VAT UPDATE
OCTOBER 2021

Covering material from July – September 2021

Notes prepared by Mike Thexton MA FCA CTA (Fellow)

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1. INTRODUCTION

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

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

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

1.1 Appeals pending

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

The HMRC website section which reports the progress of appeals was last updated on 13 July 2021.

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

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

- *Ampleaward Ltd*: HMRC's appeal against the UT decision that the company was not caught by the "fallback acquisitions" rule was heard by the CA in July 2021.
- *Beigebell Ltd*: HMRC succeeded in appeal (covered in July 2020 update) against the FTT decision that a company's directors did not have the means of knowledge of the connection of their company's transactions to a missing trader fraud: case remitted to a differently constituted FTT.
- *Bluejay Mining plc*: HMRC have been granted permission to appeal against the FTT decision that a holding company was entitled to input tax recovery.
- *Chelmsford City Council, Mid-Ulster District Council*: HMRC have been granted leave to appeal on particular points against the FTT's decisions on local authority sports provision (no appeal against the related decision in *Midlothian Council*).
- *DCM (Optical Holdings) Ltd*: the taxpayer has been granted leave to appeal against the Court of Session's decisions in favour of HMRC (listed for 8 February 2022).

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

1.1.1 Decisions in this update

- *Target Group Ltd*: CA rejected company's appeal against UT decision that its supplies of loan administration services did not fall within art.135(1)(d)

1.1.2 Other news on appeals

- *Anna Cook*: the taxpayer was refused leave to appeal to the CA against the UT decision that her Ceroc dancing classes did not qualify for the "private tuition" exemption.
- *Aria Technology Ltd v HMRC*: Supreme Court refused taxpayer leave to appeal against CA ruling (April 2020 update) that letters, taken together, constituted a valid assessment

2. OUTPUTS

2.1 Scope of VAT: linking supplies to consideration

2.1.1 Grant-funded television

Questions were referred to the CJEU on the VAT treatment of the Bulgarian public broadcasting body, which is funded partly by grants from the state budget and partly by the proceeds of its own business activities, comprising paid content (principally advertising) and non-broadcasting activities such as the sale of intellectual property and the rental of equipment.

Art.132(1)(q) PVD exempts "activities of public broadcasting organisations other than those of a commercial character". The questions related to the body's right to deduct input tax. It considered that the public grants were wholly outside the scope, rather than exempt consideration for broadcasting services, and therefore did not come into the partial exemption calculation; the tax authorities took the opposite view. The questions for the court covered the scope issue, exemption, the right of deduction and the appropriate method of partial exemption if the tax authorities were correct.

Advocate-General's opinion

The A-G referred to the decision in *Český rozhlas* (Case C–11/15), which considered the position of a state broadcaster that was funded by a licence fee. The people paying the licence fee had to pay it because they owned a receiver; there was no link between the payment of the fee and the provision of the service. There would be no difference between that case and the situation in which a broadcaster is funded by public grant, if there was no link between the payment of the grant and the provision of services – if the grant was simply a method of financing the "public mission" entrusted to the broadcaster by the state. However, if there was such a direct link, then the grant would be within the scope of VAT.

Although there was apparently some link between the grant and the amount of broadcast time, which the Commission considered might turn it into consideration, the A-G did not think that the connection was strong enough to be analogous to *Le Rayon d'Or* (Case C-151/13). That case featured a much stronger link between what was paid and what was done, and the state grants constituted third party consideration for services provided to the beneficiaries of those services.

The A-G considered and rejected the application of art.25 PVD. He therefore proposed that the first question should be answered on the basis that these grants were not within art.2.

The A-G went on to consider the scope of the exemption in art.132(1)(q). Even if the grant was outside the scope, the possibility of some other income falling within the exemption would be relevant to the questions on input tax recovery. He examined various submissions on the concept of "activities of a commercial character", and concluded that it covered "operations carried out for consideration and which do not constitute activities of general interest, as well as the provision of services carried out free of charge, insofar as they are financed by the proceeds of these operations against payment". In effect, to the extent that the operations

were not paid for by the public grant, they would not be exempt, because they would be paid for by commercial operations.

Turning to the issue of the right of deduction, the A-G noted the long-standing problem of the difference between “business/non-business” and partial exemption – the PVD prescribes ways of determining recovery where some income is exempt, but there is no set of rules governing the deduction where some income is outside the scope. Member States are entitled to set their own rules, as long as the overall result is fair. The answer to these questions is therefore vague: “a public broadcaster whose activities are financed by both public subsidies and by revenue from transactions subject to VAT is entitled to deduct the VAT due or paid on goods and services used for the needs of these activities, insofar as they are financed by revenue from transactions subject to VAT.” No method of working out the “insofar as” is prescribed.

Full court

The full court agreed that the services provided to the public and financed by the state grant were not within art.2 PVD. They were not “supplied for consideration”, and they were not within art.25.

The court limited the second question to whether activities covered by the first question fell within the exemption in art.132(1)(q). As the activities in the first question were outside the scope, there was no need to consider the second question. The issue of exemption applying under this heading to the broadcaster’s commercial activities was not considered.

The questions about input tax deduction were reformulated to address the “business/non-business” split rather than the partial exemption issue. The answer simply reiterated the long-standing principle that the method of doing this is within the discretion of the Member State concerned, provided that the method is fair and logical.

CJEU (Case C-21/20): *Balgarskanatsionalna televizia v Direktor na Direktsia*

2.2 Disbursements

2.2.1 Counsel’s fees

A concessionary treatment for counsel’s fees paid into and kept in a solicitor’s client account was agreed between HM Customs and Excise (as the department was then known), the Bar Council and the Law Society at the time VAT was first introduced. The concession was published in the *London Gazette* on 4 April 1973 and is not set out in any HMRC manual or VAT notice.

HMRC have recently confirmed to the Law Society that the concession still currently stands. However, HMRC are reviewing it to consider whether it should be withdrawn. If it is withdrawn, HMRC have confirmed that the new treatment would apply prospectively, with appropriate advance notice given.

The concession means that there are two ways in which a solicitor may treat counsel's fees for VAT purposes:

1. Treating counsel's fee as the firm's own expense (normal VAT accounting)

The solicitor may treat the fee as the firm's own expense and reclaim the VAT element as input tax.

When the solicitor delivers their own sales invoice to the client, the value of the supply for VAT purposes is the value of the firm's own costs, plus the tax-exclusive value of counsel's fees.

VAT, where applicable, is then added to both.

2. Treating counsel's fee as a disbursement for VAT purposes (using the concession)

The solicitor may treat counsel's advice as supplied directly to the client and the settlement of the fees as a disbursement for VAT purposes.

Counsel's VAT invoice (receipted fee notes) may be amended by:

- inserting on the fee note the client's name and the word 'per' immediately preceding the solicitor's own name and address; or
- crossing out the solicitor's name and address and replacing it with the name and address of the client.

The fee note from counsel will then be recognised as a valid VAT invoice in the hands of the client (who can reclaim the VAT if registered) and no VAT record need be kept in the solicitor's account ledgers. The solicitor should keep a copy of the VAT invoice.

Extra considerations may arise where the underlying client is based outside the UK.

Where the solicitor considers that the services of counsel, if supplied directly to the client, would be outside the scope of UK VAT, the solicitor must certify counsel's fee note to this effect and ask the client to pay the VAT-exclusive amount only. The solicitor should advise counsel that VAT is not due on their services because of the client's place of belonging, and provide them with appropriate commercial evidence of this.

Alternatively, the solicitor may ask counsel's clerk to cancel the original fee note and submit a new one; this will have no adverse VAT implications in that counsel's fee note only becomes a tax invoice when receipted.

In either case, the fee note will have to be addressed to the ultimate client.

Little is known about the use of the concession and HMRC would like to understand more about:

- the extent and ways in which solicitors currently use it;
- its benefits or deficiencies.

The Law Society asked for comments from solicitors to be submitted by 30 September.

www.lawsociety.org.uk/topics/tax/review-of-vat-concessionary-treatment-for-counsel-fees

2.3 Exemptions

2.3.1 Insurance related service?

In (TC07308), a company appealed against a June 2013 ruling that it was making taxable supplies and should be registered with effect from 1 June 2009. The company's business was to assist consumers to make PPI claims. It made cold calls and entered into contracts with those customers who agreed to be represented, in return for a fee of 39% of the compensation received.

The company argued that its contracts gave it the right to terminate a customer's inappropriate insurance policies from the outset, and that on the basis of *Lubbock Fine* (which concerned termination of a lease) the termination of insurance policies involved "insurance transactions". The FTT judge considered the analogy with the leasing case to be misconceived. That decision held that the consideration for the termination was exempt; in this case, the analogy would be with the payment of compensation, not the service of assisting with the claim.

In support of the conclusion that this was not a supply of "insurance transactions", the judge commented that the customers would not have considered the service to be "terminating insurance". Throughout the documentation, it was referred to as assisting with a claim for compensation. That was also how the business was described in a VAT registration application dated 26 November 2009. Some of the contracts had already long expired, which meant that the company could not terminate them – its services on expired and unexpired policies were effectively identical.

The second question was whether the company was supplying insurance related services of an insurance agent or broker. This involved consideration of Directive 77/92/EEC, *Re Forsakringsaktiebolaget Skandia* (Case C-240/99) and the 2010 Court of Appeal decision in *InsuranceWide.com v HMRC*. Whether or not a person is an insurance broker or an insurance agent depends on what they do. How they choose to describe themselves or their activities is not determinative. The definitions in the Insurance Directive were relevant, but only to the extent that they reflected legal reality and practice in insurance law; they would not determine the outcome of a VAT case. CJEU cases have held that it is an essential characteristic of an insurance broker or an insurance agent for VAT purposes that they are engaged in the business of putting insurance companies in touch with potential clients or, more generally, acting as intermediaries between insurance companies and clients or potential clients. The FTT judge did not consider that the company had these characteristics. Although it acted as an agent for its customers, it did not "put them in touch" with the insurance companies, even when making a claim – they already had, or had in the past, insurance policies with those companies. Nor did the UK law, which exempts "assistance in the administration of contracts of insurance, including the handling of claims", assist the appellant. That was not a proper description of the service: it was not making a claim under the policy, but a claim against the insurer in relation to unfair contract terms.

The judge also considered whether the services related to insurance transactions. The 2001 High Court precedent of *Century Life* was cited. That concerned an insurance company considering whether pensions policies had been mis-sold: the HC judge held that involved the detailed consideration of whether the policy had been suitable for the customer, and that was an insurance-related service. The FTT judge did not consider that the situations were similar. The company dealt with claims for compensation in relation to contracts that had usually expired, and were usually then held to have been void from the outset. That involved consideration of compliance with regulations in the selling of the policy, but it was quite different from the assessment of the suitability of an ongoing pension contract as in *Century Life*.

The appeal was therefore dismissed. The company appealed to the Upper Tribunal. There is an interesting comment on the scope of the UK exemption at paragraphs 12 and 13:

The exemption in domestic law would potentially need to be considered if it were wider than the terms of the exemption in Article 135(1)(a) that it purports to implement. In that case, if the Appellant could show that its supplies fell within the terms of the domestic legislation, it would succeed in the appeal even if it failed under Article 135(1)(a).

However, the parties agree that the exemption as implemented in domestic law is not wider, as in more generous to the taxpayer, than the exemption in Article 135(1)(a). That is because, as set out above, the domestic legislation incorporates all the requirements of Article 135(1)(a) and then adds requirements not expressly found in the language of Article 135(1)(a).

The company's counsel essentially argued the same points again, relying on a slightly wider range of precedent cases. HMRC responded that the FTT had come to the correct decision for the correct reasons.

The UT agreed with the FTT that the company was not involved in insurance transactions. The commercial and economic reality was that it was seeking compensation for mis-selling, which was not an insurance transaction; the cancellation of the policy, where that was part of the compensation, was only incidental to the customer's purpose. The judges also rejected the idea that the cancellation of an insurance policy could be an insurance transaction: there was extensive authority for the proposition that an insurance transaction had to involve the provider of insurance agreeing to indemnify the recipient in exchange for a premium (*Card Protection Plan, BGZ Leasing, Aspiro*). There was no precedent to suggest that cancelling a policy also qualified. *Lubbock Fine* was decided in a completely different context.

The company's counsel accepted that it was not acting as an "insurance broker", but argued that it was nevertheless acting as an "insurance agent" and providing "insurance-related services". The UT considered the precedents in detail and came to the same conclusion as the FTT: the company did not have either of the requirements of an insurance agent: (i) the relationship with the insured and insurer; nor (ii) performing the essential activity of insurance agents, which is putting potential customers in touch with insurers.

The UT noted that this meant it was unnecessary to consider whether the services were "insurance-related", but for completeness it agreed with the FTT on that point as well. The appeal was dismissed again.

Upper Tribunal: *Claims Advisory Group Ltd v HMRC*

2.3.2 Loan administration services

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

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

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

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

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

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

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

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

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

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

(7) it is necessary to distinguish a "mere physical or technical supply, such as making a data-handling system available to a bank", or "technical and electronic assistance to the person performing the essential, specific functions": these are not exempt; in particular the court must examine the extent of the supplier's responsibility, and whether it is "restricted to technical aspects" or "extends to the specific, essential aspects of the transactions" (paragraphs [37] and [66]).

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

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

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

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

She concluded:

I think it is clear that the starting point is to identify the individual elements of a single complex supply. Whether that supply falls to be treated as exempt will generally (but not necessarily exclusively) be determined by reference to predominance, but this might either be a single predominant element or in some cases a combination of elements.

The test is an objective one, from the perspective of a typical consumer, and based on the contract and the economic realities. I agree with Mr Cordara that the reference by Advocate General Tizzano to "economic purpose", referred to by Jonathan Parker LJ in Tesco, is relevant.

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

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

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

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

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

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

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

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

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

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

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

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

This means that the *Marleasing* principle (construing UK law in such a way that its effect is consistent with EU law where possible), and the overriding authority of CJEU decisions which conflict with earlier UK precedents, continue into the future, until the UK law is changed. The facts of the present case all took place while the UK was still part of the EU, but it appears that the decision would be the same even if they were after 1 January 2021.

Court of Appeal: *Target Group Ltd v HMRC*

2.3.3 Management of special investment funds

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

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

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

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

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

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

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

2.3.4 Fiscal neutrality

The latest hearing in the long-running dispute arising from the UK's exemption for gambling concerned an assessment of the extent to which gaming machines operated by Rank and Gala Leisure between 18 December 2005 and 31 January 2013 were "similar" (for VAT and fiscal neutrality purposes) to other machines that were treated as exempt from VAT under the law. If they were similar, the principle of fiscal neutrality would require that they were also treated as exempt. The relevant UK law was in VATA 1994 Sch.9 Group 4, which was amended on 6 December 2005 and again on 31 January 2013 to change the definition of "taxable gaming machine". The companies argued that the distinction between taxable and exempt machines could not be justified.

The principles of how to judge similarity for this purpose had been set out by the CJEU in *HMRC v The Rank Group plc* (Cases C-259/10 and 260/10), and there have been several hearings in the years since concerning the application of that judgment to different circumstances. HMRC had accepted that certain types of machine had to be treated as exempt following the 2020 UT decision in *Rank and Done Brothers*, but other types of machine remained in dispute.

Judge Greg Sinfield analysed the history of CJEU decisions in this area from *Fischer* (Case C-283/95) and *Linneweber* (Case C-453/02) to *Rank*. He summarised the approach as: "two supplies of services are similar where they have similar characteristics and meet the same needs from the point of view of a typical or average consumer and any differences between them do not have a significant influence on the decision of the average consumer to use one service rather than the other." He also noted factors that the CJEU had said should not be taken into account:

(1) the lawful or unlawful nature of the operation of a game of chance (paragraph 45);

(2) the identity of the operators of the games and the legal form by means of which they exercise their activities (paragraph 45);

(3) differences in the setting in which games of chance are made available and, in particular, accessibility in terms of location and opening times and atmosphere (paragraph 47);

(4) differences in the application of other taxes (paragraph 48);

(5) the legal regimes relating to control and regulation of the games (paragraph 49); and

(6) differences in the details of the structure, the arrangements or the rules of games which all fall within a single category of game, such as slot machines (paragraph 55).

The CJEU permitted different categories of gambling to be treated as distinct (e.g. horse racing, slot machines, lotteries); however, fixed odds betting terminals were "a type of slot machine" to be judged against other slot machines. In the context of slot machines, the CJEU noted that "differences relating to the minimum and maximum stakes and prizes, the chances of winning, the [events or games] available and the possibility of interaction between the player and the slot machine are liable to have a considerable influence on the decision of the average consumer, as the attraction of games of chance lies chiefly in the possibility of winning."

The judge went on to analyse how the UK Tribunals had applied these principles in the *Rank* and *Done Brothers* decisions, and summarised the approach he would adopt. Physical and online "slots" games were all in the same category; nevertheless, that did not mean they all had to be treated in the same way. He had to consider the nature of different games and the evidence presented in relation to the likely behaviour of "typical consumers".

HMRC's argument was based on a distinction between the typical consumer of physical slots games and the typical consumer of online games (which were exempt). HMRC presented evidence that the typical consumer of physical slots games was:

(1) single;

(2) white;

(3) unemployed;

(4) male;

(5) under 35 years old;

(6) without a university degree; and

(7) playing in a pub.

The appellants claimed that the average player of slots was an older woman playing a game between sessions of bingo. In either case, HMRC argued, such consumers did not play online. The judge did not accept that this was the right approach. Access to the internet was an irrelevant factor that should be disregarded: he had to consider the games themselves, and whether they met the same needs of the average consumer, who would be assumed to have access to them.

After extensive consideration of the witness evidence and the arguments put forward by HMRC, the decision is quite brief: the judge considered that none of the factors identified by the CJEU as relevant considerations in *Rank* exerted a significant influence on the average player's decision to play a taxed game rather than an exempt game. He considered that the evidence showed that the average player viewed taxed games and exempt games as similar and interchangeable because they all met the same need from the point of view of that player which was to gamble by playing a slots game for money with a view to winning more than they staked. Accordingly, treating taxed games and exempt games differently for VAT purposes during the relevant period breached the principle of fiscal neutrality.

The appeal was allowed; quantum had not been before the Tribunal, so the parties were invited to agree the amount and to return if they could not do so.

First-Tier Tribunal (TC08190): *The Rank Group plc and another*

HMRC have responded to the FTT decision. Businesses which have asked for their appeals to be stood over behind those cases may now expect to be paid. However, HMRC will want to see evidence, and may ask for more information after examining it. Claims must be on all fours with the decided case (i.e. must relate to supplies made from 6 December 2005 to 31 January 2013); they must have been made within the appropriate deadline (i.e. compliance with reg.37 SI 1995/2518) and an appeal must have been lodged with the Tribunal.

Revenue & Customs Brief 12/2021

2.3.5 Covid testing services

HMRC have issued a Brief to clarify the VAT treatment of Covid-19 testing services. HMRC consider that the objective purposes of COVID-19 testing are diagnosis and the protection of human health. This also applies to tests taken for international air flights. This means that such testing may be exempt medical care subject to meeting the usual

requirements, including the administration of the test to the patient and the provision of the results by a medical professional.

