money, and

(c) that is promoted as being primarily for the raising of money.

This is based on PVD art.132(1)(o):

The supply of services and goods, by organisations whose activities are exempt pursuant to points (b), (g), (h), (i), (l), (m) and (n), in connection with fundraising events organised exclusively for their own benefit, provided that exemption is not likely to cause distortion of competition.

HMRC argued that this should be interpreted "strictly", and therefore restrictively. The judge disagreed, taking the test set out by the CA in *Expert Witness Institute* [2001] and approved in *Insurancewide.com* [2010]:

"*A 'strict' construction is not to be equated, in this context, with a restricted construction. The court must recognise that it is for a supplier, whose supplies would otherwise be taxable, to establish that it comes within the exemption, so that if the court is left in doubt whether a fair interpretation of the words of the exemption covers the supplies in question, the claim to the exemption must be rejected. But the court is not required to reject a claim which does come within a fair interpretation of the words of the exemption because there is another, more restricted, meaning of the words which would exclude the supplies in question.*"

HMRC disputed both conditions (b) and (c). The judge reviewed a number of precedents and found that the fundraising exemption has been interpreted as requiring that raising funds is a significant purpose of the event, rather than an incidental outcome, but that it did not have to be "the" primary purpose. The judge was critical of HMRC's guidance on the matter, and also questioned why HMRC had not accepted the wording on the tickets and fliers as showing the purpose of the show. He found as a fact that the show had two purposes, fundraising and education, neither of which predominated.

YAS relied on HMRC dropping a similar argument in relation to a show run by the Westmorland County Agricultural Society Ltd, where HMRC withdrew an assessment without proceeding to a hearing in December 2020. HMRC had not given any reasons for withdrawing from that litigation; it appeared to follow from the receipt of a witness statement from that society's chief executive which, the judge noted, was very similar to the evidence put forward by YAS. The judge commented that

there was some attraction in this argument, but he did not know enough about that other case (without a Tribunal decision to read) to regard them as sufficiently similar. He declined to follow the EU principle of "equal treatment" in relation to the Westmorland show.

The key question, then, was whether the word "primarily" in the UK legislation was required or allowed by the PVD. It is not mentioned there: the only condition is the prevention of likely distortion of competition. In the 2018 *Loughborough Students Union* case, FTT Judge Peter Kempster had concluded that the word was ultra vires, and the *Marleasing* principle required that the UK legislation should be read and applied as if it was not there. The judge considered the principle and other precedents and came to the same conclusion.

The appeal was therefore allowed, both on the time limit issue and on the substantive issue.

First-Tier Tribunal (TC08803): *Yorkshire Agricultural Society*

Lecture 2

2.4 Zero-rating

2.4.1 Beverages

A company appealed against HMRC's refusal of a voluntary disclosure reclaiming £80,730 in output tax charged for periods 06/17 to 12/19. The company's product was "turmeric shots"; it had accounted for output tax on sales, but now contended that the product was "food" and was therefore zero-rated.

Judge Geraint Williams first noted that the company had complied with an extension of the 30-day time limit for making appeals that was introduced during the pandemic. He accepted that the appeal had been made in time.

The key question was whether the "shots", which were liquid, were a "beverage" and therefore excluded from zero-rating. There are a number of well-known cases on the subject, in particular *Bioconcepts Ltd* [1993] in which the following description was first formulated:

Its meaning in ordinary usage covers drinks or "liquors" that are commonly consumed. ... Liquids that are commonly consumed are those that are characteristically taken to increase bodily liquid levels, to slake the thirst, to fortify or to give pleasure.

Subsequent decisions have confirmed, if such confirmation were required, that the test in *Bioconcepts* is not an exhaustive test and that the word "beverage" is to be given its ordinary English language meaning.

In *Innocent Ltd*, Judge Mosedale asked HMRC's representative if HMRC have a definition of beverage. She replied that "a 'good working description' would be that a beverage is the kind of drink that one might commonly offer a guest. A soup would not be offered as a drink. Liquid medicine or a dietary supplement would not be offered to a guest as a drink. But she thinks, if the host had some in the house, he would offer a smoothie to a guest as a drink."

In *The Core (Swindon) Ltd*, the FTT considered that it was relevant to consider:

(1) How is the product marketed …

(2) Why it is consumed by the customer … and

(3) What is the use to which it is put …?"

This was upheld by the Upper Tribunal, overriding HMRC's objection that it introduced a subjective test. The views of the supplier and consumer were relevant in deciding what the product actually was (in that case, a meal replacement), as confirmed by the actual use to which it was put.

The judge then considered the nature of the product. There are three versions ("original", raw turmeric and ginger, and raw turmeric and beetroot); a discontinued line (raw turmeric and coconut) was also part of the appeal. The manufacturing and packaging were described, and the nature of the business, jointly owned by the former footballer Thomas Robson-Kanu and his father. Robson-Kanu emphasised that there were no conclusively proven medical benefits, but he himself credited his long-term health and ability to return pain-free after injury to his daily consumption.

The company's argument was that the product did not meet the various tests of "beverage" formulated in previous cases. It would not be given to an unexpected guest; it was consumed for its nutritional value, not for any of the reasons given in *Bioconcepts*. The judge said he could manage no more than a sip before requiring some water to take away the taste; Robson-Kanu admitted that it was bitter and an acquired taste.

HMRC's argument simply restated their view that the shots met the *Bioconcepts* definition. One of the key disagreements was over the meaning of "to fortify" – HMRC considered that the shots were clearly intended to have that effect. Their argument also emphasised the multi-factorial approach that the FTT and UT said was necessary in *The Core*, and submitted that, from an all-round perspective (taste, texture, manufacturing technique, marketing and use) it was clear that the shots were consistent with many of the beverage hallmarks and should be assessed for VAT on that basis.

Even though the judge quoted the comment from *Bioconcepts* that "a matter of classification is not one calling for or justifying over-elaborate, almost mind-numbing legal analysis. It is a short practical question calling for a short practical answer", he nevertheless went through the tests in turn and concluded:

- the shots were "a drinkable liquid commonly consumed";
- a consumer would choose an alternative liquid of greater volume with a lower unit cost if their purpose was to increase bodily liquid levels;
- a consumer would choose a more pleasant tasting liquid of greater volume with a lower unit cost if the purpose of consumption were to slake thirst;
- "fortify" suggested a sense of immediate effect, which was absent – the benefits would be felt over a number of weeks or months;
- the Shots are not commonly or principally drunk for pleasure but for the claimed long-term health and wellbeing benefits;

- it would be most unlikely that a customer would offer one of the expensive shots, acquired by regular subscription, to an unexpected guest;
- the marketing of subscriptions was unlike most other beverages with which HMRC said the product competed.

For all these reasons, the judge concluded that the shots should be zero-rated as a food and not excluded as a beverage. The appeal was allowed.

First-Tier Tribunal (TC08792): *Innate-Essence Ltd (t/a The Turmeric Co)*

Lecture 3

2.4.2 Updated Notice

HMRC have updated Notice 708/6 *Energy-saving materials and heating equipment* to add guidance on the extension of the zero rating of the installation of energy saving materials installed in residential accommodation to Northern Ireland from 1 May 2023 to 31 March 2027).

Notice 708/6

Lecture 4

2.4.3 Article

In an article in *Taxation*, Mike Thexton reviews some of the stranger cases that have concerned the zero-rating of food, and concludes that there is no rational basis for the UK law: it is frozen in time in 1973 because the UK was not allowed to extend zero-rating and there was no political will to narrow it. It could now be reformed on rational lines, following Brexit.

Taxation, 6 April 2023

2.4.4 Digital publications

HMRC have issued a Brief stating that they will write to those traders who submitted claims for repayment of output tax on digital publications supplied before 1 May 2020 following on from the *News Corp* case. As the Supreme Court confirmed in February 2023 that the "standstill provision" meant that digital publications remained standard rated until the law was changed with effect from 1 May 2020, HMRC will ask for confirmation of whether the traders with outstanding appeals or claims wish to pursue them further. Presumably there will be very little benefit in doing so, given the terms of the Supreme Court decision.

Revenue and Customs Brief 06/2023

2.4.5 Consultation response

The Chartered Institute of Taxation has responded to HMRC's consultation "VAT energy saving materials relief – improving energy efficiency and reducing carbon emissions". The CIOT has made specific comments in relation to the possibility of VAT relief for battery storage, and more general points about the difficulties that arise for traders when installation of energy-saving materials is part of a larger building project. The CIOT recommends that guidance is made clearer so that traders can be more confident about whether the zero rate can be applied to that part of the work that qualifies; there could also be a "statutory carve-out" (as discussed in the *Talacre Beach Caravan Sales* case) or possibly the suspension of the *Card Protection Plan* principles in this area in order to achieve the government's objectives of incentivising such installations by giving VAT relief.

https://www.tax.org.uk/ref1106

Lecture 4

2.5 Lower rate

Nothing to report.

2.6 Computational matters

2.6.1 Consultation response

The CIOT has published its comments on the draft regulations on VAT provisions for drink deposit return schemes (DRS). The CIOT is broadly in favour of the regulations and considers they will be readily understood by tax advisers and will achieve the stated objective of encouraging return of single-use containers for recycling rather than putting them in landfill.

The new rules are introduced by clause 314 Finance (no.2) Bill 2023, which inserts new sections 55B to 55D into the VAT Act, and the draft regulations will form regs 75A to 75K and 90ZA of the 1995 General VAT Regulations. The Scottish Government intends to introduce its DRS on 1 March 2024; the English scheme is intended to launch on 1 October 2024. The regulations will apply to the whole of the UK, but only once a DRS has been introduced in that jurisdiction.

The essence of the scheme is that deposit amounts will be excluded from the charge to VAT at all stages of the supply chain except for the first. The first supplier will be required to account for output tax on deposit amounts received and not repaid; presumably the calculation of this amount will be provided by the scheme administrator.

https://www.tax.org.uk/ref1118;
https://www.gov.uk/government/consultations/draft-regulations-vat-provisions-for-drink-deposit-return-schemes;
https://publications.parliament.uk/pa/bills/cbill/58-03/0276/220276v2.pdf

It has subsequently been announced that the deposit return scheme will be deferred until 2025 to allow manufacturers more time to prepare.

Lecture 5

2.7 Discounts, rebates and gifts

Nothing to report.

2.8 Compound and multiple

Nothing to report.

2.9 Agency

2.9.1 TOMS

A Polish company acted as a "hotel services consolidator", which involved offering business customers the possibility of booking accommodation facilities in hotels and other similar establishments located in Poland and abroad. It provided no facilities itself, but purchased them and sold them on its own name. Sometimes it also provided advice on available choices and help with travel arrangements, but usually it simply sold the accommodation on at a mark-up to represent its transaction fee.

The tax authority ruled that the company was not entitled to apply the margin scheme, as it was not selling a "package" of more than one service. The Polish court at first instance allowed the taxpayer's appeal, but the Supreme Court referred questions to the CJEU, noting that precedent cases suggested that the purchase and resale of accommodation on its own could be subject to the margin scheme in PVD articles 306 to 310. It also suggested that the principal of neutrality required that accommodation sold with and without other services should be taxed in the same way.

The CJ noted that the purpose of the special scheme was to reduce the difficulties that would otherwise be posed by the different treatments for place of supply, taxable amount and input tax deduction that apply to the different parts of a package of supplies. However, to treat "accommodation on its own" differently from "accommodation in a package" would create a more complex system, and would make the treatment of the supplies of accommodation dependent on the existence of other supplies.

The company's supplies were covered by the special scheme, regardless of the importance or absence of ancillary services.

CJEU (Case C-108/22): *Dyrektor Krajowej Informacji Skarbowej v C. sp. z o.o., in liquidation*

Note that, in the UK, "wholesale supplies of travel services" (i.e. to other businesses which will sell them on rather than consuming them) may be excluded from TOMS at the option of the business, in accordance with HMRC's view that they are not covered by the scheme. This is probably not in accordance with EU law, but the fact that *Notice 709/5* gives traders the option (at section 3.2) means that it is unlikely to cause a problem.

Notice 709/5

Lecture 6

2.10 Second hand goods

2.10.1 Cars for parts

A Belgian company bought scrapped vehicles from insurance companies and sold them to third parties for retrieval of usable spare parts. The Belgian authorities ruled that the sale for parts did not qualify for the

margin scheme; even though no VAT would be incurred on the purchase, output tax was due on the whole of the sale consideration.

