VAT UPDATE
OCTOBER 2023

Covering material from July – September 2023

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VAT Update October 2023

Contents

1. INTRODUCTION ... 1
  1.1 Appeals pending ... 1
2. OUTPUTS ... 3
  2.1 Scope of VAT: linking supplies to consideration ... 3
  2.2 Disbursements ... 6
  2.3 Exemptions ... 6
  2.4 Zero-rating ... 15
  2.5 Lower rate ... 15
  2.6 Computational matters ... 15
  2.7 Discounts, rebates and gifts ... 15
  2.8 Compound and multiple ... 15
  2.9 Agency ... 16
  2.10 Second hand goods ... 22
  2.11 Charities and clubs ... 22
  2.12 Other supply problems ... 22
3. LAND AND PROPERTY ... 24
  3.1 Exemption ... 24
  3.2 Option to tax ... 26
  3.3 Developers and builders ... 26
  3.4 Input tax claims on land ... 26
4. INTERNATIONAL SUPPLIES ... 28
  4.1 E-commerce ... 28
  4.2 Where is a supply of services? ... 28
  4.3 International supplies of goods ... 28
  4.4 European rules ... 30
  4.5 Foreign refund reclaims ... 35
5. INPUTS ... 36
  5.1 Economic activity ... 36
  5.2 Who receives the supply? ... 37
  5.3 Partial exemption ... 37
  5.4 Cars ... 41
  5.5 Business entertainment ... 41
  5.6 Non-business use of supplies ... 42
  5.7 Bad debt relief ... 42
  5.8 Other input tax problems ... 42
6. ADMINISTRATION AND PENALTIES ... 46
  6.1 Group registration ... 46
  6.2 Other registration rules ... 46
  6.3 Payments and returns ... 51
  6.4 Repayment claims ... 56
  6.5 Timing issues ... 56
  6.6 Records ... 56
  6.7 Assessments ... 56
  6.8 Penalties and appeals ... 57
  6.9 Other administration issues ... 68

1. INTRODUCTION

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

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

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

1.1 Appeals pending

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

The HMRC website section which reports the progress of appeals is updated at irregular intervals. The latest update appeared on.

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.

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

- *Conservatory Roofing UK Ltd*: Upper Tribunal remitted case to FTT to consider further relevant information not taken into account when dismissing company’s appeal.
- *Hippodrome Casino Ltd*: HMRC to appeal the FTT decision in the company’s favour on partial exemption (listed for Upper Tribunal in October 2023).
- *Innovative Bites Ltd*: HMRC have been granted permission to appeal the FTT decision in the company’s favour to the Upper Tribunal (hearing listed for November 2023).
- *Sintra Global Inc & Parul Malde*: HMRC have been granted leave to appeal to the Upper Tribunal against FTT’s decision to allow appeals against various assessments and penalties relating to alleged inward diversion fraud (listed for hearing July 2023).
- *Sonder Europe Ltd*: HMRC are seeking leave to appeal the decision in this update at 2.9 that supplies of accommodation were covered by TOMS.
- *The Prudential Assurance Company Ltd*: taxpayer has been granted leave to appeal to the CA against the UT’s decision in favour of

HMRC's appeal on the interaction of the time of supply and grouping rules.

- *Wm Morrison Supermarkets plc*: the company's appeal on the liability of cereal bars was allowed by the UT and remitted to the FTT for reconsideration.
- *Yorkshire Agricultural Society*: HMRC is seeing permission to appeal against the FTT's decision that the Great Yorkshire Show qualified for the charitable fundraising exemption.

1.1.1 Decisions in this update

- *Hotel La Tour Ltd*: HMRC have been granted permission to appeal the FTT decision in the company's favour on the deductibility of the incidental costs of selling a subsidiary (listed for Upper Tribunal in June 2023).

1.1.2 Other points on appeals

- *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 – this case no longer appears on HMRC's list and may have been settled without a re-hearing.

2. OUTPUTS

2.1 Scope of VAT: linking supplies to consideration

2.1.1 Public levy

The administration of a German spa town levied a "spa tax" to finance the facilities provided for spa and leisure purposes and related events. It was charged to:

- persons staying in the municipality who are not resident in the municipality and who are offered the opportunity to use those facilities and to participate in those events;
- residents of the municipality, the focal point of whose life is in a different municipality;
- non-local persons staying in the municipality for professional reasons to attend conferences or other events.

The spa tax is not collected from day visitors, non-local persons or residents working or undergoing training in the municipality. It is set at a daily rate for visitors according to their length of stay, and at an annual flat rate for residents who are subject to it. Local laws required people providing accommodation, including campsites, to notify the authority about people arriving and departing.

The administration treated the tax as VATable revenue and claimed a deduction for costs of erecting, maintaining and renovating the spa park, spa buildings and footpaths. The facilities are freely accessible to everyone without presentation of any ticket.

The German tax authority ruled that this was not an economic activity and disallowed the input tax claims. The German court was minded to agree with the tax authority, but referred questions to the CJEU to clarify a number of issues:

- whether the levying of the spa tax was "an economic activity within art.2 PVD";
- if it was, how the question of "significant distortions of competition" should be assessed for the purpose of art.13, in particular considering the geographical range of the market for spa facilities.

The CJ rephrased the first question as turning on whether the levying of the spa tax involved making supplies of services for consideration within art.2, which was a necessary condition for there to be an economic activity within art.9. In this case, there was no legal relationship to provide the context for reciprocal performance: as the facilities were freely available to everyone, regardless of whether they were the people who paid the tax, it could not be consideration for the supply. Also, the obligation to pay was unconnected to the use of the facilities.

Because the first question was answered in the negative, it was unnecessary to answer the second question.

CJEU (Case C-344/22): *Gemeinde A v Finanzamt*

Lecture 1

2.1.2 Payment for no-shows

The Privy Council acts as the highest court of appeal for a number of Commonwealth countries. Although an appeal from Mauritius is based on the local law, the judges and both sides agreed that the Mauritius VAT Act should be construed in line with the corresponding provisions in UK legislation, so the decision in the case is likely to be relevant to a similar dispute here.

The appellant was a hotel which entered into one-year contracts with travel operators under which each operator bound itself to buy a specified number of rooms for each night of the contractual period at a specified price, which included VAT at 15%. The price paid by the tour operator was for an "all-inclusive package" which comprised meals and certain other activities offered by the hotel. Blue Lagoon did not refund the operator any night which the operator had bought and had not been able to sell to a client.

Where the tour operator did not send a guest to occupy the room, the hotel treated the receipt as “special income” and did not account for VAT on it. Assessments were raised for periods from July 2005 to June 2010 which were appealed. The Mauritius Supreme Court upheld the assessments in 2018, and a further appeal was made to the Privy Council.

This raised a new argument that had not been put to the Mauritius courts: that, if there was a supply to the tour operators in relation to the unoccupied rooms, it should be zero-rated because it was a supply to people belonging outside Mauritius at the time the services were performed (i.e. the service was the booking, as there was no occupation). The Privy Council accepted arguments from the tax authority that it would be prejudiced by allowing this new argument to be introduced at a late stage and refused to admit it.

The only issue was therefore whether the receipt of money in respect of unoccupied rooms was a supply of services for consideration, or was outside the scope of VAT. Both parties relied on UK and CJEU precedent case law.

The hotel argued that its supplies were the provision of accommodation, meals and other services, and if no guest arrived, it made no supplies. It argued that this was the commercial and economic reality. It considered that the UK decision in *Esporta Ltd* supported this argument (although in that case the CA found that charges for periods after cancellation were part of the consideration for a supply).

The tax authority argued that the reservation of accommodation by the tour operator was the service; it enabled the tour operator to sell accommodation on to its clients. It cited the UK precedent of *Bass plc* (1993) and the CJEU cases of *Air France* and *Hop! Brit Air* (Cases C-250/14 and C-289/14). In that case, the CJEU had rejected the taxpayers’ attempt to recharacterise the payment as a contractual indemnity aimed at compensating the carrier for harm suffered by the failure of the passenger to board. The CJEU noted that since the customer paid the same price for the ticket whether they flew or not, the payment made by a flying passenger (being a sum inclusive of VAT which had to be accounted for)

would be less than the payment made by the no-show passenger if the airline did not have to account for VAT on that same sum. That could not be justified.

In that case, the CJEU distinguished the situation from the leading case on deposits, *Eugenie-les-Bains* (Case C-277/05). The CJEU in that case had considered the deposit to be separate from the contract for the provision of accommodation; it was paid to encourage both parties to perform the contract, and its forfeiture on no-showing was to compensate the hotelier for the breach.

The tax authority argued that the amount paid by the tour operator was the whole amount, as in *Air France*, rather than a deposit, as in *Eugenie-les-Bains*. The judges agreed. The payment was consideration which was directly linked to the service which the hotel provided to the tour operators and on which the tour operators relied in running their own businesses. It did not matter that there was no direct relationship between the hotel and the guest.

The Supreme Court had also concluded that the issue of a tax invoice by the hotel confirmed that the VAT was due. Lady Rose commented that the Privy Council did not agree with the proposition – if that was the meaning of the Supreme Court's decision – that the mere issue of an invoice could turn something that was not a taxable transaction into such a transaction. The provision referred to by the Supreme Court was about the timing of the charge, but was not itself a charging provision. Nevertheless, the appeal was dismissed for the reasons given earlier.

Privy Council: *Blue Lagoon Beach Hotel & Co Ltd v Assessment Review Committee and another (Mauritius)*

Lecture 2

2.1.3 More than one activity

HMRC have updated the *Business/Non-Business* Manual to clarify how they will determine if a trader has more than one activity, and how this impacts on input tax recovery. The following extract includes an example:

Businesses may have just one activity but within this they may have transactions that are subject to VAT and those that are not. VAT on costs which relate to both will need to be apportioned because there is only a right to deduct VAT on taxed transactions.

Activity is not defined in law and so it must be given its plain, ordinary, or literal meaning. When considering whether an activity is a separate activity, much will depend on the specific facts and circumstances of the activities in question. It is important to consider the underlying substance and reality, particularly where this is shown to result in a fair and reasonable outcome, with the VAT recovery reflecting the underlying usage.

When considering the facts in a specific circumstance, the types of questions that may be relevant could include:

- *Is there an independent objective being pursued and separately managed?*

- *Is there a discrete and separate cost base, reflected in accounts?*
- *Are there supplies made to a specific set of customers, that is distinct from the broader customer base?*
- *Is what is being carried out solely to enable downstream supplies?*
- *Does what is being done only occur in relation to specific supplies?*

For example, where a retailer provides car parking specifically to enable customers to park close to the shop, in order that they can easily visit the retailer's premises and buy goods, we would see this as part of the retail (business) activity. This would remain the position even if parking charges are made once any free period expires.

This can be relevant in a situation where HMRC seek to disallow input tax because they cannot see a direct link to taxable outputs; the trader will have to argue that there is only one overall activity, and the inputs are linked to the whole business, rather than being incurred in a separate and discrete non-business activity.

VBNB30400

Lecture 3

2.2 Disbursements

Nothing to report.

2.3 Exemptions

2.3.1 Not insurance

In TC08479, the FTT held that the operator of a Self Invested Pension Scheme (SIPP) was not involved in "insurance transactions" for VAT purposes, and therefore its fees did not qualify for exemption. The Upper Tribunal has upheld that decision, although for slightly different reasons.

First-Tier Tribunal

The operator charged investors fees for its services. Although pensions business is treated as insurance for financial regulatory purposes, it treated its fees as taxable up to 2014. It then reviewed its VAT position and made a claim in March 2016 to recover overpaid VAT, arguing that its fees should have been treated as exempt. The claim was rejected in October 2019, and after the decision was upheld on review in February 2020, the company appealed. The FTT considered the matter in principle without regard to the amounts involved, which could be agreed between the parties if the appellant was successful.

The FTT reviewed the application form, fees schedule, terms and conditions and key features document. The SIPP was a registered pension scheme under income tax rules, so members received tax relief on contributions and were restricted in the ways in which they could access their money. They (or their financial advisers) were responsible for taking decisions about investments.

The Tribunal discussed a range of precedents about insurance transactions in general UK law, as well as VAT cases leading up to the CJEU decision in *United Biscuits (Pensions Trustees) Ltd* (Case C-235/19). That case showed that the definition of insurance for VAT is narrower than for other regulatory purposes, and pensions business is not necessarily covered by the VAT exemption. It also highlighted the fact that the UK had incorrectly treated investment management of pension schemes by insurance companies as within the exemption up to 31 March 2019, leading to a fiscal distortion between insurance-based pension schemes and those not benefiting from the exemption.

Judge Amanda Brown noted that the case involved three days of detailed argument by counsel. The appellant's case was essentially predicated on a submission that the provision of a pension is an activity constituting the provision of long-term insurance when viewed through the lens of the EU insurance directives, the Financial Services and Markets Act and historic domestic case law on what constitutes insurance.

The appellant argued that the VAT case law had mainly concerned "indemnity insurance", where the insurer agrees to indemnify the insured against loss. By contrast under a life insurance contract the insurer agrees to make payment of a sum by reference only to the uncertainty as to timing or order of events, each sum being determined at the time of payment and potentially subject to fluctuation. The SIPP contract ensured that, in return for the payment of the fees, the payments would be made in accordance with the tax rules in FA 2004.

HMRC responded by arguing that *United Biscuits* defined the essential features of "insurance transactions", and they were not present in the SIPP. In particular, the appellant bore no risk: it was a defined contribution scheme, so the pot of money built up by the policyholders would be used to pay out all and any benefits. They bore all the risk.

The Tribunal noted that its task was to determine the VAT liability, and was therefore cautious in expressing a view on whether the SIPP was "insurance" under general UK law. It decided that, on balance, the contract did meet the tests set down in a 1904 case involving Prudential.

The Tribunal also noted that HMRC guidance suggested that meeting these tests would make the contracts eligible for VAT exemption. However, "HMRC guidance is not the law and enforcing its application is not within the jurisdiction of this Tribunal (that is a matter for a judicial review challenge in the Administrative Court)." The Tribunal had to apply the VAT law, and in the developing precedents the assumption of risk by the insurer appeared to be significant. "In order for a supply to be exempt as an insurance transaction, the insured must pay the insurer to assume a financial risk. Such a conclusion includes within the scope of the exemption both indemnity and contingency insurance as, under a conventional (non-investment) life assurance policy the insured pays a fixed, up-front, annual or monthly premium over the term of the policy and the insurer bears the risk on a fixed sum payment on the happening of the insured event (death/critical illness etc). However, excluded from exemption is any policy/scheme which meets the Prudential life/death uncertainty without the assumption of financial risk."

The Tribunal had not been presented with any evidence about SIPPs provided by insurance companies, so it was not possible to consider an

argument based on fiscal neutrality. However, even if it could be shown that other taxpayers had benefited from the exemption, in accordance with the *Rank Group* decision (Case C-259/10) a taxpayer could not use fiscal neutrality to benefit from a legal error by the authorities.

The FTT concluded that the SIPPs were not insurance transactions for VAT purposes, so the fees charged by the company were not exempt. The appeal was dismissed. The Tribunal noted "by way of postscript" that "by reference to HMRC's guidance in this area the appellant's case had clear merit. By reference to the case prosecuted by HMRC their guidance is outdated and misleading and should be amended without delay."

Upper Tribunal

The company appealed, arguing that the FTT had erred in its interpretation of the CJEU precedents to exclude "contingency insurance" from the exemption, and to regard the lack of financial risk to the supplier as determining that it was not an insurance transaction.

The UT examined the precedent cases again in detail, and derived a number of principles from them concerning risk. It considered that the FTT had slightly overstated the conclusion in holding that an insurance transaction required the supplier to take on a financial risk in relation to an uncertain future event; it was possible that someone else would bear the risk. However, it was an essential feature of insurance transactions that the insured person should be protected from the consequences of the risk or uncertainty. In a defined contribution scheme such as this, there was no transfer of any risk away from the policyholder – all the benefits would be paid out of the investments that they owned (or were held for their benefit).

In a 1997 case involving *Winterthur Life UK Ltd* (which pre-dated *Card Protection Plan*), Customs had argued that the provider of SIPP management services within the insurer's group were not exempt because it was not an authorised insurer (a condition of the UK law that was held to be non-compliant with the Directive in *CPP*); the Tribunal had decided that it was exempt as part of an overall insurance service. The UT noted that this case was decided before the earliest of the various CJEU cases which had considered the definition of "insurance transaction", and it would be decided differently today.

The conclusion was the same as that of the FTT, although for slightly different reasons: the appeal was dismissed again.

Upper Tribunal: *Intelligent Money Ltd v HMRC*

Lecture 4

2.3.2 Updated Notice

HMRC have updated section 2.2 of their Notice *Insurance* with the definition of "insurance transactions" taken from *United Biscuits (Pension Trustees) Ltd & Anor v HMRC* (CJEU Case C-235/19). The CJEU confirmed the earlier *Card Protection Plan* decision (1999) in holding that "the essentials of an insurance transaction are… that the insurer undertakes, in return for prior payment of a premium, to provide the insured, in the event of materialisation of the risk covered, with the service agreed when the contract was concluded".