In line with the normal VAT rules that apply to medical care, the service can only be exempted where it is:

- carried out and supplied by a relevant health professional within the meaning of items 1, 2, 2A or 3 of Group 7 of Schedule 9 of the VAT Act 1994;
- supplied by a non-registered person, but the services are wholly performed by a relevant health professional – the exemption does not apply where the health professional is a dental technician;
- carried out by a non-registered person acting under the supervision of a relevant health professional – the exemption does not apply where the health professional is a pharmacist, pharmacy technician or dental technician;
- supplied by a hospital or state regulated institution – in this case the exemption also covers the supply of any goods in connection with the supply.

The supply of COVID-19 testing by a body regulated by the Care Quality Commission (or equivalent in Northern Ireland, Scotland & Wales) for other activities, but not for COVID-19 testing, is standard rated. The exemption can apply if the supply meets another of the tests required to qualify.

Revenue & Customs Brief 11/2021

2.3.6 Private medicine

Art.132(1)(b) PVD exempts medical care (and closely related goods) supplied "by bodies governed by public law or, under social conditions comparable with those applicable to bodies governed by public law, by hospitals, centres for medical treatment or diagnosis and other duly recognised establishments of a similar nature." Art.133 permits Member States to restrict the exemption in art.132(1)(b) by imposing one or more conditions: it can be restricted to non-profit making bodies, bodies managed on an essentially voluntary basis, bodies subject to price regulation, and situations in which distortion of competition would not arise.

The German law restricted the exemption to certain categories of "approved" hospital. A private limited company that was not on the approved list appealed against a ruling that the majority of its supplies were taxable. The German court was concerned that the domestic law might impose conditions that were not compatible with the PVD, in particular in the light of the principle of fiscal neutrality.

Advocate-General Hogan commented that the CJEU uses the expression "fiscal neutrality" in three different ways:

- the idea that the tax should be "neutral" from the point of view of a taxable person, in that input tax is recoverable so that the total tax collected is the VAT fraction of the amount paid by the final consumer;

- the principle of equal treatment of similar transactions;
- the principle of distortion of competition.

The A-G drew a distinction between the second and third of these senses. Prevention of distortion of competition is a principle of interpretation where other methods of interpretation do not lead to a conclusive result; but equal treatment is an overarching principle of law. He considered that both of these concepts were relevant to the dispute.

The A-G went on to examine the scope of the exemption in art.132(1)(b), in order to consider whether it precluded the way in which the equivalent provision was written into German law. It imposed conditions on three aspects of the supply:

- the nature of the service provided,
- the form of the establishment providing the service, and
- the manner in which the service is provided.

The first condition was not controversial in the present case. The "form of the establishment" has to be "hospitals, centres for medical treatment or diagnosis and other duly recognised establishments of a similar nature." After detailed consideration of the principles underlying the rule, the A-G concluded: "*It follows that, in my view, both the wording, the context and the objectives pursued by Article 132(1)(b) of the VAT Directive, and the need to interpret any provision in a manner which does not call into question its validity, demonstrate that the discretion available to the Member States to define the conditions under which an establishment governed by private law is to be regarded as 'duly recognised' extends solely to the conditions which must be satisfied in order for an establishment to be duly authorised to carry out, within a structure in which resources are pooled, the health and medical services covered by that exemption. In essence, therefore, the 'duly recognised' requirement relates to professional standards only.*"

Unusually, the A-G noted that precedent decisions appear to be inconsistent: *Lup* (Case C-106/05) claimed to rely on *Dornier* (Case C-45/01), but in fact applied a different analysis to the relevance of the extent to which the care in an institution was paid for by public health insurance. However, he was confident that the overall conclusion remained that a distinction between two institutions could not be based solely on the extent to which the care was funded by health insurance: the key question was whether the services were equivalent from a qualitative point of view in the light of the professional qualifications of the service providers in question. If an institution was largely funded by public health insurance, that was an indication that it was "duly authorised" by the State; but the converse did not follow – if an institution's patients were mostly private, it would still be duly authorised if it was able to show that it met the appropriate legal medical standards to allow it to operate.

The A-G went on to consider the expression "under comparable social conditions". He considered that the required comparison involved consideration of the requirements imposed on the institution with respect to its patients, rather than its whole operation. "Comparable" meant "similar but not necessarily identical".

The judgment in *Idealmed III* (Case C-211/18) appeared to apply the "comparable social conditions" to the services provided and not to the provider. However, the A-G considered that it was based on a different situation and should not be more widely applied.

The conclusion on whether the German law was compatible with the PVD drew a distinction between:

- on the one hand, several of the German conditions for exemption, which the A-G opined were neither "social conditions" nor within art.133, and therefore not legitimate; and
- on the other hand, the requirement that, in order to be exempt, a private hospital must have carried out, during the previous financial year, at least 40% of hospital services invoiced for an amount lower than the amount reimbursable by the social security bodies. This was capable of constituting a "social condition" for the purposes of art.132(1)(b), if a comparable requirement was imposed on bodies governed by public law.

The A-G's opinion is a very detailed examination of the EU rules on exemption; even though it may not be particularly relevant to the medical care exemption in the UK, it provides a model of legal analysis that could be helpful in other contexts.

CJEU (A-G) (Case C-228/20): *I GmbH v Finanzamt H*

2.3.7 Philanthropic exemption

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

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

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

Judge Greg Sinfield examined the meaning and relevance of "public interest" in the heading of art.132. He rejected HMRC's submission that,

as well as showing that its main aim was ‘philosophical’, UGLE must also prove that its aim was in the public interest, i.e. for the benefit of the public. By analogy with the exemption for trade unions, it was clear that it was not necessary for an exempt body’s aims to benefit the whole public: trade unions are regarded as acting in the public interest when they defend and represent the interests of their members. UGLE’s philosophical aims could likewise be “in the public interest” even if they were mainly of concern to the body’s own members.

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

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

The appeal was dismissed.

First-Tier Tribunal (TC08250): *United Grand Lodge of England*

2.3.8 Updated Manual

The *Cost Sharing Exemption* Manual has been extensively updated, confirming that in the context of overseas members of cost-sharing groups, the conclusion in the case of *Taksatorringen* – that there is a distortion of competition where there is a genuine risk that the VAT exemption itself would give rise to distortions of competition – remains the position after the completion of Brexit on 31 December 2020.

In other respects, the effect of Brexit has been reflected by replacing references to EU legislation with references to UK law, removing references to “other” Member States, and referring to R&C Brief 10/2018 for an explanation of HMRC’s approach to the test for “necessary services”.

VAT Cost Sharing Exemption Manual

2.4 Zero-rating

2.4.1 Seeds and plants

HMRC have updated their Notice *Seeds and plants that can be zero-rated*. The guidance has been updated to include the following list of plants which may be zero-rated when they are held out for sale for the production of edible fruit:

- Aronia berry (chokeberry)
- Goji berry
- Honeyberry
- Jostaberry
- Kiwi
- Lingonberry
- Melon
- Pinkcurrant
- Pluot, aprium, apriplum or plumcot (prunus hybrids)
- Pomegranate
- Sloe
- Sunberry

The term held out for sale means:

- The way the product is labelled, packaged, displayed, invoiced, advertised or promoted;
- The heading under which the product is listed in the catalogue, webpage or price list.

Notice 701/38

2.5 Lower rate

2.5.1 Caravans and houseboats

HMRC have updated their Notice on *Caravans and houseboats* to reflect the extension of the temporary reduced rate of VAT for tourism and hospitality (5% to 30 September 2021 and 12.5% to 31 March 2022). The affected supplies include stays in and pitch fees for caravans that relate to tourism.

VAT Notice 701/20

2.5.2 Articles

In an article in *Taxation*, Neil Warren discusses HMRC's announcement of their policy that supplies of electricity from public car charging points are standard rated, regardless of the amount of electricity supplied to individual customers or from individual charging points.

Taxation, 1 July 2021

In another article, Neil Warren discusses practical issues arising from the introduction of a fourth rate of VAT (12.5%), and suggests ways in which businesses can save tax.

Taxation, 26 August 2021

2.5.3 Updated Manual

HMRC have updated their *Fuel and Power* Manual with guidance on the place of supply rules for cross-border supplies of gas and electricity in light of the UK's departure from the EU and new wording on HMRC's position where a customer of a fuel and power supplier provides an incorrect declaration of eligibility for reduced VAT rating.

VFUP3400, VFUP2530

2.6 Computational matters

Nothing to report.

2.7 Discounts, rebates and gifts

Nothing to report.

2.8 Compound and multiple

Nothing to report.

2.9 Agency

Nothing to report.

2.10 Second hand goods

Nothing to report.

2.11 Charities and clubs

Nothing to report.

2.12 Other supply problems

2.12.1 UK emissions trading scheme

On 5 July the Financial Secretary to the Treasury, Jesse Norman MP, announced that legislation will be introduced at the earliest opportunity to allow a VAT zero rate to apply to trades in UK emissions trading scheme allowances within the VAT Terminal Markets Order (SI 1973/173).

A UK Emissions Trading Scheme (UK ETS) replaced the UK's participation in the EU ETS on 1 January 2021. The scheme has been established to increase the climate ambition of the UK's carbon pricing policy, while mitigating the risk of carbon leakage through free allowances.

The minister said that the Order permits VAT zero rating for transactions on terminal commodity markets. It is seen as an important VAT trade facilitation measure by those involved in trading commodity futures

contracts, where often on these markets there are very substantial volumes of transactions over short periods of time. The zero-rating relief provided by the TMO avoids the administrative and cash flow burdens of accounting for VAT and should have no effect on the VAT amount collected at the final stage of consumption.

The Order was the subject of infringement proceedings in recent years, with the CJEU finding that some transactions had been added to the scope of zero-rating after the "standstill provisions" came into effect. The minister confirmed that the new legislation will apply from the commencement of the new arrangements in May 2021.

https://questions-statements.parliament.uk/written-statements/detail/2021-07-05/hcws148

3. LAND AND PROPERTY

3.1 Exemption

3.1.1 Responses to consultation

Earlier this year HMRC issued a "call for evidence" in relation to the problems arising from the VAT rules on land and buildings. The consultation arose out of a report by the Office of Tax Simplification; it sought views on possible options for change to make the system simpler and fairer, including:

- removing the seller's ability to opt to tax, and
- making all relevant transactions either exempt or taxable at a reduced rate or standard rate.

Responses have been submitted by the Law Society (LS) and by CIOT.

The LS agrees with the OTS's suggestion that simplification could and should be considered to address particular issues with the scope and application of the rules and to ensure that taxpayers can comply with their tax obligations. It recommends that any proposed changes should focus on specific areas of concern before considering whether more wholesale changes are needed.

Specific areas for attention include:

- clear identification of the boundary between land and non-land supplies;
- the VAT treatment of payments connected with land, such as overage payments;
- complexities and potential bear traps that can be encountered in connection with the zero rating for residential property, and
- the VAT treatment of bundled services that include the occupation of land.

The LS argued against some of the more potentially disruptive proposed options, such as the idea of making all land transactions exempt, or making all land supplies taxable.

The LS considers that the following would be preferable/bear further exploration:

- the suggestion of making supplies of commercial property taxable but with an option to exempt, and
- making all residential property transactions zero-rated.

Depending on the outcome of other aspects of the call for evidence, the LS also recommends the creation of a publicly available and searchable register of options to tax. This could be accompanied by a searchable register of entities that are VAT-registered and go beyond the functionality of the current VAT number check facility.

www.lawsociety.org.uk/campaigns/consultation-responses/simplifying-the-vat-land-exemption-law-society-response

The CIOT response concentrated on different issues, although there were some areas of overlap:

- the CIOT wishes for any changes to the VAT rules for land and property to be considered from a wider social policy and green taxation policy perspective.
- the CIOT is not in favour of a major overhaul of the VAT rules for land and property at this time as its members have indicated that for the majority of land and property transactions, the VAT position is clear and/or administratively straightforward. A major change would create additional complexity for taxpayers.
- there are however discrete areas of complexity which could benefit from further focus – namely legislative definitions and the option to tax:
    - definitions – a major area for focus is to identify areas of complexity arising from definitions in English land law, VATA 1994 Sch.9 and the inherited definitions from the EU's art.135(1)(l) PVD. The definitions for the UK's 'right over land' and the EU's 'leasing or letting of immovable property' cause complexity.
    - the CIOT is supportive of ideas for simplification of the administration and operation of the option to tax system. These points have already been made in the Office of Tax Simplification's VAT report and are supported by the CIOT and should continue to be a focus for HMRC.

Other responses can also be found by internet search.

www.tax.org.uk/ref807

3.1.2 Article

In an article in *Taxation*, Richard Croker and Catherine Robins of Pinsent Masons LLP discuss whether the VAT rules for land and property are really in need of reform.

Taxation, 29 July 2021

3.1.3 Dilapidations

In an article in *Taxation*, Elizabeth Small reviews the VAT treatment of dilapidation payments. This discusses HMRC's attitude as reflected before R & C Brief 12/2020, the position put forward following that Brief, and the moderation of their view in early August 2021 following concerted representations by professional bodies and the property industry. In her view, HMRC had not understood the nature of rent negotiations and had appeared to suspect a possibility of value shifting which was not realistic.

She concludes:

"In early August 2021 HMRC went on to say that it intended to make a clear distinction between early termination fees and very similar payments which will be captured, and payments such as dilapidations where a direct link and reciprocity between payment and supply is less clear, which will

not be captured. However, it also reserved its right to take a different approach if value has shifted from the rent/premium that would have been reserved under the lease but for the agreement to pay dilapidations at the end.

For long leases with five-yearly rent reviews, it would seem unlikely that the parties could have negotiated an arbitrage from rent collected over, say, a 25-year lease and a hypothetical dilapidations payment in 25 years' time. So based on HMRC's current views, it seems that most landlords and tenants acting on normal commercial terms will have certainty and now know that VAT is not charged on dilapidations payments."

Taxation, 30 September 2021

3.2 Option to tax

3.2.1 End of temporary notification extension

The 30-day limit for notifying an option to tax was extended during the pandemic to 90 days for decisions made between 1 February 2020 and 31 July 2021. Decisions to opt to tax land and buildings made on or after 1 August 2021 must be notified to HMRC within 30 days.

The temporary change to allow options to tax to be signed electronically has now been made permanent. The temporary change to allow options to tax to be signed electronically has now been made permanent.

www.gov.uk/guidance/changes-to-notifying-an-option-to-tax-land-and-buildings-during-coronavirus-covid-19

3.3 Developers and builders

3.3.1 Substantial reconstruction of a listed building

A company acquired the Star & Garter Home at the top of Richmond Hill in London when the charity that used it to house ex-service personnel moved its operation elsewhere. Over 2.5 years, the company converted the structure into 86 residential units and subsequently sold them. The issue before the Tribunal was whether the sale of the units qualified for zero-rating, enabling the company to recover all the input tax incurred in the works.

The operative provision was VATA 1994 Sch.8 Group 6 item 1, which allows zero-rating for the grant of a major interest following the "substantial reconstruction" of a listed building. The judge noted that, in ordinary language, the works were a "substantial reconstruction". However, note 4 stated that "a [listed] building is not to be regarded as substantially reconstructed unless when the reconstruction is completed, the reconstructed building incorporates no more of the original building (that is to say, the building as it was before the reconstruction began) than the external walls together with other external features of architectural or

historical interest." In HMRC's view, this technical definition meant that the sales of the units had to be exempt, and input tax was not allowable.

The judge (Charles Hellier) considered the history of the legislation, including EU objections to its original form and the restrictions enacted in 2012 to remove the separate possibility of treating a project as a substantial reconstruction where 60% of the works were "approved alterations". The judge referred to the decision in *Zielinski Baker* as providing a good summary of the development and purpose of the law.

The detailed consideration of the law is of specialised interest only, as it rarely applies since 2012. The company's representative argued that the internal features retained were either "part of the walls" (because they were necessary to preserve the structural integrity of the building) or were "de minimis". The judge did not agree, particularly in the light of the changes made in 2012.

There was a separate argument based on the principal of fiscal neutrality, which the judge considered but rejected. It was not possible to identify competing transactions that were sufficiently similar to the sale of these units to engage the principle; there were some units in previously non-residential areas of the building that HMRC had agreed could be zero-rated, but precedent suggested that only sales by competing traders could form the basis of a case on fiscal neutrality grounds.

Lastly, the judge rejected a further argument based on the principle of proportionality. This appears to amount to a claim that enactment of EU law must do no more than is necessary to achieve the policy objective underlying the law. The judge did not accept the company's interpretation of the objectives of Group 6 as "to alleviate the financial burden on the owners of listed buildings", particularly after the 2012 changes. The principle did not assist the taxpayer.

The supplies were exempt and the appeal was rejected.

First-Tier Tribunal (TC08232): *Richmond Hill Developments (Jersey) Ltd*

3.4 Input tax claims on land

3.4.1 DIY claim

A couple renovated a dilapidated house over the period from 2014 to 2019. They appealed against HMRC's refusal of a DIY builders' claim. The judge (Charles Hellier) rehearsed the conditions in the law for a building to be "constructed" or for a "residential conversion". In this case, two opposing gable walls had been retained, which meant that the building could not be regarded as "new", even though they had been retained by order of the planning consent; and the property had been in residential use up to 2009, which was much too recent to satisfy the 10-year condition that would have allowed a residential conversion.

The judge noted the appellant's complaints about the anomalous way in which the rules operated, but stated that he could only apply the law as it was written. The appeal had to be dismissed.

First-Tier Tribunal (TC08258): *Stuart Hackett*

4. INTERNATIONAL SUPPLIES

4.1 E-commerce

4.1.1 One Stop Shop Return

HMRC have published new guidance on how businesses registered for the OSS Union scheme should complete and submit the One Stop Shop (OSS) Return and pay their VAT due. This relates to distance sales from Northern Ireland to the EU, where traders can still join the "Union scheme"; traders in the rest of the UK have to join the Import OSS.

One page explains how to report and pay VAT due on the distance sales of goods from Northern Ireland to consumers in the EU using the One Stop Shop Union scheme.

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

One guidance page outlines how the system works and when it applies.

www.gov.uk/guidance/submit-your-one-stop-shop-return-and-vat-payment

Another guidance page explains how to fill in a OSS Return if a trader is registered for the Union scheme and makes distance sales from Northern Ireland to the EU.

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

4.1.2 Article

In an article in *Taxation*, Rob Janering examines how businesses and marketplace operators are affected by the new e-commerce rules in the EU.

Taxation, 12 August 2021

4.2 Where is a supply of services?

4.2.1 Legitimate expectations

A company appealed to the FTT against an assessment on the grounds of a claimed legitimate expectation, arising from HMRC statements, that no assessment would be issued. The FTT dismissed the appeal, holding that the company did not have a reasonable expectation based on the HMRC statements. The company appealed to the Upper Tribunal, which also had to consider whether it was within the jurisdiction of the FTT to consider the question of legitimate expectation.

The company belonged in Poland for VAT purposes. It entered into a contract with another Polish company for the installation of a boiler in the UK. The customer was not registered for VAT in the UK. The appellant considered that it would have to register for VAT in the UK, and made an application. HMRC sent a questionnaire, and the company replied "yes" to the question "Do you supply any of these services to business

customers who belong in the UK?" and to the question "If you are supplying services related to land to business customers who belong in the UK, are all these business customers registered for VAT in the UK?" The FTT had held that these positive answers were based not on the situation as it was, but what the company believed the situation would be: it thought that it would make taxable supplies, and it thought its supplier would be registered in the UK.