The Belgian court dismissed an appeal, noting that the previous CJEU decision (*Sjelle Autogenbrug* (Case C-471/15)) concerned a different situation: the dealer bought cars and extracted the parts itself before selling them. As the PVD required that second-hand goods could be reused after the margin sale, the court did not consider that the sale of "wrecks" could qualify. The Belgian appeal court decided to refer a question to the CJEU.

The CJ confirmed that PVD art.311(1)(1) specifies that "second-hand goods" means "movable tangible property that is suitable for further use as it is or after repair". These insurance write-offs could not be repaired, so they did not appear to meet the definition. However, the CJ considered that the reuse of parts was within the objectives of the margin scheme. As long as the wreck included some parts that could be reused, and it was the intention of the purchaser to reuse them rather than simply scrapping the vehicle, the sale would be within the margin scheme.

The CJ noted that including the intentions of the purchaser (to extract parts for reuse) in determining the VAT treatment was normally contrary to the objectives of the VAT system; however, it would be possible for the referring court (and presumably the tax authorities in future) to take into account objective factors such as the presentation and state of the vehicles, the subject matter of the contract, the price for which those vehicles were sold, the method of charging or the economic activity of the person who acquired those vehicles.

CJEU (Case C-365/22): *IT v Etat belge*

Lecture 7

2.10.2 Northern Ireland second hand car scheme

HMRC have published a Notice made under the *Value Added Tax (Margin Schemes and Removal or Export of Goods: VAT-related Payments) Order*. It sets out the record keeping requirements and method of claiming a VAT related payment on eligible second-hand motor vehicles that are bought in Great Britain and moved to Northern Ireland or the EU after 30 April 2023 with the intention of selling them, and has the force of law.

SI 2023/68; *www.gov.uk/government/publications/notice-made-under-the-value-added-tax-margin-schemes-and-removal-or-export-of-goods-vat-related-payments-order-2023*

HMRC have also published two new guidance notes on the same subject:

- Appoint someone to deal with VAT-related payments using the second-hand motor vehicle payment scheme

  www.gov.uk/guidance/appoint-someone-to-deal-with-vat-related-payments-using-the-second-hand-motor-vehicle-payment-scheme

- Submit a claim using the second-hand motor vehicle payment scheme if you do not have a UK business establishment

www.gov.uk/guidance/how-to-claim-a-vat-related-payment-using-the-second-hand-motor-vehicle-payment-scheme-if-you-do-not-have-a-business-establishment-in-the-uk

2.11 Charities and clubs

Nothing to report.

2.12 Other supply problems

2.12.1 Goods or services?

A Polish entity planned to carry on activities consisting of the installation and operation of electric vehicle recharging stations which would be accessible to the public. The price charged to customers would depend on the length of time connected and the type of charger used (quick or slow). Payments might be made at the end of a period or for each session; it might also be possible to buy credits in advance. The supply would comprise:

- access to the recharging devices;
- electricity;
- the necessary technical support;
- administrative support (e.g. accounting information) through a website or app.

The trader asked the authorities to confirm that this would be regarded as a supply of services. The tax authorities ruled that the electricity was the "principal" supply to which everything else was ancillary: the supply would therefore be classified as "goods".

The Polish court at first instance overruled the tax authority, holding that the principal supply from the customer's point of view was access to a compatible charger, rather than the electricity itself. The tax authority appealed; the appeal court considered that the first three elements on the above list were a complex supply in which no element predominated, while the administrative support was ancillary to the first three. Questions were referred to the CJ to determine how the principal element should be identified and how the overall supply should be classified.

The CJ rehearsed the various cases on not artificially splitting economically indivisible supplies, even though the general principle is that all supplies are distinct and separate. The decision was unusually categorical: the court regarded the access to the charging devices, and the technical support, as "minimal required services" to deliver what the customer was really buying, which was the electricity. As the PVD regarded electricity as "tangible property", the supply should be categorised as "goods".

CJEU (Case C-282/22): *DyrektorKrajowej Informacji Skarbowej v P. in W*

Lecture 8

2.12.2 VAT road fuel scale charges

In accordance with the *Value Added Tax (Flat-rate Valuation of Supplies of Fuel for Private Use) Order* (SI 2013/2911), HMRC have published updated road fuel scale charge tables for VAT which apply from 1 May 2023 to 30 April 2024. Businesses can use the new scales from the start of the next prescribed accounting period beginning on or after 1 May 2023. The scale charges are used where a business provides road fuel for private use; the VAT is calculated on a flat-rate basis according to the scale charge.

www.gov.uk/guidance/vat-road-fuel-scale-charges-from-1-may-2023-to-30-april-2024

3. LAND AND PROPERTY

3.1 Exemption

3.1.1 Land or equipment?

From 2010 to 2014, a German individual let a turkey-rearing shed with permanently installed equipment and machinery. This included machinery for feeding the turkeys and providing heating, ventilation and lighting. The machinery was specially adapted for the use of the building as a building for the rearing of such poultry. The trader treated the whole of the income, set as a single amount by the lease, as exempt; the tax authority considered that 20% of the consideration should be taxable as relating to the supply of the machinery and equipment. The trader was successful at first instance in Germany, but the tax authority appealed, and questions were referred to the CJ.

The doubt of the referring court comes from PVD art.135(2)(c), which excludes "the letting of permanently installed equipment and machinery" from exemption. The question was whether this required a "carve-out" of a taxable amount from the overall exempt supply, as suggested by the tax authority; or whether the general principle that single supplies should have a single liability should be followed, with the effect that *CPP* and similar cases overrode art.135(2)(c).

The CJ discussed the principles briefly, and came to the clear conclusion that a single economic supply should have a single liability. Art.135(2)(c) did not require a single supply to be split; where equipment was ancillary to a letting of land, that supply would be exempt. It would be for the referring court to determine whether the supply was indivisible (the CJ noted that it appeared that this was the referring court's conclusion).

CJEU (Case C-516/21): *Finanzamt X v Y*

Lecture 9

3.2 Option to tax

3.2.1 Permission option?

On 7 February 2008, a company sent forms 1614A to HMRC in respect of two pieces of land that it had recently purchased. It declared that it had made no exempt supplies with either piece of land; HMRC confirmed that the land was opted with an effective date of 10 January 2008, and the company subsequently claimed input tax on expenditure on the land and charged VAT on rental invoices to tenants.

The two properties were sold on 2 March 2015 and 20 January 2017, but no VAT was added to the sale price. HMRC issued assessments on 3 August 2017 charging £50,000 on the sale of one and £4,710 on the sale of the other. The assessments were not appealed and applications for late appeals were not made.

On 12 November 2018, the company's new representative sent to HMRC copies of leases relating to the larger property which were dated before 10 January 2008. He said these showed the company had made exempt

supplies in relation to that property before the date of the OTT, and that HMRC's permission had therefore been required before it could be opted, and no permission had been given. In other words, there was no valid OTT in place, even though the company had purported to exercise that option. On 4 February 2019, he submitted that the position was the same in relation to the other land as well.

VATA 1994 Sch.10 para.30 is a rarely used provision which allows HMRC retrospectively to dispense with the requirement for prior permission, and to treat a "purported option as if it had instead been validly exercised". On 6 March 2019, an officer issued a decision stating that HMRC were exercising their discretion under this provision to treat both properties as opted with effect from 10 January 2008. On 22 June 2019, the company appealed to the Tribunal against this decision.

At the hearing, the company's representative conceded that no exempt supplies had been made in respect of the smaller parcel of land, so the appeal was only concerned with the larger one.

There were a number of issues:

(1) The facts as to what had happened in early 2008 were in dispute. The company's case was that HMRC already knew about the exempt supplies when Form VAT1614A was sent to them.

(2) VATA 1994 Sch.10 was rewritten with effect from 1 June 2008, and the rewritten provisions included para.30. The next issue was whether that deeming provision could be used in relation to a purported option which had an effective date of 10 January 2008, before it had come into force.

(3) If the answer to that question was yes, whether the company had a right of appeal under VATA 1994 s.83(1)(wb) against HMRC's exercise of their para.30 powers.

(4) Given that VATA 1994 s 84.(7ZA) provides that an appeal made under s.83(1)(wb) can only be allowed if the Tribunal considers HMRC have acted unreasonably, the questions were:

(a) whether the company was estopped from making certain submissions about the reasonableness of HMRC's exercise of the para.30 power, because reliance had been placed on the "common assumption" that there had been no exempt supplies in relation to the property before 10 January 2008, and

(b) whether HMRC had acted unreasonably for any other reason.

Judge Redston helpfully summarised her conclusions on each issue before setting out her reasoning in more detail:

(1) She agreed that an officer who carried out a compliance visit in late January 2008 had known about the exempt supplies.

(2) VATA 1994 Sch.10 para.30 could retrospectively validate the option in relation to supplies made after 1 June 2008, which was enough to dispose of the appeal because the disputed supplies took place in 2015 and 2017.

(3) s.83(1)(wb) gives the taxpayer a right of appeal against HMRC's refusal of the exercise of an option; it did not appear to allow a right of

appeal against HMRC's decision to allow an option to be exercised. The judge would therefore have struck out the appeal on the basis that the FTT had no jurisdiction.

(4) As the appeal right was not free from doubt, she also considered what her decision would have been if the trader did have the right to appeal:

(a) in her view, the company was estopped from relying on HMRC's knowledge of the exempt supplies, because both parties had shared a "common assumption" that the OTT had been valid, and the other tests relating to estoppel by convention set out by the Supreme Court in *Tinkler v HMRC* [2021] were met.

(b) none of the other submissions made by the company's representative persuaded her that HMRC had acted unreasonably.

In consequence of these decisions, the VAT of £50,000 remained due and payable.

There was a dispute about what had happened at the control visit in January 2008 and also in relation to the submission of the VAT 1614A. At a directions hearing, the judge gave permission for the parties to submit evidence, including having the control officer and the director who signed the form attend the hearing to give oral evidence. Neither did so, and no explanation for their absence was put forward by either side. According to precedent about non-production of witnesses, the judge said that "the court must make its decision only on the basis of the evidence before it, even if that means there is no evidence from that witness to take into account when deciding the factual issues in dispute, and can take into account the absence of evidence from any witness from that party." She said that she had therefore decided the appeal on the evidence provided to her, and made no adverse inference as the result of the non-attendance of the potential witnesses.

The decision that the control officer was aware of the exempt supplies was reached on the balance of probabilities, based on the slightly different and incomplete descriptions of the visit in contemporaneous notes made by the officer and the company's accountant. It seemed more likely than not that the officer had seen documentation about the particular property and was aware that exempt supplies had been made, even though the company owned a number of properties and her notes could have been referring to others.

The OTT form was dated on the day before the control visit, even though it was clear from the officer's notes that an option had not been made. The judge found as a fact that it had been completed after the meeting. It declared that no exempt supplies had been made. A different officer dealt with it, writing to ask from what date the option was supposed to apply and also asking for confirmation that no exempt supplies had been made. The company replied with the effective date of 10 January 2008 and again confirmed that no exempt supplies had been made. The officer reviewing the OTT acknowledged the effect of the option from 10 January, and on 21 April 2008 HMRC repaid the company the whole of its input tax claim from 12/07, which is what the control visit had been arranged to check.0

The judge noted the documents that the representative submitted to HMRC in 2018 had been accepted as authentic by HMRC. She therefore

did not consider them in detail; she had already found as a fact that exempt supplies had been made before 10 January 2008.

The purported date of the option and its notification, and the officer's acknowledgement of it, all fell during the currency of the original VATA 1994 Sch.10. This set out the conditions for a "permission option", which required HMRC to consider the value of grants made before and after the option was to take effect in order to secure a fair and reasonable attribution of the input tax. If HMRC had not considered those factors, it could not have given permission and the option could not be valid.

The new para.30 took effect when the whole of Sch.10 was replaced from 1 June 2008. It gives HMRC the power to dispense with the need for permission in a situation where a notification has been received in a situation where the law required prior permission; it allows HMRC to treat that notification as valid and give effect to the option. The judge invited submissions from the parties on the possibility of its application to options exercised before 1 June 2008; she concluded that there was no provision that prevented HMRC applying it to supplies made after that date, even if the purported option had been "exercised" before that date. Accordingly, it meant that the option applied to the supply made in 2015.

HMRC and the representative agreed that the wording of s.83(1)(wb) was broad enough to encompass an appeal against the decision to exercise discretion under para.30. The judge disagreed: in her view, the appeal right exists only where HMRC have refused to do something which a person has asked HMRC to do; here, HMRC had not refused to do anything, but had instead deemed the purported OTT to have effect.

However, the judge was not certain about this. There was a lack of symmetry, because a refusal to exercise the para.30 power would clearly be appealable; both parties thought there was an appeal right; and there was no case law on the issue. She therefore considered what her decision would have been if she had accepted that there was an appeal right. That would require HMRC to have "acted unreasonably" in the sense of the *Wednesbury Corporation* case.