Notice 701/36

2.3.3 Updated Manual

HMRC have included a background note in the *Insurance* Manual to introduce the material on the regulation of insurance in the UK:

"It should be noted that just because an insurer is regulated, this does not automatically mean that your business activities will fall within the exemption. Equally, as per the decision in CPP, a taxable person may be carrying out activities that fall within the exemption although they are not regulated. For the purposes of the exemption, business activities must include the essential characteristics of an insurance transaction (please see VATINS2110 for further detail)."

VATINS2500

2.3.4 Investment gold

A company sold gold bullion to retail investors via an app. The gold remained physically within the vaults of Brink's in Zurich at all times. The company expected the supplies to be zero-rated within the Value Added Tax (Terminal Markets) Order 1973 (SI 1973/173), permitting the deduction of input tax; HMRC ruled that the supplies were exempt within Sch.9 Group 15. Initially the company appealed to the FTT, but then withdrew that appeal and applied for judicial review on the grounds of legitimate expectation.

This claim was based on a Memorandum of Understanding between the London Bullion Market Association ("LBMA"), the London Platinum and Palladium Market ("LPPM"), and HMRC. The company argued that the memorandum gave it a legitimate expectation of a zero-rating for VAT, frustration of which was an abuse of power, and (2) that in light of it, HMRC's March 2019 decision was irrational.

The judge briefly summarised the company's contracts with its customers, which allowed them to invest in gold and use it as a form of currency by links between their gold accounts and a Mastercard; its contracts with StoneX, a member of the LBMA, to manage the transactions in gold; and its contract with Brink's, which had custody of the physical gold, which was stored in a segregated section of the vault. Brink's was also a member of the LBMA.

The memorandum of understanding explained the nature of various transactions that took place on the market and confirmed how they were to be treated for VAT. It referred to transactions between LBMA members and non-members where the gold remained under the control of a member.

The judge reviewed the law, which provides that:

- supplies of gold between taxable persons are zero-rated where one of them is a member of the LBMA;
- supplies of investment gold between LBMA members and non-members are standard rated and subject to a reverse charge;
- supplies of investment gold to a private individual are exempt.

The judge next reviewed the law on legitimate expectations, noting that the fact that a person has instructed a tax adviser is not fatal to such a claim, but is something to be taken into account. In a precedent case (*Aozora*) Lady Rose had said that the burden was on the taxpayer to show that it would be unfair not to allow their reliance on the expectation; the taxpayer's counsel argued that this was said "per incuriam" (i.e. was wrong), which the present judge described as "a decidedly bold submission". However, he did not consider it necessary to decide that point.

The judge described the company's case as resting on the memorandum "which, it contends, contains clear and unequivocal representations, devoid of relevant qualification, that transactions of the same type as its supplies of gold will be zero-rated." He said that the argument fell at this first hurdle. The terms of the memorandum simply did not cover the company's arrangements that allowed retail customers to buy gold which remained in Brink's vaults. It is aimed at transactions within the bullion market at a wholesale level. The memorandum required an involvement in the transactions of LBMA members, which was absent in the case of the company and its retail customers.

It would not be conspicuously unfair or an abuse of power to deny a legitimate expectation even if it had existed, given the public interest in HMRC collecting the tax due according to what the law clearly stated. The fact that the company and its advisers did not approach HMRC to find out their view counted against this.

The application for judicial review was dismissed with costs.

High Court: *The King on the application of Glint Pay Services Ltd v HMRC*

Lecture 5

2.3.5 Healthcare (1)

A company appealed against a decision made in April 2019, confirmed on review in July 2019, that its supplies were standard rated rather than exempt healthcare services supplied by a registered medical practitioner. The principal of the business was a doctor; the services were cosmetic in nature. The company had been registered for VAT from August 2014 to May 2017, when it deregistered; the disputed decision led to assessments from December 2016 onwards.

The company agreed that purely cosmetic procedures were standard rated, but contended that these were not a routine part of its business and would be below the registration threshold. It had been agreed during ADR that the principal was an appropriately qualified person, so the Tribunal (Judge Christopher McNall) only had to decide whether the services constituted "medical care".

He noted that the grounds of appeal referred only to the terms in Item 1 of Group 7 Sch.9 VATA 1994: the company advanced an alternative argument based on Item 4, but it had not been registered with the Care Quality Commission until August 2018, which meant that it could not fall within Item 4. Any consideration of Item 4 and its conditions were only included in the decision to assist the parties in agreeing liabilities for later periods.

The judge relied on the Court of Appeal's 2022 decision in *Mainpay Ltd* for the approach to follow. "Medical care" was an independent concept of EU law, and had to be interpreted in line with EU precedents. The definitions in exemptions were strict but not restrictive. It was necessary to consider the economic reality of the situation to determine the nature of any supply.

The *Mainpay* Upper Tribunal had defined medical care in terms that were explicitly approved by the CA: it involves the diagnosing, treating and where possible curing of diseases and health disorders. The UT had rejected a contention that it extended to "involvement in medical services by qualified medical personnel", which had been argued by the taxpayer based on the CJEU precedent *Kugler*.

The judge also noted that earlier cases had emphasised that any decision in this area would turn on the particular facts of the case. He summarised briefly the different situations in *Ultralase*, *Skin Rich Clinic* and *Window to the Womb*, where the FTT had come to different conclusions about the extent to which the services constituted medical care.

The judge noted that the taxpayer had not kept sufficiently detailed records that would establish a medical basis for the treatments given. The taxpayer argued that this was "HMRC's fault" because HMRC had not defined what records should be kept for this purpose; but the judge considered that the burden lay with the taxpayer to prove that the exemption applied. Possible supporting evidence would include referrals from general practitioners; the absence of such evidence was damaging to the taxpayer's case.

Examples of the doctor's initial consultation notes (suitably redacted) were considered. The judge said that they did not appear to be "scientific documents". There was little detail about the client's physical condition, nor any of the data that might be expected in a medical assessment (such as blood pressure readings, height and weight). A spreadsheet of clients was apparently populated with medical commentary only later, when the taxpayer became aware of HMRC's interest. The judge considered that the original consultation notes were a more reliable indication of how the service was supplied. The treatment notes were also not of the kind that might have been expected in a healthcare setting.

The judge concluded that, "standing back", what was supplied was cosmetic procedures. Attempts to relate this to treatment of psychological disorders were strained and not backed up by the evidence: "The fact that people go to the clinic feeling unhappy with some aspect of their appearance, and (at least sometimes) are happier when something is done at the clinic about that aspect of their appearance, does not mean that the treatment is medical, or has a therapeutic aim."

Even after the clinic registered with CQC and therefore became a "state-regulated institution", it would not qualify for exemption under Item 4 because the procedures were not "medical or surgical treatment". The same considerations applied to Item 4 as to Item 1.

The appeal was dismissed.

First-Tier Tribunal (TC08846): *Illuminate Skin Clinics Ltd*

Lecture 6

2.3.6 Healthcare (2)

A similar argument came before Judge Anne Fairpo in a very long-running dispute. The company had been visited by HMRC for the first time in 2009, and an initial decision that it should be registered was made in August 2010. The company then filed nil returns from 02/2011 to 08/2012, presumably on the basis that it still considered that it was making exempt supplies – in effect, disputing the registration decision without actually appealing it. A further visit in May 2013 led to a decision to backdate registration to 2007 with assessments and penalties running up to May 2014. These were appealed; the appeal was stood over behind another case where the taxpayer eventually withdrew. That appears to be the explanation for the hearing in 2023 of a case relating to 15 years before, which created some difficulties because patient files were destroyed after 10 years.

The company argued on the basis of CJEU Case C-91/12 *PFC Clinic* that cosmetic procedures can be medical care. It was "improving people's lives in the same way as hospitals". However, it was not registered with the Care Quality Commission, which apparently had decided that its services did not require it to be registered. The judge said that this decision was indicative that it was not providing medical care, because that would have come under the ambit of the CQC.

The company asserted that its services were carried out by qualified medical practitioners, but no detailed evidence was brought forward to support this. The judge noted that the company website described the services as being in the field of "medico-beauty". She commented that dissatisfaction with one's appearance does not necessarily constitute a health disorder. She rejected an argument that the company's treatments were not merely cosmetic because some of them had an enduring effect: she gave examples of purely cosmetic procedures that would do so.

Once again, there was no evidence that medical assessments of clients were made by the staff. The records for the early periods in dispute had been disposed of; the taxpayer claimed that HMRC had not asked to see them, whereas HMRC claimed they had asked but the records had not been provided. The judge considered that the correspondence supported HMRC's claim. The company had merely asserted to HMRC, without offering evidence, that all its services were exempt medical care; in oral evidence in the FTT, the director accepted that "maybe 10% – 15%" might be standard rated cosmetic procedures.

In conclusion, the judge commented that some of the procedures might have been medical care – cosmetic procedures that were carried out to treat a condition that qualified as a disorder – but there was no evidence to show how much of the turnover would qualify. In the absence of any evidence, the appeal had to be dismissed.

The judge acknowledged that the director was sincere in believing and asserting that the company "improved people's lives". However, that was not enough for the services to be exempt from VAT.

First-Tier Tribunal (TC08865): *EPEM Ltd*

Lecture 6

2.3.7 Updated Notice

HMRC have updated the Notice *Health Professionals and Pharmaceutical Products*, making a number of minor changes.

The more significant changes are:

- the addition of pharmacy technicians in Great Britain to the list of health professionals;
- the removal of services directly supervised by a pharmacist from the list of services that are not exempt from VAT.

These changes reflect the amendments to the law that took effect on 1 May 2023 in relation to services to the public provided by pharmacists.

Notice 701/57

2.3.8 Articles

In an article in *Taxation*, Guy Smith discusses HMRC's establishment of a new "cosmetic medical sector team" in the context of recent case law on the healthcare exemption as it applies to cosmetic procedures, including the *Illuminate* case.

Taxation, 10 August 2023

In an article in *Taxation*, Mike Thexton discusses the impact of the principle of fiscal neutrality on the healthcare exemption post-Brexit, with reference to the distinction drawn by the VAT Act between practitioners on "statutory registers" and those on "accredited registers".

Taxation, 17 August 2023

In an article in *Tax Adviser*, Jeremy Woolf discusses the relevance of EU law after Brexit, with particular reference to the enactment of the *EU Law (Revocation and Reform) Act 2023*, which significantly diminishes the influence of EU law from 1 January 2024.

Tax Adviser, September 2023

2.3.9 Updated Manual

HMRC have updated their *VAT Health* Manual in relation to the liability of Covid-19 testing services. The guidance replaces R&C Brief 11/2021 on the same issue. The manual distinguishes PCR tests (carried out in a laboratory) from lateral flow tests (often self-administered). A test can only be exempt where the service is:

- carried out and supplied by a relevant health professional within the categories in VATA 1994 Sch.9 Group 7; or
- supplied by a non-registered person, but wholly performed by a relevant health professional (other than a dental technician); or
- carried out by a non-registered person acting under the supervision of a registered person; or
- supplied by a hospital or state-regulated institution, in which case the exemption also covers any goods in connection with the supply.

The note discusses different forms of "state regulation" for this purpose, and acknowledges that the objective purpose of the test is "medical care" (diagnosis and the protection of human health) even where the test is taken in connection with conditions for being allowed to fly.

Test kits will be standard rated when supplied to individuals for self-administration or to hospitals, pharmacies and GP surgeries; where they are used as part of an exempt service, the supply to the person being tested will be exempt.

VATHLT2015

2.4 Zero-rating

2.4.1 Patient group directions

The *Value Added Tax (Drugs and Medicines) Order 2023* applies a temporary zero-rate of VAT (effective from 9 October 2023 to 31 March 2027) to the supply of drugs and medicines in the UK to an individual for personal use in accordance with a patient group direction.

A patient group direction is a written instruction that allows healthcare professionals to supply and administer specified drugs and medicines to a pre-defined group of patients without a prescription. The measure is designed to reduce costs for the NHS and better reflect prevailing practice – for example, where pharmacies provide medicines to groups of individuals without the need for individual GP prescriptions.

SI 2023/1006

2.5 Lower rate

Nothing to report.

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

2.9.1 Margin scheme

In the late 2018 decision *Harry Mensing v Finanzamt Hamm* (Case C-264/17), the CJEU examined the relationship between the option for the margin scheme in some circumstances in art.316 PVD and the mandatory margin scheme in art.314. The CJEU ruled that the right to opt for the margin scheme in art.316 could not be made subject to art.314. It was clear and mandatory, and the German law did not comply.

In its further consideration of the consequences of that decision, the German court has referred further questions to the CJEU; the same A-G (Szpunar) gave an opinion, and the full court has now issued a further decision.

The appellant is a German art dealer who, in 2014, purchased a number of works of art as acquisitions from artists residing elsewhere in the EU and paid German acquisition tax on the purchases. He asked his local tax authority to apply the margin scheme to his sales, but this was refused. He declined to deduct input tax on the purchases, although it was noted that he could still do so, if his request for the margin scheme calculation of output tax failed.

Article 314 makes the margin scheme mandatory where a taxable dealer supplies something that has been supplied to him within the EU by a non-taxable person; or by a taxable person where the supply was exempt within art.136 (input tax blocked on purchase); or by a taxable person covered by the exemption for small enterprises; or on a supply also within the margin scheme. Article 316 allows taxable dealers to opt for the margin scheme in relation to works of art that the dealer has personally imported, or acquired from the creator, or acquired in circumstances where the reduced rate in art.103 applies. In each of these cases, application of the margin scheme is likely to be preferable to deduction of input tax and accounting for output tax on the full selling price.

The problem is that the transactions appear to fall within art.316, in that the supplies were purchased from the artists or their successors in title, but not within art.314, because the acquisition was effectively a taxable transaction (subject to acquisition tax). The question for the CJEU was whether the German law, which ruled out the margin scheme in these circumstances, was incompatible with the PVD; it concluded that it was, and also ruled that the trader could not have it both ways – he could not apply the margin scheme and deduct the acquisition tax as input tax.

Following that decision, the German court held that the margin should be calculated by adding the acquisition tax to the purchase price. The German tax authorities appealed against that decision, arguing that neither the German law nor the Directive permitted such a calculation of the margin. Further questions were referred to the CJEU, asking whether there was an unintended gap in the legislation that could only be solved by a change in the law, or whether the calculation could be determined by the court.

The A-G noted that the purpose of the profit margin was to avoid a double charge to VAT where the purchase price included VAT at an earlier stage

for which the present trader could not obtain a deduction. The margin scheme provided for this when the purchase was made in the same territory, and there was a specific rule relating to imports in art.317; however, the PVD did not explicitly deal with the situation where the purchase was exempt for the seller but taxable as an acquisition for the purchaser.

The A-G considered that the definitions of purchase price and selling price in art.312 were clear and unequivocal, and did not allow acquisition tax to be taken into account in calculating the margin. This was not a satisfactory outcome; the issue was how it could be resolved. The A-G considered that the only solution would be a change to the Directive: it was not possible for a judicial interpretation by the CJEU or the national court to make good such an omission in the EU legislation, where the words of the PVD were clear and unambiguous.

The full court appears to have disagreed with this. It is a little hard to follow the reasoning – a numerical illustration would help – but the court's answer is that the Directive requires the purchase price of imported works of art to be calculated as including the import VAT. That was explicitly stated in art.317, and the provisions about the calculation of the margin in art.312 and 315 should be interpreted in the same way: acquisition tax should be included in the purchase price when calculating the taxable amount for the margin scheme.

CJEU (Case C-180/22): *Finanzamt Hamm v Harry Mensing*

Lecture 7

2.9.2 Scope of TOMS

A company appealed against HMRC's decision that its supplies of accommodation were not within TOMS. It leased residential apartments for periods of a year or more (exempt); it then let them for periods of between a day and a month, but on average five days, to business and leisure travellers. This was a taxable supply, but the company sought to reduce the taxable amount by using the margin scheme.

HMRC argued that the company "materially altered" the supply that it had bought in before supplying it on, and therefore fell outside TOMS. Judge Greg Sinfield noted that this requirement of the UK law did not appear in the Directive, so if it was relevant, he would have to consider whether it was permitted by the EU law.

The judge set out the conditions for the TOMS to apply according to art.308 PVD:

The EU special scheme applies to

(1) transactions carried out by travel agents or tour operators;

(2) dealing with customers in their own name;

(3) using supplies of goods or services provided by other taxable persons;

(4) in the provision of travel facilities; and

(5) where those supplies are for the direct benefit of the traveller.

EU case law had shown that the scope of TOMS was broad, and it was mandatory where it applied. Case C-163/91 *Van Ginkel* and Case C-552/71 *Alpenchalets* showed that supplies of accommodation on their own, without being part of a package, can be within TOMS. Case C-308/96 *Madgett & Baldwin* showed that TOMS can apply to purely domestic transactions, even if it was introduced as a simplification for international businesses. Case C-200/04 *ISI* showed that the trader did not have to be a "travel agent or tour operator", if the supplies met the conditions listed above.

The judge noted the recent UK case of *The Squa.re Ltd* as being of little assistance: HMRC had accepted in that case that TOMS applied, so the issues relevant to the present case were not discussed.

HMRC argued that the company was acting in the same way as a hotelier rather than as a tour operator. It was acquiring its own resources in order to make onward supplies of holiday accommodation. The "material alteration" condition was breached in several possible ways:

- 62.5% of the properties were acquired unfurnished, and the company furnished them (and sometimes made insignificant other changes such as minor decorations);
- the acquisitions were of long-term rights and the onward supplies were of short-term licences;
- the acquisitions were exempt residential leases and the onward supplies were of taxable holiday accommodation.