On the basis of the questionnaire, HMRC refused registration on 18 June 2015. The decision was based on a conclusion that any supplies the company was making were subject to a reverse charge on its customers; as it did not have a UK establishment, it was not entitled to register.

The company then tried to claim back input tax, which was refused, and applied again to register. This time it declared that its Polish customer was not registered in the UK, and HMRC assessed it to output tax.

The UT (Mr Justice Adam Johnson and Judge Charles Hellier) set out the reverse charge provisions. The installation of the boiler in the UK was land-related, and without the reverse charge it was clear that it would have required the appellant to register in the UK. If the customer belonged in the UK and was registered, the reverse charge would have overridden the registration requirement.

The FTT had criticised the wording of the questionnaire for being unclear and hard to apply to the circumstances of the appellant. The company had a genuine intention to make taxable supplies to UK-based and registered customers, although this turned out not to be fulfilled; in respect of the only customer it supplied, the answer "yes" was incorrect, because it was neither UK based nor UK registered.

The FTT had concluded that, when HMRC rejected the registration application, it had been correct to do so on the basis of the answers that had been given. The rejection had included an invitation to supply further information if the company disagreed with the decision; the company did not do this.

The company had sought professional advice, which the FTT had considered a reasonable course of action; however, that advice had been that HMRC's decision was wrong, and yet it was not challenged. The failure to act on the advice was not a reasonable course of action, so the FTT decided the company did not have a legitimate expectation that it would not be assessed.

On appeal, the company's representative argued that the fault was in HMRC's badly-drafted questionnaire. The company had done its best and had acquired a legitimate expectation when it received HMRC's original decision.

HMRC's representative argued that the decision had not been "unqualified", because it set out the assumptions on which the conclusion was based; because the company had not set out the full details of its transactions, it had not "placed all its cards face upwards on the table", and could not rely on the HMRC letter.

The UT agreed with the FTT. The letter of 18 June had to be considered in its context, which included the questionnaire. The questionnaire might have been ambiguous, but the letter was not; it clearly stated that the

company would not be making taxable supplies "if it was supplying construction services solely to business customers who belong in the UK and who are all registered for VAT in the UK". The company could not have doubted the meaning of that decision.

The UT's decision that there was no legitimate expectation was slightly different from that of the FTT: it reached its conclusion on the basis of the letter of 18 June itself, rather than on the failure to act on the professional advice received subsequently. However, the result was the same: the appeal was dismissed again.

Although it was not strictly necessarily to reach a decision on whether the FTT had had the jurisdiction to consider legitimate expectations, the judges went on to consider it. The assessment had been raised under s.73 VATA 1994; the rights of appeal to the FTT were given by s.83(1), which listed 33 different matters, including at (p) "an assessment under s.73(1) or (2) in respect of a period for which the appellant has made a return under this Act, or under s.73(7), (7A) or (7B)."

The UT considered the precedents on jurisdiction and the interpretation of s.83, which included the High Court's decision in *Oxfam* in 2009. The judge in that case had concluded that the wording "with respect to" in the opening words of s.83(1) were wide enough to cover any question relating to the determination of the point at issue (which in that case was a claim to be repaid input tax). The jurisdiction of the Tribunal was determined by reference to the subject matter of the subsection (e.g. input tax), not by reference to a legal regime or type of law. The UT noted other reasons given by the judge in the Oxfam case for allowing a limited jurisdiction to consider questions of public law within the context of each individual part of s.83 on the facts of a particular case.

By contrast, in *Noor* (2013) the Upper Tribunal had taken the opposite view in the context of the same subsection (s.83(1)(c)). It considered that the right given by 83(1)(c) was in respect of a person's right to credit for input tax "under the VAT legislation". The UT considered a number of other precedents and differing views as to the extent of jurisdiction.

In conclusion, the judges noted that the words of s.83(1)(p) are wider than s.83(1)(c). The precedents considered a right to appeal about "the amount of any input tax"; the present case concerned "with respect to an assessment… or the amount of such an assessment." Given that s.73 included the words "the Commissioners may assess…", the appeal right appeared to cover the mere fact that HMRC had chosen to raise an assessment, as well as the amount assessed.

HMRC argued that this had been considered by the Court of Appeal in *Rahman (no.2)* (2003) and *Pegasus Birds Ltd* (2004). These cases had examined in detail the powers of the Tribunal to cancel or vary an assessment raised on "best of judgement" principles. The UT also considered how those decisions had been applied in later cases, including *Gore*, where the FTT had decided it did not have jurisdiction to consider legitimate expectations.

In conclusion on the question of jurisdiction, the UT stated that it was clear that the FTT does not have a general supervisory jurisdiction: most judicial review type questions must go to the Upper Tribunal. However, a taxpayer might be entitled to mount a defence under some of the

categories in s.83 based on challenging the validity of a decision on public law grounds. The judges considered that the word "may" in s.73 conferred a discretion on HMRC which was therefore open to this type of challenge. The simple words of s.83(1)(p) meant that the taxpayer could appeal "with respect to an assessment", which would therefore include the exercise of HMRC's discretion to raise that assessment. The judges considered that *Rahman* and *Pegasus Birds* tended to support this interpretation rather than contradicting it.

There were also sound policy reasons for allowing taxpayers the quicker and less expensive route to challenging an assessment, rather than requiring them to pursue a judicial review. The UT therefore considered that the FTT had had jurisdiction to determine the question in the present case.

Upper Tribunal: *KSM Henryk Zeman SP Z.o.o. v HMRC*

4.3 International supplies of goods

4.3.1 Onward supply relief

A company was appointed to act as an "import agent" in relation to the importation into the UK of a number of consignments of goods from China between 2014 and 2017. When the goods were released to it, it arranged their onward transport to other countries in the EU. The company made import declarations in which it claimed exemption from import VAT under Onward Supply Relief ("OSR"). HMRC decided that OSR was not available on these imports and raised a VAT assessment of some £5.7m in November 2017. The company appealed against this assessment on the grounds that it was entitled to OSR.

OSR provides for a short-cut to prevent the need to pay import VAT and claim it as input tax against a zero-rated despatch. If it is available, it allows the importer not to pay the VAT at all. The relief is based on art.143(1) PVD, which provides that the relief is subject to the provision of information to the local VAT authorities. Art 131 permits further conditions to be imposed. It is enacted in the UK's domestic legislation by SI 1995/2518 reg.138.

The problem is that the person liable to pay the import VAT (designated by the Member State under art.201) must also make a supply of the goods which is exempt under art.138. Although the company described itself as an "import agent", it was not a legal agent with authority to confer title to the goods. It therefore could not make, or be deemed to make, a supply of the goods; this meant that OSR was not available. Nevertheless, it was the person designated to pay the import VAT under art.201, so the assessment was correct.

The facts were agreed and were described by the judge (Charles Hellier). He analysed the contractual relationships between the company and the Czech customer for whom it acted, and the Chinese companies who supplied the goods. The company accepted that that it did not acquire title to the goods and could not say that it had made an actual supply of them. Its representative relied on VATA 1994 s.47(2A). He argued that the

company acted as agent of the end customers and acted "in [its] own name" for the purpose of that section. Accordingly, he contended that it was to be treated as having made a supply of the goods for the purposes of OSR. He put forward a number of supporting arguments, including the overall issue of double taxation that would arise if OSR was not available – the goods would be taxed both on importation to the UK and on arrival in the end customer's country. This was surely contrary to art.145 PVD.

HMRC's representative argued that s.47(2A) only applied to domestic transactions. The company would have to fall within s.47(1)(b), which it did not because it was not a legal agent of the Chinese manufacturer and did not, in the sense required, act in its own name. The double charge could have been avoided if the company had used the External Community Transit Procedure.

The judge analysed s.47. (1)(a) applied to "acquisitions", which were defined in the law to cover cross-border supplies of goods within the EU. (1)(b) applied to "imports", which do not have to involve a supply. (2A) does not explicitly state that it applies to domestic transactions, but rather to "supplies to which subsection (1) does not apply". HMRC's representative claimed that two previous FTT cases on s.47(2A) (*Radford Racing* and *Donald Savage*) had come to the wrong decision.

The judge analysed the law in detail, and concluded that it was possible for s.47(2A) to apply to the company's transactions as s.47(1) did not. However, the conditions of s.47(2A) included the requirement that the supply of goods must take place "through an agent" who "acts in his own name". Again the judge analysed the law and concluded that an "agent", for this purpose, must have authority to give rise to a transfer of title to goods to his principal, or to cause title in his principal's goods to be transferred to someone else. Although the contracts were drawn up on the understanding that the company would qualify for OSR, it was not an agent in this sense.

If he was wrong in that, the judge also considered that the company did not "act in its own name" in effecting the transaction. It acted in its own name when making the customs declaration and paying the import VAT, but that was not the sense required by the law.

The judge agreed with HMRC that Member States had discretion on how to prevent double taxation in line with the European treaties; the availability of the External Transit Procedure meant that it was not necessary to construe the domestic legislation in the way contended for by the company.

The conclusion, in dismissing the appeal, was as meticulous as the rest of the decision:

I find that:

(1) In order to qualify for OSR Scanwell had to make, or be deemed to make, supplies of goods.

(2) A supply of goods required the transfer of title in goods. Scanwell did not make any actual supply of goods.

(3) Scanwell could potentially be deemed to make a supply by section 47.

(4) Scanwell's activities did not fall within section 47(1), therefore they could potentially fall within section 47(2A).

(5) Its activities did not fall within section 47(2A) because it did not bring about the supply of goods and did not act in its own name in relation to any supply.

(6) As a result it was not entitled to OSR.

First-Tier Tribunal (TC08207): *Scanwell Logistics (UK) Ltd*

4.3.2 Post-Brexit guidance

There continues to be a stream of amendments and clarifications on the post-Brexit trade guidance that cannot be dealt with in a general update. The main guidance is gathered together on the GOV.UK website at the location given below, but it is hard to keep track of the detail when there is so much of it. Some particular points have been selected for more detailed mention in the following sections.

www.gov.uk/guidance/brexit-guidance-for-businesses

4.3.3 Northern Ireland

HMRC have updated their Notice *Retail Export Scheme (Northern Ireland)* to clarify the treatment of goods moving from Northern Ireland to Great Britain where a claim has been made under the VAT retail export scheme. This highlights one of the complexities of Brexit: in theory, a UK resident can claim VAT relief on goods bought in Northern Ireland under the scheme, but would then have to pay import VAT in the UK on arrival, as there are no tax-free personal allowances on movements between NI and GB.

Notice 704

The *Finance Act 2021, Section 95 and Schedule 18 (Distance Selling: Northern Ireland) (Appointed Day No 1 and Transitory Provision) Regulations 2021* took effect on 1 July 2021, although some provisions are delayed until later. The SI brings into force most of the provisions of Sch.18 FA 2021, which implement Council Directive (EU) 2017/2455 so far as relevant to the United Kingdom's obligations under the Protocol on Ireland/Northern Ireland in the EU Withdrawal Agreement. They also specify which provisions are not being brought into force yet and those which are being brought into force to a limited extent. They include transitional measures to have effect until 31 December 2021.

SI 2021/770

HMRC have updated their guidance on movements of goods between NI and the EU to reflect the change in the distance selling threshold to €10,000 (£8,818) from 1 July 2021. The rules are set out in section 6 of the page referenced below.

www.gov.uk/guidance/vat-on-movements-of-goods-between-northern-ireland-and-the-eu

4.3.4 Legislation

The *Value Added Tax (Miscellaneous Amendments and Repeals) (EU Exit) Regulations* (SI 2021/714) were summarised in the last update. The

regulations had to be amended shortly afterwards because the original version showed the date they would come into force as 1 July 2021. Another statutory instrument amended this to 1 August 2021.

SI 2021/779

4.3.5 Guidance

HMRC have updated their guidance on accounting for import VAT on the VAT return, to address a problem with monthly VAT statements which has caused difficulties for businesses which use simplified declarations for imports.

Where businesses import goods into the UK using simplified declarations, they are required to submit their supplementary declarations by the fourth working day of the month following the month of import.

Monthly VAT statements will show the total import VAT postponed for the previous month. HMRC have identified an issue where entries are not being allocated to the correct monthly VAT statement. They say they are actively seeking a solution to the problem, and in the meantime, businesses have two options:

- they can use the figures on their import VAT statements to complete their VAT return, or
- if they can identify the affected entries, they can reallocate them to the correct monthly statement and use these figures to complete their VAT return.

Businesses are advised to check their Quarter 1 VAT returns if they had problems with their January and February 2021 statements, and to follow detailed guidance (on the page referenced below) on how to correct errors if necessary.

HMRC also comment that, as long as reasonable care is taken to follow the guidance, there will be no penalty for errors.

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

HMRC have issued new guidance on businesses that are able to register under the Union One Stop Shop rules for distance sales of goods from Northern Ireland to consumers elsewhere in the EU.

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

4.4 European rules

4.4.1 Covid-19 response

The Council has adopted an amendment to the PVD introducing a temporary VAT exemption for importations and for certain supplies: the ‘buy and donate’ Directive will introduce a VAT exemption for the purchase of goods and services by the Commission and other EU agencies for distribution free of charge to member states in response to the COVID-19 pandemic. This is achieved by making a temporary addition to the list of exempted transactions in art.143.

www.consilium.europa.eu/en/press/press-releases/2021/07/13/council-adopts-a-temporary-buy-and-donate-vat-exemption/

4.4.2 European Public Prosecutor's Office

On 4 August 2021, premises in Germany, the Netherlands, Slovakia, Bulgaria and Hungary have been searched in the framework of an EPPO investigation into cross-border VAT fraud estimated at more than €14 million.

Marcus Paintinger, the European Delegated Prosecutor (Munich Office), said "Without the EPPO, setting up this operation would have taken months. Now it was a matter of weeks."

www.eppo.europa.eu/en/news/premises-germany-netherlands-slovakia-bulgaria-and-hungary-searched-framework-eppo

4.4.3 Failure to account for income

An individual acted as an agent for performing artists, arranging performances and receiving commissions from an organisation responsible for managing festivals. Transactions were in cash and were not declared either for VAT or profits taxes.

The trader argued that the assessments he received were excessive because he had been charged to tax on profits on the whole amount of the undeclared income, when the subsequent assessment to VAT should have been taken into account in reducing the profit.

The court noted that charging penalties for tax evasion is left to the discretion of the Member States, subject to the EU principle of proportionality. However, the measurement of tax due and taxable transactions is not subject to the States' discretion. The CJEU essentially agreed with the trader: unless it was possible for the trader to issue supplementary invoices and collect the VAT due, the price already received had to be regarded as VAT-inclusive.

CJEU (Case C‑ 521/19): *CB v Tribunal Económico-Administrativo Regional de Galicia*

4.4.4 Set-off of payments in prosecution

A Romanian company was prosecuted for VAT offences that allegedly took place in 2011/12. A dispute arose concerning the treatment of various payments made by the company in order to reduce the penalties charged on it. Questions were referred to the CJEU, but the first of these was ruled inadmissible and the second was considered by the court to be answerable by reference to existing case law. The company had made provisional payments of sums claimed to be due by the tax authority, and then claimed interest on the basis that it should have been able to set various payments against its tax liability. The court ruled that a payment, even if it is provisional, cannot be considered to be "undue" and therefore capable of generating interest for the payer, if it is aimed at honouring the tax liability on taxable transactions that are admitted to have taken place.

CJEU (Case C-81/20) *SC Mitliv Exim SRL v Agenţia Naţională de Administrare Fiscală*

4.4.5 Reduced rate

PVD Annex III item 7 allows Member States to apply a reduced rate under art.98 to "The right of admission to shows, theatres, circuses, fairs, amusement parks, concerts, museums, zoos, cinemas, exhibitions and similar cultural events and establishments". German law provides for a reduced rate of 7% to be applied to "circus shows, fairground activities, as well as turnover directly linked to the operation of zoos". A company which operated a fairground was told it had to apply the standard rate to its admission charges because it was a "sedentary fairground" as opposed to a seasonal or temporary fair. It disputed this on the grounds of fiscal neutrality, and questions were referred to the CJEU.

The referring court was not sure how to apply the EU law, partly because the German law itself did not explicitly rule out sedentary fairs. The word used in the reduced rating provision was 'Freizeitparks' ('leisure parks'), which could cover both of the expressions 'fairs' and 'amusement parks' from Annex III. The lower level of appeal court in Germany had concluded that the services offered by sedentary fairs were not sufficiently similar to those of itinerant ones to engage the principle of fiscal neutrality.

The court observed that there was no definition of 'fair' or 'amusement park' in the PVD or in the Implementing Regulation. The terms were therefore independent concepts of EU law that must be interpreted in a uniform manner in each territory. The interpretation should be in accordance with the usual meaning in everyday language, but a strict interpretation was required because the reduced rate was an exception to the normal rules of VAT. The court concluded that the use of different expressions in Annex III meant that different things were being referred to; 'fairs' were temporary in nature, while 'amusement parks' were sedentary. Each was distinct and did not encompass the other.

The court went on to consider the question of fiscal neutrality, and how it applied to fairs and amusement parks, with regard in particular to German cultural traditions. Its conclusion was that the German approach did not contravene the PVD, as long as fiscal neutrality was respected.

CJEU (Case C-406/20): *Phantasialand v Finanzamt Brühl*

4.4.6 Advance payment of VAT

A Polish company, G, made acquisitions of fuel that were placed in a tax warehouse in Poland. It failed to pay the acquisition tax within 5 days of the arrival, or submit a statement of acquisitions by the 5th of the following month, as required by Polish law. The company appealed, arguing that the imposition of an earlier due date for VAT on acquisitions than VAT on domestic transactions was contrary to the European treaty, and was not within the scope afforded to Member States by art.273 PVD to impose obligations considered necessary to ensure the correct collection of the tax.

The referring court was also concerned that the due date was or could be earlier than the tax point provided for by art.69 PVD (the issue of the invoice or 15th of the month following the arrival). It also asked whether an interim payment within art.206 PVD could be required without taking into account a taxable person's right to deduct, and whether a late interim

payment lost its status if it had not been paid by the end of the VAT period in which it was due.

The court considered that the establishment of an obligation to pay VAT was a three step process: for an obligation to pay VAT to arise, that VAT must have become chargeable and for the VAT to have become chargeable, a chargeable event must first have occurred. It was therefore not possible to require the payment of VAT before the chargeable event. Art.206 authorised provisions for early payment of VAT that had become chargeable (i.e. before the normal accounting dates for the period), but it did not authorise the present procedure. Nor could art.273 justify such a requirement.

CJEU (Case C-855/19): *G. sp. z o.o. v Dyrektor Izby Administracji Skarbowej w Bydgoszczy*

4.4.7 Timing of deductions

A German company GK rented commercial property from a landlord and sub-let it to tenants. Both and its landlord had opted to tax, and both used cash accounting, as implemented in Germany using the derogation in art.66 PVD.