The representative submitted that the unreasonableness lay in the failure to take account of the control officer's knowledge of the exempt supplies. HMRC said that the company was "estopped by convention" from relying on that, as both parties had proceeded on the basis that the option was valid. The judge reviewed precedents on "estoppel by convention", and cited the following principles:

(i) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be expressly shared between them.

(ii) The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely upon it.

(iii) The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter.

(iv) That reliance must have occurred in connection with some subsequent mutual dealing between the parties.

(v) Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position.

The judge rephrased part of the Supreme Court judgment in *Tinkler*, substituting HMRC and Rolldeen for the parties in the Supreme Court judge's example:

"[HMRC] must know that [Rolldeen] shares the common assumption and must be strengthened, or influenced, in its reliance on that common assumption by that knowledge; and [Rolldeen] must (objectively) intend, or expect, that that will be the effect on [HMRC] of its conduct crossing the line so that one can say that [Rolldeen] has assumed some element of responsibility for [HMRC's] reliance on the common assumption."

The judge agreed with HMRC that these conditions were satisfied. For whatever reason, the control officer's knowledge was not taken into account by the officer reviewing the OTT application; however, it was no bar to estoppel that the party wishing to rely on estoppel had made a mistake.

The judge agreed with HMRC that this was exactly the sort of situation for which para.30 had been introduced, and none of the other submissions made by the company's representative showed any other reason to regard HMRC's exercise of discretion to be unreasonable.

On the basis of her decision that there was no right of appeal, the judge struck it out; in case that was wrong, she also dismissed it.

First-Tier Tribunal (TC08783): *Rolldeen Estates Ltd*

Lecture 10

3.2.2 Article

In an article in *Taxation*, Elizabeth Small discusses the *Moulsdale* case on the disapplication of the option to tax.

Taxation, 27 April 2023

3.3 Developers and builders

Nothing to report.

3.4 Input tax claims on land

3.4.1 DIY claim - Goods and services

A DIY housebuilder appealed against the refusal of a substantial amount of his claim on the basis that the supplies should have been zero-rated by the supplier as supplies of "construction services and building materials". Judge Malcolm Frost appears to have been swayed by the apparent unfairness of HMRC refusing a repayment even where they accepted that the proper result was that they should not have any VAT; in their view, it was necessary for the supplier to claim the VAT back and repay it to the DIY builder. The judge said, "In essence, HMRC choose to expend resources in defending an appeal before this Tribunal as a means of retaining a windfall that they accept they ought not have received. The proceedings in relation to this issue would be entirely obviated by HMRC simply facilitating the repayment of incorrectly-charged VAT to the supplier." HMRC may say that, when examining a DIY claim, they have no assurance that the supplier has actually paid them the VAT, and that ought not to be their responsibility.

The judge then found in favour of the appellant on several of the invoices on the surprising ground that the invoices were "supplies of goods with incidental services". He considered that this enabled him to apply *Card Protection Plan* and effectively disregard the zero-rating possibility. If the supplies were properly standard rated, the claim was valid. The judge accepted the appellant's estimates of the split between the value of the materials and the work involved in installing them, and on that basis regarded several supplies as "goods". The claim was not wholly successful: the appeal was allowed in respect of £16,683 of additional VAT out of a total in dispute of nearly £37,500.

First-Tier Tribunal (TC08801): *Steven James Mort*

Lecture 11

3.5 Other land problems

Nothing to report.

4. INTERNATIONAL SUPPLIES

4.1 E-commerce

Nothing to report.

4.2 Where is a supply of services?

4.2.1 Sports agent

A sports agency company appealed against a decision that it was liable to output tax on a fee received from Inter Milan in relation to the transfer of a player (Eduardo) from Sporting Clube de Portugal. Judge Nigel Popplewell described it as a "who supplied what to whom" case.

HMRC's position was that the payment was made by Inter, but it covered services supplied to the player as an individual. The supply to the club was outside the scope of UK VAT as a B2B transaction, but the supply to the player was a "basic rule B2C service" and was liable to output tax in the UK, where the agent was based. The assessment was based on the agents' right to 10% of the player's salary from Inter, €30 million (VAT on €3 million was calculated at £438,954). The agent claimed the fee was 10% of the transfer fee paid by Inter to Sporting (€40 million), and it only related to that transaction.

The company argued that the whole of the payment related to supplies made to the club, and the whole transaction was therefore outside the scope of UK VAT. The company also put forward an alternative argument: that it was acting as an intermediary making arrangements for a supply to be made between two other parties. HMRC did not consider that the company was acting as an intermediary in this transaction in the VAT sense, because a contract of employment was not a supply for VAT purposes, but accepted that if it was, the place of supply would not be the UK.

The judge described the work of a football agent, and noted that the appellant's policy was not to charge its player clients a fee for services provided to them. This gave the company a competitive advantage in attracting players. It sought to make enough money from services to football clubs to make up the shortfall.

The decision records the circumstances of the particular transfer, which involved complex negotiations to secure the deal: Sporting initially set a fee that Inter considered excessive, but the appellant arranged a meeting at which the chairmen of the two clubs came to an agreement and the transaction proceeded.

After a trial 3-month period acting as the player's agent expired in July 2016, a second contract with the player was entered into for a limited duration and purpose: it was simply to negotiate the transfer, rather than to provide ongoing representation. It included a clause "The Player shall pay to the Intermediary a commission amounting to 10% of the Player's total gross income, image rights payments and other remuneration ("Fee") payable to the Player under any employment contract entered into by the

Player with any introduced Club, such Fee could be paid annually during the length of the employment contract."

There were also waiver letters in respect of each contract, which the director stated had been given to the player at the same time as the representation contract was signed. This stated "I can confirm on behalf of myself and the Company that, following further discussions and agreement between us, we have agreed to waive all and any fees relating to any commission/image rights which would be due to us in respect of your annual income pursuant to Clause 4. This contract waiver is lawfully binding as long as Sports Invest UK Ltd have been involved in the transfer of the player from his current club to a new club."

The contract with Inter set out the payment of a fee of €4 million by instalments from 30 September 2016 to 30 June 2018. HMRC cited FA regulations that supported their view that the reality of the transaction was that Inter was settling the player's obligation under the representation contract, so the payment should be apportioned between what was proper to the club and what was proper to the player. The director of the company gave evidence explaining his view that services were provided to the player for no consideration, and the company only charged the club.

The judge set out the competing arguments of the two representatives at length. The company's counsel effectively urged him to "follow the money" and take the transactions at their straightforward face value: the waiver letter meant that the service to the player was for no consideration. HMRC countered that the waiver letter effectively transferred the liability to the club, but did not extinguish it.

There is an interesting footnote in relation to an exchange of correspondence between the parties after the hearing. HMRC asked for metadata evidence of when the waiver letters were created, and notified the judge that this suggested they were created on 4 March 2022, rather than at the same time as the representation agreements as put forward by the director in evidence. The judge accepted the counter-argument that this was simply the date on which a pdf had been generated in order to provide an electronic copy to HMRC, and he read nothing into it.

The judge considered that the contracts, including the waiver letters, supported the appellant's case. He then had to consider the commercial and economic reality, in line with the principles of the *Newey* case. He understood HMRC's position and concern, that there was "untaxed consumption of services" by the player, but the economic and commercial reality was entirely consistent with the contracts. There was nothing artificial about the situation: the company gained its competitive advantage by not charging the players, and that was within its rights.

Although this was enough to decide the appeal in favour of the company, the judge discussed the question of the intermediary supply, as it had been argued before him. He rejected HMRC's view that it could not apply to an underlying "non-supply" such as the arrangement of an employment contract; in his view, the intention of the legislation, interpreted in line with the PVD, was to catch a broad range of intermediary activities. The judge was cautious about expressing his view when the point had not been fully argued "into the corners", but his tentative conclusion was that, if he had not found that the VATable transaction was only between the company and Inter, he would have regarded the supply to the player as

falling within VATA 1994 Sch.4A para.10. The place of supply would then have been Italy, where the underlying transaction between the player and Inter took place.

First-Tier Tribunal (TC08797): *Sports Invest UK Ltd*

Lecture 12

4.2.2 Fixed establishment

A Swiss company owned a Belgian subsidiary (CP) which supplied manufacturing services to its holding company under a "tolling contract". It held stocks of raw materials belonging to the HC, processed them into products used in the manufacture of plastics, and stored those products before they were sold by the HC to customers in Belgium, the EU and outside the EU. CP also supplied other services to the HC, including storage, making recommendations on manufacturing, carrying out checks and assessments, reporting results and making deliveries or providing services needed by other production units.

In 2017, the tax authority ruled that the subsidiary constituted a fixed establishment of the Swiss HC in Belgium, and its supplies to the HC were therefore subject to Belgian output tax. An assessment was raised for more than €10 million, with associated penalties and interest. At first instance, the Belgian court upheld the assessment but quashed the penalties. Both sides appealed, and questions were referred to the CJEU.

The tax authority's argument was that the "human and technical resources" of CP were exclusively made available to the HC under the tolling contract, so they had to be regarded as belonging to the HC for the purposes of identifying a FE. The services supplied by CP were used for the purposes of the HC (selling its products in Belgium) through the presence on a permanent basis of its FE (the subsidiary).

The CJEU started by noting that the objective of art.44 was to avoid the possibility of non-taxation or double taxation. The use of the main establishment of the customer as the place of supply provided a measure of legal certainty, as it was usually easy and objective to confirm where that was. The use of "another FE", as an exception to the general rule, was subject to conditions: according to the precedent of *Welmory*, it would only be used if the normal rule did not lead to a rational result or led to a conflict with another Member State.

The CJEU goes on to make an important and basic statement: "*It should also be noted that the matter of whether there is a fixed establishment within the meaning of the second sentence of art.44 PVD must not be determined by reference to the taxable person providing the services but by reference to the taxable person receiving them.*" The same means cannot be used both to provide and receive the same services: it did not appear possible to distinguish the resources used by CP for its tolling services from those that were, according to the tax authority, used by the HC to receive those services in Belgium, within its alleged FE, which, according to that authority, was constituted only by the resources belonging to CP. The supplies of tolling services and the supplies of goods were distinct and separate, and had to be given their own appropriate treatment.

The connection between the parties was not conclusive evidence that the HC had a FE in the place where a subsidiary operated, as discussed in the *Berlin Chemie* case. A legal person, even if it has only one customer, is assumed to use the technical and human resources at its disposal for its own needs. The European Commission submitted that, since the provider of the services concerned remains responsible for its own resources and provides those services at its own risk, the contract for the provision of services, while exclusive, does not in itself mean that the provider's resources become those of its customer.

The court concluded that the situation in this case did not amount to a FE of the HC in Belgium, in spite of the exclusive contract, the connection and the fact that nearly all the subsidiary's turnover was derived from its parent.

CJEU (Case C-232/22): *Cabot Plastics Belgium SA v Etat belge*

Lecture 13

4.3 International supplies of goods

4.3.1 Implementation of the Windsor Framework

The Specialised Committee on the Implementation of the Windsor Framework met on 23 June 2023 in Brussels. The meeting was co-chaired by officials from the European Commission and the UK government.

This was the second meeting of the Committee since the EU-UK Withdrawal Agreement Joint Committee meeting held in London on 24 March 2023, where the European Union and the United Kingdom adopted the new arrangements relating to the Windsor Framework.

The Committee co-chairs took stock of the work undertaken by both sides on the implementation of the Framework since the last meeting in London on 27 April 2023. In particular, they welcomed the adoption by the EU of legislation in the areas of agri-food, medicines, tariff rate quotas and customs, which reflect the joint solutions announced in Windsor on 27 February 2023.

They took stock of the recent guidance published by the UK and EU to support the implementation of the Windsor Framework and recognised the importance of making available additional stakeholder guidance in due course. The co-chairs agreed to continue meeting regularly, to monitor and ensure the full implementation of all the elements of the Framework in a timely way.