The judge did not consider any of these to be a "material alteration", so it was not necessary to reach a view on whether that condition was contrary to EU law. He also did not consider it necessary for TOMS that the trader should buy holiday accommodation and sell holiday accommodation. This trader bought in accommodation, and made no significant changes to the structure of that accommodation before supplying it on. The nature of the accommodation from the point of view of the original supplier was not relevant to the TOMS trader. The addition of furniture did not alter the structure itself.

The company's appeal was allowed: it was entitled to calculate its output tax using TOMS.

First-Tier Tribunal (TC08852): *Sonder Europe Ltd*

In an article in *Taxation*, Kevin Hill discusses this decision and suggests that operators in this sector may be entitled to reclaims for past periods. As the four-year cap on claims will be running, this should be considered as quickly as possible.

Taxation, 24 August 2023

Lecture 8

2.9.3 Private hire vehicles

Uber applied for, and was granted, a declaration by the High Court that a private cab operator was required to enter into contracts with passengers as a principal when it accepted a booking. The arguments were based on the regulatory requirements of the *Local Government (Miscellaneous Provisions) Act 1976* and the *Private Hire Vehicles (London) Act 1998*.

The London rules had been considered in the earlier case of *Uber London Ltd v Transport for London and others* (2022). The concept of "operator" under the legislation required a contract to exist between the person offering the complete service (the provision of a car with driver) and the hirer. Parliament had intended that the operator should undertake the contractual responsibility for the safety of the hire.

The judge commented that the VAT consequences were not relevant to the decision, but the decision is likely to have VAT consequences. There have been plenty of cases over the years in which Tribunals have found that taxi firms have taken bookings as agent for the driver, and are therefore treated as making a supply of booking services to the driver rather than transport services to the passenger.

Uber now treat their supplies as falling within TOMS: they make the supply to the passenger as principal, but they buy in the services of the driver and apply VAT only to the margin. This produces the same output tax as if they were accounting for VAT on the amount retained as "commission" on a supply to the driver. That now seems to be the required VAT treatment for private hire operators.

High Court: *Uber Britannia Ltd v Sefton Metropolitan Borough Council*

Lecture 9

2.9.4 Another TOMS dispute

A company filed an error correction notice for periods 03/17 to 03/21, claiming that it had overpaid output tax and underclaimed input tax because it had applied TOMS when it should not have done. HMRC rejected the claim, ruling that the returns had been correct, and the company appealed. The "error" related to the treatment of "wholesale" supplies, which the company argued should fall within the normal VAT rules. Its supplies of services to non-UK businesses would have been outside the scope of VAT with the right of recovery, rather than subject to UK VAT on the margin with no right of recovery on directly incurred costs.

Judge Anne Fairpo summarised the issue before the Tribunal as whether the original treatment was incorrect and therefore capable of being changed by an error correction notice, or whether it was a lawful option which the company had chosen and could not go back on. The CJEU had decided in *Commission v Spain* (Case C-189/11) that wholesale supplies fell within TOMS, but HMRC had confirmed in R&C Brief 05/2014 that the UK law would not be changed: traders could use direct effect and apply the *Spain* decision, or could continue to exclude wholesale supplies from TOMS in accordance with the traditional UK treatment.

In the present case, HMRC argued that R&C Brief 05/2014 was wrong: the UK law was written in the same terms as the PVD, so the *Marleasing* principle required it to be construed in the same way. That meant that wholesale supplies fell within TOMS in the UK as a matter of UK law; the effect of the Brief was to allow a concessionary treatment to businesses which chose to use it. It did not have the force of law.

The company argued that the Brief was evidence that HMRC had specifically intended to depart from the CJEU treatment by publishing the Brief, and could not now rely on *Marleasing* and the Tribunal to rewrite

UK legislation. It contended that HMRC's construction of the law was not required by the *Marleasing* principle.

The judge commented "Neither party's submissions on the state of the law were particularly well developed or convincing either for or against the proposition."

According to the precedent of *V&A Trustees* (HC 1996), not every mistake made by a taxpayer falls within the error correction mechanism of SI 1995/2518 reg.35. That concerned a choice of a disadvantageous (but permissible) accounting treatment. HMRC argued that the same principle applied here, while the taxpayer distinguished the earlier case on the basis that it did not deal with an inconsistency between UK and EU law.

The company also argued that HMRC were attempting to rely on the direct effect of the PVD to override domestic law, which an emanation of the state cannot do in an action against a taxpayer. HMRC responded that they were not imposing direct effect: it was the company that had chosen to apply EU rules. The judge agreed with HMRC on this point. It made no difference that it was not a considered choice by the company. The judge considered that "the reality is that [the taxpayer] is required to live with the consequences of its actions, not that HMRC are forcing the company to act in a particular way."

The company also argued that Brief 05/2014 was a breach of the principle of fiscal neutrality, in that it permitted identical supplies to be taxed in different ways. It would suffer discrimination in comparison to its competitors if they were allowed to exclude their wholesale supplies from TOMS and the company's error correction was refused.

HMRC submitted that fiscal neutrality can no longer be relied upon as a cause of action, following the UK departure from the European Union (paragraph 3, Schedule 1, European Union (Withdrawal) Act 2018). HMRC further submitted that there was no fiscal neutrality breach in any case. All taxpayers making wholesale supplies are treated equally as they have the same choice as to whether or not to apply TOMS. Again, the judge agreed with HMRC: the choice was available to all taxpayers, and the fact that the company now regretted its choice did not mean that it had been treated less favourably than other taxpayers. This meant that it was not necessary to consider whether the concept of fiscal neutrality survives in UK law in any relevant form.

The company's claim that other taxpayers had received repayment of similar error corrections was a complaint about the fairness of HMRC's administration, over which the FTT had no jurisdiction. The appeal was dismissed.

First-Tier Tribunal (TC08893): *Golf Holidays Worldwide Ltd*

Lecture 10

2.9.5 Change of contracts not enough

A company had lost an earlier appeal about the liability of supplies it made as a principal rather than an agent. The FTT (2018) and Upper Tribunal (2020) had concluded that acted as a principal in providing students with essays and assignments which were procured by the company, also acting as principal. It was contrary to the economic and

commercial reality of the situation to regard the company as an agent arranging supplies between the student and the writer. The assessments in that appeal, covering the periods from January 2012 to September 2015, amounted to just over £900,000.

The company made further appeals against assessments for the period 12/16 in the amount of £31,422, for the periods 12/17 to 06/19 in the amount of £286,541 and for the periods 09/19 to 03/20 in the amount of £101,596.

Judge Kim Sukul summarised the findings of the UT in the previous appeal, in particular that the effect of the contracts did not create a relationship between the writers and the customers. It was a triangular arrangement with all supplies passing through All Answers.

The Tribunal heard from three employees who explained changes to the contracts. Their evidence was not challenged and was accepted in relation to the reasoning behind the changes, the process of making the changes and the dates the changes were processed. However, the judge considered that the relevant facts were unchanged. Those were again summarised by quoting from the UT decision.

HMRC set out comparative tables showing the "core" terms contained within the old and new contracts, and argued that there had been no material changes to the business model or the obligations of the various parties. The reasoning of the UT therefore continued to apply.

The company submitted that there had been material changes. These included the retention of any intellectual property in the work by the writer, and an explicit statement in the writer contract that the allocation of a project to a writer created a binding contract between the writer and the customer.

The judge referred to *Tolsma* as containing "the essence of the dispute between the parties": the company argued that there was only a legal relationship between the writer and the student, and any reciprocal performance occurred within the context of that relationship. Therefore, although the customer paid the money to the company, it was not consideration for a supply by the company. This led to the question of how to determine who made and received a supply, for which the judge turned to the CJEU decision in *Newey*. In short, it was necessary first to consider the contracts, and then to consider whether there was anything in the commercial and economic reality of the situation that indicated that the contracts should be overridden. The judge proposed to follow that approach in analysing the transactions at issue.

The UT had decided that the core obligation of the company was to deliver the academic work to the requisite standard and by the applicable deadline, and this was binding on the company only. That was the main reason for its finding that the supply was made by the company, and it was only supported by the fact that copyright was assigned to the company by the writer. The judge held that reserving the copyright was not enough to change the core obligation, which remained with the company.

The new statement that "You agree that when you do bid for a project and we allocate it to you, this is a binding contract for services between yourself and the Customer" also did not change the reasoning of the UT: that had concluded that "no separate contract, consisting entirely of

implied terms, came, into existence between a Writer (through the agency of the Appellant) and a Customer not least because it was not explained to us the offer and acceptance that could lead to such a contract or indeed what the terms of such a contract would be." The brief words stating that a contract came into existence still did not clarify its terms or meet the requirement for offer and acceptance.

The company further argued that the commercial and economic reality had changed: it no longer had any rights over the material, so it did not have the right to supply it as principal. The judge disagreed. In his view, the contracts had not materially changed; and if he was wrong on that, he considered that the commercial and economic reality had not changed. The company was still responsible for providing the customer with the limited right to use the academic work, of suitable quality, within the stipulated timescale, and it was paid for that supply.

The appeal was dismissed.

First-Tier Tribunal (TC08920): *All Answers Ltd*

Lecture 11

2.10 Second hand goods

Nothing to report.

2.11 Charities and clubs

2.11.1 Updated Notice

HMRC have updated their Notice *How VAT affects charities* with a new section on validity of certificates issued to obtain certain construction works at the zero rate. From 1 June 2022, charities should apply the "two stage test" described in R&C Brief 10/2022 to decide where their activities are business or non-business, and then considering whether the building being constructed is used solely (at least 95%) for non-business purposes and so is eligible for the zero rate.

A new section 6.1.4 confirms that certificates issued before 1 June 2022 will continue to be valid for the period covered by the certificate, even if that continues beyond 1 June 2022.

Notice 701/1

2.12 Other supply problems

2.12.1 Updated Manual

The VAT *Supply and Consideration* Manual has been updated with examples of when output tax is due in different circumstances where business assets have been used for non-business purposes. The updated guidance is reproduced below:

The following table summarises when output tax will be due:

Input tax position -	*Temporary application to private and other non-business use*
Wholly claimed (including *Lennartz* type cases - see below)	Yes
Apportioned between business and non-business use	No
Apportioned between taxable and exempt business activities	Yes
Wholly not deducted because:	
- not for business use (therefore not input tax)	No
- acquired for an exempt activity and wholly restricted under a partial exemption method	No
- company car	See Notice 700/64 Motoring expenses
- business entertainment (for example yacht)	No
- supplier is not a taxable person	No

Certain computers, land and buildings acquired as assets of the business may be subject to the capital goods scheme. Please see Notice 706/2 Capital goods scheme for details of disposals of such capital items.

Business/non-business use: Lennartz ruling

Following the ECJ ruling in *Lennartz v Finanzamt München 3* (Case C-97/90), you may find that a trader has reclaimed all the input tax incurred on the purchase of an asset which is to be used for both business and non-business purposes. The ECJ ruling questioned the way the private use of business assets is dealt with for VAT purposes. A business which acquires assets partly for its business, and partly for other purposes, can deduct all the VAT incurred on the purchase as input tax, but must account for output tax each accounting period on any non-business use. Traders may nevertheless continue to use apportionment as provided under VATA 1994 s.24(5). The ruling does not apply to cars, items used for business entertainment or goods where business use is exempt. For further information on the application of the Lennartz ruling please see V1-13 Input Tax.

VATSC03370

Lecture 12

3. LAND AND PROPERTY

3.1 Exemption

3.1.1 Legitimate expectation

A landlord owned about 600 flats in Chelsea. Most of them were let on long leases, but about a third were let as serviced accommodation. Until 2019, the company had treated all its rental income as exempt; HMRC then decided that the letting of the serviced accommodation should be taxable, and raised assessments. The company appealed the liability decision to the FTT, but in the meantime also applied for judicial review, arguing that HMRC had carried out numerous inspections both of its records and those of a connected company over nearly 30 years and had never raised the issue of liability. It therefore claimed a legitimate expectation that no such assessment would be raised.

The judge reviewed the records of the various visits, and considered what those records suggested was discussed. One of the taxpayer's witnesses, a former control officer, gave evidence to the effect that a control officer certainly ought to have considered the application of the exemption as a significant risk factor to be fully checked during a visit; however, the judge noted that there was no evidence from the claimant's directors or employees to say that this actually happened.

The grounds for allowing the claim for judicial review started with "substantive unfairness". HMRC argued that it was not unfair to raise the assessments, and in any case simple unfairness was not enough for the application to succeed. The threshold was higher: it had to be "conspicuous unfairness that amounted to an abuse of power". The judge noted that the test was in fact that of procedural unfairness, which he did not consider was applicable; indeed, he did not consider the raising of the assessments to be unfair.

The judge next turned to the question of legitimate expectation. HMRC argued that they had never made any representation to the effect that the supplies were properly treated as exempt, and the taxpayer had not in any event relied on such a representation to its detriment. They also claimed that the taxpayer had not placed all its cards faced upwards on the table at a control visit in 2005, and had changed its business substantially afterwards. The company disputed all these points.

The judge commented that it was difficult to rule on some of these points before the hearing of the FTT appeal on the substantive issues. For example, it would not be possible to be sure whether the taxpayer had shown "all the cards", or whether any changes to the business had been material, without consideration of the law on exemption. He said "The problem arises because I have been asked to decide this case on the hypothetical basis that the Liability Decision was correct, but without there being any agreement as to why the Liability Decision was correct." For example, it might turn out that the supplies had never been exempt; or that the business had changed in some way at a particular date to be determined, and that unspecified change was what caused the exemption to be lost. He was therefore unable to conclude on these issues, but decided that he did not need to in order to reach his decision.

The company accepted that it could not hold HMRC to an expectation indefinitely, even if it turned out to be legitimate. When HMRC had declared in 2019 that the supplies were taxable, the company had started to treat them as such. It was the retrospective assessment going back to 2015 that the company disputed.

The judge summarised what he considered to be the relevant principles to consider in deciding whether there was a legitimate expectation:

(1) Taxpayers ought to pay the tax due from them. It is unfair to other taxpayers if they do not.

(2) Although they have a discretion as to how they go about their task, the Defendants' role is to collect taxes, not to waive them.

(3) The general rule (subject to certain exceptions which are not relevant in the present case) is that the Defendants can make assessments to correct incorrect VAT returns, but only if they do so within 4 years. This strikes a balance between the public interest in collecting taxes which are due and the interest of the individual taxpayer in achieving finality and certainty.

(4) The Claimant was liable to pay VAT on the Relevant Supplies. (This is what I am asked to assume. As I have noted, it remains to be determined whether that liability first arose in 1989 or on a later date.)

(5) The Claimant was under a duty to file correct VAT returns. It was incumbent on the Claimant to determine for itself the correct treatment of the Relevant Supplies.

(6) Moreover, the sums involved were significant, which gave the Claimant an added incentive to make sure that its VAT returns were correct. (As I have noted, the Relevant Supplies accounted for the majority of the Claimant's income. By the time of the period covered by the Assessments, VAT on the Relevant Supplies amounted to over £1m per year.)

(7) Nevertheless, the Claimant filed incorrect VAT returns. (This again follows from the assumption that the Liability Decision was correct. Again, it remains to be determined whether the Claimant began to file incorrect returns in 1989 or on a later date.)

(8) The Claimant has provided no evidence as to how it decided to start filing incorrect VAT returns. (Whether it was filed in 1989 or on a later date, the first incorrect VAT return was filed before the Defendants had the opportunity to consider the circumstances which made it incorrect.)

(9) The Claimant did not ask the Defendants for a VAT Ruling, i.e. written advice on which it could rely.

The judge did not consider that the inspections carried out by control officers over many years made any difference. He was prepared to accept that the officers should have considered the question of exemption, but there was no evidence that they actually did so, and it was clear from follow-up letters that HMRC had never actually made such a representation to the taxpayer.

Further, the taxpayer had never done anything in response to any representation from HMRC, let alone anything to its detriment. It had simply continued to treat the supplies as exempt, which is what it would

have done without the control visits. It was its own responsibility to determine the liability of the supplies, and if it had done so incorrectly, that was its own fault. The judge was not convinced that the company could commercially have added output tax to its prices; if it had continued to charge the same gross rent, the VAT liability would have been the same whether or not HMRC had given any assurance that it would not arise.

The judge also rejected an argument based on various EU legal principles and on article 1 of the First Protocol of the ECHR. The application for judicial review was dismissed.

High Court: *The King on the application of Realreed Ltd v HMRC*

Lecture 13

3.2 Option to tax

Nothing to report.

3.3 Developers and builders

Nothing to report.

3.4 Input tax claims on land

3.4.1 DIY business

HMRC refused a DIY builder's claim for £13,048 on the grounds that the building would be available for use in a business, which contravened the conditions for the claim.

The claim had been made on 3 March 2021 and further information was requested. The appellant readily responded that the planning consent was for a furnished holiday let, and that he intended to live in the property in between lettings. When the refusal was upheld on review, he appealed, arguing that any business use would be incidental to his occupation as main residence. He only listed the property on Airbnb to satisfy the planning conditions; he regularly spent time abroad, and the property would only be let during those periods; he cited the *Lord Fisher* tests of business and claimed that his letting activity would not meet those criteria. In addition, because of Covid, there had been no letting since the building was completed.