GK deferred some of its rent payable from 2004 onwards. Payments of rent for the years 2009 to 2012 was paid in the years 2013 to 2016, and some was waived altogether. GK deducted input tax on the rent on the basis of payments made rather than the periods to which the rent related.

Following an audit, the tax authority ruled that the deductions should have been taken in the years to which the rent related, which by this time were time-barred. It therefore assessed to deny the deductions. GK appealed, and questions were referred to the CJEU. According to the order for reference, the referring court considered that the tax authority's position was correct under German law: even if output tax was based on the date of receipt under cash accounting, the right to deduct arose in the period in which a supply was received. The question was therefore whether this was compatible with the PVD.

The Advocate-General (Evgeni Tanchev) considered the status of art.167, which allows Member States to vary the time at which deduction is permitted where art.66 has been implemented. After detailed consideration of a number of matters, including the status of Council minutes when enacting art.167, the A-G concluded that art.167 was mandatory: where a Member State had implemented art.66, the right to deduct arose when a supply by a cash accounting supplier was paid for, not when the supply was received. The A-G emphasised that the fact that GK used cash accounting was irrelevant: it was GK's landlord that mattered.

The A-G went through arguments put forward by the German and Swedish governments in detail and gave illustrative examples to show why he did not agree with them. He concluded by pointing out that GK had done exactly what the PVD required in plain language; if it had followed what the German authorities were arguing was the correct position, it would have deducted input tax before it had paid for the supplies, obtaining a cash flow benefit, and before the landlord was obliged to account for output tax, resulting in a shortfall to the authorities.

In his opinion, art.167 precluded the rules that Germany had implemented.

CJEU (A-G) (Case C-9/20): *Grundstücksgemeinschaft Kollaustraße 136 v Finanzamt Hamburg-Oberalster*

4.4.8 Failure to fulfil obligations

A-G Pikamae has given an opinion in an infringement case brought by the Commission against the UK for failing to police imports of textiles and footwear from China with sufficient rigour in the period from November 2011 to October 2017. As a result, the UK's returns of customs duty and VAT to the EU were understated.

The A-G's opinion sets out the background to an EU-wide investigation into "undervaluation fraud" in respect of imports, and what the Commission argued was an inadequate response from HMRC and the UK government. The A-G considered that the Commission's case was made out, and has recommended that the court declares that the UK was in breach of its duties to protect the financial interests of the EU. The Commission was demanding a further contribution of some billions of euros in respect of the failure, which seems likely to be payable.

CJEU (A-G) (Case C-213/19): *Commission v United Kingdom*

4.5 Foreign refund reclaims

4.5.1 8th Directive reclaim

A German company made an 8th Directive reclaim for VAT incurred in Spain in the years 2005 and 2006. In spite of requests for supporting information by the Spanish authorities in 2008, the company did not provide the invoices or other information to substantiate the claims. The tax authority formally refused the claims in February 2009. There followed a dispute through the Spanish courts during which some of the information was provided, but some was still missing.

Eventually, questions were referred to the CJEU, asking whether the authorities were entitled to refuse the claim on the basis of non-production of evidence within a set time-frame, where the documents were only produced during legal proceedings subsequent to the refusal. The court considered a number of precedents and arguments, including those based on formal or substantive conditions for deduction, fiscal neutrality and effectiveness of rights; however, the refusal of the claim in these circumstances was in accordance with the principle of legal certainty, and was not contrary to the Directive. It appeared that the claimant had been given ample opportunity to make out its claim.

There was a separate question as to whether the failure to produce the documentation amounted to an abuse of rights. The CJEU seemed to find this a little confusing; there might be an allegation of abuse in relation to the underlying transactions, but simply failing to produce the documentation could not fall within the definition.

CJEU (Case C-294/20): *GE Auto Service Leasing GmbH v Tribunal Económico Administrativo Central*

4.5.2 Agents who submit VAT refund claims

HMRC announced on 9 September 2021 an offer to a limited number of agents the opportunity to try out a more efficient VAT refund application service until 30 November 2021. Agents taking part in the trial will be able to submit claims electronically via the HMRC Secure Data Exchange Service (SDES) system. HMRC will retain the right to request sight of the paper documentation supporting the claims, such as the completed VAT 65A forms and original invoices, so these must be retained.

The trial is described at section 3.7.7 of the latest version of Notice 723A.

www.gov.uk/guidance/refunds-of-uk-vat-for-non-uk-businesses-or-eu-vat-for-uk-businesses

4.5.3 Updated Manual

HMRC have made extensive revisions to the *VAT Refunds to Overseas Business Persons Manual*, in particular to clarify the different procedures applying to businesses established in Northern Ireland.

VROBP1000

4.5.4 Certificates of status

HMRC have published a Brief on claims for repayment of VAT to overseas businesses not established in the EU and not VAT registered in the EU (i.e. "13th Directive" claims). Businesses were required to submit their application for refunds together with the certificate of status on or before 31 December 2020 to get VAT refunds for the 12 months to 30 June 2020. Although the deadline to submit the certificate was extended to 30 June 2021 (Revenue & Customs Brief 20/2020), HMRC are aware that businesses are still experiencing difficulties largely due to measures taken in response to COVID-19. Therefore, HMRC has agreed that they will allow overseas businesses a further 6 months to submit a valid certificate of status. This means the certificate of status for 2019/20 claims must be submitted on or before 31 December 2021. HMRC will not make a payment until they receive a valid certificate of status to validate any claims.

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5. INPUTS

5.1 Economic activity

5.1.1 No business

In TC07356, a company claimed input tax totalling £19,765 for periods from 05/14 to 05/17. HMRC decided that there was negligible substance to the "business" and assessed to claw back the tax. The decision was confirmed on review and appealed to the Tribunal.

The company was owned by an individual who also owned a farm. The company "produced hay and maintained outbuildings" on the farm. HMRC argued that the operation, such as it was, was not carried on according to sound business principles: no invoices had been issued, no payment had been made and no contracts were in place; the only customer was the owner; and there was insufficient substance to constitute a business activity.

The appellant argued that HMRC could not maintain the VAT registration and, at the same time, rule that it was not carrying on a business. That was contradictory, and HMRC ought first to deregister the company if it wanted to disallow the input tax on this ground. The judge did not agree that this was the necessary construction of the law. The mere acceptance that a trader was validly VAT-registered did not amount to an acceptance by HMRC that the person was, at all times while registered, operating as a business.

It was agreed that the company was engaged in making hay for the farmer and in the sale of outbuildings. The company also argued that it was undertaking preparatory acts for new business activities, and would be able to levy management charges once these business activities were generating revenue. These activities appeared to be unrelated to farming, and both were still at a formative stage.

The judge considered the application of the *Lord Fisher* tests, where it was held that a business:

1. is a serious undertaking earnestly pursued;
2. has a certain measure of substance;
3. is an occupation or function actively pursued with reasonable or recognisable continuity;
4. is conducted in a regular manner and on sound and recognised business principles;
5. is predominantly concerned with the making of taxable supplies for consideration; and
6. the supplies were of a kind that, subject to differences of detail, are commonly made by those who seek to profit from them.

The FTT judge was satisfied that the activity satisfied the first three criteria and the sixth, even if the scale of operations was modest. However, the relationship between the farmer and the company undermined the application of "sound business principles". The only involvement of the company was that it owned the machinery that was

used for haymaking (left over from a time when it had more substantial farming operations); the farmer did the work himself without charge, and simply decided how much his livery business would pay for the hay.

As the revenue was less than £500 per year, it did not appear that the company's activities were predominantly concerned with making supplies for a consideration, and certainly not with making a profit.

The sale of outbuildings was a one-off exempt capital transaction, and did not undermine the conclusion that the goods and services on which input tax had been claimed had not been acquired for the purposes of a business being carried on.

The appeal was dismissed, and the company appealed to the Upper Tribunal. Counsel for the taxpayer argued that as HMRC had not deregistered the trader, it was still entitled to input tax recovery; the judges had no hesitation in rejecting this contention, as it ignored the effect of s.24 VATA 1994. HMRC were not required to deregister a person, even if they were satisfied that person was not carrying on a business, but registration did not confer an automatic right to input tax recovery.

The UT went on to consider whether the FTT had erred in law in concluding that the company did not carry on an economic activity. It had applied the *Lord Fisher* tests, and had not referred to *Wakefield College*, which the UT described as "the most useful guidance" on the question. The CA in *Wakefield* had referred to *Gemeente Borsele*, *Finland* and *Longridge on the Thames*. In *Longridge*, Arden LJ made the following comment, described as "important for this appeal":

In my judgment, the domestic authorities have developed in a way which means that they now diverge in some respects from the test to be applied in determining whether an activity of providing services to a recipient who makes a payment constitutes an economic activity resulting in a liability to VAT. In Finland, for instance, the focus was on whether there was a sufficiently direct link between the payment and the service. The Fisher criteria…by contrast omit reference to the connection or proportionality of the payment to the service.

The Fisher criteria direct attention to (a) seriousness of the enterprise (b) the regularity of the activity (c) the substantiality of the 5 activity (d) the organisational features of the enterprise (e) the predominant concern of the activity and (f) a comparison with commercial providers of the same service. These factors may have a role to play but they cannot displace the approach required by CJEU jurisprudence.

The "predominant concern" of the activity is now considered unhelpful and may be misleading; the CJEU decisions make it clear that the motive of the supplier is not material in this context.

The UT considered that the FTT had erred in law in considering the question of economic activity only by reference to the 1981 *Lord Fisher* tests. The judge said: "The FTT's approach is understandable given that notwithstanding that HMRC must have been aware of the decisions in *Borsele*, *Finland*, *Wakefield* and *Longridge*, HMRC based its own analysis of whether Babylon was carrying on a business simply on the basis of the *Lord Fisher* criteria, and indeed submitted to the FTT that this was the correct approach."

HMRC argued that the error of law was immaterial to the FTT's decision, but the UT disagreed: it was not inevitable that the FTT would have come to the same decision if it had applied the correct criteria and downgraded the "predominant concern" test. The FTT decision should therefore be set aside. It was appropriate to remake the decision rather than remit it, as there was no dispute about the primary facts and there was sufficient evidence to determine the issue.

Applying the two-stage process set out in *Borsele* and endorsed in *Wakefield*, it was clear that the company did make supplies for consideration within art.2 PVD. Turning to the question of "economic activity", while the *Lord Fisher* criteria had a role to play, the more appropriate starting point was to consider whether Babylon's supplies were made for the purposes of obtaining income therefrom on a continuing basis. The haymaking was seasonal but continuous; the only question was then whether there was a direct link between the supplies and the price received for them, such that the activity was "carried out for the purposes of obtaining income therefrom". This was a wide-ranging enquiry, in which all the objective circumstances must be examined.

The UT held that the FTT had come to the correct conclusion for the following reasons. First, it was not clear what right Babylon had to the hay, given that it did not own the land on which it grew. Its only involvement in the process appeared to be the ownership of the machinery used for cutting and baling; it did not incur any staff or other costs.

Secondly, there was no direct link between the company's activities and the income it received. The price was not determined, in whole or even in part, by the value of its supplies or by reference to its costs. The owner simply fixed the price that he paid for the hay and decided what costs would be borne by each of his businesses.

Third, various other factors were consistent with the conclusion that the company was not carrying on activities with the purpose of generating income: it raised no invoices for payment, and no payment was made for a number of years until payment was identified as being relevant to HMRC's view of the input tax deduction; there was no evidence of insurance; and there was only one customer, with income of £440 a year.

Lastly, it was relevant to consider whether the company was a participant in a market, which it clearly was not.

The appeal was dismissed.

Upper Tribunal: *Babylon Farm Ltd v HMRC*

5.2 Who receives the supply?

Nothing to report.

5.3 Partial exemption

5.3.1 Incidental insurance transactions

A Portuguese company sold household electrical appliances and other computer and telecommunications equipment. It also offered extended warranties on purchased items, which constituted insurance contracts. The company received commission as an intermediary in the sale of these insurance contracts. The company took the view that the commission was exempt, but continued to deduct its input tax in full. The tax authority ruled that it was partially exempt and should therefore not have claimed all its input tax.

The company argued that the commission should be covered by "financial transactions" which can be disregarded in partial exemption calculations in accordance with art.174(2)(b) and (c) PVD. The tax authority responded that "insurance transactions" were not "financial transactions", and also that the transactions were not "incidental", because the transactions were regular and contributed a significant and necessary part of the company's income. The referring court disagreed with this finding, holding that the warranty extensions contributed less than 1% of the company's turnover.

The question remained whether it was possible to regard insurance commission as "financial transactions". The court noted that art.174(2)(c) specifically excludes transactions within art.135(1)(b) to (g), but not art.135(1)(a), which was the provision that both parties agreed exempted the income from these transactions. The court considered in some detail whether the supplies were indeed covered by art.135(1)(a), and confirmed that they did fall within "insurance related services of insurance agents and brokers".

Art.174(2)(b) refers separately to the exclusion of "incidental real estate and financial transactions". It was therefore still possible that this income should be excluded under that provision. However, the court considered that there was a clear separation between insurance in art.135(1)(a) and financial transactions in the rest of art.135(1). They could not be regarded as synonymous for the purposes of art.174, regardless of whether the transactions were incidental.

The court therefore ruled that the income had to be taken into account in calculating input tax recovery under the rules of partial exemption.

CJEU (Case C-695/19): *Rádio Popular – Electrodomésticos SA v Autoridade Tributária e Aduaneira*

5.3.2 Partial Exemption Special Method applications

HMRC have updated their Notice *Partial Exemption* with an extended Appendix 2 on how to make an online application for a special method.

The appendix sets out in some detail what should be included in a PESM application to ensure that it is processed as quickly as possible. The following information is described as "basic details":

- a brief explanation of why your current method is no longer suitable or the proposed new method is better;

- details of all the business supplies which you make or intend to make including any 'foreign' supplies and 'specified' supplies and their approximate value;
- the VAT liabilities of your main supplies and their place of supply;
- details of the main costs you incur which bear VAT and the activities to which those costs relate;
- a worked example of your proposed method using actual figures – this is very important as without a worked example we cannot judge if the proposed method is low risk, you should only use projected figures where it is not possible to use actual figures, for example, if you're starting a new business activity, and where possible should use projections prepared for other business purposes, for example, justifying the expenditure to shareholders or to obtain funding for the activity from a bank;
- an explanation of how the method would deal with changes in your activities that might arise in the future;
- a copy of your most recent annual accounts;
- your declaration (that the proposed method gives a fair result).

There is more detail on many of these items and a description of the process, including the e-mail address to send the application to.

Notice 706

5.4 Cars

5.4.1 NHS bodies and cars

The *Value Added Tax (Treatment of Transactions) (Revocation) Order 2021* revokes the provision in SI 1992/630 that enabled Northumbria Healthcare NHS Foundation Trust to recover all of the VAT on the cost of leasing cars that were provided to employees under a salary sacrifice scheme. This followed a consultation, which resulted in no changes in the original proposal.

The explanatory notes point out that the original intention of the 1992 order was to prevent double taxation on salary sacrifice schemes; since then, changes to the rules on such schemes have made the original provision redundant. Its only remaining effect appeared to be to generate the "unwelcome result" in the *Northumbria* case.

SI 2021/1023

5.5 Business entertainment

Nothing to report.

5.6 Non-business use of supplies

Nothing to report.

5.7 Bad debt relief

Nothing to report.

5.8 Other input tax problems

5.8.1 Insolvent companies' pension schemes

HMRC have updated their Notice *Funded Pension Schemes* with a new section on the entitlement to input tax credit when a company is being wound up. Where a company is being wound up but still exists as a legal entity and is still receiving supplies for which it is liable for VAT, then VAT on those supplies is deductible under the provisions of VATA 1994 s.94. This includes VAT on costs incurred in winding up the company's occupational pension scheme.

Where the VAT deductible on such supplies exceeds the output tax owed by the company to HMRC for the relevant period, the company may reclaim the balance of the VAT deductible for that period through the office of its insolvency practitioner.

Notice 700/17

5.8.2 Missing trader fraud

A company appealed on 4 October 2012 against a decision made on 1 October 2012 to deny about £460,000 of input tax in its periods 03/11 and 06/11. An earlier hearing in 2019 set out the detailed procedural history, which included an earlier dismissal of the appeal by the FTT in 2015. There were further appeals which reached the NI Court of Appeal, which decided to remit the case to a differently constituted FTT. Judge Christopher McNall interpreted the "tenor" of the CA decision as requiring the whole appeal to be reheard. The earlier Tribunal's findings of fact were "wiped clean", but the evidence given orally and in writing for the earlier hearing still stood.

The alleged fraud related to transactions in soft drinks. In respect of one set of deals, the judge identified many suspicious elements of the transactions, but nevertheless concluded that HMRC's case did not meet the required standard of proof for a finding that the transactions were connected to a fraudulent tax loss. The judge clearly expected this decision to be appealed yet again, because he then set out a long list of matters that indicated that the trader was not acting in good faith when dealing with that counterparty.

In respect of two other sets of deals, the trader had accepted that there was a tax loss in the deal chain. The only question was therefore whether the director (Mr Donaldson) knew or ought to have known of that connection. The judge set out the following features in relation to one of the counterparties (with a similar list for the other):

Other evidence which cast doubt on Mr Magee's bona fides:

(1) He had contacted Mr Donaldson by a cold call;

(2) He had no business premises (his letterhead being a domestic address also on his driving licence), no known experience in the sector (having registered for VAT only on 1 July 2010), and no viable business assets - all of which was readily discoverable;

(3) His business paperwork (and the letter of 21 October 2010) gave an incorrect business name, road, and postcode: again, all of things which were readily discoverable and which would have put a reasonable person on the alert;

(4) His VAT certificate gave his trade as 'Retail Sale of Beverages', and not as 'Wholesale Fruit/Veg Juices and Soft Drink' (which is a different trade classification, and which was the trade classification both of Irwin and PCB);

(5) There is no credit check, nor evidence of verification of the VAT number;

(6) There could not be a check of business premises because (i) no address was given, and (ii) Mr Magee said in his letter of 21 October 2010 that he was 'sourcing other premises'; i.e., he was holding himself out as a wholesaler in October 2010, but did not state, even at that time, where his stock was kept;

(7) Mr Donaldson did not know how Mr Magee could afford to let UM have the goods before payment, nor how Mr Magee was financing his business. He should have asked, but did not. Mr Donaldson explained that his approach was that he was really just concerned with whether the goods were delivered, and that, if the VAT number was genuine, that was enough;

(8) The goods arrived on a trailer, but Mr Donaldson could not remember whose.

These features – described as a "resolute lack of curiosity" on Mr Donaldson's part – were enough to support a conclusion that the director knew of the connection to fraud. If he did not actually know, he ought to have done.

The appeals were allowed in respect of one set of deals, and dismissed in respect of the other two.

First-Tier Tribunal (TC08229): *Ulster Metal Refiners Ltd*

Another case involved both denial of input tax (£197,000) and denial of zero-rating (£470,000) in respect of transactions in monthly returns from 01/17 to 07/17 and the trader's final return period ("99/99"). The different bases of HMRC's decisions are referred to as "*Kittel*" and "*Mecsek*" respectively.