In addition, the UK government and the Commission:

- welcomed the first meeting of the Enhanced Coordination Mechanism on VAT and Excise which took place on 15 June 2023
- confirmed their intention to organise the first meeting of the Special Body on Goods and
- took stock of the work of the Joint Consultative Working Group, and welcomed the establishment of 5 structured sub-groups to assist its work

The co-chairs also reiterated the importance of joint engagement with Northern Ireland stakeholders as work on the Windsor Framework is taken forward.

www.gov.uk/government/news/specialised-committee-on-the-implementation-of-the-windsor-framework-joint-statement-23-june-2023

4.4 European rules

4.4.1 European Scrutiny Committee

The UK Parliament's European Scrutiny Committee draws the attention of MPs to significant documents coming from the EU. In its 20th report of the 2022-23 session, the ESC highlights the EU's "VAT in the Digital Age" package as important. It provides a useful summary of the package and its likely impact in the UK, and puts questions to ministers about the UK's response.

https://publications.parliament.uk/pa/cm5803/cmselect/cmeuleg/119-xviii/report.html#heading-3

4.4.2 Non-fungible tokens

The European Commission has submitted a working paper to the EU VAT Committee to consider the proper VAT treatment of non-fungible tokens. The Commission analyses the nature of NFTs and sets out a number of VAT issues relating to them; its overall conclusion is that they should be taxed as electronically supplied services, but presumably the VAT Committee will issue a detailed response in due course.

https://circabc.europa.eu/ui/group/cb1eaff7-eedd-413d-ab88-94f761f9773b/library/7d1ef2eb-b820-4866-a155-785e2373fb80/details

4.4.3 Tax penalties

A Belgian company failed to submit periodic VAT returns and was subject to assessments and penalties. The penalty was set at 20% of gross VAT due; the company argued that it should be based on the net amount after deducting input tax. The precedent relied on by the company was *Salomie and Oltean* (Case C-183/14), in which the CJ ruled against a penalty that was equal to the whole of the VAT deductible; such a penalty would render the right of deduction meaningless.

The Belgian state argued that the penalty was proportionate and necessary to enforce the filing of VAT returns and payment of the tax. The situation was not comparable to the case cited, which concerned the issue of VAT invoices where there had been no taxable transactions.

The referring court noted that, according to CJ precedent case law, Member States are, in principle, empowered to choose the sanctions which seem to them to be most appropriate, provided that they do not go beyond what is necessary to attain the objectives of ensuring the correct levying and collection of the tax and of preventing fraud. However, it was unsure how to determine whether the penalties levied in the present case complied with the principle of proportionality.

The CJ reviewed the factors that might be taken into account in determining whether a penalty was appropriate:

- the nature and seriousness of the infringements – over the course of a prolonged period and despite several interventions by the Belgian tax authorities, the company neither declared nor paid the VAT due.
- the fact that, following a tax inspection, the taxable person has, voluntarily or otherwise, made good the shortfall in payment found by the competent authorities may be relevant – in this case, the shortfall in payment has not been made good voluntarily.

The CJ agreed with the Belgian state that the situation was not comparable to a penalty equal to the whole of the deductible tax; although the penalty was calculated on the basis of gross output tax, the company was still entitled to deduct input tax in accordance with the normal rules. The PVD and the general EU legal principles did not preclude the charging of the penalties in this case.

CJEU (Case C-418/22): *SA CEZAM v Etat belge*

4.4.4 Cross-border welfare services

A Bulgarian company provided welfare services for the elderly, including residents of Germany and Austria. The Bulgarian authorities took the view that these supplies would only be exempt if the company produced evidence attesting to the social nature, in accordance with German and Austrian legislation, of the services provided in the territory of those Member States. When the company failed to produce such evidence (such as official documents issued by the competent authorities), it was assessed to output tax.

The referring court was not sure whether the PVD required the exemption to apply to cross-border supplies of welfare. However, as the place of supply of services to natural persons normally depended on the place the supplier was established, the court was concerned that perhaps the Bulgarian exemption should apply to a supply that was deemed to take place in Bulgaria.

The Bulgarian authorities argued that the questions were not admissible as being clear on the basis of precedent case law, and also hypothetical. The CJ disagreed with both these views and proceeded to consider the case.

Considering the application of art.132 in line with its objectives and its context, the CJ did not consider that there was any requirement, explicit or implied, that the services should be supplied in the same state as the supplier was established. Articles 133 and 134 permit various restrictions on the application of the art.132 exemptions, but none of them refer to the place in which the supplies are made. The objective of art.132 was to reduce the cost of services “in the public interest”. It therefore followed from a literal, systematic and purposive interpretation of art.132(1)(g) that the exemption applies to any supply of services fulfilling the two conditions set out in that provision, regardless of whether such a service is actually performed in the Member State where the service provider is established or in another Member State. It was irrelevant that the Bulgarian company used a local company to find its customers.

There was a very detailed consideration of the requirement to recognise the social character of the supplier in accordance with the rules of the country in which it was established (Bulgaria) or the countries in which the material operations were carried out (Germany and Austria). In

summary, the CJ followed the place of supply rule: as the supply was deemed to be made where the supplier was established, it was making supplies in Bulgaria, and the Bulgarian rules should be applied.

Lastly, the referring court asked whether registration as a provider of social services was sufficient to establish that a supplier was a recognised body for the purposes of the exemption. Not surprisingly, the CJ ruled that this was not sufficient on its own. It would be relevant, particularly if the tax authorities routinely accepted such registration as allowing exemption, but it could be subject to further verification of the nature of the supplier by the authorities.

CJEU (Case C-620/21): *MOMTRADE RUSE OOD v Direktor na Direktsia "Obzhalvane i danachno-osiguritelna praktika" Varna pri Tse*

4.4.5 Adjustment of input tax

A Bulgarian company operated in the telecommunications sector. Between October 2014 and December 2017, it wrote off various goods, such as installations, equipment or appliances considered unsuitable for use or sale for various reasons, including wear and tear, defects or their obsolete or unsuitable nature. The writing-off was carried out in compliance with the applicable national legislation, removing the assets concerned from the company's balance sheet. Some of the goods were sold as waste to taxable third-party undertakings and others were destroyed or disposed of. The write-offs led to adjustments to the input tax that had been deducted on the purchase of the assets; the company then applied for reimbursement of the amount adjusted, arguing that the Bulgarian law requiring adjustment was incompatible with art.185 PVD.

The Bulgarian court referred questions asking for clarification of various concepts in art.185, including whether "loss" implied something that was outside the taxpayer's control (as opposed to the conscious decisions taken in this case).

The CJ confirmed that the entitlement to deduct was not affected by the writing off of assets. Selling an asset for scrap as a taxable transaction, even though it was not part of the usual economic activity of the trader, fulfilled the link between input and taxable output. Scrapping an asset, putting it out of economic use for taxable transactions, did constitute a "change" in the factors that entitled the trader to a deduction, but it would constitute "destruction" of the asset, which was excluded from the requirement to make an adjustment. The PVD imposed a requirement that such destruction should be verifiable ("duly proved or confirmed").

CJEU (Case C-127/22): *Balgarska telekomunikatsionna kompania EAD v Direktor na Direktsia 'Obzhalvane i danachno-osiguritelna*

Lecture 14

4.4.6 Disproportionate punishment

A Bulgarian trader appealed against penalties, including closing its premises for 14 days, imposed for failing to issue a receipt for a pack of cigarettes costing about €5. Questions were referred to the CJ about the proportionality of the Bulgarian system in the light of art.273 PVD and art.50 and 52 of the Charter of Fundamental Rights of the EU. In particular, the trader complained that there appeared to be two penalties

for the same (trivial) offence, violating the "ne bis in idem" principle. The two different penalties had to be challenged in different courts using different procedures, without any coordination between the two.

In assessing whether the proceedings and penalties concerned are criminal in nature, the Court's case-law shows that three criteria are relevant: the legal classification of the offence under national law, the intrinsic nature of the offence, and the degree of severity of the penalty which the person concerned is liable to incur. In the present case, the severity of the penalty suggested that there was a breach of art.50 of the Charter. The CJ considered that the combination of art.273 PVD and art.50 precluded national legislation such as that in Bulgarian that had given rise to this situation.

CJEU (Case C-97/21): *MV – 98 v Nachalnik na otdel 'Operativni deynosti' – Sofia v Glavna direktsia 'Fiskalen kontrol' pri Tsentraln*

4.4.7 Unlawful supply of electricity

A company was designated by national law as the legal person responsible for the operation of the electricity or natural gas distribution network in the territory of a group of municipalities in the Flemish region of Belgium. The company is an inter-municipal cooperation structure established in the form of an association, of which 38 Flemish municipalities are members. It is defined in its articles of association as a legal person governed by public law.

Between 7 May 2017 and 7 August 2019, an individual consumed electricity illegally. The company issued an invoice based on meter readings; the individual did not pay. The company obtained judgment for the debt, but the court was not sure whether the VAT shown on the invoice was properly chargeable in such a situation.

As electricity is "goods" for VAT, and theft of goods is not normally treated as a supply, this question is not as obvious as it immediately appears. Nevertheless, there was clearly a direct link between the supply of the electricity (even if involuntary and involving illegal conduct by the recipient) and the amount of compensation claimed by the company: it was consideration for a supply, and was liable to output tax.

There was a further question about whether the status of the company under public law, or the "negligible" nature of the "involuntary" supply, took the transaction outside the scope of VAT under art.9 or art.13 PVD. This was considered in some detail by the CJ, but the result is unsurprising, given the inclusion of electricity supply in Annex I (matters within the scope of VAT even if supplied by a public body) – the supply was not excluded.

CJEU (Case C-677/21): *Fluvius Antwerpen v MX*

4.4.8 Fictitious transactions

In October 2015, a Polish company M issued a tax invoice to a trader W for the assignment of trademarks. W paid the invoice and deducted the input tax shown. In October 2017 the Polish tax authorities questioned W's right to deduct the tax on the basis that the assignment of the trademarks in question was invalid under Polish law. The denial of input

tax was confirmed by a further decision in October 2018, this time on the basis that the assignment was fictitious.

At first instance, W's appeal succeeded, on the basis that the tax authority had not adduced evidence to show that the transaction was fictitious. The tax authority appealed, and the appeal court referred questions to the CJ. It was not sure whether the Polish law was compatible with the PVD: the PVD treats the right to deduct input tax as fundamental, and the court was not sure whether it could be lost in the circumstances of the case, where the transaction was considered invalid under Polish law. The court asked whether it was necessary to show that the transaction was the result of VAT evasion or an abuse of rights (i.e. specific VAT concepts, rather than general Polish contract law).

The CJ commented that the right to deduct was subject to substantive and formal requirements. It was necessary to ascertain whether the assignment of trademarks was actually carried out and whether they were used for the taxed transactions of the claimant. The burden of proof lies with the taxable person, who is required to provide objective evidence that goods and services were actually provided as inputs by another taxable person for the purposes of his or her own transactions subject to VAT, in respect of which he or she has actually paid VAT.

The CJ discussed a number of precedents and issues with deduction, and came to a conclusion that appears to favour the trader's right to deduct: "[the various provisions of the PVD] must be interpreted as precluding national legislation under which a taxable person is deprived of the right to deduct input value added tax solely because a taxable economic transaction is regarded as fictitious and invalid under the provisions of national civil law, without it being necessary to establish that the criteria for classifying, under EU law, that transaction as fictitious are met or, where that transaction has actually been carried out, that it is the result of value added tax evasion or abuse of rights." However, this is simply a restatement of the general principle that the tax authority has to state the reason for disallowing input tax clearly and back it up with legal argument, as in the case of MTIC fraud: it is not enough for the tax authority to argue "this is not proper economic activity", it must instead show that the trader knew or had the means of knowing that it was connected with VAT evasion.

CJEU (Case C-114/22): *DyrektorIzby Administracji Skarbowej w v W s.p. z.o.o*

4.4.9 Organised crime

Eurojust, the European Union Agency for Criminal Justice Cooperation, has announced an operation by judicial and law enforcement authorities in Lithuania, Estonia, France and Germany, supported by Eurojust and Europol, to close down a Lithuanian Organised Crime Group. The main activity of the OCG appears to have been obtaining expired food and cosmetics and altering the dates before selling them on, but they are also suspected of large-scale VAT fraud.

www.eurojust.europa.eu/news/crackdown-lithuanian-criminal-network-large-scale-food-fraud-and-tax-evasion

4.5 Foreign refund reclaims

Nothing to report.

5. INPUTS

5.1 Economic activity

5.1.1 Free PPE

At the beginning of the first lockdown, the acute shortage of Personal Protection Equipment (PPE) led some individuals to set up a venture, established as a Community Interest Company, to produce PPE using 3D printers. By the end of May 2020, they had enlisted many thousands of volunteers and over 200,000 face shields had been donated to the NHS and care homes. Using a "Go Fund Me" account, 3D had raised over £150,000 by way of public subscription towards its costs.