Judge Heidi Poon considered that the appellant was inviting the Tribunal to find that his acceptance of the planning conditions were a "ploy" to enable him to build a residence in the South Downs National Park, where residential development was not normally permitted. The listing on Airbnb also appeared to be a "ploy". The planning consent clearly prohibited occupation as anyone's main residence. She analysed s.35 VATA 1994 as imposing conditions on the claimant and on the building, and this claimant failed the eligibility criteria: on the basis of the planning consent, he had constructed a building that was primarily for use in a business, and the claim failed.

She also commented on his further argument that, as a matter of fact, it was a building designed as a dwelling and was actually being used for private occupation. She agreed with the distinction HMRC had drawn between the present situation and the case of *Irene Jennings*, in which a woman had had a second home constructed for holiday use. That was a building designed as a dwelling, and was not intended for use in a business.

The appeal against the refusal of the claim was dismissed.

First-Tier Tribunal (TC08916): *Philip Spani*

4. INTERNATIONAL SUPPLIES

4.1 E-commerce

Nothing to report.

4.2 Where is a supply of services?

Nothing to report.

4.3 International supplies of goods

4.3.1 Expired end-use certificate

A company appealed against a post-clearance demand issued in April 2018 for customs duty of £275,000 and import VAT of £55,000. The FTT dismissed its appeal and it took the matter to the Upper Tribunal.

In November 2016, the company had been the importer of record of an aircraft which had flown from Sofia in Bulgaria, landed at St Athan in Wales for servicing to be carried out by the company for the aircraft's lessee, and then left the UK for the Republic of Ireland and on to its eventual destination in the USA. The servicing was charged at £1,024 for labour and £51 for parts, with additional charges for 6 days' parking and some fuel.

HMRC had initially concluded that no liability arose because the company had entered the aircraft into the "end-use" customs procedure, and expressed that view in two letters to the company in 2017. It was then discovered that the company's end-use authorisation had expired due to an oversight on the company's part; HMRC concluded that the duty and VAT were due, and raised the demand.

The FTT had rejected arguments based on the possible application of Inward Processing Relief, remission of the duty under Article 120 of the Customs Code, the possibility that the end-use procedure was ultra vires, and whether the company had a legitimate expectation that relief was available based on the HMRC letters.

The appeal to the UT was on six grounds, including all those above together with further arguments about proportionality and discretion.

The UT rehearsed the FTT's findings of fact, which explained the history of the enquiry. The company had believed that it was possible to reinstate its end-use authorisation retrospectively up to a year after it had expired, but it seems that this was not pursued with appropriate urgency. A staff member dealing with the matter left; the company believed the certificate would not be needed in the future; and it did not believe that there was a substantial liability relating to the imports since it had expired.

The investigating officer had initially used the wrong codes in calculating the liability, and in December 2017 issued a statement of intent preceding

a C18 demand for a little over £12,000. This was expressed to be without prejudice to the possibility of further action; when the officer realised his mistake, he wrote again in March 2018 and issued the demand for over £330,000 on 18 April. By this time the company had finally applied for a new EUA (on 4 April), initially asking for it to be backdated to 1 November 2016. When it was pointed out that backdating was only possible in exceptional circumstances (which it had not put forward) and for a maximum of a year, it changed the commencement date to 9 April 2018.

The argument about Inward Processing is a technical one: because the aircraft had flown through Serbian airspace on its way from Bulgaria to Wales, it had left the EU and could not be regarded as still within a single customs controlled procedure involving an indirect export via Ireland. The FTT had agreed with HMRC, and so did the UT. The export declarations showed a direct export from Sofia to the USA, and there was no evidence of a mistake in those documents.

Again, the application of article 120 of the Code is technical, but the UT agreed with the FTT that it did not apply; it was subject to conditions that were not met, and it applied in different circumstances to those of the present case. One of those conditions was that there was "no obvious negligence" on the part of the person claiming relief; the company's conduct failed that test. This was also fatal to the claims involving legitimate expectation and proportionality, which both related to the application of article 120.

The judges expressed some sympathy for the company when comparing the size of the demand to the value of the work done, but the problem had arisen from its own neglect. The appeal was dismissed.

Upper Tribunal: *Caerdav Ltd v HMRC*

Lecture 14

4.3.2 Notice on One Stop Shop

VATA 1994 para.8(2) Sch.9ZD provides for HMRC to publish a notice setting out how to notify them of any changes to the information supplied on an application for registration for the One Stop Shop (OSS) Scheme. The short Notice published on 4 July 2023 has the force of law. Any changes in the registration details should be notified to HMRC by the 10th day of the month following the month in which the change occurred.

Notification of changes in the UK VAT number, company name, postal address, or membership of a VAT group must be made online using the registered person's UK VAT account. Notification of all other changes must be made online within the VAT OSS service, which is accessed through HMRC's Business Tax Account. The notification should be made through the 'Change registration' link within the VAT OSS service and by amending the relevant data fields as required.

www.gov.uk/government/publications/notice-in-accordance-with-paragraph-82-of-schedule-9zd-to-the-value-added-tax-act-1994

4.3.3 Updated Manual

HMRC have added pages to the VAT *Business/non-business* Manual to cover "Specific issues: movement of own goods from GB to Northern Ireland". The new guidance discusses the provisions in VATA 1994 Sch.9ZB para.31B which is intended to enable UK VAT-registered businesses or public bodies to avoid double taxation where the goods being transferred are intended to be used for non-business purposes or mixed business and non-business purposes.

VBNB47200 – VBNB47240

4.4 European rules Lecture 15

4.4.1 Limitation periods

A Hungarian company deducted input tax on various acquisitions made during June 2010 and between November 2010 and September 2011. A tax inspection was carried out in December 2011, following which the tax authority ruled that some of the input tax was not deductible on *Kittel* grounds. The decision was confirmed on appeal in December 2015.

In March 2018, the first appeal was set aside and remitted for a new hearing. The second level appeal court ruled that the first appeal had set out facts that were different from those found in the original ruling; the original facts had been correctly established. The first appeal decision was therefore flawed.

Further legal arguments about the process followed. In January 2020, the Hungarian Supreme Court upheld the decision to set aside the original decision, because the assessment had not been properly reissued in 2018. It appears that the tax authority was about to run out of time to make an assessment, but that did not exempt it from performing its legal obligations. Following that, the taxpayer claimed that the principle of legal certainty meant that the tax authority could not raise another assessment. Hungarian law provided for an extension of limitation periods where an assessment was subject to judicial review; questions were referred to the CJEU to consider whether this was contrary to the general principles of EU law. The Hungarian law appeared to allow an open-ended period in which assessments could be revised and reissued.

The CJEU noted that there were no specific provisions about this in the PVD, so it was within the responsibilities of member states to establish and apply rules on limitation periods for assessments, including the suspension of such limitation periods while judicial procedures were in progress. It was only necessary for the rules to be "reasonable".

The CJEU pointed out that a delay in legal proceedings could result in the taxpayer not being able to defend themselves, which would undermine the fairness of the process. However, as long as the initial limitation period was "reasonable" (here, five years) and was complied with, the suspension of that limitation period while judicial proceedings were carried on did not in principle contravene legal certainty or effectiveness.

CJEU (Case C-615/21): *Napfeny-Toll Kft v Nemzeti Ado-es Vamhivatal Fellebbviteli Igazgatosaga*

4.4.2 Wrong rates

A German forester bought timber from suppliers who charged VAT at the 19% standard rate, but when he sold it on he charged the reduced rate of 7%. After an audit, the tax authorities assessed him on the basis that he should have accounted for output tax at the standard rate; his appeal to the finance court was successful on the output tax rate, but it ruled that he should also only have paid 7% on his purchases. His deduction of input tax was reduced accordingly, and in September 2019 the tax authority raised assessments for 2011 to 2013, plus interest. When the trader tried to recover the overpayments from his suppliers, they all pleaded the statute of limitations on the debts.

The taxpayer applied to the tax authority for discharge of the assessments on the grounds of equity. This was rejected, and an appeal was unsuccessful. On a further appeal, questions were referred to the CJEU for clarification of the application of the principles of effectiveness and fiscal neutrality.

The question raised the possibility that the trader had a direct right of reimbursement from the tax authority (*Reemtsma*), but that this might lead to a double reimbursement of the same tax if the suppliers could also claim a refund.

The court considered that refusal of a repayment to the trader appeared disproportionate where the only reason he could not recover the wrongly charged VAT from his suppliers was the limitation period, and there was no suggestion of any fraud, abuse or negligence. The court explicitly stated that this was not affected by the fact the suppliers were not insolvent, or by the judgment in *Zipvit* (Case C-156/20). The risk of double reimbursement should be negated by the authorities refusing such a repayment claim, as it would effectively be abusive (where the suppliers had refused to reimburse their customer).

The CJEU gave a very clear answer that the trader should receive the reimbursement, and should be credited with default interest for the financial loss if the authorities did not reimburse him promptly. Presumably the German authorities had refused the repayment claim that arose from his inputs being charged at 19% while he accounted for outputs at 7%; initially that would have been refused on the basis of an output tax assessment, then on the basis of input tax disallowance.

CJEU (Case C-453/22): *Michael Schütte v Finanzamt Brilon*

4.4.3 Duty suspension

A case about excise duty on petroleum products raised a question which could also be relevant for VAT. In 2005 and 2006 an Italian warehousekeeper despatched goods under suspension to a Slovenian customer, who returned the documents apparently showing approval by the Slovenian tax authority. However, an Italian tax audit revealed that the approval stamps were forged. The question was whether the warehousekeeper's liability in respect of such an irregular departure from the suspension regime was "strict", or whether it was possible to be exempted on the basis that the warehousekeeper had acted in good faith and was not in any way responsible for the actions of third parties, and

had a legitimate expectation that the goods would move in accordance with the suspension procedure.

The court ruled that the relevant legislation only exempted the warehousekeeper where the goods were "lost" (e.g. stolen or destroyed) as a result of fortuitous events, force majeure or arising from the nature of the product during production and processing, storage and transport (e.g. evaporation). The warehousekeeper would therefore be liable.

CJEU (Case C-323/22): *KRI SpA v Agenzia delle Dogane e dei Monopoli*

4.4.4 International transport

A Romanian transport company was assessed to VAT in respect of an invoice issued in 2016 for transport of goods from Rotterdam in the Netherlands, where they had entered the EU, to Cluj-Napoca in Romania. The company had exempted the invoice as relating to the importation of goods; the tax authority found that the company had not submitted documents showing that the services were directly related to the importation of the goods and that the value of the services was included in the taxable amount of the imported goods, as the authorities considered it should have been.

The court disagreed with the Romanian authorities on the application of art.86 and art.144 PVD: to benefit from the exemption of the carriage service under art.144, it was not essential for the cost of that carriage to be included in the taxable amount for VAT purposes of the imported merchandise.

It was also not permissible to insist on particular documentation to prove entitlement to exemption, if other documentation was provided that was adequate to establish that the conditions for exemption existed. It would be for the referring court to determine whether the alternative evidence was adequate, and whether there was any reason to doubt the authenticity or reliability of those documents. This is consistent with the line of cases about the distinction between "formal requirements" (paperwork) and "substantive requirements" (facts): if the trader can prove that the substantive requirements are met, then minor breaches of the formal requirements are not normally enough to deny a favourable tax treatment.

There was a separate income tax assessment in relation to an amount paid to a company resident in Denmark. If the payment was "commission", it should have been subject to withholding tax under Romanian law. The court considered that this was potentially a breach of the equal treatment and freedom of establishment provisions of the EU Treaty: if the payment was for services, even if categorised as "commission" in Romania, and withholding would be required for payment to a non-Romanian supplier but not a Romanian one, then the discrimination could only be justified if it was necessary for the effective collection of tax (the implication being that this would not be normal).

CJEU (Case C-461/21): *SC Cartrans Preda SRL v Direcţia Generală Regională a Finanţelor Publice Ploieşti – Administraţia Judeţeană a Finanţelor Publice*

4.4.5 Bad debt rules

Art.90 PVD appears to allow member states to "derogate" from the provision which is the basis for bad debt relief, while mandating adjustment to the taxable amount in cases of price increases or decreases after the time of supply. The Bulgarian law did not permit relief where a debt was simply not paid. Questions were referred to the CJEU on whether this was compatible with the Directive.

A-G Kokott's opinion is mainly relevant to other countries, because the UK rules are clear and settled and unlikely to be affected by a CJEU decision at this point. Nevertheless, it is interesting to see the arguments about what is required by the PVD, and to note that the UK rules have changed over the years to accommodate those requirements – sometimes in response to CJEU decisions, and sometimes apparently by accident.

The A-G's conclusions were, in summary:

- Art.90 is mandatory and directly effective, so the Bulgarian trader can rely on it in an action against the state;
- The derogation for non-payment is only permissible where there is some doubt about the possibility that payment might be received, but if it is certain that payment will not be received, the taxable amount must be reduced;
- It is for the taxpayer to judge when a payment is irrecoverable, in accordance with the normal rules of a self-assessed tax, but the member state should not impose an unreasonably long "pre-financing" of the tax (i.e. requiring a delay before a bad debt claim can be made);
- Any limitation period for claiming bad debt relief should not start running earlier than the date on which the creditor is first able to claim it, which is when the creditor first realises that the debt is bad;
- There should be no requirement to alter the original invoice in relation to a bad debt claim, nor to notify the debtor that a claim is being made.

The A-G also gave an opinion on when interest should run from in a situation in which a bad debt claim should have been possible and has been wrongly refused, which has been the subject of extended proceedings in the UK.

CJEU (A-G) (Case C-314/22): *Consortium Remi Group AD v Direktor na Direktsia Obzhalvane i danachno-osiguritelna praktika Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite*

4.4.6 Liability for employee's actions

A Polish company sold fuel among other activities. The manager of one of its petrol stations operated a scheme whereby she "sold" fraudulently created purchase invoices to people who would use them to claim input tax. The scheme only operated when the manager's deputy was absent, and did not appear to involve the use of the company's computers or stationery. When the tax authority discovered the scheme, it assessed the company for the VAT that was shown on the fictitious invoices, in accordance with art.203 PVD. The company appealed, and in due course

questions were referred to the CJEU. Advocate-General Kokott has given an opinion.

It was accepted that the transactions had not taken place. The authorities and the courts in Poland had concluded that the company had not adequately supervised the employee, enabling her to carry out the fraud. She was not an outside party, and the employer was therefore responsible for her actions.

The A-G was more sympathetic to the company's difficulties: it had not known about nor profited from what its employee had done. She considered that the employee was "the issuer" of the fraudulent invoices for the purposes of art.203, and the employer could only be held responsible if it had acted in bad faith. Her preliminary conclusion was:

"[Art.203 PVD] must be interpreted as meaning that the ostensible issuer of an invoice for fictitious transactions is liable to pay the VAT entered on them only if (1) the recipient of the invoice could not be refused deduction of input tax, (2) the issuing of the invoice by a third party is to be attributed to him or her on account of particular responsibility (or proximity) and (3) he or she did not act in good faith. Good faith can be ruled out only where the ostensible issuer is himself or herself at fault. In the case of a taxable person, the culpably deficient selection or supervision of that person's employees can also constitute such fault."

It was clear that the persons claiming the input tax deduction were acting in bad faith and could be denied deduction on *Kittel* or similar grounds, because they must have known that they had bought invoices purporting to show transactions that had not taken place.

CJEU (A-G) (Case C-442/22): *P sp. z o.o. v Dyrektor Izby Administracji Skarbowej w Lublinie, interested party: Rzecznik Małych i Srednich Przed siebiorcow*

4.5 Foreign refund reclaims

Nothing to report.

5. INPUTS

5.1 Economic activity

5.1.1 Intention to make supplies

HMRC refused a company's claim for deduction of input tax on the basis that there was insufficient evidence that the inputs were used to make taxable supplies. Judge Fairpo examined the history of the business, which was involved in construction projects. It appeared that some of the suppliers had gone into liquidation without paying the output tax to HMRC, but HMRC were not alleging "means of knowledge of connection to fraud".

The appellant contended that it had provided clear evidence of taxable supplies, in particular the tenders in respect of the work carried out which were signed as contracts, and it was also clear from the invoices and bank statements that the input tax had been incurred in respect of those supplies. In addition, 30% of the disputed input tax related to other purchases which were clearly incurred in a construction project which was taxable.

The judge noted that HMRC did not dispute that the purchases had been made, and the VAT incurred, nor contend that the appellant did not the necessary evidence to support deductions. The question for the FTT was whether the purchases had been made in connection with actual or intended taxable supplies. In the judge's view, it was "puzzling" that HMRC continued to contend that the company would have incurred the costs in relation to projects that it was not actually undertaking; if they accepted that it was not involved in the supplier's non-compliance, their argument made no sense.

There was undoubtedly poor management of the business in failing to ensure that it was registered for CIS and VAT at the appropriate time, in taking far longer than it should have done to take steps to enforce payment amid misplaced optimism that the clients would pay without legal action, in possibly failing to raise invoices at all in respect of one customer, and in failing to understand that a pro forma invoice is not the same as a stage payment invoice. That was not enough to outweigh the evidence that supplies were made. Poor management was not the same as a lack of intention to make taxable supplies.