The company bought used cars in the UK and sold to trade customers in the Republic of Ireland. It had been registered for VAT from 1 April 2012 and had received regular repayments of VAT. Control visits had revealed some errors, but VAT fraud had never been raised as an issue before April 2016. This followed a discovery that one of the customers in

the RoI had been deregistered and a despatch could not therefore be zero-rated.

The decision goes through the history of the subsequent enquiry and the evidence presented by various officers as well as the owner of the business. At the start of the findings of fact, the judge (Tony Beare) commented that some of the owner's evidence was at variance with the documentary evidence, and he was therefore considered not wholly reliable. The appellant had not challenged the primary facts put forward by HMRC's witnesses, so these were accepted in full; however, the conclusions drawn from those facts were not included in that general acceptance. There were some details on which the judge differed from the witness evidence on the balance of probabilities.

The judge's discussion is interesting because of some of the criticisms of HMRC's arguments. He considered some of them "perplexing", for example a suggestion that the owner should have insisted on seeing a supplier's VAT returns and the identity of the supplier's sources for cars. The judge could not imagine any commercial business acceding to such a request. Nevertheless, he concluded that some of the transactions were connected with fraud, and the owner should have known that. The appeal was dismissed in relation to the input tax.

In respect of the sales, HMRC had not made out their case to deny zero-rating. There were different problems with different transactions: in some, the pleadings in the statement of case were inadequate; in others, they failed to establish that there was a fraudulent VAT loss; in one more, that the trader ought to have known of that fraud. The appeal therefore succeeded in relation to the zero-rating.

First-Tier Tribunal (TC08230): *Northside Fleet Ltd*

6. ADMINISTRATION AND PENALTIES

6.1 Group registration

Nothing to report.

6.2 Other registration rules

Nothing to report.

6.3 Payments and returns

6.3.1 VAT deferred due to coronavirus

HMRC have updated their guidance on deferred VAT to describe the penalty that may be charged if a business did not take action to pay the deferred VAT in full, or make an arrangement to pay by the deadline of 30 June 2021. The penalty is 5% of the deferred VAT that is unpaid when the penalty is assessed, and has to be paid within 30 days of the date of the penalty assessment. There is a right of appeal to the FTT.

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

6.4 Repayment claims

6.4.1 Entitlement to input tax without invoice

Historically, the UK regarded all delivery services supplied by the Royal Mail as exempt. This was held to be incorrect in the case of *TNT Post UK* (Case C-357/07, 23 April 2009): only the "public postal service" was covered by the PVD exemption, which referred to the "universal service obligation" of the national provider. Individually negotiated contracts should not be exempt, because they existed within a competitive marketplace.

Up to that point, Royal Mail and its customers had both assumed that the supplies were not VATable. Royal Mail had contracts which provided for the possibility of collecting VAT in addition if VAT was found to be due, but the company decided not to enforce that provision – it was not commercially practical to go to all its customers for the preceding four years and try to collect the money, even where those customers might be willing to pay (because they would be entitled to a deduction). Furthermore, HMRC took the decision not to attempt to collect the VAT from Royal Mail; as the law had been wrong, HMRC considered that they had created a legitimate expectation on the part of Royal Mail that it was not required to collect VAT in respect of the services, so that Royal Mail could have expected to have a successful defence to any attempt to issue assessments against it to account for VAT in respect of the services.

It took some time after the *TNT Post* decision for the extent of its impact to be determined. In 2010, a number of companies made claims for the

input tax that they considered they had paid over to Royal Mail on supplies purchased between 1 January 2006 and 31 March 2010. The leading case involved about £415,000, but it is estimated that the total amount of all the claims is between £500 million and £1 billion.

HMRC refused the claim for input tax on the basis that the claimant had not paid any. The claimant argued that it had purchased taxable supplies, and the VAT fraction of what it had paid must therefore be regarded as input tax. It should not be affected by HMRC's decision not to assess Royal Mail.

The First-Tier Tribunal decided that there was no VAT 'due or paid' within art.168(a) PVD, and dismissed the company's appeal. Further, as the company did not hold valid tax invoices in respect of the supplies, it had no right to claim. The decision was strengthened by the fact that the opposite result would give the trader a windfall profit that had not been expected at the time it contracted for the supplies.

The Upper Tribunal and Court of Appeal dismissed further appeals, but the Supreme Court decided to refer questions to the CJEU. The questions are long and complex, but in essence they ask whether:

- the amount paid for a taxable supply is VAT-inclusive, even if the supplier, the customer and the tax authority all thought at the time the supply was exempt;
- the decision of the tax authority not to collect VAT retrospectively was relevant to the question of whether VAT was 'due or paid';
- the absence of a tax invoice ruled out a claim.

Advocate-General Kokott has now given an opinion. She recognises first that this is not an uncommon situation: tax authorities make mistakes about the law, which are put right by case law decisions, which the traders involved cannot realistically be expected to anticipate.

She decided to answer the third question first, because if a tax invoice was necessary, the other questions would fall away. She starts by drawing a distinction between a "right to deduct in principle" and the "right to deduct in a given amount". The right in principle arises immediately on receiving a taxable supply that meets the conditions for deduction in art.168. Most of the cases on input tax concern that right, and the CJEU has consistently held that the right is fundamental and cannot be limited.

The A-G considered that "the right to deduct in a given amount" was a separate principle, governed by art.178 rather than art.168. This requires the claimant to hold an invoice. The neutrality of the tax requires the purchaser of an input to be relieved of the burden of tax paid, but that burden only arises on the payment of consideration for the supply, which is initiated by the issue of an invoice.

Cases on the significance of invoices include *Biosafe* (Case C-8/17) and *Volkswagen* (Case C-533/16). These held that the time limit for the customer's claim to deduction only ran from the time that the customer held an invoice, not from the time of supply itself. This indicated that a customer who did not possess a VAT invoice had not yet incurred a charge to VAT, and could therefore not claim it.

The A-G considered other precedent cases on alternative evidence to support a deduction and on correction of incomplete or incorrect invoices. In her view, the fact that an invoice described a supply as exempt and did not separate out an amount of VAT chargeable was fundamental: it could not be regarded as a slightly flawed tax invoice. Possession of an invoice was a substantive requirement, not a mere formal requirement.

Her recommended answer to the third question was therefore: “the right of deduction presupposes the supply of the goods or services and the possession of an invoice (art.178(a) PVD) documenting the passing on of VAT by virtue of being stated separately. Consequently, without such an invoice, the applicant is not entitled to claim to deduct input tax in the present case.”

In case the full court did not agree that this determined the issue, the A-G went on to examine the first and second questions. She concluded that the reference in art.168(a) to “VAT due or paid” was to the VAT due from or paid by the supplier to the Member State concerned, not VAT included in the consideration paid by the customer to the supplier. As the supplies were in principle taxable, there was in the abstract “VAT due” from Royal Mail to HMRC; however, as the limitation period for assessing that tax had long ago expired, that was only a theoretical liability. Nevertheless, the case law of the court consistently held that the claimant’s right to deduct was independent of the supplier’s payment of the output tax to the authorities. That part of the opinion favoured the claimants, but the necessity of an invoice overrode the favourable conclusion.

The overall answers of the A-G were:

1. The ‘VAT due or paid’ referred to in Article 168(a) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax covers the VAT actually due from or paid by the supplier to the Member State.

2. It follows from Articles 73 and 78, taking into account Article 90 of Directive 2006/112, that the taxable amount for the supply of goods or services for consideration is the consideration actually received for them by the taxable person, which already includes VAT.

3. However, the right of deduction under Article 168(a) of Directive 2006/112 presupposes the supply of the goods or services and the possession of an invoice (Article 178(a) of Directive 2006/112) documenting the passing on of VAT. By contrast, a deduction of input tax is not possible without possession of an invoice stating the VAT separately.

4. The recipient of a supply who has not endeavoured to obtain a corresponding invoice stating the VAT separately within the limitation period under civil law cannot claim to deduct input tax against the tax authorities without such an invoice.

5. Since the right of deduction of the recipient of a supply is independent of the actual taxation of the service provider, it is irrelevant whether the supplier had a successful defence to its own taxation.

CJEU (A-G) (Case C‑ 156/20): *Zipvit Ltd v HMRC*

6.4.2 More mail claims

A separate group action in relation to the same issue has reached the Court of Appeal. The litigants are pursuing an order to Royal Mail that will force it to issue VAT invoices for the supplies it made to them that were covered by the *TNT* decision; this might, in the light of *Zipvit* and other precedents, give them the right to claim input tax.

The High Court decided in 2020 that:

1. The traders did not have an actionable right of action to compel Royal Mail to issue VAT invoices.
2. If there was a cause of action it arose on the expiry of 30 days from the supply; and it was not a continuing cause of action.
3. The time limits for the bringing of a claim in tort do not apply to a claim for an injunction. This point was not in fact argued before the judge; but was conceded in the light of authority binding on the judge.

This was a preliminary decision based on a set of agreed assumptions rather than facts that had been found. The Court of Appeal summarised these assumptions as follows, and commented that anything in the judgment that refers to the facts carried no suggestion that the assumptions were correct or not correct:

i) The services provided by Royal Mail which are the subject of the claim ("the Services") were chargeable to VAT as a matter of EU law.

ii) The traders are entitled to rely on EU law by virtue of domestic law being interpreted in conformity with the EU law position.

iii) Save in respect of supplies in relation to which the contractual terms expressly provided that the price was exclusive of VAT, the consideration paid for the services included VAT.

iv) There is no factual matrix other than the contractual terms themselves and sensible inferences which can be drawn from the entering into of a contract between Royal Mail and a business, or between Royal Mail and a body within section 33(3) of the Value Added Tax Act 1994 (or its predecessor provision) ("VATA"), for the provision of postal services. Where necessary, the parties were to prepare an agreed statement to describe the Services. In fact no such statement was prepared.

v) At the time when the supplies of the Services were made, the traders and Royal Mail and HMRC mistakenly understood those supplies to be exempt from VAT and by reason of that mistake the traders did not demand a VAT invoice.

vi) Royal Mail did not account to HMRC for VAT included in the consideration price and retained the full sum for its own use.

There were problems with the assumptions, which the CA noted was a problem with hearing preliminary points of law before the facts had been agreed. Nevertheless, the court considered the issues and came to a decision: the claimants appealed against the decisions of the High Court numbered (1) and (2) above, and Royal Mail cross-appealed against other aspects of the judgment.

That decision starts with an analysis of the history of the relevant VAT provisions from an EU and UK perspective. The key point was that the UK law required a taxable person to issue a VAT invoice within 30 days of making a taxable supply, and anyone claiming input tax is supposed to hold a VAT invoice to support the claim.

The CA referred at length to the A-G's opinion in *Zipvit*, which was delivered after the CA had reserved judgment. The opinion indicated that the claimants in the present case would not have the right to insist on the issue of invoices showing the gross price already paid and the VAT element as a part of that – they had not paid any VAT, so if they had a right to an invoice, it would be issued with the price already paid as the net value. The claimants would therefore gain nothing by their action, as they would have to pay the VAT to Royal Mail before being allowed to deduct it. However, that was not the basis of the assumptions in the present case, so the CA gave its judgment without regard to the A-G-s opinion.

The claimants wanted declarations that they are entitled to VAT invoices, orders that they be provided, and damages for not providing invoices. Neither the PVD nor any CJEU precedent indicated that there was any such right as an actionable private law right.

The CA analysed the effect of the duty to issue an invoice imposed by reg.13 SI 1995/2518, and the penalty for failing to do so that could be levied by HMRC under s.69 VATA 1994. The claimants' counsel argued that the principles of effectiveness and legal certainty required the existence of a private right to compel production of an invoice, where such an invoice is a necessary condition of exercise of the right to deduct. EU law requires effective and legally certain protection of the right to deduct; and UK legislation, including regulation 13, must be interpreted accordingly. The court considered that CJEU precedent suggested rather that the purpose of an invoice was for HMRC to be able to monitor the correct operation of the VAT system and to prevent and detect fraud; it was unlikely that the UK legislature would have intended to go further than the minimum requirement of the EU law.

The existence of the penalty in s.69 VATA 1994 suggested that that was the means of enforcement that Parliament had intended for non-compliance with reg.13, rather than a private right of action. Even if there was no sanction at all for non-compliance with a statutory duty, that did not necessarily mean that there was a private right of action.

The judges listed numerous difficulties with the claimants' argument, including that the invoices supplied by Royal Mail did in fact comply with all relevant statutory requirements then in force as they would have been understood according to domestic principles of interpretation. It could not have been Parliament's intention to create a private law action against a person who in fact complied with domestic legislation as ordinarily understood.

The High Court judge had concluded that the "damage", if it existed, occurred in the period in which the 30-day limit for the issue of an invoice expired. The claimants' representative had advanced orally an argument that the breach of duty would only accrue when HMRC (or a Tribunal) found that the supplier no longer had a reasonable excuse for failing to issue an invoice; the CA held that there was so much uncertainty about the

nature of the duty that, in the absence of a formally pleaded version, it would not be useful or meaningful to provide a contingent alternative answer on this basis.

The failure to issue an invoice was a one-off breach of duty, not a continuing breach that might give rise to an open-ended time limit for claims.

The overall conclusion was that the judge had been correct that the claimants had no private law right to force Royal Mail to issue VAT invoices (issue 1). On issue 2, the CA also dismissed the appeal, but altered the judge's wording to "In relation to each given supply the cause of action arose at the date when the trader submitted its next VAT return after the date on which a VAT invoice should have been provided in respect of that supply." Royal Mail's appeal was dismissed, but that appears to have no practical implications for this case at this point.

Court of Appeal: *Claimants in the Royal Mail Group Litigation v Royal Mail Group Ltd*

6.4.3 Repayment interest

The background to the *HBOS* appeal was neatly summarised by Judge Zachary Citron at the beginning of his decision:

(1) until 1997, the UK legislation providing VAT refunds for bad debts contained a condition of entitlement (the transfer of property in goods sold under HP contracts or subject to retention of title) that, in a Court of Appeal decision in 2016, was found to be invalid under EU law principles;

(2) in 2007 and 2009, the appellants made claims for bad debt refunds on supplies made in the period 1989-1997 – the condition in question was not satisfied and for that reason HMRC initially rejected the claims;

(3) HMRC eventually paid those bad debt refunds to the appellants (£12.3 million), in 2019;

(4) HMRC also paid interest on those refunds from the dates the refunds were claimed, on the basis that there had been an error on HMRC's part in not paying the refunds upon the making of the claims;

(5) the issue in the hearing was whether HMRC should also have paid interest from earlier dates, being the dates when all conditions for the refunds, apart from the invalid condition, had been satisfied.

The entitlement to interest under the VATA depended on the delay arising from an error by HMRC (s.78). In this case, the error was in the law; the company had not claimed bad debt relief in the periods in which it was subsequently found to be due. The company argued that this was because of statements in VAT Notice 700/18 which, in its 1991, 1996 and 1997 editions, set out the conditions for a BDR claim including the one that was subsequently found not to comply with EU law. R&C Brief 1/2017 set out HMRC's changed policy on BDR and said that claims relating to supplies of goods in the relevant years would be paid subject to satisfactory evidence that the bad debts had occurred and that the VAT had not previously been reclaimed.

The judge considered that the companies had failed to claim at the time not because they were persuaded by HMRC's published policy but because they thought that the condition was valid. When *GMAC* made its successful challenge to the law in 2005, the companies made their own claims, in spite of the continued incorrect statements of the position in HMRC's notices.

It is interesting that there was a specific reference to the parties' agreed position on the legal effect of Brexit:

(1) the appellants were permitted to invite the Tribunal to interpret the provisions of relevant UK legislation by reference to the general principles of EU law and by reference to retained EU case law on the basis that they began their appeals and pleaded their EU law rights prior to 31 December 2020;

(2) the Tribunal is bound by EU case law decided prior to that date;

(3) the Tribunal may have regard to relevant CJEU case law after that date but is not bound by it.

The judge considered a number of precedent cases in some detail, and analysed the way in which s.78 operated. The fundamental question was whether the error in HMRC's notices was the cause of the appellants' failure to claim BDR at an earlier date, leading to a delay in them obtaining a repayment of tax. He answered this in the negative: in his view, the delay was "due to" the companies' belief that the condition was valid. They could have made claims and challenged the law, but they did not do so.

He went on to consider whether his interpretation and application of s.78 were in keeping with the relevant EU law principles of equivalence, effectiveness and fiscal neutrality, and decided that they were. The appeals against HMRC's decisions not to pay interest from dates earlier than the date of claim were dismissed.

First-Tier Tribunal (TC08249): *HBOS plc and another*

6.4.4 Repayment supplement

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

B claimed repayment supplement of 5% of the £71 million that was credited against TRUP's liability. HMRC responded that VATA 1994 s.79 did not apply to the amount so offset, and in any case their enquiries had been carried out within the required period.

The judge examined the chronology of events, which involved considerable negotiation between HMRC officers and the companies about how the credits and liabilities were to be treated and offset. There was constant contact by telephone and e-mail over the period from 2 November when the request for offset was made to 21 December when it was granted. HMRC officers had made mistakes, for which they had apologised. However, the transaction documents were not simple

documents. Their consequences were not straightforward, some of the parties were not identified, and at the time a key document was supplied to HMRC, it was signed but not dated.

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

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

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

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

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

He considered the competing arguments in great detail, and the decision contains a thorough analysis of s.79 (and the things that s.79 does not cover). He went on also to consider the relevant period for the delay, which is set out in SI 1995/2518 regs. 198 and 199. The company argued that it had provided a complete answer to questions raised on 23 November on 26 November (leading to an accepted delay of 3 days); the judge did not agree that the answers were sufficient. In particular, the undated agreement was not enough for HMRC to conclude their enquiries. The judge would exclude the whole period from 23 November to 18 December from the count, which meant that HMRC were well within the statutory 30 days.

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

The conclusion was that:

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

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

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

Therefore the appeal was dismissed.

First-Tier Tribunal (TC08251): *Bollinway Properties Ltd*

6.5 Timing issues

6.5.1 Instalment consideration

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

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

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

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

The court noted that X did not accept that the service was one-off in nature and completed in 2012. It considered that there were additional services rendered later, and only the first instalment paid for the services that had been supplied in 2012. However, the A-G suggested that the

court should answer the questions on the basis of the facts found by the referring court, which included the one-off nature of the supply.

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

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

X also protested that it was unreasonable to expect it to finance the whole of the VAT when it was only collecting the consideration in instalments. The A-G did not accept this argument. It was up to the trader to arrange its transactions taking into account its obligations; if it had raised a proper VAT invoice showing the whole of the VAT due on the first instalment, it would have been able to collect that VAT and would not have had to finance it itself. Art.66 PVD allowed Member States some flexibility in how they applied the rules, but that was a derogation and therefore optional; indeed, the existence of the derogation suggested that the basic rule was as the German authorities contended.

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

6.6 Records

6.6.1 Extension of MTD for VAT

The *Value Added Tax (Amendment) Regulations 2021* extend to VAT registered entities with taxable turnover below the VAT registration threshold the scope of an existing requirement to keep digital records and submit VAT returns to HMRC using compatible software. They will have effect from the beginning of the first accounting period starting on or after 1 April 2022. The exemptions for voluntarily registered traders in SI 1995/2518 reg.32B(2) to (5) is revoked with effect from that date.