The CIC incurred VAT on supplies made to it. Some of this VAT was incurred in connection with the CIC seeking CE certification (which was only achieved on 21 September 2020), some related to general overheads and part related to VAT incurred on materials bought to produce face masks. It claimed this VAT on its return for the period 08/20. HMRC accepted that it was validly registered for VAT, but refused the claim on the basis that it made no taxable supplies for consideration: because of the applicable regulations, it was only allowed to give the PPE away, not to sell it. There was an intention to sell the product in due course, but this never happened.

The fact that HMRC accepted the VAT registration meant that it was accepted that the CIC was in business and intended to make taxable supplies. HMRC's refusal to allow any input tax related only to that incurred in the current period, because its activities in the current period had been entirely altruistic and wholly funded by donation income.

The company argued that it fell within the principles of the *INZO* and *Rompelman* cases. Even the first investment expenditure incurred for the purposes of a business may be regarded as an economic activity and that, in that context, HMRC must take into account the declared intention of the business. This extends to costs which involved no direct onward supply of goods or services but which laid the groundwork for them. Accordingly, the costs involved in preparation for supplying taxable supplies (such as accreditation through BSI) and the research and feedback needed for it must be allowed.

The company submitted that it was unaware of, and had no means of learning about, the fact that (in its view) the Government chose to restrict NHS contracts for relevant goods to participants associated in various ways with senior government ministers and MPs (the "VIP lane"). The fact that this process was not made public caused 3D to continue to hope for success in selling PPE, which was realistic since it offered good value for money, a proven track record and competitive pricing.

The company based its arguments on the *Lord Fisher* tests, which it appeared to satisfy.

The judge reviewed the evidence and concluded that the CIC was seeking to enter into PPE contracts for consideration. It was then necessary to consider whether the VAT it was claiming was incurred for the purposes of this economic activity.

The judge distinguished the costs of applying for accreditation of its products. These were incurred for the purposes of being able to sell PPE for consideration in the future, and for no other purpose. They were not connected to any current donations of goods; they were business costs and were recoverable in full. On the authority of cases such as *INZO* and *Rompelman*, the fact that the CIC never actually made any sales for consideration did not deny the recovery of this input tax. On the authority of cases such as *Sveda* and *Durham Cathedral*, it was not necessary for the input to be a cost component of a particular output supply.

Turning to the costs incurred in the production of the PPE that was given away and the overheads of the CIC during the period, the CIC's argument that this was preparatory expenditure for selling PPE in the future: it included research and development and the proving of its distributed manufacturing structure. However, the judge considered that there was at least partly an altruistic purpose: the CIC had been advised that it should not sell the PPE it was currently producing without a central government contract, and it nevertheless produced it with the intention of giving it away, as explained in its Go Fund Me page.

On that basis, there was at least a partial non-business purpose in the costs incurred in the production of PPE. There was no argument before the judge as to how that VAT should be split between business and non-business, so he directed the parties to agree the apportionment between them. He urged the parties to be as pragmatic as possible in reaching an agreement, but if necessary they could return to the Tribunal.

First-Tier Tribunal (TC08837): *3D Crowd CIC*

Lecture 15

5.2 Who receives the supply?

Nothing to report.

5.3 Partial exemption

Nothing to report.

5.4 Cars

Nothing to report.

5.5 Business entertainment

Nothing to report.

5.6 Non-business use of supplies

Nothing to report.

5.7 *Bad debt relief*

5.7.1 Historic claim runs out of time

BT appealed against the refusal of a *Fleming* claim made on 30 March 2009 for VAT accounted for on supplies made from 1 January 1978 to 31 March 1989. The basis of the claim related to bad debt relief. In 2014, the Court of Appeal held that the *Fleming* window did not apply to bad debt relief claims of this kind, because of differences in the way the time limits for capping historical claims operated.

Even so, BT maintained that it would be necessary for a Tribunal to determine various facts in order to apply the CA ruling and settle the appeal. HMRC considered that the appeal had no reasonable prospect of success, and applied to have the appeal struck out. Hearings for this application were held in July 2017 and February 2019 before Judge Harriet Morgan; the decision was only released on 29 June 2020 (TC07762).

Not surprisingly, for such a long-running dispute, the FTT decision involved a detailed examination of numerous legal principles that are of relatively limited application. In summary, the judge concluded that all the points that BT wanted to argue further in the Tribunal had already been conclusively decided by the CA; to allow the case to go further would be an abuse of process. After 232 paragraphs of legal reasoning, the judge ordered the appeal to be struck out.

Nevertheless, the company appealed yet again to the Upper Tribunal, where it came before Mr Justice Leech and Judge Nicholas Aleksander in May 2023. Their consideration of the company's arguments was briefer (81 paragraphs) but equally conclusive, and the appeal was struck out again.

Para.78 is interesting:

Finally, we note that BT's submission, that the FTT should have directed a further hearing to decide the contested issues of fact, was inconsistent with BT's opening submissions to the Upper Tribunal in February 2012 that a decision on the three preliminary questions would dispose of the whole appeal and that the construction of the 30 March letter was a question of law. We are fully satisfied that BT was right first time.

That appears to be the end of the matter.

Upper Tribunal: *British Telecommunications plc v HMRC*

5.8 *Other input tax problems*

5.8.1 Scrap metal

A company appealed against decisions to deny input tax on Kittel grounds on 659 purchases of scrap metals from 11 suppliers in the periods from 11/14 to 11/15. The total amount involved was just over £3.5 million. The company's grounds of appeal were that:

(1) the transactions were part of its regular trading as a wholesaler of scrap metal, and did not stand out as different,

(2) whilst acknowledging that its due diligence had deficiencies, it denied that further due diligence would have resulted in the required means of knowledge, and

(3) it drew attention to the level of investigations which had been undertaken by HMRC to reach the conclusion that the defaulting suppliers were fraudulent.

Judge Jeanette Zaman reviewed the principles and precedents for a *Kittel* denial of input tax. The issues to be determined were:

(1) was there a fraudulent evasion of VAT;

(2) if so, were the company's purchases on which input tax have been denied connected with that fraudulent evasion; and

(3) if so, did the company know or should it have known that its purchases were connected with that fraudulent evasion of VAT.

In accordance with *Fairford* directions, the company had accepted that the deal sheets produced by HMRC were accurate and that there was a defaulting trader at the start of each transaction chain.

The judge's review of the history of the business reveals regular and frequent visits by HMRC, and letters notifying the single director of deregistration of suppliers and warnings about tax losses. She examined the due diligence carried out in respect of all the defaulting suppliers, and concluded that it was inadequate. As the director had been repeatedly warned about the risks of MTIC fraud, and told what he could do to protect his business from connection with it, this indicated that he should have known what he was involved with.

The judge did not accept all of HMRC's assertions, but her overall conclusion was that they had satisfied the burden of showing, on the balance of probabilities, that the director knew that the transactions were connected with fraud, and if he did not know, he should have done. The appeal was dismissed.

First-Tier Tribunal (TC08810): *PPX Metal Management Ltd*

Lecture 16

5.8.2 Long-running dispute

A MTIC case that has been running since 2015 has finally reached a substantive hearing in the FTT. In the last of the procedural hearings relating to the case (TC08326), the company had applied in late 2021 to bring forward the hearing to February 2022, but this was held to be

impractical. In the end the hearing before Judge Heather Gething was spread over two weeks in late November and early December.

The appeal was against two assessments to deny deduction of VAT input tax of £1,273,739 claimed in respect of 335 transactions to purchase soft drinks in the VAT periods ending 04/12 to 07/14 on the ground that the purchases of the soft drinks were transactions connected with fraudulent evasion of VAT, and that the company knew or should have known they were so connected.

The company accepted that there was a loss of VAT in respect of 334 of the transactions, and disputed that 4 more were part of an overall scheme to defraud HMRC. In respect of the rest, it considered that it was a reputable company that had been unwittingly caught up in criminal activity, and that the inference that it ought to have known about the fraud was unjustified.

HMRC's case included reference to a criminal prosecution of those running two of the main counterparties to the appellant's trade, in which it appeared that this company was as involved in money laundering as the others. The company argued that the failure to join it in the prosecution showed that HMRC's case was weak; HMRC responded that there was a lack of evidence to meet the higher criminal standard of proof. The judge initially said she would give no weight to evidence from the prosecutions; on HMRC's application, she later modified this to allow it some weight to the extent that it corroborated other evidence. It was a small piece in comparison to the 15,000 pages in the Trial Bundle.

The judge examined the evidence and HMRC's arguments, which were unusually strong even for a MTIC case. They invited the judge to treat the director's witness evidence with extreme caution, and she agreed with their assessment that he should only be believed where his statements were backed up by contemporaneous documentary evidence. Adverse inferences were to be drawn from the company's failure to produce witnesses and evidence about what happened to the stock; these failures were us inexplicable except on the basis that to produce evidence may have exposed unfavourable facts.

After an exhaustive examination of and recitation of the factors that were uncommercial in the trade, the judge concluded that the director and therefore the company actually knew that its transactions were connected with fraud. If they did not know, they ought to have known. The appeals were dismissed.

First-Tier Tribunal (TC08808): *Elbrook (Cash & Carry) Ltd*

6. ADMINISTRATION AND PENALTIES

6.1 Group registration

Nothing to report.

6.2 Other registration rules

6.2.1 Changing VAT registration details

HMRC have updated their VAT registration guidance to explain how to use a VAT online account to make changes to VAT registration.

The guidance has been updated with steps to explain how to use a VAT online account to change the following details:

- Business contact details
- Bank details
- Return dates
- Business name

If businesses are unable to change the details online, form VAT484 can be used and posted to HMRC's address. However, postal responses will take longer to process than changing the details online.

www.gov.uk/guidance/change-your-vat-registration-details

Lecture 17

6.3 Payments and returns

6.3.1 Interest rates

Following the Bank of England successive decisions to increase the base rate, HMRC have announced increases in:

- the rate of interest on late payments of most taxes – 6.75% from 13 April 2023, 7% from 31 May 2023 and 7.5% from 11 July 2023.
- the repayment interest rate on most taxes – 3.25% from 13 April 2023, 3.5% from 31 May 2023 and 4% from 11 July 2023.

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

6.3.2 Self-service TTP

After 31 May 2023, businesses owing relatively small amounts of VAT are able to set up Time To Pay arrangements online, without having to discuss the matter on the telephone. The conditions are set out on the HMRC website:

You can set up a VAT payment plan online if you:

- *have filed your latest tax return*
- *owe £20,000 or less*
- *are within 28 days of the payment deadline*
- *do not have any other payment plans or debts with HMRC*
- *plan to pay your debt off within the next 6 months*

You cannot set up a VAT payment plan online if you're in the Cash Accounting Scheme, Annual Accounting Scheme, or you make payments on account.

If you cannot set up a payment plan online, you'll need to contact HMRC. They will ask you:

- *if you can pay in full*
- *how much you can repay each month*
- *if there are other taxes you need to pay*
- *how much money you earn*
- *how much you usually spend each month*
- *what savings or investments you have*

If you have savings or assets, HMRC will expect you to use these to reduce your debt as much as possible.

If you've received independent debt advice, for example from Citizens Advice, you may have a 'Standard Financial Statement'. HMRC will accept this as evidence of what you earn and spend each month.

www.gov.uk/difficulties-paying-hmrc/pay-in-instalments

The "new" late payment penalties (applicable from 1 January 2023) continue to be suspended where a TTP arrangement has been agreed, as long as it is adhered to. This means that a TTP arrangement applied for under the above system will avoid any late payment penalties as long as it is in place within the first 15 days after the due date, and the higher penalties that apply after 30 days are avoided if the TTP arrangement is agreed between day 15 and day 30.

www.gov.uk/guidance/how-late-payment-penalties-work-if-you-pay-vat-late

Lecture 17

6.3.3 Article

In an article in *Taxation* mainly aimed at students, Laura Fallon explains the rules requiring the customer to account for VAT on purchases of international services, and some of the common exceptions to the general rule that the supplier is responsible for accounting for VAT.

Taxation, 20 April 2023

6.4 Repayment claims

6.4.1 Offset in reclaims

The guidance on set-off in HMRC's *VAT Refunds Manual* has been rewritten, including two new examples of how the normal assessment time limits can be disapplied when setting off amounts arising "from the same mistake", following the principles of the *Birmingham Hippodrome* case and VATA 1994 s.81(3A).

Example One

A company sells goods at the standard VAT rate and finds out later these goods should be exempt. It makes a claim in March 2017 for the period 1 January 2013 to 31 December 2016.