The correspondence suggested that HMRC had suspicions about the missing trader issue, but that had to be pleaded explicitly. A lack of due diligence was not relevant to the argument that HMRC had put before the Tribunal.

The appeal was allowed.

First-Tier Tribunal (TC08927): *Heartlands House Ltd*

Lecture 16

5.2 Who receives the supply?

Nothing to report.

5.3 Partial exemption

5.3.1 Sale of shares in subsidiary

The Upper Tribunal has upheld the decision of the FTT (TC08335) in the *Hotel La Tour* case.

HLT was the holding company of a subsidiary, HLTB, which operated a hotel in Birmingham. HLT was VAT registered on the basis of providing management services to the subsidiary. In mid-2015, HLT decided to construct a new hotel in Milton Keynes; after considering various possibilities, it decided that the best way to finance the development's £34.5 million cost would be to sell HLTB. This took place in July 2017. HLT claimed a deduction for input tax on various fees associated with the sale of the shares, leading to a repayment claim in respect of its 09/17 period. HMRC enquired into the return and disallowed the input tax, initially on the grounds that it was not accepted that the holding company was "in business". This was subsequently accepted, but HMRC maintained the disallowance on the basis that the costs were used in the exempt sale of the shares, rather than in the "downstream" taxable activities that would follow on from the completion of the new hotel.

The company appealed, advancing three separate arguments:

- the inputs could validly be regarded as relating to the future taxable transactions, rather than the present exempt share sale;
- because HLT and HLTB were registered as a VAT group, the share sale should be regarded as outside the scope instead of exempt;
- the sale was analogous to the sale of a business as a going concern.

In the FTT, Judge Richard Chapman considered a number of authorities on the question of "direct and immediate link" and "financing transactions". These included *VW Financial Services (UK) Ltd* (Case C-153/17); *X BV* (Case C-651/11); *Kretztechnik* (Case C-465/03); *AB SKF* (Case C-29/08); *C&D Foods Acquisition* (Case C-502/17); and *Frank A Smart & Son Ltd* (UKSC 2019). The judge noted that the parties had also referred to the older cases of *BLP Group* and *Midland Bank*, but these were effectively covered by the analysis of the precedent case law in *Frank Smart*.

The judge's analysis concentrated first on the question of whether there could be a direct and immediate link between the costs and the downstream transactions. He accepted that, in a fundraising transaction, the question was not whether the inputs were used in the share transaction, but rather whether the funds would be used in taxable activities. As long as that was the case, the initial share transaction would not "break the chain" between the costs and the taxable use, provided that those costs were not demonstrated to be cost components of the share sale. That would be the case if the costs were added into the sale price, or were separately identified as part of the sale; however, the evidence showed

that the sale was effected at the best price possible in the market, and that was not affected by the costs incurred in achieving it. This analysis, based on the judgment in *Frank Smart* (as referenced by paragraph numbers in the extract below), was summed up as follows:

(1) The purpose in fundraising was to fund its economic activity [65(iv)]. This is to be ascertained from the objective evidence [65(iv)] and [65(vii)]. As Lord Hodge notes, "The ultimate question is whether the taxable person is acting as such for the purposes of an economic activity," [65(vii)]. The circumstances to be taken into account include the nature of the asset and the period between acquisition and use for the economic activity [65(vii)].

(2) The funds are later used for taxable supplies [65(iv)]. However, the right to deduct arises immediately, potentially resulting in a time lapse between deduction and use or retention of the right to deduct even if unable to use them in certain circumstances [65(vi)] and [69].

(3) The cost of the services are cost components of downstream activities which are taxable. The right to deduct will therefore be lost if the cost of the services are incorporated into the price of the shares sold in the initial transaction that is exempt or outside the scope of VAT [47] or of downstream activities which are exempt or outside the scope of VAT [65(v)]. If the downstream activities are a combination of taxable transactions, exempt transactions and transactions outside the scope of VAT, the inputs will have to be apportioned [65(v)].

It was necessary to ascertain the purpose of the share sale on objective grounds, rather than considering the subjective intention of the taxpayer. The evidence showed that the intention was to use the funds to finance the development in Milton Keynes, and the funds were so used. The professional costs reduced the net sale proceeds, but that did not mean that they were used to obtain those proceeds in the sense of a direct and immediate link for VAT. The appeal was allowed on this basis.

Even though it was not strictly necessary, the judge went on to consider the other two grounds of appeal. The argument about the effect of group registration was raised very late (only in post-hearing submissions), and HMRC objected to its admission. After considering the case law on late changes to grounds of appeal, the judge ruled that he would not have accepted the additional ground. However, he went on to discuss it and dismiss it in any case. After considering precedents including *Thorn Materials Supply Ltd* and *Taylor Clark Leisure plc*, he concluded that it was not correct to treat the VAT group as a single entity for all purposes (which would effectively mean that HLT's shareholding in HLTB "did not exist", and could not therefore be the subject of an exempt supply). The effect of VATA 1994 s.43 was to disregard intra-group transactions for the time being, but the companies within the group still existed and had their own economic activities. The economic activity could not be ignored, even if intra-group transactions arising from that activity were disregarded.

The going concern argument was based on the CJEU decision in *AB SKF* which raise the possibility that the sale of a subsidiary might in some cases be treated as equivalent to a TOGC. The appellant's counsel tried to distinguish the present circumstances from those in *X BV*, where the CJEU had ruled that going concern treatment did not apply. *X BV* involved the

sale of a 30% holding, whereas HLTB was a wholly owned subsidiary. HMRC referred to *DTZ Zadelhoff* (Case C-259/11), which concerned the sale of a company that owned a building: the CJEU confirmed that this had to be treated as a sale of shares, not a sale of immovable property, unless the Member State had implemented an optional provision in the PVD to exclude the exemption in those circumstances.

The judge did not accept that this could be a TOGC. His reasoning was as follows: "There was no transfer of HLT's management of HLTB. On the basis of *SKF* this would not itself be fatal. However, there is nothing else that was transferred which meant that Dalata as transferee would be carrying on an independent economic activity as HLT's successor. The relevant assets were held by, and the relevant economic activity carried on by, HLTB rather than HLT prior to the transfer of the Shares and by Dalata immediately after the transfer of the Shares." This seems to require that it is part of HLT's economic activity that is transferred; consistent with his decision on grouping, the judge regards HLT's economic activity as the provision of management services, which was not transferred to the purchaser.

The appeal was allowed by the FTT on the first of the three grounds. HMRC appealed to the Upper Tribunal (Mr Justice Zacaroli and Judge Guy Brannan), maintaining that the FTT had ignored binding precedent from the *BLP Group* case. The company put forward the same arguments again; because the FTT had not come to a formal decision on the grouping point, there was not a formal cross-appeal, but the company put forward the same argument again.

The UT noted that the facts were not controversial, and rehearsed the same case law precedents as the FTT. HMRC said that the correct approach was to consider the link between costs and outputs in two stages:

(1) Stage 1 – the Tribunal was required to ask whether there was an output transaction or transactions (i.e. a taxable or exempt supply falling within the scope of VAT) to which the inputs were directly and immediately linked; and

(2) Stage 2 – only if there was no direct and immediate link to an output transaction in the scope of VAT was it necessary to consider whether there was a direct and immediate link to general economic activity.

HMRC argued that the FTT had erred in applying Stage 2 in spite of the existence of the share issue, which ought to block the deduction of input tax.

The UT decision is then quite brief and forceful. On the strength of the CJEU decision in *AB SKF* and the Supreme Court decision in *Frank A Smart Ltd*, the principles of linking and blocking had developed since *BLP Group*, which the judges no longer considered to be a strong precedent. The FTT had correctly identified this and applied the principles correctly. There was no error of law, and HMRC's appeal was dismissed.

Because the company's case succeeded on the basic point considered by the FTT, it was not necessary to consider the separate argument based on grouping. The UT therefore did not express any opinion on it, either to agree or disagree with the informal conclusion of the FTT judge.

Upper Tribunal: *HMRC v Hotel La Tour Ltd*

Lecture 17

5.3.2 Private equity

HMRC have updated their *Partial Exemption* manual to give guidance to officers on their policy in relation to input tax claims in the private equity and venture capital sectors. There are interesting points to note for anyone who deals with such businesses, but in particular the explanation of key risks is worth reading:

The main risks in this sector for HMRC are:

- *correct determination of whether there is a right to deduct input tax on the disposal of shares at the exit of the investment,*
- *partial exemption methods which do not give a fair and reasonable attribution of input tax to supplies which carry a right to deduct.*
- *failure to account for the reverse charge where due – see vatposs14000 and vgroups01350*

A key concern in this sector is the extent to which a PEH [Private Equity House] VAT Group's outputs are supplies for consideration made in the UK. In addition to any reverse charge liabilities, the main outputs of a PEH VAT Group will be director's, management, and financial services provided to the investee company. Where these are supplied for a consideration and the place of supply of the services (PoSS) is the UK, these supplies will fall within the scope of UK VAT. Further guidance on the PoSS can be found in the VAT Place of Supply of Services manual.

There may be circumstances where the presence of consideration in respect of services provided by the PEH VAT Group may be unclear, for example where the investee company is in difficult financial circumstances. In such cases, if you have any doubts about whether there is consideration present, you should first ask the PEH to explain to you what they think the consideration for the service is. You should then consult the supply and consideration guidance, and, if necessary, seek technical advice (see VATPOLADV), to determine whether consideration is present.

PE79000 to PE79400

5.4 Cars

5.4.1 Article

In an article in *Taxation*, John Messore discusses the possibility of deduction of input tax on the cost of charging electric cars that are used for business purposes, questioning whether HMRC are correct in stating that employers cannot claim for reimbursing a proportion of employees' domestic electricity bills.

Taxation, 17 August 2023

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 Missing traders

HMRC denied a deduction of £264,000 in relation to VAT claimed on supplies of construction labour, and issued a penalty of just under £80,000 to the company and the director. Following *Fairford* directions, the company accepted that HMRC had established that the relevant transactions were connected with fraudulent evasion and tax losses; it was therefore only in dispute whether the director knew or ought to have known of this connection.

Judge Geraint Williams went through the history of the company's trading and the investigation into its affairs in detail. He concluded that "The transactions which were undertaken by Konstruct all bore features that, in our view, would concern a legitimate businessman or trader." There was no single factor that led to the dismissal of the appeals; rather, it was the overall circumstances surrounding the transactions.

Among other factors, the judge noted that "RS was the sole director and shareholder and was responsible for running Konstruct. RS had no previous experience in the labour supply business before purchasing Konstruct, his experience was as a labourer pouring concrete. In his evidence, RS confirmed that he was solely responsible for the sourcing and supplying of labour. His evidence was that he rarely attended the office and continued to work on construction sites as a concrete pourer whilst simultaneously running a labour supply business with a turnover of £500,000 to £1 million per quarter with responsibility for hundreds of workers. We do not accept that evidence as plausible…"

As RS was solely responsible for the company's affairs, the PLN had been justified. The appeals against the denial of input tax and the penalties were dismissed.

First-Tier Tribunal (TC08925): *Konstruct Recruitment Ltd and another*

5.8.2 Successful judicial review

The organisation of the NHS for VAT is unusual. Although most of what NHS Trusts do is non-business or exempt, there are some taxable activities that give rise to a right of deduction under normal principles. However, for the purposes of VAT, all NHS bodies which are members of "the NHS VAT Division in England" are treated as the same one entity. Accordingly, intra-divisional supplies are ignored for the purposes of VAT, and supplies are deemed to be by and from the same entity, namely the NHS VAT Division. Although this was not formally either a group registration within VATA 1994 s.43 nor a divisional registration under

s.46, at the relevant time HMRC treated them as they were part of the same VAT registration, despite the fact that they were separately VAT registered and, unlike VAT groups, submitted individual VAT returns.

This meant that goods purchased by the NHS Supply Chain were transferred to the applicant in the present case, the Supply Chain incurred VAT but did not charge it to the applicant; nor did they deduct it, because they had not used it to make a taxable supply. The VAT incurred was passed on to the transferee as part of the price charged, but was not itemised on a formal VAT invoice.

The applicant Trust submitted that there was a concession agreed between HMRC and the NHS, published in a NHS Note, which allowed NHS entities which purchased goods through Supply Chain for a taxable business purpose to recover input tax on those goods. In the present case, the Trust had purchased two specialised radiotherapy machines at a cost of £4.1m (gross); Supply Chain had paid £685,000 of output tax to the third party supplier.

The Trust had established a subsidiary company to provide it with fully managed healthcare facilities. It purchased the machines from Supply Chain and supplied them onward to the company under a lease, which was a taxable supply. HMRC refused a deduction under the normal VAT rules on the basis that the Trust did not hold a VAT invoice; an appeal to the Tribunal was made and eventually withdrawn. The Trust decided to rely on the concession, which meant it had to apply for judicial review.

The judge (Mrs Justice Foster) set out the principles of judicial review in relation to concessions, as established in earlier cases. A concession could be relied on if it was "a statement formally published by the Inland Revenue to the world might safely be regarded as binding, subject to its terms, in any case falling clearly within them" so that it would create a legitimate expectation; that would depend on the statement being "clear, unambiguous and devoid of relevant qualification".

HMRC did not argue that the concession in issue was unclear or was ambiguous, but rather submitted that the meaning placed on it by the Trust was wrong; further, that they had not brought themselves within the terms of any concession, as correctly interpreted, and the Trust had not shown that their intention (or that of other material entities) at relevant time, was for the business use of the machines.

HMRC pointed to the wording of the concession which appeared in NHS Newsletter 1/98 and was repeated in materials in 2004. It stated that Supply Chain's documentation would be treated as adequate alternative evidence for input tax supplies where purchases through Supply Chain were used for taxable business activities. It concluded "It [the alternative evidence] will not be issued for those purchases which are used by the VAT Divisional customer in the provision of NHS healthcare. This arrangement is a concession and only applies in respect of business activities such as the supply of confectionery."

The judge examined the history of the decision to refuse the claim. HMRC's original reason was that Supply Chain had allocated the purchase of the machines to a non-business use, and the Trust could not change that allocation. The Trust requested HMRC to issue a clear decision that it was refusing the claim based on the concession rather than

VATA. This decision, issued on 31 March 2021, pointed out that the machines were not confectionery and did not fall within the scope of the concession.

The application for judicial review was based on arguments that HMRC had:

i) failed to give due effect to the concessionary regime/misdirected themselves as to the effect of the concession;

ii) failed to take into account a relevant consideration, namely that at the time of the supply of the machines, the Trust's intention was to use them for business purposes; and

iii) taken irrelevant considerations into account, namely: the supposed intention of NHS Supply Chain when the machines were supplied; that the machines were not confectionery; that the machines were capable of being used for a purpose other than a business purpose.

The judge considered the arguments in great detail, and came to the clear conclusion that the applicant's claim was well founded. There was no valid claim under VATA 1994, so judicial review was the only remedy available. The court should consider not only the material available to the decision-maker at the time, but in the interests of justice, should consider material available at the time of the hearing. HMRC had failed to consider the decision within the correct framework of the concession, in treating Supply Chain's intentions as relevant and in using the reference to confectionery as limiting the scope of the concession.

The judge noted the various errors of law in the HMRC refusal decision and ordered that it should be quashed.

High Court (Administrative Court)*: R (on the application of Royal Surrey NHS Foundation Trust) v HMRC*

5.8.3 Updated Manual

HMRC have added to the page "Cases about evidence to claim input tax" in the VAT *Input Tax* Manual. The page has contained summaries of *Genius Holding BV* and *Terra Baubedarf Handel GmbH*; a new summary of the *Zipvit* case has now been included.

Zipvit is a mail order supplier that had received postal services from the Royal Mail. At the time, these services were treated as exempt by both Royal Mail and by HMRC. In 2009 the CJEU decided that VAT should have been charged on some of postal services provided by Royal Mail to businesses.

Following the CJEU decision, Zipvit submitted a claim for VAT claiming that the VAT was "embedded" in the price it paid to Royal Mail although the services were treated as exempt at the time.

HMRC rejected this claim on the grounds that Zipvit had not paid VAT on these services and did not hold a valid VAT invoice.

The Court of Appeal held that the requirement for a VAT invoice that satisfies the legislative requirements is mandatory and in the absence of a VAT invoice showing that VAT was charged to Zipvit by Royal Mail, Zipvit could not recover any input tax (even if that input tax was 'due and paid'). The Court also concluded that whilst HMRC has discretion to

accept alternative evidence, in order to do this HMRC must be satisfied that the alternative evidence shows that the VAT to be claimed was duly accounted for by the supplier.

VIT63100

6. ADMINISTRATION AND PENALTIES

6.1 Group registration

Nothing to report.

6.2 Other registration rules Lecture 18

6.2.1 Registration used for fraud?

In TC07421 (October 2019), Judge Mosedale considered an application by an appellant for its appeal to be expedited. The appeal was against a revocation of VAT registration on the grounds that it was being used solely or principally for fraudulent purposes. The company had also been assessed to £46m of input tax that was allegedly related to missing trader fraud.

The company supplied the labour of "mini umbrella companies" (MUCs) to temporary work agencies. It charged VAT to its customers and paid VAT to its suppliers, all at the standard rate. The allegation underlying the deregistration and the assessment was that the arrangements between the appellant and its suppliers was contrived so that in many cases they did not account to HMRC for the VAT that was due. HMRC alleged that the appellant controlled the MUCs with a view to evading VAT; however, the supplies to its customers were not contrived or other than at arm's length.