SI 2021/986

6.6.2 Update on MTD

HMRC have published edition 18 (September 2021) of their *Making Tax Digital Update for Agents*. It covers developments in the MTD project for other taxes, but also some in the existing MTD for VAT requirements, including the publication of an independent research report into businesses' experience of the introduction of MTD.

HMRC are introducing improvements to the functionality of the Agent Services Account, which should now be able to show a client's payment due dates and payment history.

There is an important note about direct debits:

2.5 Client Direct Debits

UK Banking Regulations require us to inform customers paying by direct debit of the amount and date their direct debit will be taken.

Due to the very short timeframe between submission of the VAT return and payment of the tax, we are unable to send postal notifications to customers. Instead, we will have to use customers' email addresses to inform them.

We will need to cancel the direct debits of all customers for whom we do not hold an email address prior to moving them to the new system. We will notify all affected customers about this in a letter we will send to them. We started moving these accounts in July 2021 and hope to finish the work by November 2021.

The letter encourages affected customers to regularly log in to their Business Tax Account between July 2021 and November 2021. Once an account has been moved, the customer's Business Tax Account will automatically prompt them to set up a new direct debit and provide a contact email address when they next login.

If new direct debits are not set up customers will be required to pay their VAT via an alternative method.

Details on how to pay your VAT

Unfortunately, we're unable to advise agents exactly when their clients' accounts will be migrated to the new IT platform. When submitting returns on behalf of their clients' agents will sign into the 'old' agent portal as normal.

If the obligation to file their VAT return is there, the return can be submitted. If the obligation is not there, the client's VAT record has been migrated. The agent should login to their Agent Services Account (ASA) and submit the VAT return using the non-MTD filing service within ASA.

As is often the case, it is hard to find these documents by using the GOV.UK search function. A general internet search is quicker.

Internet search for "Making Tax Digital Update for Agents – September 2021"

6.7 Assessments

6.7.1 Not best judgement

A trader appealed against an assessment for £34,486 in respect of alleged undeclared takings in a Chinese takeaway restaurant, together with penalties of £25,531 (which were not part of the appeal). The original assessment had been for £41,684, reduced once because of calculation errors and a second time after further information had been provided by the taxpayer.

HMRC had carried out an invigilation exercise on 10 March 2017 and observed no irregularities. However, the DGT of that evening (£1,656.91) were so significantly different from the average DGT over Friday evenings for the previous three years (£1,082.94) that HMRC concluded there must be suppression of takings. HMRC also claimed that the trader had failed to retain the detailed records to show the DGT, and had failed to record accurately the split between cash and card receipts. The judge (Natsai Manyayara) noted the methodology used by HMRC in arriving at the assessment.

The trader's case was that HMRC did not have sufficient evidence to show that there was suppression of cash takings. There was very little information about the invigilation itself, and the appellant had provided a number of explanations for the increase in turnover in comparison with previous years (a price increase in February 2017, the closure of competitors, a "menu drop" to 1,000 local households, and the opening of local pubs and bars). The appellant also criticised the way in which HMRC had arrived at the amount to assess.

The judge set out the witness evidence of the husband and wife who ran the business, a finance manager who kept the books and the accountant who submitted the VAT returns. The accountant had prepared detailed schedules to support the original figures and to show that HMRC's version of events was wrong. The officer who made the decision also gave evidence. On the night of the invigilation she had only attended for 8 minutes, although her colleagues stayed for two hours. She offered various explanations for their failure to see any suppression of cash.

The judge described the history of the investigation and the various versions of the assessment in detail. She also rehearsed the principles of a "best judgement assessment". The trader's case was that the assessment was so flawed that it failed this basic test. After going through the evidence and the schedules in great detail, the judge agreed: although there was no evidence that the assessment was vindictive or dishonest, it was nevertheless not properly issued, because it failed to take into account matters which were clearly brought to HMRC's attention.

The judge noted that there was still a discrepancy between the figures on the VAT returns and the detailed schedules of cash sales supplied by the accountant. This suggested that there was an underdeclaration of £3,780. The appeal was allowed to that extent.

First-Tier Tribunal (TC08213): *Brough East Yorkshire Ltd*

Another case concerned assessments for VAT of £61,614 (with associated penalty of £54,923) for the period from 01/04/2014 to 04/07/2017 and for corporation tax totalling £43,797 (with associated penalty of £39,417) in respect of the accounting periods ended 31 March 2015, 2016 & 2017. These were based on alleged under-declaration of sales and profits by a Chinese restaurant and takeaway in Abergavenny.

Judge Kevin Poole noted that two of the officers involved in the enquiries had left HMRC and therefore gave no evidence to the Tribunal. The notes of the corporation tax enquiry were "sketchy in the extreme". The VAT assessment was based on extrapolation from two invigilation visits; one of these happened to be Chinese New Year's Eve, which the judge considered likely to distort the figures.

The judge considered the evidence presented by both sides and concluded that HMRC had simply "assumed the worst". The flawed reliance on two observations, without any consideration of why they might be out of the ordinary or any observation of actual suppression, meant that the assessments were not to best judgement. In this case, they (and the associated penalties) were discharged in their entirety.

First-Tier Tribunal (TC08169): *Kong's Restaurant Ltd*

6.7.2 Disallowed input tax

A trader appealed against assessments disallowing input tax totalling £85,083 claimed between 06/12 and 03/15. The basis for the assessment was that the trader had been unable to produce evidence to support the deductions. After the hearing, HMRC withdrew assessments for two periods and reduced two others, leaving the amount in dispute at £66,680.

The Tribunal decision records a long and involved enquiry in which the HMRC officer tried to obtain information and gradually reduced the amounts assessed from an initial £330,000 over five years as that information was provided. Judge Rupert Jones considered that the trader and his accountant were essentially honest people who had tried to do the right thing and to assist the Tribunal; however, HMRC had been justified in raising the assessments. The records that might have supported the deductions had not been kept as was required by the law. In the circumstances, the appeal had to be dismissed.

First-Tier Tribunal (TC08222): *Timothy Lock*

6.7.3 Lunchtime sales

HMRC raised assessments on a fish and chip shop for £109,670 of VAT and a penalty of £87,736 on the basis that the company had systematically excluded lunchtime sales from its VAT returns over the period 08/10 to 04/17. The behaviour was "deliberate and concealed". A PLN was issued to the director and shareholder.

The assessments for periods 08/10 to 07/15 were made more than a year after evidence of facts, sufficient in HMRC's opinion to justify the making of that assessment, had come to their knowledge. As a result, those assessments were out of time, and the appeal was allowed against them. However, a penalty did not depend on there being a valid assessment for the period concerned, and the PLN was confirmed in full. The Tribunal also reduced the assessments for later periods to take into account zero rated sales and inflation.

The full decision is a careful analysis of all the evidence and the law by Judge Anne Redston, setting out in particular the reasons for finding that HMRC had had all the evidence required for an assessment over a year before the assessments were issued. This had been raised by the taxpayer's representatives as early as 2017, but HMRC had never addressed it and did not do so in the statement of case or filed witness statements. The judge ruled that it would be procedurally unfair for HMRC's witness to be led by HMRC's counsel to give an explanation for the delay. Accordingly, the assessments for the earlier years failed.

The appeal was allowed in part.

First-Tier Tribunal (TC08170): *Albany Fish Bar Ltd and another*

6.7.4 Alcohol problems

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

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

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

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

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

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

The company had been registered as a High Value Dealer under the Money Laundering regulations from 2004, shortly after it was formed in

2002. It received visits from HMRC in connection with compliance with the Money Laundering rules, and was noted not to be fully compliant with "know your customer" procedures and keeping of detailed records of all high value transactions. Discussion of the requirements and the company's failure to comply with them continued over a number of years.

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

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

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

The company appealed to the Upper Tribunal in the first half of 2020, arguing that the FTT erred in law in concluding that Award could have made supplies of the goods after it had divested itself of possession and control of the goods while they were outside the UK (as evidenced by what were referred to as "the French Transaction Documents, or FTDs), and also that it gave insufficient reasons for its decision.

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

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

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

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

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

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

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

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

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

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

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

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

The appeal was dismissed again, and the company appealed to the Court of Appeal. Henderson LJ gave the leading judgment, and Lang LJ and Sir David Richards agreed. The company had sought to appeal on four grounds, but only one was allowed to go forward: that of procedural unfairness, in that the UT had misunderstood HMRC's pleaded case, and this had affected the whole decision. The UT had recorded that "HMRC's pleaded case was that the customers were mere buffers or conduits whose purpose was to give the appearance of an in-bond transaction and thus to facilitate the movement of the goods to the UK to be sold by or on behalf

of [Awards]", whereas such a plea had been "expressly disavowed by HMRC".

The judge considered the argument about what had been argued before the UT and what had been HMRC's position, and concluded that the appeal was unsustainable. In his judgment, there was no procedural unfairness: "HMRC were fully entitled to take their stand on the principles established in *Khan*, *Brady* and *Ingenious Games*, and to leave it to Awards to provide, if it could, a credible alternative explanation for the very substantial cash payments into its bank account in the UK. This is what Mr Judd attempted to do, in his written and oral evidence, but his evidence was rejected as untruthful and worthless for all the reasons exposed by the Tribunals in their decisions." The company's counsel (who had not appeared in the earlier hearings – the company changed all its representation after the UT defeat) "advanced some interesting legal arguments, but since they were all based on what I consider to be a misinterpretation of the FBP Response, and, upon a consequential reversal of the burden of proof in cases of the present type, I consider that it would be inappropriate for this court to engage with them."

The appeal was dismissed unanimously.

Court of Appeal: *Awards Drinks Ltd (in liquidation) v HMRC*

6.7.5 Time limits

HMRC raised an assessment for £8,009 on 30 January 2020, later amended on 4 June 2020. The trader appealed, acknowledging that tax had been overclaimed, but arguing that the time limit for assessing had expired. This was based on a contention that the services concerned (supplied by eBay) were an "importation", which would mean that the four-year limit would run from the date of the transaction. HMRC responded that the assessment had been raised under s.73(1) or (2), in which case the limit ran from the end of the return period concerned (in this case, 31 January 2016).

Judge Anne Redston noted that the assessment did not specify the subsection under which it was issued. However, it was clear from the PVD that the terms "importation" and "acquisition" in the context of VAT only refer to goods, not services. The appellant was using a dictionary definition obtained from Google, which did not have legal force.

The decision sets out the course of the enquiry, which led to claims of "harassment" by the HMRC officer and an official complaint. However, it seems that the appellant's accountant made a mistake in accounting for input tax on eBay invoices which were in fact subject to a reverse charge, and then gave inconsistent replies to the officer's questions. The judge stated that the conduct of the officer was not a matter before the Tribunal, but she commented that the questions asked appeared to be within the normal range for an enquiry.

The appeal was dismissed.

First-Tier Tribunal (TC08223): *Roxanne Webb*

6.7.6 Lack of records

In TC07359, a sole trader appealed against assessments totalling £140,000 for periods from 09/09 to 12/13. The trader ran three newsagents' shops, and his records were not satisfactory. He did not keep the appropriate till rolls, and other records did not explain anomalous results such as a negative mark-up on standard rated goods. The Tribunal agreed that it was necessary for HMRC to carry out a business economic exercise. The trader objected that HMRC's assessments suggested that he had concealed £1m of turnover over a four year period, nearly £5,000 a week. Nevertheless, the Tribunal accepted that the assessment had been calculated in a reasonable manner and the trader had failed to discharge the burden of proof to displace it. The appeal was dismissed.

The trader appealed to the Upper Tribunal, which set out the basis on which such an appeal had to be made. The grounds of appeal included challenges to the findings of fact, which therefore had to satisfy the conditions of *Edwards v Bairstow*. The UT judges expressed regret that there was no clearly identified section of the FTT decision that set out the findings of fact, with the result that it was difficult to draw together those findings. The principal findings of fact were summarised in 17 paragraphs, drawn from paragraphs 20 to 112 of the FTT decision.

The UT also commented that the FTT had not clearly delineated its findings between the two questions of whether the assessment was issued to best judgement, and whether there were any grounds to change the amount; nevertheless, it had clearly set out that it understood that these were the questions that needed to be answered, and had dealt with both issues in its reasoning.

The taxpayer's first ground of appeal was that the FTT had incorrectly described the issues that the parties had agreed and had therefore incorrectly identified the issues that still needed to be determined. It had therefore erred in law by taking into account material that should not have been taken into account. The UT considered the complaint in detail and found that the FTT's decision had reflected an agreement that was recorded in the judge's notes of a "permission to appeal" hearing in March 2020. The taxpayer's counsel's argument conflicted with the judge's notes, which had to be assumed to be authoritative. The judge's notes showed that HMRC had not accepted the points that counsel claimed they had accepted; the procedural ground of appeal therefore could not succeed.

The taxpayer's challenges to the factual findings were considered in turn and dismissed. The matters complained of had all been taken into account by the FTT, and it was not possible to find any error of law in its decision. Although there was no specific reference to the overall argument that "£1 million of undeclared turnover was not credible", it was clear that the FTT had considered it and found it to be outweighed by the rest of the evidence. The problem was that the poor quality of the taxpayer's records meant that he could not displace the assessments.

The appeal was dismissed again.

Upper Tribunal: *Douglas v HMRC*

6.8 Penalties and appeals

6.8.1 Default surcharge

A company entered the surcharge regime in respect of the 08/16 period as the payment was 10 days late. It incurred a 2% surcharge in respect of the 02/17 period, where the payment was three days late. On 22 November 2017 HMRC notified the company that it was to make payments on account, setting out the payments due for the 02/18 and 05/18 periods. The first POA, due on 31 January 2018, was paid 5 days late, the second POA was on time, and the balancing payment was nine days late. The first POA and balancing payment for the following period were also late.

The facts about the late payments were not in dispute. The company claimed that it had relied on its accountants to tell it what to pay and when; it had not been aware that the 7-day extension was not available for POA payers. The present engagement manager for the accountants gave evidence: she had not been aware that the company was within the POA regime, and was also not aware that the 7-day extension was not available.

The company further argued that the penalties were disproportionate, contending that the principles set out in *Trinity Mirror* indicated that this was the exceptional case in which that applied.

The judge (Anne Fairpo) did not consider that the lack of knowledge or the lack of attention to the letter received from HMRC could constitute an objectively reasonable excuse. She considered the CJEU precedents on proportionality raised by the appellant, but did not agree that they were applicable. The POA regime was not complex, and its terms were clearly set out in the letter of November 2017. A minor error in the postcode used by HMRC did not appear to have affected the delivery of the post.

The appeal was dismissed.

First-Tier Tribunal (TC08206): *One Motion Logistics Ltd*

A company appealed against a 5% surcharge of £545 for its period 06/19. The return had been filed on time, but payment was one day late; the previous two returns had also been filed on time, with payments being 1 and 3 days late.

The surcharge was notified to the company on 25 October 2019. A review was upheld on 9 January 2020; the directors claimed not to have received the review decision. The Tribunal appeal was only made on 18 December 2020, ten months late. Judge Abigail Hudson did not accept that non-receipt of the decision would lead a reasonable person to conclude that the surcharge had been dropped; she would have expected a response to be chased up. She considered the possibility that correspondence had not been delivered, but there was insufficient evidence to find for the taxpayer on the balance of probabilities.

The appeal was dismissed.

First-Tier Tribunal (TC08184): *Ash Signs & Engraving Ltd*

6.8.2 Penalties

An individual who ran a shoe shop appealed against VAT assessments for periods 11/09 to 11/15 and related assessments to income tax and NIC for the years 2010/11 to 2014/15, and deliberate behaviour penalty assessments for the same periods.

An unannounced visit in 2015, and interrogation of the electronic tills, led HMRC to conclude that sales had been understated. The records in the tills were incomplete, so a best judgement assessment had to be raised on the basis of average turnover and extrapolation.

The appellant claimed that the figures submitted to HMRC were correct; the discrepancies on the tills arose from errors made by the cobbler employed in the shop, and by the fact that the tills were "ex-demonstration" models that had been used by the showroom before being bought by the appellant.

Judge Anne Fairpo considered the appellant's explanations and the responses of the HMRC officers, who were experienced in dealing with till systems, in detail. She did not find the explanations credible, and concluded that the assessments had been raised to best judgement. She found some of the appellant's evidence to be contradictory, and concluded that she had known that the figures she was declaring to HMRC were incorrect.

The appeals against both the assessments and the penalties were dismissed.

First-Tier Tribunal (TC08187): *Anne Stewart*

6.8.3 Late appeals

A company made an unquantified claim for repayment of output tax on gaming machine takings on 1 February 2006. The company's representative wrote to HMRC regarding the claim on 28 October 2011 and again on 3 July 2012. HMRC responded on 16 July 2012 and 17 August 2012 stating that the 2006 letter had not been received and that as the claim was not quantified, it could not be accepted as valid. The quantified claim was subsequently submitted on 16 November 2012.

On 14 January 2013, HMRC notified the company of a repayment of just over £250,000 plus £44,000 of interest, but also raised assessments in almost identical amounts. The assessments were stated to be contingent on the outcome of the ongoing *Rank* litigation, and no action would be taken to collect them at that time. The letter set out the procedure for objecting to the assessments.

On 8 February 2013 a director of the company wrote to HMRC stating that the company wished to formally appeal against the assessment included in the letter. There was no appeal to the Tribunal. On 17 September 2014, HMRC issued a demand for payment of the assessed amounts, and the company paid this during October 2014. The next action appears to have been a letter from the company's representatives to HMRC on 21 August 2020 to progress the claim. It noted that no response had been received to the letter of 8 February 2013 and asserted that this meant that the matter was still open. A Tribunal appeal was finally lodged on 6 November 2020.

The judge accepted the director's witness statement as a true account of the background to the appeal. She noted that the company had no in-house tax expertise and did not obtain professional help with the letters it wrote. HMRC did not receive either the letter of February 2006 or February 2013 when they were originally sent. As the company directors were unfamiliar with the appeals procedure, they believed that they had done all they needed to do to register their objection, and did not follow up HMRC's lack of response.

The company argued that it had posted the request for reconsideration, so it was to be assumed that it had arrived; as HMRC had not notified a response to the review, it was deemed to have upheld the original decision; and the time limit for appealing that review decision ran from when a document notifying it was sent by HMRC, which had never happened, so the appeal was in time.

The judge (Kim Sukul) decided that, on the balance of probabilities on the basis of the evidence presented by HMRC, that the February 2013 letter had not arrived. That meant that the deeming provisions on delivery of post did not apply. She also decided that the letter could not be interpreted as a request for a review: it was clearly a statement of intention to make a formal appeal, but addressed to the wrong recipient.

The delay in this case was over 7 years from the relevant assessment. Although the judge accepted that the company's reasons for delay were its belief that it had done everything necessary, she did not agree that failing to follow the matter up for such a long time was a reasonable action. She accepted that there would be considerable prejudice to the company if it was unable to argue its case for this considerable amount of money; there was also prejudice for HMRC in having to enter a dispute about periods that were so long ago that the records would have been destroyed.