Year	Output Tax	Input Tax	Amount paid to HMRC
2016	£3 million	£1 million	£2 million
2015	£3 million	£1 million	£2 million
2014	£3 million	£1 million	£2 million
2013	£3 million	£1 million	£2 million
2012	£3 million	£1 million	£2 million
2011	£3 million	£10 million	£7 million

The claim correctly applies set-off for incorrectly claimed Input Tax in 2013-2016 and totals £8m. In 2011 the company bought machinery to produce the exempt goods and incorrectly claimed £10m Input Tax on the purchase. HMRC is now out of time to assess this amount.

In this scenario the company gets the benefit of the exempt rate while still retaining substantial amounts of Input Tax and would be in a better position than if no mistake had been made.

HMRC applies s.81(3A) to reduce the claims value by the net amount paid by HMRC in 2011. We must also take account of the amounts overpaid in 2012 and apply set-off equitably to undo all the consequences of the mistake. The claim will be reduced by £5m in total, and HMRC will pay £3m to the company.

Example Two

A company finds it incorrectly supplied services at the standard instead of exempt rate from 1st October 2017 to 31st March 2019. It makes a claim in June 2019 for VAT periods 03/19, 12/18, 06/18 and 12/17 totalling £300,000 and leaves out 09/18 and 03/18 where there was more Input Tax than Output Tax.

Period	Output tax	Input tax	Amount paid to HMRC
03/2019	£85,000	£10,000	£75,000
12/2018	£85,000	£10,000	£75,000
09/2018	£85,000	£165,000	£80,000

Period	Output tax	Input tax	Amount paid to HMRC
06/2018	£85,000	£10,000	£75,000
03/2018	£85,000	£165,000	£80,000
12/2017	£85,000	£10,000	£75,000

HMRC will use s.81(3A) to include the 03/18 and 09/18 periods and the claim will be reduced from £300,000 to £140,000.

www.gov.uk/hmrc-internal-manuals/vat-refunds-manual/vrm7000

Lecture 18

6.4.2 Article

In an article in *Taxation*, Neil Warren discusses a situation in which a VAT refund claim has been delayed by four months.

Taxation, 20 April 2023

6.5 Timing issues

Nothing to report.

6.6 Records

6.6.1 Another online tool

HMRC have published new guidance to help businesses check whether they can correct errors in a future VAT return or whether the errors need to be reported separately using form VAT652. It is essentially an online tool which enables the business to tell whether it will be possible to correct the error through the next VAT return, or separately disclose it.

The guidance goes on to set out the options for disclosing errors:

If you need to report an error

After you've checked you can either:

- sign in with your Government Gateway user ID and password (if you do not have a user ID, you can create one when you first try to sign in)
- use your email address to get a confirmation code that you can use to sign in

How to use the online form

You will need:

- the net value of your error
- the total value of your sales

You'll be able to save your application and return to it later.

You can check your answers at the end of the online form before submitting it.

Once submitted, you'll receive a confirmation email and a unique reference number.

Other ways to send the form

If you do not want to use the online service you can use the printable form VAT652, but you will not receive a confirmation or unique reference number.

www.gov.uk/guidance/check-if-you-need-to-report-errors-in-your-vat-return

Lecture 17

6.6.2 National Audit Office Report

The NAO has published a report *Progress with Making Tax Digital*. It is concerned with the whole of the MTD programme, not just VAT, but it contains strong criticism of the way in which the project has been planned and implemented. This is from the summary of the report:

"*HMRC's initial timeframe for MTD was unrealistic. It did not allow sufficient time for HMRC to explore the full range of options that would achieve the programme's aims and select one that it could implement.*

Each announcement has set an ambitious timeframe for delivery, with several aspects of the MTD programme to be delivered in parallel. The repeated delays and rephasing of MTD has undermined its credibility and increased its costs. There is a risk that delivery partners and taxpayers disengage from a programme that can only succeed if those groups significantly change their behaviour. Higher costs were not inevitable, had HMRC taken more time to plan and consider the realism of the options.

HMRC has not demonstrated the programme offers the best value for money for digitalising the tax system, with later business cases significantly underplaying the total cost to customers of making the change. The programme should now develop a robust business case which includes a comprehensive and up-to-date assessment of the costs to customers of implementing MTD. Planning has been too high-level and the risk remains that further delays will add costs and defer benefits. HMRC is reviewing how MTD will work for businesses and landlords with lower Self Assessment income. It should take this opportunity to assess how far the programme is improving services, reducing burdens, and making the tax system easier to comply with and use lessons from this review to ensure the wider programme is finally on track to secure the benefits it has long promised."

www.nao.org.uk/reports/progress-with-making-tax-digital/

6.7 Assessments

6.7.1 Time limits for VAT and penalties

A company appealed against assessments for VAT overclaimed on fictitious invoices for periods 03/13 to 06/14 and also penalties on a "prompted, deliberate, not concealed" basis for the same periods. PLNs were issued to the director on 3 March 2016; Judge Geraint Williams noted that the director had not appealed the PLNs, even though this was pointed out to him in a Tribunal decision in 2019 concerning the procedure for the company's appeal.

The judge started by commenting on the reliability and credibility of the witnesses: the HMRC officer was "straightforward and honest", while the director of the company made a statement that consisted mainly of denials, including that it was "not admitted" that the company had submitted an appeal to the Tribunal. His evidence was considered unreliable for reasons expanded on in the decision.

The company carried on an architectural business. It registered for VAT on 1 April 2008; it submitted repayment returns for the periods from 03/13 to 06/14, which triggered an enquiry. The director ran a second company which was also investigated, but the outcome of that is not covered in detail in this appeal.

The decision records the progress of this enquiry from July 2014: by August, follow-up enquiries with suppliers revealed that some of the purchase invoices had been manipulated to show larger input tax amounts. Correspondence ensued, but the assessment disallowing some or all of the input tax for the periods 03/13 to 06/14 was only issued on 28 October 2015. A penalty assessment followed on 1 February 2016, charging a "deliberate and concealed" penalty at 92.5% for 06/14 (with a small reduction for disclosure), and "deliberate but not concealed" penalties for 03/13 to 03/14 at 70%, with no reduction as no information had been provided. PLNs were then issued to the director as the officer believed that the company would become insolvent. These decisions were confirmed on review and the company appealed in March 2017.

The judge rejected all of the appellant's contentions about the facts. The assessments had been raised to the best of the officer's judgement on the basis of the information available to him. However, the judge concluded that the officer had all the evidence required to raise the VAT assessments by August 2014 (as very little information had been provided after that date). The assessments were therefore within the two-year time limit for periods 12/13 to 06/14, but were outside the 12-month time limit for 03/13 to 09/13.

The judge went on to consider whether the penalty assessments were invalidated because the VAT assessments on which they were based had to be set aside. The 2021 Tribunal case of *Albany Fish Bar Ltd* highlighted that FA 2007 Sch.24 provides that the calculation of "potential lost revenue" is based on the tax "due or payable" by the taxpayer, not "due and payable". There was no doubt that the tax had been due; the fact that the assessments had to be struck out did not change that.

The judge agreed with the categorisation of the taxpayer's behaviour and the level of reduction given for minimal cooperation during the enquiry. The penalties were therefore confirmed in full; presumably they are now payable either by the company, if it still has any assets, or by the director under the PLN, if not.

First-Tier Tribunal (TC08834): *Maxxim Residential Design Ltd*

Lecture 19

6.8 Penalties and appeals

6.8.1 Default surcharge

A company appealed against a 2% surcharge of £1,936 for its 01/22 return period. The company had paid its tax for 01/21 in several instalments and had received a surcharge liability notice. It submitted the return for 01/22 on 7 March 2022; a director rang HMRC on 10 March to discuss Time To Pay, on the basis that the company could not pay the full amount of £96,802 immediately. The tax was duly paid by instalments; the company was issued with a 2% surcharge and a SLNE.

The grounds for appeal were that TTP had been applied for "before the due date", which the director understood to be 10 March (because the company paid by direct debit). In the review letter refusing the appeal, HMRC stated that the company had only contacted them on 18 March, which the director disputed (he had written to appeal the surcharge on 18 March, after it was issued on 17 March). There were also problems with supply of machines that led to a cash flow difficulty, which would be exacerbated by the war in Ukraine.

Judge Natsai Manyarara gave an unusually detailed decision considering the law and all the facts, and providing a great deal of explanation, but the conclusion was inevitable: the actual due date was 7 March, and the trader's own evidence was that he had not asked for TTP by then. His honest but mistaken belief about the due date could not be a reasonable excuse, and he had not met the statutory conditions.

The appeal was dismissed.

First-Tier Tribunal (TC08830): *WWM Rose & Sons Ltd*

A recruitment company appealed against a 10% surcharge of £523 for its 03/22 period. It argued that its financial difficulties as a result of Covid-19 were a reasonable excuse. When the liability for 03/22 fell due (7 May 2022), the liabilities for 06/21 and 12/21 were also outstanding; SLNEs had been issued in respect of them (after the first default in the 12/20 period), but the amounts were below the £400 limit for surcharges to be collected at 2% or 5%.

The Tribunal's findings of fact include

- The director "knew that the VAT due from the company was required to be paid on time. However, a lot of the time he forgot to check the period for payment of the VAT due"
- "The company used the VAT that it did receive to pay its workers."

- "The Appellant did not consider moving to cash accounting."
- The director "telephoned HMRC twice for advice, was told to apply for something (he could not remember what) and forgot to apply for whatever it was he had been advised to apply for."

It is therefore not surprising that the judge concluded that the director "had little, if any, regard to the Appellant's duty to pay VAT that it owed". The appeal was dismissed.

First-Tier Tribunal (TC08836): *Nations Recruitment Ltd*

Lecture 20

6.8.2 Withdrawn ruling

A company applied for judicial review of HMRC's decision to raise an assessment for £10.7m for periods from 03/17 to 12/20 following an earlier withdrawal of a non-statutory clearance dated 17 July 2009. HMRC argued that the clearance did not create a legitimate expectation that the company could rely on, because it had been issued on the basis of incomplete information supplied by the company.

The company provided training for cadet pilots. This was funded by a "bond" arrangement involving loans from banks; in due course the pilot would recover the cost out of salary by working for an airline. A previous arrangement had been the subject of a clearance from Customs & Excise in 2002; when Deloitte were asked to review the matter in 2007, they advised that the way in which the pilots paid for the training effectively constituted "salary sacrifice", which meant that they were providing consideration for a supply of training to them personally (rather than the airline meeting the cost). The result would be that the training company should account for output tax much earlier (when it supplied the training in exchange for a "bond" from the cadet) and there would be irrecoverable VAT (because it would be suffered by the individuals). This was a problem for the company because its competitors operated in jurisdictions where there was no VAT on such training fees.

Deloitte recommended that the company should seek a ruling, and pointed out that a binding ruling would only be obtained if HMRC were put in possession of the complete facts and context of the issues of uncertainty. It would therefore be necessary to draw attention to the possibility that the salary sacrifice produced the effect described above. Deloitte provided a draft application for this clearance in February 2009. "Track changes" shows the following sentence:

During their employment with the sponsor airline, the cadet may receive a reduced salary to take account of the fact that the sponsor airline has paid a placement fee to APL for the provision of the cadet. However, these arrangements are made between the sponsor airline and the cadet without APL being party to the agreement.

The final submitted application did not include these sentences; this was at the request of the company, as revealed by the comments in track changes.

The application asserted that the company provided its services to the airline, and covered its costs by charging a placement fee to the airline. This could be justified if the bond was effectively taken over by the

airline without any payment to the airline by the pilot; the pilot would have given no consideration for the training, and the company's only taxable output would be for the service supplied to the airline.

The HMRC officers reviewing the application considered that there was potentially avoidance of VAT in the arrangement because its effect was to supply the training VAT-free. However, after further consideration and investigation, and after stating that it appeared to be a borderline case, HMRC gave a ruling confirming that the company was not regarded as making a supply for consideration to the trainees.

HMRC then notified an enquiry into the treatment of the arrangement in November 2016. At a meeting in September 2018, they indicated that they now considered that the clearance had been issued without HMRC knowing "the full picture". After further correspondence in which the company protested the difficulties that this would cause, HMRC issued the assessments which were the subject of the judicial review application.

In the High Court, the judge set out the principles of "legitimate expectation":

A legitimate expectation arises in circumstances where:

(a) the claimant has an expectation of being treated in a particular way favourable to the claimant by the defendant public authority;

(b) the authority has caused the claimant to have that expectation by words or conduct;

(c) the claimant's expectation is legitimate; and

(d) it would be an unjust exercise of power for the authority to frustrate the claimant's expectation.

For a legitimate expectation to arise in relation to an HMRC non-statutory clearance:

(a) the communication from HMRC should be clear, unambiguous and devoid of relevant qualification: see R v. IRC ex parte MFK Underwriting Agents Limited [1990].