The decision was made on 16 September 2019 and appealed on 20 September, while the assessment was still under review. The application for expedition was heard on 24 October. Judge Mosedale noted that the application was not backed up by a great deal of evidence, but she found the company's witness "plausible". The appeal should be heard as soon as possible. Nevertheless, HMRC should be given sufficient time to prepare, which included review of 11,000 documents that had only been provided on 23 October in response to an information notice issued in June. The appellant would have to live with the consequence of that delay, which was of its own making.

The appellant would also have to amend its grounds of appeal, which were at present largely concerned with the unreasonableness of HMRC's conduct. The jurisdiction of the Tribunal was appellate in registration matters, and the appeal would consider whether HMRC's decision was correct based on the evidence.

Judge Mosedale made directions concerning cooperation going forward, including the possible use of samples of MUCs in order to establish a more general picture.

The appeal proceeded to the FTT (TC08399) in September 2020, but Judge Geraint Williams did not release his decision until February 2022 because of a long period of illness. That hearing was still only concerned with a preliminary issue: whether HMRC could use the "*Ablessio* principle" (named after Case C-527/11) to justify deregistration of a trader, or whether such action was contrary to UK law or disproportionate. The judge decided:

The principle in *Ablessio* applies both to a party that has fraudulently defaulted on its VAT obligations and to a party who has facilitated the VAT fraud of another party.

Simple facilitation by a party of the VAT fraud of another is not sufficient to apply the principle in *Ablessio*.

It is not necessary to prove that the facilitating party was itself dishonest. It must, however, be proved that the facilitating party knew or should have known that it was facilitating the VAT fraud of another party.

The company appealed to the Upper Tribunal (Mr Justice Edwin Johnson and Judge Thomas Scott). The hearing took place on 19 May 2023, and the decision was released on 1 September. Clearly the company's attempt to obtain a speedy answer has failed.

There were four grounds of appeal, which included the important question of whether HMRC could deregister a person who made taxable supplies above the registration limit that were *not* connected with fraud. The company also questioned the FTT's interpretation of the principles in *Ablessio* and other precedents on which it relied. It was common ground that EU law remained applicable for the appeal, because the decision to deregister was taken before 31 December 2020.

The judges considered the fourth ground first, as it had not been argued before the FTT and therefore required fresh consideration, and if established it would be a "knockout blow" for the appellants. It was summarised as follows:

Reading the domestic legislative scheme as somehow providing, implicitly, a general power of deregistration in cases of misuse is to adopt an interpretation that is contra legem. Accordingly, the FTT erred in concluding that Ablessio permits HMRC to deregister a taxable person who knew or should have known that it was facilitating the VAT fraud of another party.

The UT considered the impact of EU law on VAT law post-Brexit. The *Taxation (Cross-border Trade) Act 2018* s.42 and the *EU (Withdrawal) Act 2018 s.6* provide specifically that the abuse of rights principle continues to apply to VAT after Brexit; those provisions effectively established abuse of rights as a specific principle of UK law, no longer dependent on EU law.

The *Ablessio* case was effectively decided on the principles of abuse of rights as set out in *Halifax* and *Kittel*. *Halifax* established that abuse of rights is a general principle of interpretation which applies regardless of any specific provision in the relevant domestic legislation. An abusive practice arises where there is objective evidence of artificial transactions that are solely or mainly entered into for the purpose of obtaining an advantage which is contrary to the objectives of the VAT system; whether those conditions were met would be decided by the courts on a case-by-case basis.

The *Kittel* case took this further by explaining why the *Halifax* principle did not contravene the principle of legal certainty, and also addressed the position of a person who was not themselves evading VAT but who knew or should have known that they were taking part in a transaction connected with fraudulent evasion of VAT.

Ablessio itself established that the Latvian tax authority could not refuse to register a trader solely on the grounds of suspicions of the tax authority that it did not have the resources to carry on the declared economic activity, and on the basis that the shareholder had applied for previous registrations by companies that did not carry out real economic activity. The authority would require objective evidence of fraudulent intention to apply the abuse of rights principle. The court made it clear that registration could be refused in those circumstances, which it would be for the domestic court to assess on the basis of the appropriate legal standard of proof.

The judge noted that the ground of appeal in the skeleton argument suggested that HMRC could not in any circumstances use *Ablessio* to deregister a taxable person; this was narrowed in the hearing to cover only the situation in which the trader had "innocent" supplies above the registration threshold, in which case the appellant argued that it was "against the law" to refuse registration. HMRC did not object to this apparent change in the grounds of appeal between skeleton and hearing.

After considering a number of precedents, including *Mobilx*, the judge rejected the taxpayer's submissions. HMRC's reliance on abuse of rights was now established in UK law; the existence of other untainted transactions might be relevant to an argument about whether deregistration was proportionate or justified, but this ground of appeal was that it could never be justified in those circumstances.

The judge went on to reject the first ground of appeal, which was that *Ablessio* was about refusal of registration and could not be extended to cover deregistration of someone who was already registered. The judge could see no justification for this limitation of the principle, which he considered would facilitate fraud.

The second ground of appeal was likewise rejected. The appellant argued that the FTT had wrongly relied on inapplicable UK precedents in concluding that it was appropriate to deregister a trader who was not directly involved in a fraud. The judge held that it would be appropriate if there was objective evidence that the person knew or ought to have known that they were facilitating a fraud being carried out by someone else, even if they made their own "untainted" transactions in excess of the threshold.

Lastly, the UT considered the third ground, which was that deregistration in these circumstances breached the EU legal principles of proportionality, legal certainty and fiscal neutrality. After considering these concepts in some detail, the judge concluded that deregistration did not in principle breach any of them, if HMRC could show that the registration was being used to facilitate fraud. In particular, the PVD allowed member states to take steps that were necessary and appropriate to prevent avoidance, evasion and abuse, and deregistration could be justified as falling within that provision.

The appeal was dismissed on all grounds.

Upper Tribunal: *Impact Contracting Solutions Ltd v HMRC*

6.2.2 Connected businesses

A woman operated as a sole trader and also in partnership with her husband. HMRC decided that the profits of their trade in breeding puppies had been understated, and raised assessments to income tax and to VAT, together with penalties. The sole trader and the partnership appealed against the income tax assessments and against the decision on the effective date of registration; as no VAT returns had been filed for the periods under dispute, the VAT assessments could not be appealed at this stage.

The judge (Jane Bailey) noted that the two businesses had used a number of different trading names, which could cause confusion; there were also five separate appeals, but the decisions appealed against had not been attached to the appeal notices, so it was difficult to relate the different issues to the reference numbers. However, there were income tax assessments and penalties levied on the sole trade and the partnership for all the tax years from 2012/13 to 2017/18; there was a decision to backdate the effective date of registration of the sole trade to 1 November 2011, and also a "liable no longer liable" decision that the partnership should have been registered for the period from 1 January 2015 to 31 July 2017, with late registration penalties related to both decisions.

The appeal against the registration decision for the partnership was made out of time; because HMRC did not object to it being heard, the judge "exceptionally" decided to admit it. She said that she would have decided differently if HMRC had objected, because the reasons given for lateness were not adequate.

The judge noted that an earlier hearing had had to be cancelled because of the inadequacy of the documents bundle. The new bundle before the Tribunal still omitted many documents that the judge would have expected to see (most notably the accounts for the businesses for the relevant years), but the decision would have to be based solely on the evidence presented.

The judge listed the witnesses who gave evidence and commented on the relative weight given to their various testimonies. She considered all of them to have been helpful, but some had more relevant knowledge than others. The trader's husband was only involved in the partnership business to the extent of approving the annual accounts; the accountant prepared the accounts and the tax returns, but his work was based on information provided by others. The sole trader herself was described as "likeable and engaging", but her evidence was sometimes at odds with the documentary evidence.

The decision starts with consideration of the reason for there being two businesses. This had been explained by the trader as based on differences in the dogs that each business bred and sold; the judge did not accept that this was true. Nor did she accept the trader's assertion that puppies were not moved between the two businesses. The partnership business had been wound up in July 2017; the judge concluded that this was because the sole trade had applied for VAT registration, and there was then no reason for the split between the two.

The figures from tax returns showed that the sole trade kept its turnover just below the VAT registration threshold in each year. This was

apparently deliberate, involving decisions to make no sales for periods. The partnership's turnover increased at a faster rate than that of the sole trade. The judge appears to have carried out a detailed examination of the bank statements and cash books of the businesses, and concluded that the turnover of the sole trade was significantly understated. However, because of the way the records were kept, it was not possible to be certain which business had sold which puppy, or which receipts related to which sale.

The business arranged insurance for customers and declared the price of the puppy in the application. The trader gave evidence, supported by other witnesses in the industry, that the prices given to the insurers were inflated, in spite of the danger of voiding the insurance policy. However, HMRC had contacted a number of customers and asked how much their puppies had cost; in many cases, the amount agreed exactly with the price declared to the insurer. The judge concluded that it was most likely that the declared prices were the true prices.

Many of the customers also said that they had paid partly in cash, but there were very few cash deposits in the bank accounts. The judge concluded that cash had been received and not included in the turnover. The balance of probabilities suggested that some of this cash had been paid into the trader's personal bank account; her explanations for such cash bankings (as coming from non-taxable sources such as gifts and sales of private assets) were not accepted in full.

The judge carried out a further analysis based on the numbers of puppies bred each year, and concluded that this also suggested that the declared sales had been understated.

The income tax assessments depended on HMRC having made "discoveries". The burden was on HMRC to show that this was the case; at the hearing the trader's representative accepted that this had been satisfied. The burden was then on the trader to show that the resulting assessments were excessive. HMRC's representative accepted that the figures were too high, and the judge agreed. There would be a resulting reduction in the assessments and the penalties; it would also be necessary to reconsider the VAT assessments and the date from which the partnership was required to be registered, but the decision to register the sole trade with effect from 1 November 2011 was confirmed.

The parties were invited to agree the revised figures. If they could not do so, they should file further submissions with the Tribunal. The appeal was technically "allowed in part", but it was clear that the trader lost on most of the points of principle involved.

First-Tier Tribunal (TC08859): *Sylvia Hook (trading as Sylmis puppies also known as Sylml puppies) and another*

6.2.3 Case study

In an article in *Taxation*, Neil Warren discusses the effect on registration of a UK computer consultant being involved in an international transaction in goods and using a French consultant to help with the deal. Counter-intuitively, the consultant's outputs would not lead to a requirement to register, but the inputs (through a reverse charge) would. He considers the benefit that could be gained by registering

retrospectively, invoicing UK VAT-registered customers (who could then recover the VAT) and claiming back input tax.

Taxation, 21 September 2023

6.3 Payments and returns Lecture 19

6.3.1 Reader's Query

The following Reader's Query, answers and follow-up comment are worth reading for a practical problem in dealing with HMRC.

VAT's criminal? Query 20,186 – Criminal.

My client is a trainee criminal barrister. He registered for VAT in early 2022, received a registration number, with a commencement date of 6 April 2022, wanting to submit a return to 31 March 2023 and annually thereafter. He has paid three instalments of VAT during 2022-23. I have finalised all the figures for his return, and yet his online VAT account is showing no returns as due. He paid the VAT I calculated is due: not a lot, but he wants to be compliant.

I have made endless attempts to sort matters out. Calls first to the general VAT helpline, and then in recent months, regular calls to the annual accounting team. A couple of months ago I was told that a migration fault had occurred on the move of his records, and that the matter would be passed to 'technical'. The only subsequent successful call said that he would chase technical, and that there was nowhere I could write to in order to try and sort out the issue. Nearly all the calls result in pre-recorded messages saying all advisors are busy, asking me to call back later, and then cutting the call off. Only two of my 15 calls made to date succeeded in getting through to the helpline, both of them only after listening to piped music for the best part of an hour. The recorded message has told me countless times that my call is important to them!

For 2023-24 my client will continue to make instalments, aiming to comply. But it seems 'criminal' that a taxpayer and his agent who want to comply are unable to do so. It is easy to understand that less honest taxpayers would not try so hard. Does anyone have suggestions of how best to get HMRC to take whatever steps are needed so that my client can file his return?

Answer 1: Monty Jivraj. HMRC customer service has deteriorated to an unacceptable level.

I am sorry to hear about your disappointment when dealing with HMRC.

Business owners and accountants have become well-acquainted with the chaos at HMRC for some time.

The push for a digital tax system has left some waiting months to receive basic tax information. HMRC has left business owners waiting hours to get through to an adviser and the digital tax push has gone off course.

It was meant to maximise tax revenue, save the government cash, and improve customer service. But in the seven years since HMRC rolled out the programme, which has gone £1bn over budget, anyone would be hard pressed to find any such improvement.

HMRC customer service has deteriorated to an unacceptable standard and business owners and accountants have spent hours on the phone trying to get through to a customer service adviser, only to be told they must go online.

HMRC is drowning. Taxpayers and advisers are too. A report by the Public Accounts Committee, published earlier this year, found post and call handling had fallen significantly during the pandemic.

In 2021-22 HMRC responded to 39.5% of mail within 15 days, compared to 70.3% in 2019-20. The average speed of answering calls was 6:39 minutes in 2019-20, which rose to 12:22 minutes in 2021-22.

I suggest that Criminal writes a letter of complaint on behalf of the client to processing.complaints.team@hmrc.gov.uk setting out the chapter and verse of the difficulties they are facing in doing the right thing.

Answer 2: Gardener. 'Your call is important to us'. Really?

I suspect that this query will resonate with many, if not every, tax adviser who has to deal with HMRC. 'Your call is important to us' is particularly galling: not sufficiently important to answer the telephone; not sufficiently important to invest in a queuing system that gives the caller some indication of how long the wait might be. And yet we are supposed to jump when they contact us, on pain of penalties.

As the department increasingly relies on digital systems, it has become increasingly difficult to make contact with 'a person'; if the system does not work as it is supposed to, the agent and taxpayer are left with nowhere to go. 'The future is digital' could end up with the same damning indictment that the Infrastructure and Projects Authority recently gave to the HS2 rail project – 'not deliverable'.

I can suggest two possible ways to try to resolve this specific issue. The first is an approach to the client's MP. I have one of these in progress at the moment, and am waiting to see if it will achieve anything; traditionally, MPs have been able to nudge (to use HMRC's own expression) government departments into doing something.

The other is to register for the agents' forum. The procedure is described by the Association of Taxation Technicians at tinyurl.com/28fzmfyc.

It is a place where tax agents can report problems with systems, and I have found that it does elicit a response from a person.

It does not necessarily resolve the issue straight away, but starting a thread on the forum and seeing what they say is a great deal quicker than hanging on the telephone. This query seems ideal for the forum, because it is clearly a systems issue.

As an example, I used it earlier this year to discover that a systems glitch meant that HMRC would not be collecting VAT annual accounting payments on account (POA) this year from my clients who use it – HMRC did not appear to be aware before the thread appeared that it had transferred all the quarterly payers to its new system but had forgotten those liable for POA. This may be connected to the present query, as the barrister appears to be on annual accounting.

Several of my other visits to the forum concern HMRC's allocation of payments. I do not recommend paying HMRC money that it has not asked

for (as in the case of my clients' POA) – making sure that those payments are eventually credited to the correct taxpayer's account, after being lost in the system, may require further hanging on the telephone. I have advised my clients to put the money aside so as not to be taken by surprise when a full year's VAT has to be paid all at once. – *Gardener.*

Feedback: Desperately trying to comply

I am 'Criminal', the pseudonym I used for the recent Readers' forum query, 'VAT's criminal', for which the replies were published in *Taxation*, 24 August 2023, page 24. Thank you to Monty Jivraj and Gardener for their responses. While I had considered writing either to my or my client's MP (or both), the suggestions of registering on the agents' forum and the complaints information were useful.

Fortunately, my case is heading towards resolution. In a recent call, the 14th one, progress was made. (Many calls ended in being cut off after about one hour of waiting.) The official told me that there had been developments since I last called: he was now himself able to process (there is a 'but', see below) the necessary changes to their records, and did so while I held on. Previously, the call staff had to refer the case either to 'technical support' or 'transformation team'. A few minutes after that last call, I was able to submit a return.

I say 'heading towards resolution' because the records now show nearly all the VAT assessed as being payable, with a due date of the end of this month, with only one instalment being shown as paid, whereas, in fact, all the tax was paid on time. But HMRC's records instead show the rest of the instalments as being unallocated. I am therefore in round two, calling, hoping to get through, so that the unallocated payments can be correctly allocated: all the VAT due has been paid.

On my most recent call, the team member tried unsuccessfully to allocate the payments. After 40 minutes of trying, he had to concede defeat, and said he would pass the issue to the migration team.

I liked both respondent's sympathy and comments that the case is widespread – something I was well aware of through reading this magazine for years and my own general experience, but this has been a bad one. In total, so far, I have spent over 30 hours on this, counting the endless holding on listening to piped music.