The judge set out her balancing exercise in detail. She found that the company's belief that it had done the right thing in February 2013 was a reasonable excuse for failing to make a proper appeal to the Tribunal within the time limit; she took into account the company's lack of expertise and the uncertainty arising from the lengthy *Rank* litigation. However, the company's failure over several years even to seek an acknowledgement of the appeal from HMRC was not objectively reasonable. There was therefore not a good reason for the whole of the delay.

Applying the principles of *Martland* and *Data Select,* the judge dismissed the application for permission to make a late appeal.

First-Tier Tribunal (TC08208): *John Codona's Pleasure Fairs Ltd*

On 7 June 2019, HMRC issued a company with two decisions, both based on alleged connection with fraud: one denied deduction of input tax (£232,000 in periods 11/17 and 05/18), the other denied zero-rating (on exports of £205,000 in periods 02/18 and 08/18). The company applied to make a late appeal against those decisions and an assessment for £428,000 on 22 November 2019. No reason for the lateness was given. HMRC resisted the application.

HMRC had received a letter from a representative on 18 July 2019 (12 days after the 30-day limit for requesting a review expired) but was unable to respond directly because no 64-8 was in place. No 64-8 was ever filed,

but the Tribunal appeal submitted by the same representative in November included a form authorising him to act in relation to the proceedings.

The notice of appeal included the gross value of the transactions instead of the tax in dispute. Neither party pointed this out: Judge Anne Redston noted that she identified it herself in the course of the proceedings. The answer to the question about whether the appeal was filed in time also contained inaccuracies and inconsistencies, asserting that a review was in progress while also stating that no review had been carried out because of the lack of a 64-8.

The judge considered the legislation on requests for a review out of time (VATA 1994 s.83E) and decided that, even disregarding the 64-8 problem, the letter sent in July did not meet the conditions in the law. HMRC were therefore not obliged to carry out a review; a statement that a review would have been refused because the decision had already been reviewed by two other sections would have been unlawful if s.83E had been complied with, but in the circumstances the refusal was correct.

The Tribunal considered recent case law, in particular *Martland* (on the matters to consider in relation to allowing a late appeal) and *Katib* (in relation to reliance on bad advice received by the appellant). The judge agreed with HMRC that the delay ran from 30 days after the decision to the lodging of the Tribunal appeal (4 months and 15 days late); the letters in July were irrelevant.

The company's representative argued that the delay by the company was much less than the delays by HMRC in issuing the decisions and the Tribunal in listing the hearing. The judge rejected these factors as irrelevant, and found the delay to be serious and significant.

The company had never provided any direct evidence about the reasons for the delay. Its representative invited the Tribunal to make various inferences about those reasons, but the judge refused to do so. In particular, if the representatives had contributed to the delay, then *Katib* showed that this would not exonerate the appellant. In the absence of any evidence, it was not possible to find that there was a good reason for the delay.

The required balancing exercise clearly favoured HMRC, and the application was duly rejected.

First-Tier Tribunal (TC08212): *Infinity Business Systems Ltd*

In TC07018, the FTT considered the case of a farmer who was removed from the AFRS by HMRC with effect from 31 October 2012 on the grounds that he was receiving too much benefit under the scheme. At the same time, HMRC removed Shields & Son Partnership from the AFRS for the same reason, and that firm appealed the decision. The CJEU held in 2017 that the UK law did not comply with the PVD in imposing the limit on benefit under the AFRS. The present appellant's accountants wrote to HMRC in March 2018 claiming that the decision meant their client should be restored retrospectively to the AFRS and he should be refunded £65,688 in accordance with their supporting calculations. HMRC refused; their letter cited the £3,000 benefit rule as the reason, and appeared to assume that the application was to apply from a current date.

HMRC subsequently sent a much more detailed reply setting out the time limits for appealing against the 2012 decision; the accountants filed an appeal to the Tribunal in July 2018. The Tribunal therefore had to consider whether to entertain an appeal made over five years after the deadline.

Robert Maas appeared for the appellant. He informed the Tribunal that of 38 cancellations in 2012 by HMRC 33 had related to Northern Irish farmers, one of which was Shields & Sons. In his view the Applicant had only had two possible challenges to the October 2012 decision – first that no reasonable body of Commissioners could have reached the decision or secondly that HMRC had acted in bad faith. In his view both of these are virtually impossible for a taxpayer to establish, particularly bearing in mind that the burden of proof is on the taxpayer. His argument was therefore based on the rights of the taxpayer where the state has acted in breach of EU law, as set out in cases such as *Deville* (C-240/87), *Metallgesellschaft Ltd* (Cases C-397/98 and C-410/98) and *Fleming* (UKHL 2008).

According to the 2018 UT decision in *Martland*, the FTT should consider the length of the delay, the reasons for it, and then "all the circumstances of the case", including the respective prejudice to the parties. In this case, the delay was long, but the reason was the extreme difficulty of overturning the original decision; the prejudice to the applicant was considerable, as its appeal was almost bound to succeed on the basis of CJEU precedent, whereas HMRC were already considering their response to the *Shields* decision and would not therefore have to address the matter afresh.

HMRC's representative argued that allowing appeals out of time on the basis of developments in case law would lead to many closed cases having to be reopened and would undermine the administration of justice and the principle of legal certainty.

The judge distinguished the cases that were cited for the appellant. In his view, there was no good reason for the trader not to have lodged an appeal against the 2012 decision within the time limits, as Shields had done. Accordingly, the application for leave to appeal out of time was dismissed.

The trader appealed to the Upper Tribunal, where once again Robert Maas argued that the effect of the HMRC decision and the refusal to allow an appeal was that the trader was deprived of his EU law rights, and the doctrine of effectiveness required that he should be allowed to appeal even though that appeal was brought five years after the deadline.

The judges described the submission as follows: "At its highest, Mr Maas's submission is that the EU law principle of effectiveness requires that there is no time limit on the enforcement of EU law rights when a directly effective EU law right is not properly transposed into national law. In the alternative, he says that the principle of effectiveness requires that the effectiveness of Mr Hewitt's remedy should be judged at the time at which he was as a practical matter able to enforce his rights. That was not until the availability of the right was confirmed by the CJEU's decision in *Shields CJEU*."

The judges asked for submissions on the effect of Brexit on the application of the principle of effectiveness. The parties agreed that it was a "retained general principle of EU law" within the meaning of s.6(7) EU Withdrawal Act 2018 and it should be given full effect in relation to the matters under consideration in the proceedings. There is a restriction in para.39(3) Sch.8 EUWA 2018: there is no right of action in domestic law on or after IP completion day based on a failure to comply with any general principle of EU law and that after that date no court or tribunal may disapply or quash any enactment or other rule of law, or quash any conduct or otherwise decide that it is unlawful, because it is incompatible with any general principle of EU law. However, that does not apply for proceedings begun before 11pm on 31 December 2020.

The judges considered the precedents on the lawfulness of time limits in various circumstances. They concluded that the time limit in this case did not deprive the appellant of an effective remedy: he could have appealed the decision in 2012, but chose not to do so. The fact that a different farmer pursued an appeal and won some years later showed that the remedy would have been effective. The UT summed up its conclusions as follows:

(1) The fact that a time limit or limitation period on claims begins to run and expires before the date on which the claimant is aware that they had an enforceable right does not breach the principle of effectiveness (Class 8 [88]-[90], [94]).

(2) The case law authorities also demonstrate that the fact that a time limit or limitation period for appeals begins to run and expires before the date on which the claimant's right is clearly established by a decision of the CJEU does not prevent the claimant's right to appeal being regarded as an effective remedy (Leeds [43], FII [151], Caterpillar [52]). It is nothing to the point that Mr Hewitt may have regarded the prospects of success at the time of the breach as vanishingly small (Caterpillar [48]).

(3) Even if it could be argued that the relevant provisions of the Principal VAT Directive have not been properly transposed into EU law, for the reasons that we have given, that would not prevent HMRC from relying upon a reasonable time limit in domestic law (Leeds [41]).

The decision concludes with a comment on the fact that the argument was put in a slightly different way in the FTT, which appeared to have considered that it was being invited to exercise its discretion to allow an appeal to proceed out of time, rather than being required to give effect to an enforceable EU right. The UT was satisfied that the FTT had considered the issue of discretion in the right way, and saw no reason to interfere with its decision.

Upper Tribunal: *Hampton George Hewitt v HMRC*

6.8.4 Application to appeal to Upper Tribunal

A company applied to appeal an unfavourable FTT decision on the standard rating of its supplies of insulated conservatory roofs. It claimed that the FTT had failed to address the company's arguments and had therefore not given sufficient reasons for its decision, and that it had misapplied the "predominance" test from *Mesto Zamberk* (in spite of correctly describing the test).

Judge Michael Connell considered the way in which the FTT had reached its decision and rejected the company's arguments. The FTT had fully dealt with the company's case and had correctly applied the *Mesto* test. The application to appeal to the Upper Tribunal was refused.

First-Tier Tribunal (TC08255): *Conservatory Roofing UK Ltd*

6.8.5 Personal liability notice

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.

First-Tier Tribunal (TC08177): *Mohammed Zaman*

6.8.6 Costs

A company applied for costs on the grounds of alleged unreasonable conduct by HMRC in the conduct of an appeal. HMRC had issued an assessment on 18 April 2018 in respect of goods that had been acquired by way of acquisition from a supplier in Germany and immediately despatched to a customer in Poland who, HMRC claimed, had not accounted for acquisition tax. The transactions had been the subject of two earlier assessments that had been withdrawn; all the assessments were raised within the statutory time limits.

The assessment was upheld on review and the company appealed to the Tribunal, without paying the tax. There was a dispute about when a hardship application was made; the Tribunal decided that the exact date made little difference. After extended exchanges of correspondence, HMRC acceded to the application in March 2019. This cause of this delay appeared to have been "shared" by both parties.

The proceedings then involved various applications by HMRC for more time to present a statement of case, as well as disputes about disclosure of documents. This had not been completed when the "general Covid stay" came into force in March 2020. HMRC were due to serve witness statements on 29 September 2020; when these had not been produced by 8 January 2021, the Tribunal issued an "unless order" to HMRC requiring production no later than 22 January 2021. On that date, HMRC confirmed

that there would be no witness statements and applied for a stay of proceedings "to review its position and to obtain further input from its policy team". On 28 January 2021, HMRC communicated on a "without prejudice" basis that they intended to withdraw the assessment. In spite of this, the appellant objected to the stay. The assessments were withdrawn on 25 February.

The appellant applied for costs on the grounds of HMRC's unreasonable behaviour in not withdrawing from the case earlier, and in failing to make disclosures as directed. The Tribunal noted that the leading and binding authority on the question of unreasonable costs is the 2019 Court of Appeal decision in *Distinctive Care Ltd v HMRC*. In that case, and by reference to the approval of the Upper Tribunal judgment, it was determined:

(1) The earliest conduct that was relevant in the context of determining whether a party had behaved unreasonably was the point at which the proceedings commenced with the issue of a notice of appeal as the discretion applies only to unreasonable conduct in the proceedings and not to the investigation leading to those proceedings.

(2) The focus of the Tribunal was to be the handling of the litigation and not as to the quality of the original decision. The Tribunal is warned that the award of costs should not represent a wide-ranging analysis of the parties conduct prior to the appeal.

(3) The granting of an unreasonable costs order is not to be seen as a "back-door" means of costs shifting with the consequence that what constitutes unreasonable behaviour is unlikely to extend to improper or negligent behaviour.

(4) Where a party withdraws from an appeal it is necessary to consider whether they had acted promptly once it was identified that the proceedings were to be discontinued.

(5) Where costs are awarded on the grounds of unreasonable behaviour the scope of the costs award may include costs incurred prior to the commencement of proceedings provided that such costs are within the scope of the ultimate appeal.

In respect of the timing of withdrawal, the FTT followed the approach of the UT in the 2014 case of *Tarafdur v HMRC*, in which the UT held that it was necessary to answer these questions:

(1) What was the reason for withdrawal of that party from the appeal?

(2) Having regard to that reason, could that party have withdrawn at an earlier stage in proceedings?

(3) Was it unreasonable for that party to not to have withdrawn at an earlier stage?

The Tribunal noted that an award of costs is exceptional. Having considered the chronology and the arguments of both parties, the judge concluded that in most aspects HMRC's conduct of the proceedings was not unreasonable. However, there were two episodes of questionable conduct by HMRC:

(1) the inclusion of documents on HMRC's list of documents which they subsequently sought to exclude from disclosure; and

(2) non-compliance with the direction to serve witness statements.

The second of these showed a disrespect for the Tribunal and the appellant, but the judge did not consider that an award of costs was appropriate. It would broaden the scope of costs too far and risk such awards become the norm rather than the exception.

On the other hand, the inclusion of documents on a list of documents, followed by a refusal to disclose such documents did, in the Tribunal's view, amount to unreasonable conduct. The judge gave directions as to how the relevant costs arising should be identified.

After considering the delay in withdrawing the assessments, the judge concluded that HMRC had been entitled to attempt to protect the revenue, and the appellant had also contributed to the delay. It was not appropriate to award costs.

The application was allowed in part, and the parties were directed to negotiate the amount of costs that would be payable.

First-Tier Tribunal (TC08217): *Lenity Ltd*

On 29 April 2021, Judge Christopher McNall heard and granted an application from HMRC for a stay of proceedings until 60 days after the UT decision in the *HSBC Electronic Data Processing* case is issued. HMRC applied for costs, on the basis that the case was allocated to the "complex" track.

The judge considered arguments about whether this was a "standard case management hearing" and rejected them. The application had been hotly contested, which was the appellant's right; however, in a complex case, contesting an application comes with the risk that the other party will apply for costs. The judge did not consider that there was any rule that separated out a procedural hearing from any other part of the proceedings for the purposes of assessing costs.

The costs application for £22,193.50 was summarily granted. The judge considered that it would be disproportionate to put the parties to the expense of disputing it further, in the context of an overall argument about tens of millions of pounds.

First-Tier Tribunal (TC08214): *Barclays Services Ltd and another*

6.8.7 Strike-out

A company appealed against a rejection by HMRC of an application to backdate the admission of its parent company to its VAT group. The request was made on 29 September 2016; the holding company had joined the group registration on 26 June 2013, and the requested amendment would have changed this to 1 July 2012.

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

The company's grounds of appeal had referred to VATA 1994 s.83(1)(b), (k) and (t), but the skeleton argument referred instead to s.83(1)(a). The company did not formally apply to amend its grounds of appeal. The

judge decided to consider the arguments rather than to "dance on the head of a pin". No arguments were advanced on s.83(1)(b).

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

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

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

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

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

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

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

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

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

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

Since there was no valid application for registration and no other decision in relation to registration, there was no appealable issue under s.83(1)(a). As there was no valid application for grouping, s.83(1)(k) was not

engaged. HMRC had not made a decision about repayment, so s.83(1)(t) was not engaged. Accordingly, the Tribunal had no jurisdiction to hear an appeal, and it had to be struck out.

First-Tier Tribunal (TC08167): *Dollar Financial UK Ltd*

A procedural hearing in relation to this case was heard a week before the above appeal, but the decision is numbered after it. Judge Christopher McNall heard an application by HMRC to stay the substantive appeal until after the Upper Tribunal has given a ruling in *HSBC Electronic Data Processing (Guangdong) Ltd and others v HMRC*. That hearing is expected to follow in October 2021, although the decision may not be released for some time after that.

HMRC sought to stay only the question of whether the company had a fixed establishment in the UK, which is the issue in the *HSBC* appeal. The parties did not agree whether this was a question only of fact (i.e. with the law agreed) or of fact and law (i.e. the law itself was not agreed). The judge set out correspondence between the appellant, HMRC and the Tribunal which had failed to clarify what was the agreed view of the effect and application of the CJEU decision in *Berkholz*. The judge concluded that the parties had not mutually agreed the entirety of the relevant law, so their dispute is not limited to the facts alone.

The judge noted an apparent overlap between the first issue in the HSBC appeal and the present case. In his view, the UT decision would be of "material assistance" to the FTT in determining its appeal. The question remained of whether it would be "expedient" to grant a stay. The judge stated that there was "a short menu of unattractive options."

The appellant wanted the stay to be refused. The judge did not think that was appropriate, given the imminent consideration of the point by the UT. It was also not appropriate to stay the whole appeal, when the respective teams were "ready to go" and a multi-day hearing had been scheduled.

Balancing the various arguments, the judge granted a stay to the extent that the FTT could hear evidence and make findings of fact on all the issues in the present appeal, but should not make any findings of law in relation to the fixed establishment issue. As the above decision shows, the FTT judge did not consider it relevant to the eventual outcome.

First-Tier Tribunal (TC08199): *Dollar Financial UK Ltd*

In TC07843, a company appealed against assessments to £1.7m of output tax on the basis that there was insufficient evidence to support zero-rating of export of vehicles in periods from 01/16 to 06/17, and also to deny input tax claimed on various purchased and imported vehicles amounting to £310,000.

The appeal had been through a number of disputes about procedure, with HMRC objecting to the grounds of appeal as vague and having no prospect of success, and various attempts to agree case management directions that were disrupted by the retirement of the assessing officer and the pandemic. The Tribunal heard an application for strike-out by HMRC by video in August 2020.

HMRC argued that the company had abandoned its original grounds of appeal (which were that the sales qualified for zero-rating) and now sought to challenge the "best judgement" underlying the assessments. In the FTT, Judge John Brooks considered precedents on allowing such a change to grounds of appeal and decided that, on balance, the length of the delay and the prejudice to HMRC outweighed any other considerations. Given that the original grounds of appeal had been

negated by the company itself, it stood no reasonable prospect of success. HMRC's strike-out application was granted.

The company appealed this decision to the Upper Tribunal, where it came before Judges Phyllis Ramshaw and Andrew Scott. The grounds of appeal were that:

(1) The First-tier Tribunal erred in its construction of the letter of 5 August 2020;

(2) The First-tier Tribunal acted in a procedurally unfair manner;

(3) The First-tier Tribunal deprived the appellant of access to the court and/or effective protection of its EU law rights.

The company argued that the letter that the FTT had interpreted as abandoning the original grounds did not do so. The UT commented that the company's counsel (who had not appeared in the FTT) put forward a wealth of detailed evidence to demonstrate that, in the context of everything else that had gone before in the dispute, the supposed abandonment of a claim to zero-rating of exports was "a throwaway sentence in a letter". This argument was misplaced: it was not for the UT to consider evidence that could and should have been put before the FTT, but was not. The UT had to focus on the error said to have been made by the FTT, and would decide the appeal without reference to these arguments.

The UT examined the arguments and the decision in detail, and concluded as follows: "Although we consider that the TT was aware of the correct legal test that must be applied when exercising its discretion to strike out, we find that the FTT erred in law. The test to be applied by the tribunal was whether there was any reasonable prospect of the appeal succeeding by reference to the relevant materials. For the reasons set out below we find that the decision reached was irrational. Once all of those materials are considered as a whole, it was simply not open to the FTT to decide that the appellant had abandoned its case that its supplies were zero-rated."