(b) the taxpayer must show that he has put all his cards face up on the table by giving full details of the specific transaction on which a ruling is sought. The taxpayer is to treat HMRC with complete frankness and make full disclosure of all the material facts known to him. The situation calls for utmost faith on the part of the taxpayer: see MFK at p.1569E, p.1575B.

(c) full disclosure will not have been made where statements made in the clearance request are materially inaccurate or misleading. It does not follow that full disclosure has been made because sufficient information was disclosed to enable inference to be drawn therefrom. Where a piece of information essential to the deliberations required of HMRC by the taxpayer was not furnished to them there is no unfairness in revoking a clearance: see R v. IRC (ex parte Matrix Securities Limited) [1994].

(d) the requirement for full disclosure will be especially difficult to satisfy if there has been a purely oral exchange with a tax official. Full disclosure requires the taxpayer to disclose the perceived problem which the taxpayer wishes to have addressed: see Corkteck Ltd v HMRC [2009].

There are other detailed considerations in the judgment – it is a very thorough review of the principles and precedents.

The judge considered that the principal issue was whether the disclosure was "full and frank". The actual VAT treatment of the arrangements was the subject of a separate appeal before the FTT, and was neither needed nor appropriate for the judicial review application.

HMRC contended that it was not: the application was materially inaccurate and misleading, in that it failed to refer to the salary sacrifice arrangements that were in fact an integral part of the way the programme operated. The 2002 clearance application had referred explicitly to salary sacrifice; the 2009 application was accompanied by a copy of the 2002 ruling (which did not make such a reference), but not the application. The "track changes" were evidence that the information had been withheld.

The company argued that there were no inaccuracies, and that HMRC could and should have concluded on the basis of the information provided that the salaries of pilots would be reduced because of the airlines' payment of the bonds. In the company's contention, HMRC simply changed their mind about the treatment of the arrangement in 2016, and it was unreasonable for them to do so (in particular, to do so retrospectively).

The judge examined the agreement between the company and easyjet, which was one of its major customers. In his view, it was quite clear from those documents that the pilots paid for their own training, and knew that they would do so. The impression that the airline paid for the training was misleading, and that could not be corrected by other statements in the clearance application that might have led HMRC to ask further questions. That was not "full and frank disclosure".

The judge went on to consider a number of other possible arguments, including that HMRC should be assumed to know everything that had been included in the 2002 application because it was referred to in the 2009 application, and therefore were aware of the salary sacrifice element. In his view, it was not incumbent on HMRC to piece together the correct picture from different sources of information provided at different times and in different contexts. HMRC were entitled to assume that anything material would be clearly included in the clearance request itself.

The company put forward an alternative argument based on *R v IRC ex parte Unilever plc* [1996]. That involved HMRC withdrawing, without notice, a long-established practice that was non-statutory but had been operated without question for many years (extending the time limits for making group relief claims). The court held that the circumstances of that case were "unique", and the present situation was readily distinguishable. The company had operated the same arrangement for many years, but it had withheld material information from HMRC in doing so. In the communications which followed the ruling and in which HMRC explained the basis of its decision, it should have become more than clear to the company that HMRC were labouring under the misapprehension that the effect of the arrangement was that the airlines were paying for the training when, at least in relation to its biggest customer, this was plainly wrong. The company did not seek to correct the obvious misapprehension at any time.

The judge dismissed the company's application to quash the decisions to withdraw the clearance and to issue the assessments.

High Court: *R (on the application of Airline Placement Ltd) v HMRC*

Lecture 21

6.8.3 Freezing order

In TC07621, an individual appealed against the disallowance of input tax on legal fees incurred in quarters 06/17 to 12/17 in relation to a dispute over a freezing order imposed on his assets by HMRC following the issue of personal liability notices for £8.7m in July 2015. These in turn related to the individual's alleged involvement in companies based outside the EU that had been issued with civil evasion penalties for failing to account properly for import VAT on goods imported into the UK. The PLNs were the subject of separate appeals. In the meantime, the freezing orders and penalties had been increased, so that the prohibition on moving the appellant's assets stood at £22.75m from August 2018.

The individual was registered for VAT as a sole trader in relation to a property holding business with opted rental income. He said that he also provided consultancy services through the sole trade, but no output tax invoices were raised in the relevant period for that activity because of the time spent on the PLN litigation.

The Tribunal accepted that the freezing orders had an impact on his sole trade, even though they did not prevent him continuing to collect rent. He had to abort the purchase of two properties in August 2015 because the freezing order did not allow him to enter the necessary arrangements.

The trader relied on the Court of Appeal decision in *Praesto Consulting* as support for the deduction. Looked at "in the round", the restrictions imposed by the freezing orders provided the necessary link between the sole trade and the legal costs. Alternatively, they should be regarded as overheads incurred in attempting to make more capital available for the business, as in *Kretztechnik*.

The FTT was not persuaded. The legal costs were incurred purely in attempting to show that there was no link between the appellant and the companies that were the subject of the evasion penalties. The purpose of the legal fees was not in order to allow him to continue to rent the properties that he owns or to invest in more rental properties. There was no nexus with what the sole proprietorship continued to invoice, to adopt the terminology used in *Rosner*. The legal supplies to the appellant and the economic reality of the sole proprietorship illustrated that the advice was in respect of the alleged activities of others, as opposed to those of the sole proprietorship.

The appeal in relation to the deductibility of the legal fees was dismissed.

However, in TC08615, decided in 2022, the FTT allowed the appeals by the company (Sintra Global Inc) and the individual against the assessments to VAT and the PLNs. The officers had closed their minds to the possibility that the taxpayer was not liable for the tax, and had therefore not taken into account all the relevant evidence before them. The assessments were therefore not made to the best of the officers'

judgement and failed in their entirety; the penalties based on those assessments fell away, because there was no “VAT due or payable”.

The individual applied to the High Court for the freezing order to be lifted. HMRC objected on the grounds that the FTT decision was being appealed, and there was a real risk of the assets being dissipated, leaving the individual unable to meet the assessments if the appeal succeeded. According to precedent, the judge had to consider a number of issues without carrying out a “mini-trial” of the appeal itself. He examined each of the grounds of appeal that the FTT had accepted HMRC could bring before the Upper Tribunal, and concluded that HMRC had a real prospect of success. This suggested that the freezing order should not be cancelled.

However, the severe criticism of HMRC’s conduct by the FTT led the judge to reconsider the terms of the injunction and vary it. This included:

(1) a forward-looking cross-undertaking in damages subject to a suitable cap which I will hear further argument on but which I provisionally consider might be set at £500,000;

(2) provisions for the freezing injunction to cease automatically a reasonable time, say 15 business days, after the handing down of the Upper Tribunal Decision unless renewed on a new application;

(3) a significant variation in the basis of Mr. Malde's monthly allowance to a quarterly allowance, to afford him some flexibility in his spending and at a higher overall level – again I will hear further from the parties on this but have in mind the figure of £30,000 a quarter;

(4) an enumeration of matters that Mr Malde may take which reasonably would not be expected to reduce the assets available to HMRC in the case of a successful appeal, such as bona fide investments in his companies, where Mr Malde may be permitted to undertake such matters upon notifying HMRC with full details but without requiring HMRC's prior permission.

The fact that the freezing injunction had deprived the individual of his assets for such a long period was not in itself a reason to allow the application. The judge recommended that he should apply to the Courts and Tribunals service for the appeal to be heard as quickly as possible.

High Court: *HMRC v Parul Keshavlal Malde*

Lecture 22

6.8.4 Late appeals

A company appealed against a number of assessments to VAT and also a penalty totalling £3.5 million. The appeals were late by varying lengths of time, which were not agreed – the appellant accepted that it had been late for periods from just over 2 months to just under a year, while HMRC considered that several of the appeals were much more overdue.

Judge Rachel Perez recorded an extraordinary history of correspondence between HMRC, the taxpayer and the taxpayer’s accountant, including many allegations that the HMRC officer was unobtainable, and letters sent to and from the trader’s MP, Sajid Javid, complaining about the situation. She noted the very serious health issues faced by the director, for which evidence had been presented. She accepted that the delays in appealing

were serious – although she appears to have agreed with the shorter measures given by the trader – but they were not particularly significant, given HMRC's continuing engagement with the matter. The prejudice in the case was all one way, given allegations of fraud which the director would have no opportunity to defend if the appeal was not allowed to proceed, and the very large amount of money at stake.

She simply was not prepared to add to the director's troubles by refusing to allow the appeals to be made late. She stressed that this did not amount to saying that the input tax claims should succeed because of the circumstances, nor that the penalty should not be payable for that reason; but the Tribunal should give the appellant the chance to argue its case on those matters.

First-Tier Tribunal (TC08819): *PRB Trading Ltd*

6.8.5 Hardship

Judge Nigel Popplewell heard an application by a company for its appeal to be heard without depositing £110,000 of disputed VAT. HMRC had refused to accept the hardship application, so it fell to be decided by the Tribunal.

He repeated the useful summary of the principles of a hardship application from the FTT case of *NT ADA Ltd*, which cross-referenced to paragraphs in the 2017 Upper Tribunal decision in *Elbrook (Cash & Carry) Ltd* (UT paragraph references in square brackets):

(1) The purpose of the provisions is to strike a balance between the abuse of the appeals mechanism by employing it to delay paying disputed tax and the stricture of having to pay or deposit the disputed sum as the price of entering the appeal process; the relief afforded by the "hardship" provisions should not be applied so as to operate as a fetter on the right of appeal ([19]).

(2) The Tribunal should not concern itself with the merits of the underlying appeal ([20]).

(3) The test is an "all or nothing" one, in which it is not relevant that the appellant might be able to pay or deposit some amount less than the whole disputed sum ([31]).

(4) The test is to be applied to the position at the date of the hearing ([26]). This means that the Tribunal should not "speculate as to what might become available to the appellant in the future" ([22] & [26]). It should focus on "immediately or readily available resources" ([21]).

(5) The fact that the appellant may have the necessary cash or other readily available resources may not be determinative, if hardship would result from using it (or them) in paying the disputed sum ([22]).

(6) Available borrowing resources may be considered, but generally only from existing sources, e.g. unused facilities or new facilities immediately available with minimal formality ([23]).

(7) Potentially available borrowing from new sources, for example if the appellant owns property capable as acting as security for a new loan, will only exceptionally be considered as "immediately or readily available",

for example where arrangements for borrowing are at an advanced stage ([24]).

(8) The potential sale, outside the ordinary course of business, of assets properly purchased for the purposes of the appellant's business, might cause hardship even if the assets are not currently being used in the business ([25]).

(9) There is no hard and fast rule that "regard can never be had to the resources of connected (but legally independent) entities where… there is common control and the evidence suggests a free flow of resources to meet the needs or requirements of any one entity at the expense of the other or others of them from time to time" ([25]).

(10) Although the test is to be applied by reference to the circumstances at the date of the hearing (see [33(4)] above), that does not mean that events leading up to that time are necessarily ignored. The Tribunal can take into account "whether the appellant is himself responsible for putting himself in a position where he cannot pay…, and that would include by delaying the hearing so that at the time of the hearing he cannot pay… without hardship" ([27] and [28]). The basis for this is that the "real cause" of the appellant's inability to pay without hardship may be his own prior actions.

(11) The Tribunal should make its assessment on the basis of the most up-to-date available information. The burden lies on the appellant to establish hardship, so it is normally incumbent on the appellant to adduce the necessary evidence to satisfy the Tribunal ([29]). Absence of contemporaneous accounting evidence may justify the Tribunal in placing little, if any, weight on an oral assertion that the appellant is unable to afford to pay.

(12) Within the above parameters, the decision of the Tribunal is a value judgment on the basis of the evidence before it ([16]).

Although this came from a FTT decision and was therefore not binding, the judge agreed with it and adopted it for the purpose of the decision.

The VAT dispute related to a *Kittel* denial of input tax on cars purchased for sale to customers in the Republic of Ireland. HMRC decided that the trader was involved in MTIC fraud and raised assessments for the tax in July 2021. The trader appealed in February 2022 and applied for hardship at the same time. In May 2022, HMRC asked for further information in order to assess the hardship application, and refused it on 23 June 2022. The company provided bank statements to the Tribunal in accordance with directions (backed up by an Unless order). These statements showed balances of £307 and £161. The director said that there had been no trading since HMRC had denied the repayments.

The judge heard witness evidence from the director and owner of the company, which he had set up to help his brother start a business. He ran a similar, more established business himself, YBA Ltd. When the appellant's business was effectively closed down by HMRC refusing the repayments, the appellant owed YBA Ltd some £80,000, and the only way of possibly recovering this was for the present director to take over the company from his brother.