What I didn't put in my query is that the client is, in fact, my son; and that I am a very experienced direct tax practitioner, a retired big four tax partner, and I am helping my son as he embarks on his career. I was appointed his VAT agent. I raised the query out of frustration and to share my experience: I can do some other work while holding on, but I can't fully concentrate, because the piped music is occasionally interrupted by such things as 'your call is important to us' or 'all our advisers are busy at the moment' and each time a (recorded) human voice comes on, you think you've been successful. I can't imagine how one could charge for all the 30 hours I have spent so far had it been a paying client. I suspect one can't, so it is the agents who are losing out, while their clients will likely not understand the months without progress.

Some further comments: all the staff I have spoken to, bar one, have been friendly, professional and tried to help. I know it isn't their fault, it is shortage of staff and poor systems, or a botched system migration. The

staff member who was curt and abrupt was memorable: after holding on for over 50 minutes, nature called and I had to step away from my desk. I got back just in time after hearing a real voice and to be told 'good job you answered, after 20 seconds our service standard means we end the call'. Telling him I had waited 50 minutes did not elicit any sympathy.

Secondly, I was told there are thousands of customers affected, due to an oversight in dealing with annual accounting customers when there was a migration to a new system. Further, there are a variety of errors that have arisen in the migration, including many where payments weren't showing at all on the account: so there is no one-solution-fits-all, but the recent ability for the staff to make the changes has helped.

Now, to payment allocation. I was told that if my son gets a call demanding the tax shown on the return, he is to mention that it is a migration issue and that his agent has been in regular contact. I await to see what happens and am also fearing his current year VAT quarterly payments will not be allocated.

With honest taxpayers and their agents struggling so hard with poor HMRC systems, it is easy to think that less scrupulous taxpayers won't be as compliant or diligent. I am tempted to submit a freedom of information request for an estimate of the loss of tax caused by such matters.

Good luck to other affected taxpayers and their agents.

Criminal.

Taxation, 24 August and 28 September 2023

6.3.2 Interest guidance

HMRC have added the following section to their online guidance on the new rules for interest on overdue VAT that has applied since 1 January 2023:

You cannot appeal against your late payment interest charge. However, you can object if:

- *HMRC has caused a mistake or there has been any unreasonable delay*
- *you dispute the relevant date or effective date of payment*
- *mitigating circumstances apply*
- *you are questioning the legislation*

We can only accept an interest objection if you have fully paid the tax for which the interest charge has been made. Contact the VAT: general enquiries helpline if you need to discuss this further.

These points reflect guidance on interest set out in HMRC's *Debt Management and Banking* Manual at DMBM404010.

www.gov.uk/guidance/late-payment-interest-if-you-do-not-pay-vat-or-penalties-on-time

6.3.3 Interest rates

Following the Bank of England's decision to increase the bank base rate to 5.25%, HMRC have raised the rate of interest on late paid tax to 7.75%

with effect from 14 August 2023. The rate on overpayments has also risen to 4.25%.

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

6.4 Repayment claims

Nothing to report.

6.5 Timing issues

Nothing to report.

6.6 Records

6.6.1 CIOT response: Progress with Making Tax Digital

The CIOT has responded to the Public Accounts Committee's enquiry into Making Tax Digital. Although this is focussed on the income tax self assessment (ITSA) project, whose introduction has been delayed to April 2026, the CIOT makes the following comment about MTD for VAT:

The government should also undertake an in-depth evaluation of MTD for VAT, involving real business data. There is a lack of compelling data to demonstrate that MTD is indeed reducing the tax gap and delivering efficiencies for businesses. Until this is available, progressing with MTD for ITSA, with its associated costs for taxpayers, agents and HMRC, seems imprudent.

www.tax.org.uk/ref1146

6.7 Assessments Lecture 20

6.7.1 Protection of the revenue

A French resident sold goods through Amazon. If those goods were in the UK at the time of supply, he would be immediately registrable for VAT under VATA 1994 Sch.1A. He considered that he was not selling from the UK, and when customers placed orders the goods were located in France; however, Amazon moved goods without instructions from him or any possibility of control by him, and some of the goods were moved to the UK.

The Tribunal decision is not clear about the chronology of events, but it appears that he registered for VAT under the Flat Rate Scheme with effect from 28 February 2018. HMRC carried out an enquiry into his returns, and in due course concluded from Amazon reports he supplied that far more of his sales were subject to UK VAT than he had realised. HMRC raised two assessments in September 2020, and also cancelled his authority to use the Flat Rate Scheme.

Where the chronology is unclear is in the effect of the removal from the FRS. The assessment under appeal (£7,612) was raised to cover the periods 04/18 to 04/20; the other assessment, for £16,151, was for earlier periods from 30 January 2015 to 27 February 2018. This was stated not to be the subject of the present appeal, but it is not clear whether it had also been appealed against. The decision records that the appellant ceased all

commercial activity in April 2020, so the removal from the FRS can only have had any effect if it was retrospective; however, the decision does not explain exactly how the assessment was arrived at. It only mentions in passing that HMRC had made a decision "to withdraw his authorisation to use the FRS with effect from the time he was VAT registered".

The judge (Mark Baldwin) accepted that HMRC's assessment met the basic test for "best judgement" as understood in the *Van Boeckel* case. It was based on material provided by the trader, and it was not required to "do the taxpayer's job for him". The material had been carefully and honestly assessed by HMRC.

However, it was also necessary to consider whether the decision to remove him from the FRS could be impugned. Presumably that meant that the assessment used the standard rate of VAT, although this is not set out in numerical terms. The judge noted that he could only allow an appeal on this point if he was satisfied that it was unreasonably made; but a decision to remove someone from FRS retrospectively could only be made "for the protection of the revenue". The judge was not satisfied that this was the situation. There was no apparent abuse of the rules; the trader would benefit from the FRS, but only to the extent of the straightforward application of the law.

The appeal was allowed to the extent that the assessment should be recalculated on the basis of the FRS rates rather than the standard rate. The liability would apply to the sales that HMRC had concluded were subject to UK VAT.

First-Tier Tribunal (TC08843): *Pierre Andre Divisia*

6.8 Penalties and appeals Lecture 20

6.8.1 Default surcharge

A company appealed against a 5% surcharge of £4,662 for its 12/20 return period. The company had also appealed against a default surcharge in respect of the period 12/21, but this had been removed by HMRC and was not, therefore, under appeal.

The trader had defaulted in period 12/18 but had applied for TTP on 31 January 2019. HMRC had issued a SLN; the decision says that "This default surcharge was later removed and the Appellant was informed by letter", although there should not have been a surcharge for a first default.

The trader was also late paying for the period 09/19, but once again had applied for TTP on 1 November; this time HMRC levied a 2% surcharge but then withdrew it. If the SLN for 12/18 had been withdrawn, there should have been no surcharge for 09/19 in any case.

A similar set of circumstances occurred in relation to the 12/19 return; the company's difficulties then became even more extreme with the beginning of the pandemic in March 2020. The VAT for 06/20 was also paid late, and the penalty was reduced to nil because this was deemed to count as the first default. However, it finally established a SLN period running to June 2021. A 2% penalty of £2,418 was charged for period 09/20,

followed by the penalty that was the subject of the present appeal. The decision notes that it was initially charged at 15%, so presumably the earlier defaults were removed during correspondence and this was now counted as the second default.

The trader put forward a number of defences, of which the most striking was that HMRC had acted unfairly in allocating payments that it had made to periods earlier than 12/20, when it would have reduced the surcharge if those payments had been allocated to that period. Presumably the point was that the other periods were not subject to surcharge; however, reallocating the payments might have constituted a breach of the TTP agreements for those earlier periods, which could have had the same result.

The judge did not accept that HMRC had an obligation to allocate the payments in a particular way, and the allocation to the earliest outstanding liability was a reasonable one. The company did not have a reasonable excuse, and its appeal was dismissed.

First-Tier Tribunal (TC08883): *Desser & Co Ltd*

A company appealed against a 10% surcharge of £20,165 (reduced from an original assessment of £52,665) for its 03/21 period. It had entered the surcharge regime after late payment for 06/20 (just after the expiry of the Covid "holiday"). It paid a 2% surcharge for the 09/20 period, reduced after review when HMRC accepted that some of the VAT had been paid by the due date. It suffered a 5% surcharge of £20,573 for its 12/20 period. The 03/21 payment was again late, and once again HMRC reduced the surcharge on review after accepting that some of the VAT had been paid on time.

The trader's appeal was partly based on alleged non-receipt of the assessment and SLNE for 03/21; however, HMRC relied on their systems showing that the documents were issued to the correct address and were not returned. There was no evidence to displace the statutory presumption of service. The trader had been refused a TTP agreement for 03/21 on 10 May 2021, on the grounds that it already had an arrangement in place for 09/20. Its cash flow difficulties were neither sudden nor new, and had predated the pandemic.

Judge Natsai Manyarara considered the director's representations in detail and concluded that he had not established a reasonable excuse; the evidence showed that he had only contacted HMRC about TTP the day before the due date, and it was clear that the officer he spoke to said that she had to confirm with a superior whether permission could be given. As it was not given, there was no TTP arrangement in place, and no excuse.

The judge also considered representations about the fairness of the penalty, the fairness of the increases in the rate, and whether the trader should be so punished for a few days' delay. None of these could amount to a defence. The appeal was dismissed.

First-Tier Tribunal (TC08850): *Polyteck Building Services Ltd*

A company appealed against a 2% surcharge of £1,607 for its 10/21 period. The appeal was notified to the Tribunal late because there had been further correspondence following the conclusion of a statutory review, and HMRC had to point out that the only recourse was to the

Tribunal. HMRC did not object to the late appeal and the judge admitted it.

The company had entered the surcharge regime by late payment for its 10/20 period. Oddly, HMRC had initially charged a 2% penalty for this period, but had withdrawn it after acknowledging that there had been no previous default.

The director claimed that there had been a TTP agreement in place for 10/20, which would mean that 10/21 was a first default. However, he had written a letter to HMRC in December 2020 which expressed his frustration at not being able to speak to anyone. It appeared that there was no TTP agreement in force, and the company accepted that it did not have a reasonable excuse for 10/21. The appeal therefore had to fail.

First-Tier Tribunal (TC08847): *SB Wakefield Ltd*

A company appealed against default surcharges at 10% (£2,613) and 15% (£3,662) for its 08/21 and 11/21 periods respectively. The company sold high-end cars, and had had an excellent compliance record up to the pandemic, with a DD in place for HMRC to draw the VAT declared on the returns that were always filed on time. After that, a number of problems arose, and the company entered the surcharge regime after paying late for period 08/20. The DD was cancelled, and the trader applied for TTP to cover a number of liabilities. This agreement ran up to 15 November 2021, with monthly payments being made. However, it appeared that at least some of the VAT for all the periods from 11/20 to 11/21 was paid late.

The return for 08/21 was also filed late, on 12 October. The director claimed to have believed that the TTP direct debit would cover future liabilities as well as past ones; he paid the VAT for this period by credit card on 25 November when he realised that no payment had been made. The 11/21 return was filed on time, but once again the payment was made after the due date when the director realised that no DD had been taken.

Judge Nathanial Rudolf sympathised with the appellant, but did not consider that he had a defence against the surcharge. It was not objectively reasonable to have expected the DD arrangement made a year earlier to cover the current liabilities, without checking that this was so. It would not have taken long to discover that no DD was in place and to correct that situation; to fail to do so at all, after leaving the filing of the returns to the last minute, was not the action of a reasonable trader. The appeal was dismissed.

The judge noted that "Mr Sadiq himself said at the start of his evidence: *If it is down to the law, I am guilty and must pay the fines*. We pay tribute to the measured, calm and courteous way Mr Sadiq presented this appeal."

First-Tier Tribunal (TC08856): *Spirit Motor Company Ltd*

A company appealed against a 5% surcharge of £480 (reduced from £961 after an earlier surcharge was cancelled) for its 04/22 period. The company had entered the surcharge regime in its 01/21 quarter and had made further defaults leading to the disputed surcharge. The second default, for the 04/21 quarter, led to a surcharge of less than £400 which was not collected.

The appellant claimed that the surcharge notices for the periods 01/21, 04/21 and 07/21 were not received by the company. He also claimed that those periods "fell within the time that the appellant had opted for the VAT deferral scheme." This appeared to be a misunderstanding of the scheme that entitled traders to pay the VAT deferred from the first lockdown period (20 March 2020 to 30 June 2020) by instalments. It was possible to elect to join that scheme between February and June 2021, but it had no relevance to the current VAT returns for that period.

It is strange that the surcharge was initially calculated at 10% on the basis that period 07/21 had also been in default. The judge's findings of fact include "The return was received on 9 August 2021 and VAT was paid on 6 September 2021. The default surcharge for the period 07/21 was removed as the return and payment had been received by the due date." There is no explanation of why a default had ever been recorded.

In his initial objections to the surcharge, the appellant had written to HMRC asserting that "*The due date of the payment was 15th June 2022 and we made payment on 21st June 2022.*" This was both an admission that he did not know the due dates, and that he had paid late in any case. The judge had no difficulty in finding that he was in default.

HMRC were able to rely on the statutory presumption that the SLNs had been delivered, because there was no evidence to suggest otherwise: the address on file was correct and they had not been returned undelivered. A further claim that the company was awaiting funds to pay the VAT liability could not succeed because it relied on simple insufficiency of funds.

Judge Natsai Manyarara produces extremely detailed and lengthy decisions which leave no room for doubt, even if the answer appears to be a foregone conclusion from the outset: the appeal was dismissed.

First-Tier Tribunal (TC08923): *Echo Construction Ltd*

HMRC have updated the *Compliance Handbook* with two entries about the new rules for late payment penalties. The first makes it clear that it is not necessary to pay the penalty before an appeal can be determined; the second discusses the interaction of the new rules with Annual Accounting instalment payments.

CH193340, CH193080

There are also further updates clarifying the extent of HMRC's statutory powers of discretion in relation to awarding penalty points or assessing financial penalties for late filing and late payment of VAT. The legislation provides that HMRC "may assess", which means they also may not; however, HMRC consider that the circumstances in which the discretion could be exercised will be exceptional, such as a national emergency. This discretion is separate from the consideration of a "reasonable excuse" defence.

CH192440, CH193500

6.8.2 Hardship

A company appealed to the Tribunal against HMRC's refusal of a hardship application. The company had been assessed in November 2019 to VAT of £280,000, which it claimed it could not pay. In addition,

HMRC had issued a PLN to the director for £177,000, and the director applied to appeal against that. HMRC and the Tribunal had concluded that the appeal was lodged late, but Judge Nigel Popplewell noted that the director's agent had applied for a review and no review conclusion letter had been issued. That meant that the appeal was in fact premature, because an appeal cannot be made to the Tribunal until the review has finished.

The judge went through the principles of deciding a hardship application, which were covered by the same judge in (TC08811): *ABA Motors Ltd* (July 2023 update). In particular, it was necessary to consider the situation at the time of the hearing, rather than at the time of the original decision or HMRC's refusal of the hardship application; it was also not appropriate to consider the merits of the underlying appeal. The evidence showed that the company had ceased to trade and had only £165 in the bank. The judge concluded: "At the date of the hearing, the company has no resources. It is not, therefore, so much a question of hardship. The company simply has nothing from which it can pay the VAT at stake in its appeal." The application was therefore allowed.

The judge went on to direct that HMRC should issue a review conclusion within 30 days of release of the decision so that the taxpayer and his advisers could decide whether to appeal against it.

First-Tier Tribunal (TC08862): *Massala Exotic Ltd*

Another hardship application came before Judge Anne Scott in relation to an assessment for £170,000. The decision goes into a little more detail about the evidence, identifying movements in the company's bank account that probably suggested to HMRC that cash resources were being moved out of the company; however, the judge came to an almost identical conclusion that the company had no resources, and allowed the hardship application.

First-Tier Tribunal (TC08901): *Waynefleet Ltd*

6.8.3 Late appeals

An individual submitted a notice of appeal on 1 June 2022 against a decision to issue a PLN for £56,986 on 19 November 2020. After taking account of the "Covid concession" extension to time limits, the appeal deadline was 19 March 2021, so the appeal was brought about 14 months late. Judge Nigel Popplewell heard an application to admit the appeal out of time. The applicant did not attend the video hearing; the judge noted that he had a history of not engaging with HMRC, including the failure to provide evidence of entitlement to input tax deductions that were the reason for the assessment and the penalty. The hearing therefore proceeded in his absence.

The judge applied the normal *Martland* process of establishing the length of delay, considering the reasons for it and balancing all the factors. In the absence of engagement or attendance from the applicant, it was impossible to attach any weight to his agent's claims that he was severely impacted by Covid. It was therefore inevitable that the balancing exercise would go against him, and the application to bring a late appeal was rejected.

First-Tier Tribunal (TC08857): *Kenwright*

A club appealed against assessments for £17,572 which arose out of the *Rank* litigation. Judge Howard Watkinson reproduced the summary of the history of Rank set out by Judge Baldwin in *York Burton Lane Club and Institute Ltd* (TC08632); the present appellant had claimed the disputed sum on 27 July 2006, and had been credited with it on 17 November 2011 following the High Court's judgment in *Rank*. In the letter notifying the credit, HMRC stated that they would appeal the decision and had raised an assessment to claw the credit back. This would not be pursued until judgment had been provided. The club neither requested a review nor lodged an appeal against the assessment.