The letter was contradictory in that it strenuously maintained the claim to the entitlement to input tax on supplies on which no output tax had been charged; it was therefore incomprehensible that it denied a claim to zero-rating. The judge in the FTT had failed to properly consider what the appellant's remaining case might be, if that sentence was given its literal meaning. The only possible conclusion that could reasonably be drawn from the materials as a whole was that the company had not abandoned its claim to zero-rating. In allowing the appeal, the judges said:

We find the First-tier Tribunal materially erred in law for the following reasons. When construing assertions in the letter regarding zero-rating it failed to consider the letter as a whole, failed to consider relevant aspects of the proposed amended grounds of appeal and failed to take a highly relevant factor into account, namely the continuing claim to be entitled to recover input tax. We accept that the Upper Tribunal must be slow to interfere with elements of First-tier Tribunal's evaluation but in this case there is no discernible evidence that the First-tier Tribunal evaluated the above aspects of the evidence or if it did so has not provided an explanation in the written reasons for the decision. Our view is that the assertion in the letter as construed by the First-tier Tribunal is – as the

respondents put it in their correspondence – simply incomprehensible. On closer analysis of the letter and the proposed grounds of appeal, the letter clearly cannot be construed as the appellant abandoning its case that its supplies were zero-rated. Such a conclusion, in our view, is inconsistent with the evidence and therefore the Tribunal's finding that the appellant could not succeed was irrational. No reasonable tribunal could, when considering the relevant material before it, have come to that conclusion. For the above reasons, we consider that the Tribunal's decision was vitiated by an error of law."

The underlying appeal was therefore reinstated and remitted to the FTT to be heard in due course.

Upper Tribunal: *G B Fleet Hire Ltd v HMRC*

6.8.8 Debarring

An appeal about classification of imports led to a useful analysis of the law on barring HMRC from taking part in an appeal. The appeal concerns the decision of HMRC to issue a C18 Post Clearance Demand Notice for the period 6 May 2014 to 4 May 2017 in the total sum of £603,548 and an associated civil penalty of £2,500. The different classifications of the company's Chinese-manufactured handbags under the tariff carried duty rates of 3.7% or 9.7%.

The appellant argued that HMRC should be debarred because there was no reasonable prospect of their case succeeding. In their view, HMRC could not simply rely on the burden of proof lying with the appellant, and had presented no argument to distinguish the circumstances from precedent cases on which the appellant relied.

Judge Amanda Brown considered that an application for a summary decision in this matter was entirely misconceived. The Tribunal needed to consider the evidence and physically examine the goods, and so determine the correct classification in accordance with a full appellate jurisdiction. She pointed out that HMRC's statement of case was not, and was not intended to be, a skeleton argument: it was only a pleading, setting out the legal basis on which the decision was made and thereby maintained.

The decision goes on to make various case management directions, and to dismiss the appellant's application for costs.

First-Tier Tribunal (TC08210): *Laurence Supply Co (Leather Goods) Ltd*

6.9 Other administration issues

6.9.1 Legislation Day 2021

The initial draft clauses for the 2022 Finance Act were published on 20 July 2021 and included more detail on previously announced proposals. In relation to indirect taxes, the main proposal is the introduction of new penalties for use of "electronic sales suppression", to take effect from Royal Assent to the Finance Bill 2022.

The new rules requiring large businesses to notify HMRC when they take an "uncertain tax position" extend to corporation tax, VAT and income tax. The threshold for what is a large business, and therefore within the scope of the notification measure, is modelled on the Senior Accounting Officer (SAO) regime. Broadly, this means businesses that have a turnover above £200 million and/ or a gross balance sheet total above £2 billion in the previous financial year are subject to the requirement to notify. The turnover and balance sheet amounts relate only to the UK presence of the business and, similar to the SAO rules, there are specific provisions around aggregating turnover and balance sheet totals for group companies. The changes will have effect for returns within scope that are due to be filed on or after 1 April 2022.

There are also significant extensions to HMRC's powers in relation to clamping down on promotion of tax avoidance schemes, including freezing orders to prevent promoters hiding their assets to avoid penalties, publication of suspected tax avoidance schemes, an additional penalty for UK entities that facilitates promotion by offshore promoters, and a power to apply for a winding-up order where a body is operating against the public interest.

The call for evidence on VAT and value shifting is being extended to obtain a better understanding of the concerns of those responding to the initial consultation earlier this year. Although it was said that the legislation was settled, it is not included in this draft.

There were further announcements on:

- the findings of research on the impact of MTD, which found that many businesses are still not using fully compliant software;
- a call for evidence on changes to the VAT grouping provisions, which the government has decided not to take any further at this stage;
- reform to the public sector refund rules under s.41 VATA 1994;
- a call for evidence on the VAT challenges posed by the sharing economy.

www.gov.uk/government/collections/finance-bill-2021-22

6.9.2 CIOT comment on ESS

CIOT has commented on the proposals to increase HMRC's powers to clamp down on "electronic sales suppression". The main comment is that it has not been made clear why HMRC need this new power rather than using existing powers, and when they would use it instead of prosecuting for existing offences. CIOT is concerned that the introduction of new legislation leads to an overloading of statutory measures.

The CIOT also requests a review of the effectiveness of the new powers after two to three years, and questions whether the penalties have been set at an appropriate level to encourage compliance.

https://assets-eu-01.kc-usercontent.com/220a4c02-94bf-019b-9bac-51cdc7bf0d99/aebed259-1bf2-4ce2-9533-afa583f2d84c/210913%20FB21-22%20Draft%20legislation%20-

%20Powers%20to%20tackle%20electronic%20sales%20suppression%20-%20CIOT%20comments.pdf

6.9.3 Autumn Budget

The Chancellor announced that the Autumn Budget will be on 27 October 2021.

www.gov.uk/government/news/chancellor-launches-vision-for-future-public-spending

6.9.4 CIOT response: Tax administration framework

The Chartered Institute of Taxation (CIOT) has published its response to the HMRC call for evidence on "the tax administration framework: supporting a 21st century system". The response sets out a number of detailed comments in the following areas:

- The need for a replacement of the Taxes Management Act 1970 with legislation that is easier to follow for HMRC, advisers and taxpayers
- Consideration of reforming the 5 April tax year end
- Consistency of obligations for registration and deregistration for different taxes
- Simplification of the calculation of tax liabilities
- Use of data and information available to HMRC to streamline reporting obligations
- Greater simplicity and clarity for tax payments and repayments, avoiding the problems that arise when a wrong reference or account number is used and payments cannot be traced
- Building in effective methods of verification, sanctions and safeguards to promote compliance

The main focus of the review is direct taxes, but there may be implications for VAT in due course.

www.tax.org.uk/tax-administration-review-must-make-system-easier-to-navigate

6.9.5 Tax gap

HMRC have published the annual "tax gap" report for 2019/20, which estimated that the total theoretical shortfall in tax revenue was 5.3%, or £35 billion. There has been a long-term reduction in the overall tax gap, from 7.5% in the tax year 2005 to 2006 to 5.3% in 2019 to 2020 – between 2016 to 2017 and 2019 to 2020 the overall percentage tax gap has remained low. T

The tax gap for VAT is the second largest component of the total tax gap at £12.3 billion. There has been a long-term reduction for the VAT gap from 14.1% in 2005 to 2006 to 8.4% in 2019 to 2020.

www.gov.uk/government/statistics/measuring-tax-gaps

6.9.6 Disclosure of avoidance schemes

The *Indirect Taxes (Disclosure of Avoidance Schemes) (Amendment) Regulations 2021* came into force on 30 September 2021 to reflect changes made to Sch.17 F(No. 2)A 2017 by Sch.31 FA 2021. The Act amended the reporting obligations in relation to the disclosure of tax avoidance scheme rules for VAT and other indirect taxes (DASVOIT) to allow HMRC to allocate a reference number to arrangements, or a proposal, that have not been disclosed where HMRC reasonably suspects them to be notifiable. In such circumstances, the amendments also extend the obligations in Sch.17 to all persons that HMRC reasonably suspects to be supplying the arrangements, or proposal, and their clients.

The Regulations make consequential amendments to the 2017 Regulations in order to give effect to those amendments by including references to suppliers of arrangements and proposed arrangements, as well as promoters, and removing references to the arrangements being "notifiable" in circumstances where this is no longer required.

SI 2021/979

The *Tax Avoidance Schemes (Information) (Amendment) Regulations 2021* are the equivalent provisions for direct tax (DOTAS).

SI 2021/980

6.9.7 Digital tax reform

In response to HMRC's consultation 'The tax administration framework: Supporting a 21st century tax system', the ATT called for tax policies and legislation to develop in parallel with any new digital systems to avoid placing more burdens on, or adding to the frustrations of, taxpayers. The ATT response highlights the importance of developing tax policy jointly with digital teams who understand what can, and cannot, be achieved with the existing digital systems, or what developments can be practically and cost-effectively be added on.

www.att.org.uk/technical/news/plea-new-tax-rules-fit-digital-systems

6.9.8 Prosecutions

An individual was given an 8 month prison sentence, suspended for 12 months, as well as a 4-year disqualification order for making a claim to £3.3 million of VAT in respect of a company that had apparently never traded. He claimed that he had been used as a "front" for others who really controlled the company, but the Insolvency Service argued that responsibility still lay with the director. He pleaded guilty to one count of failing to keep adequate company records.

www.gov.uk/government/news/suspended-sentence-for-director-who-claimed-he-was-used-as-front-for-company

An individual who ran two takeaway outlets has been imprisoned for 4 years for cheating Exchequer out of £83,443 between 2015 and 2020. HMRC's random checks led to an investigation that showed he had consistently provided false information for his accountant to submit income tax and VAT returns.

www.cps.gov.uk/mersey-cheshire/news/takeaway-owner-jailed-fraudulent-tax-returns

A company director made false claims for £1.89 million of VAT on purchases that had not taken place. He pleaded guilty to a single charge of VAT evasion and was sentenced to five and a half years in prison, as well as being disqualified from acting as a company director for 10 years.

www.cps.gov.uk/cps/news/vat-fraudster-who-spent-money-spanish-homes-jailed

An individual was prosecuted for VAT fraud amounting to £817,000 in 2013, but he absconded to Pakistan to avoid his punishment. He returned to the UK and was arrested by HMRC officers on 13 August 2021. He was sentenced at a hearing on 18 August to the original three and a half years in prison together with an additional six months for absconding. He is also subject to a confiscation order for nearly £700,000.

www.mynewsdesk.com/uk/hm-revenue-customs-hmrc/pressreleases/runaway-vat-fraudster-jailed-3123046

Another takeaway owner was convicted of evasion totalling £103,571 in income tax, NIC and VAT and sentenced to 30 months' imprisonment. HMRC used evidence from Hungry House and Just Eat to show that his sales were greater than he was showing on his returns.

www.cps.gov.uk/mersey-cheshire/news/pizza-takeaway-boss-jailed-sending-false-tax-returns

6.9.9 Publishing details of deliberate tax defaulters

HMRC have updated the letter it sends out to warn taxpayers that their details may be published following a deliberate inaccuracy penalty. The letter invites the taxpayer to make representations as to why their details should not be published. Apparently some taxpayers have made representations on the grounds that they have already paid the penalty; the new version of the letter makes it clear that this is irrelevant, as the intention to publish is based on the charge of a deliberate conduct penalty, not on the payment or non-payment of the tax.

The letter also signposts access to extra support if that is needed as well as explaining what a taxpayer needs to do if they want to make representations or have any other queries about the process.

www.tax.org.uk/publishing-details-of-deliberate-tax-defaulters-opening-letter-pddd1

6.9.10 Avoidance enablers

HMRC have updated their guidance on the "enabler penalty" regime with new information about assessments, inspection powers, modifications and restrictions on power to publish information. The guidance has been updated for amendments made by s.123 FA 2021, and primarily relate to multi-user schemes.

www.gov.uk/guidance/tax-avoidance-penalties-appeals-and-publishing-details-of-enablers

HMRC have updated their factsheet (CC/FS43) on the penalties they may charge for enablers of tax avoidance which are subsequently defeated to

reflect changes made by FA 2021. These relate mainly to the time limits for the issue of notices of assessment for enabler penalties.

www.gov.uk/government/publications/compliance-checks-penalties-for-enablers-of-defeated-tax-avoidance-ccfs43/compliance-checks-penalties-for-enablers-of-defeated-tax-avoidance-ccfs43

6.9.11 Updated Notice

HMRC have updated their guidance on *Insolvency* with information about unincorporated associations and clubs, and payment of corporation tax.

Notice 700/56

6.9.12 Customer Engagement and Support Team

HMRC have published details of a new initiative abbreviated to CEST, which confusingly is also used for "Check Employment Status for Tax". The dedicated web page says:

You can get specialist help from HMRC if you have a complex tax issue and:

- *you cannot find the information you need on GOV.UK*
- *there is not a dedicated team in HMRC that you can contact*

The mid-sized business Customer Engagement Team will help deal with your query or direct you to someone who can.

If you're a mid-sized business experiencing growth, you may be able to get additional support for growing businesses.

This service can be used by any mid-sized business with either:

- *a UK turnover above £10 million*
- *at least 20 employees*

To apply, the trader needs:

- *a Government Gateway user ID and password – if you do not have one, you can create one when you apply*
- *your business's contact details - including name, correspondence address*
- *your unique taxpayer reference (known as a 'UTR'), VAT registration number or employer PAYE reference*
- *details of your business's annual turnover and number of employees*
- *you or your representative's contact details*

If you want to provide documents to support your application they'll need to be less than 5MB each and in a commonly used format, like PDF, JPEG or DOCX.

There is a link from the web page to an application form, for which a Gateway sign-in is required. HMRC have confirmed that the CEST service can be accessed by any agent with a Government Gateway ID, regardless of the size of the agent, by using their own Government Gateway ID and entering their client's UTR and other details once inside

the system. Their query must not relate to one for which there is already another dedicated team within HMRC that they can contact.

www.gov.uk/guidance/get-help-with-a-tax-issue-as-a-mid-sized-business

6.9.13 Article

In an article in *Taxation*, Neil Warren considers the problem of delays in processing VAT forms, and suggests ways in which they can be reduced.

Taxation, 22 July 2021

6.9.14 President of Tribunals' Annual Report 2021

The Courts and Tribunals Judiciary has published the *Senior President of Tribunals' 2021 Annual Report*. As well as setting out the strategic objectives of the President (Sir Keith Lindblom), the report contains reviews of the workings of the Upper-Tier Tax Tribunal and the First-Tier Tax Tribunal over the last year by their respective senior judges, Mr Justice Zacaroli and Judge Greg Sinfield.

www.judiciary.uk/announcements/senior-president-of-tribunals-annual-report-2021-is-published/

6.9.15 Security

Southend United FC appealed against notices requiring deposit of security for PAYE (£443,608), NIC (£268,239) and VAT (£40,950). A previous notice had been the subject of an unsuccessful appeal in 2013. A further notice was issued in 2015 but was withdrawn; another was issued in 2016 but withdrawn in January 2017 on the basis of specific undertakings given by the directors. From that time onwards, the taxes were paid, but they were almost invariably paid late. In January 2019, there were arrears of PAYE and NIC of £208,000 and VAT of over £16,000.

Further notices requiring security were then issued; the club cleared the arrears, but the notices were upheld on review, on the grounds that the risks of non-payment remained even after the current liabilities had been settled.

The judge decided that the appeal was against the whole decision-making process, including the review decision. Information available to HMRC both at the time of the original decision and the review should be taken into account. The judge reviewed the arguments of the parties and found that the decision to require security could not be considered unreasonable. The reviewing officer had taken into account the following factors:

(1) There was a history of late payment.

(2) Previous security requests had been made. Although the latest was withdrawn following explanation of SUFC's plans for the future, it was with the caveat that if any payment was not received in full and on time HMRC reserved the right to issue a notice of requirement without further warning.

(3) SUFC had repeatedly been made aware that a failure to meet its obligations would result in Notices being issued.

(4) SUFC and the Directors' commitment to the future had not been reflected in the recent payment history.

(5) Insufficient evidence had been provided as to plans to remedy the persistent compliance failures.

The taxpayer's criticism of the decisions, and the lack of witness statements provided by the officers involved, did not convince the judge that there was any fault in the process. In his view, the officer would have inevitably come to the same decision, even if he had taken into account other factors put forward by the club.

The appeal was dismissed.

First-Tier Tribunal (TC08178): *Southend United Football Club Ltd and others*

A company appealed against the issue of a notice requiring deposit of security of just over £100,000 for VAT. The notice was issued on 14 August 2019; the formal appeal form was not submitted until December, but the appellant had notified both the Tribunal and HMRC of an intention to appeal on 20 August. HMRC did not object to the appeal being brought out of time, and the judge (Tony Beare) gave permission.

There was no dispute about the trader's record of late payments and late returns. At the time the notice was issued, the company had been in default in 10 periods from and including 03/14, and some of the payments were very late (one over a year, one nearly six months). The aggregate VAT arrears at the time was £70,055, and had been over £100,000 in May 2019.

The judge noted that the director running the company had not previously been involved with other companies that had gone into liquidation owing HMRC money, and this distinguished the situation from many security appeals. He also noted that HMRC had recently paid the company £364,000 in error, and they were in discussions about returning the amount. Although the company had claimed that it was owed significant CIS repayments, it was now agreed that no such amounts were due.

The judge commented on his jurisdiction, which was restricted to considering whether the decision to issue the notice was unreasonable. He was critical of HMRC's assertion in each of their review letter, their statement of case and their skeleton argument, that, in cases such as this "there is no right of appeal against quantum". No authority for this proposition was provided, and in the judge's view it was grossly misleading. "For instance, while it may be entirely reasonable in a particular case for the Respondents to require security of, say, X, a security requirement of 10X might well be totally excessive, with the result that the decision as a whole is unreasonable and thus susceptible to a successful challenge."

It was therefore the Tribunal's task to decide whether to require security of £100,779 was a reasonable decision, rather than to decide whether any security requirement was reasonable. The judge expressed sympathy for the company's predicament, given that it had clearly been trying to settle its VAT liabilities but had fallen short. However, he agreed with other Tribunals which had considered habitual late payment as representing a risk to the revenue. The decision to require security in some amount was therefore a reasonable one. He made the following comment, which must reflect the situation in many security appeals:

"I accept that, by requiring the Appellant to provide security, the Respondents may have made it more likely that the Appellant would ultimately default on its VAT liabilities. However, in my view, that is not a reason for declining to exercise the relevant power. On the contrary, the fact that a taxpayer's economic position is parlous enough to be threatened by the requirement to provide security is surely a reason for exercising the power to require security in the first place."

The judge was again critical of the decisions in that they did not set out in detail how the amount of security was calculated. He attempted to make his own calculation from the raw data and HMRC's policies on the question, and came to a slightly lower figure if default surcharges were excluded; the result of including the surcharges (which he considered reasonable) was a figure slightly higher than the notice required. He said that it was "highly unsatisfactory" that:

(1) the relevant calculation was not given to the Appellant at the time of the NOR or in the review letter and was also not included in the statement of case or the DB;

(2) the principles for calculating the amount of the security set out in the Respondents' letter of 13 May 2013 are not consistent with the principles for calculating amounts of security set out SG32200; and

(3) at the hearing, Mr Sanusi was unable to explain to me how the amount of the security had in fact been calculated.

Nevertheless, in his view the amount required was not unreasonable. The appeal was dismissed, with a strongly worded suggestion that HMRC should make their calculations more transparent in future.

First-Tier Tribunal (TC08182): *FMC (fabrics maintenance contractors) Ltd*