The judge stated that he was satisfied that HMRC's refusal of hardship had been entirely proper on the basis of the information that had been presented to them at the time the decision was taken. However, he had to take a decision based on all the information available at the time of the hearing, and the witness evidence of the director was significant. HMRC's representative suggested that this should be rejected because it was not backed up by documentary evidence, but the judge considered that the witness had given "comprehensive, coherent, and, to my mind, wholly plausible answers". Not only did the appellant have no assets and no prospect of generating any income, but also the second company, YBA Ltd, was unable to provide any more funds. It too was in dispute with HMRC and was also taking an appeal to the Tribunal.

The judge concluded that it was not just a question of hardship: it was simply impossible for the appellant to pay. The hardship application was allowed.

First-Tier Tribunal (TC08811): *ABA Motors Ltd*

Lecture 23

6.8.6 Second time appeal

In TC08177, heard in 2021, an individual appealed against a PLN of just over £1.7 million in relation to inaccuracy penalties charged on a company of which he was the sole shareholder and director. The alleged inaccuracies related to HMRC's assertion that the company sold alcoholic goods in the UK rather than dealing in them while they were outside the scope. An assessment was raised on the company for periods 02/16 to 08/17; the company did not appeal, but went into liquidation. HMRC charged a penalty on the company on 23 October 2018, and sent the PLN to the director on 26 October on the grounds that the company was likely to become insolvent.

Judge Zachary Citron examined the evidence presented, which included numerous indications that the company was involved in something unlawful. However, he did not consider that HMRC had shown, on the balance of probabilities, that the goods had been removed to the UK before they were sold. This meant that the appeal had to be allowed, because the alleged inaccuracy on which the penalty was based fell away.

In case this decision was appealed and found to be incorrect, the judge also considered the question of deliberate conduct. In his view, if there was any inaccuracy in the returns, the director would have known about it, and any resulting penalty would have been attributable to him.

In September 2022, the Upper Tribunal set aside this decision and remitted the case to the same FTT panel for reconsideration in the light of the UT's findings. The error of law was that the FTT had considered the burden of proof to have lain on HMRC throughout, because it was a penalty case; however, as the only defence offered against the penalty was that the VAT itself was not due, that issue should have been determined with the burden of proof lying on the appellant.

The FTT judge noted that he was not to disturb the original findings of primary fact, nor to make any new findings; he was required to reassess

the consequences of those findings. There were some disputes about what were the findings of primary fact and what the UT meant by those terms. On going through those findings and reassessing them, the judge came to a decision that may have surprised and will certainly have disappointed HMRC: on the basis of all the evidence, and applying the civil standard of proof, the judge was satisfied that the company had discharged the burden of proof to show that the goods were neither located in the UK at the point of sale, nor transported to the UK as part of the company's sales. The appeal was allowed again.

First-Tier Tribunal (TC08809): *Mohammed Zaman*

Lecture 24

6.8.7 Shared penalty

HMRC issued PLNs to the two directors of a company, ICL, charging each of them 50% of a penalty levied on the company. One of them appealed; the other apparently did not, and was not involved in the proceedings at all.

Judge Jane Bailey heard procedural applications from both parties. HMRC wanted the admission of extra witness statements; the appellant wanted disclosure of information from HMRC; and HMRC made a further very late application to replace one of the witness statements with a different statement.

ICL had been deregistered by HMRC on the basis that it had been established with the intention of facilitating VAT fraud (following the principles of the *Ablessio* case). The company's appeal against that decision was struck out after the company failed to comply with an "unless order". HMRC had also denied input tax on *Kittel* principles, and a separate appeal against that decision was also struck out. The company went into liquidation in January 2021; HMRC issued a penalty to the company and PLNs to the directors.

The appellant director's grounds of appeal were that the company had not been involved in fraudulent evasion; he neither knew nor ought to have known of any involvement; he was not directly involved in the transactions so HMRC had exaggerated his level of culpability; and HMRC had ignored his representations about this.

The decision sets out the progress of the appeal, which appears to have involved significant delays and failures to meet deadlines on both sides. This culminated in HMRC serving their bundle to the appellant less than 24 hours before the hearing.

The judge noted that the seven "late" witness statements had been made in relation to ICL's initial appeal that was struck out. HMRC must therefore have had them for a considerable amount of time, and there was no good reason for their lateness. Although she decided to admit them on the basis that the prejudice to HMRC would be very substantial, and the appellant would not be facing anything he had not seen before, she said she would back this up with the sanction of an automatic Unless Order – if HMRC do not now carry on the appeal correctly, they will be barred from the proceedings if they do not comply with the directions. These included directions in relation to HMRC's additional late application to substitute one of the witness statements.

The judge allowed the appellant's application for two elements of HMRC's case to be explained more fully, but refused the application for disclosure of a document possibly held by the Insolvency Service relating to his fellow director. The judge concluded that it was not relevant to these proceedings, and therefore should not be required, whether or not it was within the possession or control of HMRC.

First-Tier Tribunal (TC08802): *Giles Ellis*

Lecture 24

6.8.8 Penalty and PLN

A company and its director appealed against assessments to VAT (reduced to £11,400 by the time of the hearing) and penalties (£7,281) and a PLN assigning the penalty to the director. The company had registered for VAT on 5 April 2017, describing the trade as "plumbing and drainage, heating and plumbing contracting". It made successive repayment returns, which lead to an enquiry in August 2019. The director said the claims were "due to our expenses being more than the sales". The visiting officer was told that the company records were in storage and could not be accessed "for health and safety reasons". Later the director said that he had visited the storage unit but that he could not locate some of the records.

The judge considered that the investigating officer had given "measured and straightforward" evidence, and had given the appellant the benefit of the doubt in many areas. The director's evidence to the Tribunal was substantially different, and the judge did not accept it. There were inconsistencies in his account and explanations that were not credible. The conduct was held to be deliberate within the definition of the Supreme Court in *HMRC v Tooth*. Although, very belatedly, the director had produced evidence for some of the claims for input tax, there were still very substantial gaps. Furthermore, he has failed to substantiate the source of funding for the claimed purchases.

The judge upheld the assessments to VAT because the required evidence to support the deductions had not been provided by the company. The minimal reduction in penalties (15%) was appropriate and the PLN was justified. The appeals were dismissed.

First-Tier Tribunal (TC08828): *Coonley Trading Ltd*

Lecture 24

6.8.9 Strike-out application

A strike-out hearing came before Judge Brannan in the FTT on 7 December 2020. The appeal was a MTIC case about refusal of £214,386 of input tax. HMRC had argued that the appeal had no reasonable prospect of success. There was also a second, live appeal against a separate decision to deny zero-rating on certain supposed despatches to the Republic of Ireland, where HMRC had not applied for strike-out. The decisions dated from 2016 and the company had appealed in early 2017.

First round

In the decision, released on 29 January 2021, the judge refused HMRC's strike-out application, and also refused the company's application to

adduce additional evidence. In early 2022, HMRC appealed against this decision to the Upper Tribunal (Mr Justice Edwin Johnson and Judge Andrew Scott). They argued that the judge had reached a decision that was perverse, he had misapplied the law, and he had failed to give sufficient reasons.

The UT gave a brief history of the business and the dispute as far as it was relevant to the strike-out decision. The company manufactured road tankers, but had started a separate business of dealing in second-hand cars, which had been investigated for connection with VAT evasion. Following the appeal, the FTT issued a number of procedural directions, some of which were not complied with by HMRC.

Judge Brannan had cited several authorities on striking-out applications. The UT noted a precedent that suggested the UT should exercise extreme caution in interfering with case management decisions of this sort. However, counsel for HMRC argued that a strike-out decision was more than case management, in that it was effectively a summary decision of the case. He suggested that the UT might take the opportunity of giving guidance to the FTT on how to deal with strike-out applications under Rule 8(3)(c); the UT declined to do so. It would only consider whether the judge's decision was wrong in law, and whether it should be set aside.

HMRC's argument was that the company had put forward no real answer to any of the four issues that have to be proved in a MTIC case:

1. There had been a tax loss.
2. The tax loss was occasioned by fraud.
3. The company's transactions were connected to that fraudulent tax loss.
4. The company knew or should have known that its transactions were so connected.

If the company had no answers, it could not possibly succeed. Before the UT, HMRC's counsel argued that the judge had failed to engage with this argument. The UT examined the judge's explanation for his decision not to strike out the appeal, and essentially agreed with HMRC's counsel: the judge had not engaged with the case, and had not explained why. The UT was careful to consider the situation as it had been at the time of the FTT hearing, and noted that the company had now accepted HMRC's case on issues (1) to (3). Even if the judge had only had to consider issue (4), his reasoning was inadequate.

Turning to the specific grounds of appeal, the UT did not wish to label the judge's decision "perverse", but accepted that it contained errors of law, and failed to set out sufficient reasons. The decision should be set aside; the FTT had had a considerable amount of material to consider, which meant that it was not appropriate for the UT to remake it. The case would be remitted to a differently constituted FTT. Both parties should be restricted to the evidence upon which they relied at the original strike-out hearing, unless the FTT gave permission for further evidence.

Second round

The new FTT hearing was held by Judge Jonathan Cannan on 18 April 2023. He considered in some detail all of the factors put forward by HMRC as indicative that the company should have known of the connection to fraud, to which HMRC said that the company had no answer. He also reproduced in full the witness statements of the company's witnesses, which contained brief explanations of the transactions but did not directly address many of HMRC's arguments.

Nevertheless, the judge considered that HMRC had not met the threshold for him to dismiss the appeal on a summary basis. The explanations given should be tested in a full hearing; there was a realistic prospect of the company rebutting HMRC's assertion that it ought to have known of the connection with fraud. It would not be fair or just to determine what the company should have known without a fuller investigation of the facts.

The judge dismissed HMRC's application for strike-out a second time.

First-Tier Tribunal (TC08793): *Tasca Tankers Ltd*

Lecture 25

6.9 Other administration issues

6.9.1 Notifiable arrangements

The *Indirect Taxes (Notifiable Arrangements) (Amendment) Regulations 2023* amend the 2017 regulations in respect of avoidance arrangements notifiable under the VATA 1994 Regulations in regulations 5 and 6, which described VAT avoidance arrangements relating to offshore supplies.

The description of those arrangements makes reference to supplies of services made from one person to another. Under s.43(1)(a) VATA 1994, supplies made by a member of a VAT group to another member of the group are disregarded for VAT purposes. The amendments made by regulations 3 and 4 of these regulations establish that, where reference is made to supplies in regulations 5 and 6 of the 2017 Regulations, the term includes supplies that would otherwise fall to be disregarded by virtue of s.43(1)(a).

Transitional provision is made in reg.5(1) to ensure that the amendments do not apply in relation to cases where the duty to notify the tax avoidance arrangements described in regulations 5 or 6 of the 2017 Regulations arises before the day on which these regulations come into force (1 June 2023).

SI 2023/473

6.9.2 Article

In an article in *Taxation*, Damon Wright examines significant recent changes in VAT legislation, including the place of supply of electronically supplied services and the treatment of e-commerce supplies through platforms. He speculates that there will be further challenges in the future in relation to social media, virtual world markets and virtual currencies,

finance, education and healthcare, particularly where traditional services are affected by new technology, and in reporting and compliance.

Taxation, 1 June 2023

6.9.3 Tax Simplification

The UK Parliamentary Treasury Committee has issued a report on Tax Simplification. It concludes that the UK tax system is overcomplicated and the decision to abolish the Office of Tax Simplification (OTS) sends out the wrong message about the UK government's intentions. The cross-party Committee tabled two amendments to the Finance (no.2) Bill 2023, one removing the abolition of the OTS and the other requiring the Treasury to report annually on tax simplification if the OTS is indeed abolished (as seems likely).

https://publications.parliament.uk/pa/cm5803/cmselect/cmtreasy/1425/summary.html

6.9.4 Disqualification

The High Court confirmed a claim by the Official Receiver that the director of a company should be disqualified for 12 years from holding the office of director because of his involvement in MTIC frauds in relation to his company's 05/06 VAT return period. The company had lost a FTT appeal over the VAT in 2016 (TC04946).

The individual protested that it was unreasonable to bring these proceedings against him after such a long time, and that it amounted to a vendetta or witch-hunt. The judge expressed some sympathy for the difficulties caused by the long delays, but still found the director's evidence unsatisfactory. The fact that the director had at the very least turned a blind eye to his company's involvement in a fraud indicated a period of disqualification towards the middle to top end of the top bracket of sanctions available.

High Court: *Re Walmley Ash Ltd (formerly Balmoral Ltd)*