HMRC wrote to the club on 26 March 2014, requiring the assessment to be paid with interest. The club did this on 4 June 2014. Following the Upper Tribunal's 2020 decision in *Rank*, an officer of the club wrote to HMRC on 26 October 2020 asking for the money back again. HMRC pointed out that no appeal had been made against the protective assessment. Correspondence followed in which a representative raised a number of arguments questioning the validity of HMRC's position, culminating in the submission of a Notice of Appeal on 4 August 2022. No copy of the November 2011 assessment was attached.

The judge summarised the issues the Tribunal had to consider:

- What decision of HMRC is the Appellant seeking to appeal?
- Was the decision of HMRC that the Appellant seeks to appeal an appealable decision?
- Is the appeal out of time?
- If so should permission be given for a late appeal?
- Would it be an abuse of the Tribunal's process to permit the Appellant to bring an appeal?

The club's representative argued that the club was appealing against a decision notified by HMRC on 5 July 2022 not to make an "automatic repayment". He accepted that there was no statutory basis for this. The judge ruled that the only decision that was appealable within s.83 VATA 1994 was the 2011 assessment; the only decision in relation to a repayment had been in the company's favour on 17 November 2011. If the appeal was against a "decision" not to repay, it had to be struck out for lack of jurisdiction.

If the appeal was against the November 2011 assessment, the *Martland* and *Denton* procedures had to be followed. The delay was clearly serious and significant. The reason was a deliberate decision not to appeal the protective assessment, in spite of being informed of appeal rights at the time. Even after this was pointed out in July 2021, a formal appeal was not made for a further year. The judge concluded that there was no good reason for the delay.

In the balancing exercise, the judge noted that HMRC's representative accepted that the appellant's case was very strong; the judge went further and suggested that it would inevitably win on the basis of the Upper Tribunal decision. Nevertheless, it was necessary to give proper weight to the need to observe time limits, and the application to make a late appeal was refused.

First-Tier Tribunal (TC08904): *Little Lever Working Men's Club*

A company was contacted by a supplier of its e-cigarettes in 2018, notifying it of litigation about the possible application of the reduced rate to e-cigarettes (as "smoking cessation products") and encouraging it to submit an error correction notice. It did this in October 2018, claiming a repayment of approximately £273,000. HMRC sent a letter rejecting the claim on 10 December 2018; the company claimed that this letter had never arrived.

On 27 May 2022 HMRC wrote to the appellant to advise that they were approaching the four-year limit for any further claims of a similar nature and inviting them to make a protective claim. The letter also referred to the rejection of the previous ECN, and set out appeal rights and procedures. The company claimed that this was the first time it had realised that the original claim had been formally rejected; it had assumed that it was simply stood over behind other litigation, and that no action was necessary.

Judge Anne Fairpo applied the *Martland* procedure in the normal way, as agreed by the parties. It was agreed that the delay was substantial. The company argued that the reason was non-receipt of the letter, and it had acted swiftly when it had become aware of the problem; there would be little prejudice to HMRC, who must have regarded the matter as still unresolved on the basis of their May 2022 letter, and there was still ongoing litigation involving other taxpayers. There would be substantial prejudice to the taxpayer in not allowing the appeal to proceed; if the litigation was ultimately successful, it might have to pay out overcharges to its customers without being able to recover amounts from HMRC, and the claim was more than its annual profits.

The judge commented that the starting point, as set out in *Martland*, is that permission should not be granted unless she was satisfied on balance that it should be; HMRC are entitled to expect that an appellant will appeal within the statutory time limits and so, if no appeal is made, that the matter has become final.

In that context, the reason given by the company was not enough to succeed. It had taken no action at all for three years in relation to a significant claim; its lack of awareness of the process and Tribunal appeals did not assist it. A reasonable taxpayer would, given the size of the claim, have made enquiries about the process and the next steps they could expect to take place. HMRC's invitation to the taxpayer to make a further claim was not an indication that they regarded the earlier claim as anything other than finally settled.

She did not place any particular weight on the strength or weakness of the underlying appeal, which is the subject of ongoing wider litigation. The application to appeal out of time was refused.

First-Tier Tribunal (TC08928): *Bull Brand Ltd*

6.8.4 Penalties

A company appealed against a penalty of £21,457; its present sole director appealed against a PLN for £17,098, and a former director appealed against a PLN for £4,360 (in effect, splitting the company's penalty 80:20 between them).

The decision records the sequence of events leading to the penalty. This included the transfer of all the company's records onto a laptop which the director took on a business trip to Slovakia in March 2020. He left his car and the laptop behind when he booked a flight home to avoid impending lockdowns in Slovakia and the UK; they were subsequently stolen, which meant that he had no information earlier than January 2020 to give to HMRC when they enquired into the VAT returns. Later in 2020, HMRC issued assessments for a number of periods on the basis that there was insufficient evidence to support the input tax claims the company had made. The company did not appeal, and in January 2021 HMRC issued the penalty to the company and the PLNs to the directors.

Judge John Brooks had to determine what had happened from the limited supporting evidence and the testimony of the present director, who he considered to be a not wholly reliable witness. He noted that there were input tax claims in respect of items sold on to a customer, but no corresponding output tax. To this extent, there was a deliberate but not concealed understatement of VAT, and a penalty was due. The former director had submitted some of these returns, which meant that the penalty in respect of these errors should be allocated 2/3 to him and 1/3 to the present director.

The judge then discussed the consequences of the loss of the records, where the absence of evidence appeared to be the only reason HMRC gave for disallowing the input tax claims. If the records had existed when the returns were submitted, they were not inaccurate at the time; HMRC accepted, and the judge agreed, that that meant there should be no penalty. The VAT could be subsequently disallowed for lack of evidence, but the penalty should be removed.

The judge also increased the mitigation allowed, where HMRC had restricted the discount for "giving access" because not all of the company's records had been provided. The judge appears to have been more sympathetic to the loss of the laptop than HMRC.

The judge recalculated the various penalties and allowed the appeals in part: the company would be liable for £10,251; the present director for £3,417; and the former director for £6,834. The former director was therefore worse off as a result of the hearing.

First-Tier Tribunal (TC08851): *Aizio Associated Ltd and Others*

A company appealed against a penalty for failure to notify of £46,726, based on unpaid VAT for the period from 1 September 2013 to 31 March 2018. There was also an inaccuracy penalty that the company had appealed; HMRC said that it had been suspended, and as the company had ceased trading, HMRC would not seek to collect it. After an assurance that there were no circumstances in which the penalty would be pursued, the company agreed to withdraw its appeal against that penalty.

The company was incorporated in December 2012. It sold goods on eBay, and registered for VAT on 1 April 2018. In January 2020, HMRC opened an enquiry which led to an assessment for VAT of £208,173 for the period from 1 September 2013 to 31 March 2018. On 22 September 2020, HMRC issued eBay with a "joint and several liability" notice, which led to eBay blocking the company from its platform, which in turn led to it ceasing to trade.

The present director (who had taken over the company in December 2017) claimed at the hearing that the company had only exceeded the registration threshold in April 2018. As the submitted grounds of appeal had only mentioned "special circumstances", the Tribunal considered this to be a request to amend the grounds of appeal. The judge (Rachel Gauke) reviewed the principles of allowing such a request, and decided that the new ground would in any case have no reasonable prospect of success: the director's knowledge of the company only went back to December 2017, and he admitted that the company did not have records further back than September 2016. It would not therefore be able to displace HMRC's case.

HMRC provided the Tribunal with little information about how it calculated the VAT due or the registration date. However, HMRC claimed that the assessment was based on actual sales information supplied to them by eBay; the company had provided no evidence to the contrary, and had not appealed against the VAT assessments. The judge concluded that it was more likely than not that the VAT was due and the registration date was correct. HMRC had calculated the penalty on the "non-deliberate" scale, and had allowed mitigation for telling, helping and giving access which reduced the percentage to 23%. There were no grounds for changing these percentages.

The judge noted that most of the "special circumstances" pleaded by the appellant related to the fact that he had taken over the company in December 2017, and most of the penalty related to earlier periods. She explained that the company was a separate person, and it was liable to the penalty regardless of the change of ownership. The correspondence showed that HMRC had considered whether there might be special circumstances and their negative decision could not be said to be flawed. The judge discussed whether any of the circumstances constituted a reasonable excuse, and concluded that they did not.

The appeal was dismissed and the assessment was confirmed.

First-Tier Tribunal (TC08915): *GB-Gadgets Ltd*

An individual appealed against a PLN issued on 4 December 2013 for £271,251. It related to a penalty assessment against his company, Aglow Fashions Ltd, which HMRC had assessed to underdeclared output tax for periods 04/09 to 04/12.

Judge Richard Chapman started with an analysis of the law on the relationship between an appeal against a PLN, which was brought by the individual, and any dispute about the underlying VAT assessment, which would have to be brought by the company. Previous decisions had held that the PLN appellant could dispute the amount of the VAT on which the penalty was based, even though that was proper to the company, but would have to accept the burden of proof on the balance of probabilities that the assessment was excessive: the individual could not be in a better position than the company would have been in disputing the VAT. In relation to the penalty, the burden would lie on HMRC to show that the individual had been dishonest or had acted deliberately.

The facts of the case were so long ago that the HMRC officer who had been mainly responsible for the VAT assessment had retired and did not give evidence. The judge noted that the officer who took over from him,

who was cross-examined at length, could only give "hearsay" evidence that could bear very little weight. The judge also noted that the appellant had sometimes given contradictory evidence, although he made no overall finding that he was an unreliable witness.

The company manufactured and sold clothing. The VAT dispute concerned the split between zero-rated children's clothes and standard rated general clothing, as well as duplicated claims for input tax and errors in transferring figures from invoices to sales lists. The total assessment was £319,911, and the penalty was based on "deliberate and concealed" behaviour.

On 4 August 2016, the appellant signed and entered into a director disqualification undertaking for a period of six years. This included an admission that he had caused the company to submit incorrect VAT returns, underdeclaring the tax due. The appellant now claimed that the solicitor acting for him in those proceedings had failed to meet deadlines, resulting in his defence being struck out, leaving him with no alternative but to sign a statement that he regarded as "unsafe".

The judge referred to a schedule of sales which had been provided to HMRC in 2020. The appellant may have regretted providing it, because the judge considered it to be likely to be an accurate record of sales; it revealed a number of discrepancies between the invoices listed and those provided to HMRC in support of the VAT returns. The 2020 list clearly showed that some descriptions had been changed to justify zero-rating; there were duplications and errors in the values.

The appellant and his representative argued that the assessment was not to best judgement; the judge considered their arguments and rejected them. No evidence had been put forward by the appellant that could displace the best judgement assessment, so the Tribunal had to proceed on the basis that the VAT figure on which the penalty was based was accurate.

There were numerous indications that the misstatements arose from deliberate and concealed conduct. The appellant had said in evidence that he had a clear knowledge of his goods, his sales and his stock, and the judge accepted that this was true. Against that background, the misstatements that were revealed by the documents could only be both deliberate and concealed.

The appeal against the PLN was dismissed.

First-Tier Tribunal (TC08894): *Mohammed Naseemdost*

6.8.5 Disclosure

CCA Distribution Ltd was refused a deduction of nearly £10m of VAT in 2007 on *Kittel* grounds. The company's appeal to the FTT was dismissed on 14 May 2020, and HMRC issued an evasion penalty to the company and a Director's Liability Notice under VATA 1994 s.61 (as the facts predate the changes to the penalty rules) to the director for just under £2m on 7 July 2021. The director appealed against the DLN. At a procedural hearing on 20 February 2023, Judge Anne Redston allowed an application by HMRC to strike out some of the director's grounds of appeal; he then made an application to the Tribunal for an order requiring HMRC to "disclose any documentation relating to the fraudsters which mentioned his name or that of CCA Distribution Ltd".

HMRC said that they had already disclosed all relevant documentation, including documents that were adverse to their case. Because of the nature of carousel fraud and the voluminous litigation that has dealt with it over the last 15 years, there would be enormous numbers of documents that would simply mention either the company or the director, most of them not in any way relevant to the argument.

The director argued that he could not trust HMRC, and he could not tell whether any of the documents would assist his case unless he was able to see them all. He sought to rely on a decision of the Upper Tribunal in *E-Buyer Ltd*, but unfortunately for him that was overturned by the Court of Appeal (as the judge pointed out).

The strike-out decision prevented the director from relitigating matters of fact that had been decided against him in the 2020 FTT hearing. That was not relevant to his belief that there might be documents that would help him argue his case.

The application for further disclosure was refused.

First-Tier Tribunal (TC08928): *Trees*

6.8.6 Costs

HMRC applied for an order making the director of a company jointly and severally liable with the company for the costs of an appeal that had been struck out for failure to comply with an "unless" order. The appeal concerned disallowance of input tax on *Kittel* grounds and a dishonesty penalty; the director had been convicted of conspiracy to cheat the public revenue and had been sentenced to 3.5 years in prison.

The judge noted that HMRC estimated the costs at over £400,000, and agreed that a detailed schedule of costs could be deferred until the decision had been given in principle. He considered the case law on making a "non-party costs order", and concluded that, in principle, this was a situation in which one would be appropriate: the director had knowingly taken part in a substantial VAT fraud (albeit in a minor way and for a minor part of the proceeds), and had made an appeal to the Tribunal that he must have known was hopeless, causing substantial amounts of money to be wasted.

Even so, the judge was also required to consider the individual's means in deciding what was the "fair and just outcome". He clearly did not have the means to pay. The judge stressed that dismissing HMRC's application should not be taken as an indication that the matter was anything other than very serious wrongdoing; however, having considered his financial circumstances as required by rule 10(5)(b) of the FTT rules, that was the decision he was compelled to make.

First-Tier Tribunal (TC08888): *Hobbs Close Ltd*

6.8.7 Code of Governance for Resolving Tax Disputes

HMRC has published new guidance on its internal procedures for deciding how tax disputes should be resolved, depending on the particular circumstances of a dispute and how much tax is at stake.

The following guidance sets out HMRC's internal governance arrangements for deciding how tax disputes should be resolved:

- Code of Governance for Resolving Tax Disputes: this updated document outlines HMRC's approach to resolving tax disputes, including the department's litigation and settlement strategy and ADR.
- Tax Disputes Resolution Board remit: this covers the operational principles and remit of the TDRB, including the trigger points for referrals to the Commissioners for Revenue and Customs. Broadly, the TDRB advises on cases where the total tax at stake is at least £100m or where the case is sensitive.
- Customer Compliance Group Disputes Resolution Board remit: the CCGDRB advises on cases outside the remit of the TDRB, generally where the tax at stake exceeds £5m (or £15m in cases involving large businesses).

HMRC has also updated its collection of guidance to include the HMRC Code of Governance for Resolving Tax Disputes.

www.gov.uk/government/publications/resolving-tax-disputes/code-of-governance-for-resolving-tax-disputes; www.gov.uk/government/publications/dispute-resolution-governance-board-remits/tax-disputes-resolution-board-remit; www.gov.uk/government/publications/dispute-resolution-governance-board-remits/customer-compliance-group-disputes-resolution-board-remit

6.9 Other administration issues

6.9.1 Confiscation order

A jailed fraudster who bought three Spanish villas after stealing from the taxpayer must pay £1.2 million back or face another seven years in jail. Graham Drury, 71, was jailed for five-and-a-half years in 2021 after submitting fraudulent VAT returns to HMRC. His company, Drury Machine Sales Ltd, was claiming fraudulent VAT repayments from HMRC on machinery that was never purchased.

At a hearing in Mold Crown Court, Drury was told to pay a £1.2m confiscation order within three months, or have seven years added to his prison sentence. Debbie Porter, operational lead at the Fraud Investigation Service at HMRC, said: "Drury stole almost £2m of taxpayers' money to fund a lavish lifestyle, which included Spanish villas, a luxury car and Rolex watches. "He's already paying the price for his crimes in jail and now must sell his assets or face even longer without his freedom. If he fails to pay the full order, he will still owe the money due after he is released. HMRC will always seek to recover stolen money and if you know of anyone who is committing tax fraud, you can report them to HMRC on gov.uk."

www.dailypost.co.uk/news/north-wales-news/vat-fraudster-told-cough-up-27426942

6.9.2 Prosecution

HMRC have announced the imprisonment of two people in connection with smuggling Polish beer to the UK without paying duty or import VAT estimated at £3.1m. One admitted to cheating the public revenue, money laundering and VAT fraud, and was sentenced to 3 years and 8 months; the other was found guilty after trial of cheating the public revenue and VAT fraud and was sentenced to 3 years and 4 months.

www.mynewsdesk.com/uk/hm-revenue-customs-hmrc/pressreleases/beer-smugglers-jailed-for-seven-years-3265490

The same press release also notes a confiscation order against three men who were imprisoned in 2021 for money-laundering offences. The order requires them to pay back £2.7million of face an extra 15 years in prison in addition to the original total of 16 years (between them). Another £1million has already been seized and forfeited. The original convictions are described in the earlier press release below.

www.mynewsdesk.com/uk/hm-revenue-customs-hmrc/pressreleases/duo-jailed-for-laundering-25-pounds-million-3134407

6.9.3 Draft legislation for next Finance Bill

On 18 July 2023, the government published a number of draft clauses for the next Finance Bill, with consultation running until 12 September. None of the proposals relate to VAT, although the government is also consulting on proposals to update the *Terminal Markets Order* (SI 1973/173) to clarify the VAT treatment of exchange traded commodity transactions.

www.gov.uk/government/collections/finance-bill-2023-24