VAT UPDATE
APRIL 2024

Covering material from January – March 2024

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VAT Update April 2024

Contents

1. INTRODUCTION....1
   - 1.1 Appeals pending....1
   - 1.2 Decisions in this update....2
2. OUTPUTS....3
   - 2.1 Scope of VAT: linking supplies to consideration....3
   - 2.2 Disbursements....4
   - 2.3 Exemptions....5
   - 2.4 Zero-rating....10
   - 2.5 Lower rate....18
   - 2.6 Computational matters....18
   - 2.7 Discounts, rebates and gifts....18
   - 2.8 Compound and multiple....18
   - 2.9 Agency....18
   - 2.10 Second hand goods....23
   - 2.11 Charities and clubs....23
   - 2.12 Other supply problems....23
3. LAND AND PROPERTY....25
   - 3.1 Exemption....25
   - 3.2 Option to tax....29
   - 3.3 Developers and builders....29
   - 3.4 Input tax claims on land....30
4. INTERNATIONAL SUPPLIES....31
   - 4.1 E-commerce....31
   - 4.2 Where is a supply of services?....31
   - 4.3 International supplies of goods....34
   - 4.4 European rules....43
   - 4.5 Foreign refund reclaims....53
5. INPUTS....55
   - 5.1 Economic activity....55
   - 5.2 Who receives the supply?....55
   - 5.3 Partial exemption....55
   - 5.4 Cars....59
   - 5.5 Business entertainment....59
   - 5.6 Non-business use of supplies....59
   - 5.7 Bad debt relief....60
   - 5.8 Other input tax problems....60
6. ADMINISTRATION AND PENALTIES....66
   - 6.1 Group registration....66
   - 6.2 Other registration rules....73
   - 6.3 Payments and returns....75
   - 6.4 Repayment claims....75
   - 6.5 Timing issues....76
   - 6.6 Records....76
   - 6.7 Assessments....76
   - 6.8 Penalties and appeals....80
   - 6.9 Other administration issues....84

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 says that it will be updated monthly, but it appears to be less frequent or regular than that. The latest update appeared on 28 February 2024.

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

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

- *Bolt Services UK Ltd*: HMRC granted leave to appeal FTT's decision that ride-hailing services were within TOMS.
- *Conservatory Roofing UK Ltd*: Upper Tribunal remitted case to FTT to consider further relevant information not taken into account when dismissing company's appeal.
- *Hotel La Tour Ltd*: HMRC have been granted permission to appeal the UT decision in the company's favour to the Court of Appeal (hearing listed for April 2024).
- *Innovative Bites Ltd*: HMRC have appealed the FTT decision in the company's favour to the Upper Tribunal (hearing was in 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 2024).

- *Sonder Europe Ltd*: HMRC have been granted leave to appeal the decision in this update at 2.9 that supplies of accommodation were covered by TOMS (hearing listed for December 2024).
- *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.

1.2 Decisions in this update

- *Hippodrome Casino Ltd*: Upper Tribunal allowed HMRC's appeal against the FTT decision in the company's favour on partial exemption.
- *The Prudential Assurance Company Ltd*: taxpayer's appeal to the CA against the UT's decision in favour of HMRC on the interaction of the time of supply and grouping rules was rejected by a majority decision.
- *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, but a different FTT judge confirmed the original decision that the products were "confectionery".

2. OUTPUTS

2.1 Scope of VAT: linking supplies to consideration

2.1.1 Grant-funded education

A second case has now been heard involving Colchester Institute Corporation (CIC) and the question of whether the provision of grant-funded education is "outside the scope non-business" or "exempt business". The fundamental issue is whether grants provided by government funding bodies constitute third party consideration for the supply of education to students, or are "true grants" without the necessary reciprocal link to the supplies being made.

The context of the dispute is the "Lennartz mechanism", which allows a trader with part-business, part non-business use of an asset to claim 100% of the input tax on purchase and then account for output tax on the non-business use over the life of the asset. Until the rules were changed in 2009 to prevent the use of Lennartz for buildings, it was accepted that colleges which received grant funding could apply it to their capital property costs. CIC made substantial claims in 2009 for input tax incurred on a building project that was completed in 2008 and brought into use during the quarter to 31 January 2009. Input tax, net of output tax on deemed supplies in excess of £2m was repaid to CIC in December 2009.

In 2014, CIC's VAT advisor submitted a claim for recovery of the last four years' worth of output tax accounted for on deemed supplies, less a small amount of input tax that had been recovered in the same period. The claim was based on the argument that grant income was consideration; no part of the building was therefore used for non-business purposes. The Lennartz output tax should therefore not be accounted for, and the input tax was not recoverable. However, the large amount of input tax that had been recovered up front was out of time for assessment. The advisor had gathered a group of colleges to make similar claims.

The claim was refused; HMRC also raised assessments for periods after 01/2015, as CIC had given notice that it was no longer accounting for the Lennartz output tax.

In 2020, the Upper Tribunal decided that some of the grants constituted consideration for supplies of exempt education. However, the claim for repayment of output tax was refused on the basis of the principle in *Birmingham Hippodrome*: although HMRC were out of time to assess the over-recovered input tax, they were allowed to net it off against a claim for over-declared output tax if it arose from the same mistake. The repayment claim therefore failed. The current appeal concerned the assessments that HMRC continued to raise in relation to later periods.

After setting out the history and the law at some length, Judge John Brooks came to his decision very quickly. He was bound by the decision of the Upper Tribunal: the grant income was business income, which meant that Lennartz deemed supplies could not arise. The assessments in relation to £99,000 of output tax were therefore discharged. The appeal was formally allowed in part, because the college had conceded a part of it relating to disallowed input tax amounting to £24,700.

First-Tier Tribunal (TC09097): *Colchester Institute Corporation*

Lecture 1

2.2 Disbursements

2.2.1 Article

In an article in *Taxation*, Richard Pedley complains that caravan site owners add VAT to the recharge of business rates to caravan owners. He considers this unfair because business rates themselves are not subject to VAT; presumably the site owners consider the recharges not to fall within the definition of disbursements, so they represent an increase in the consideration for the supply of the site (which is subject to VAT as an exception to exemption in Group 1 Sch.9 VATA 1994).

Taxation, 21 March 2024

Lecture 2

2.2.2 MOT tests

HMRC have updated their internal guidance on MOT tests in the *VAT Taxable Person* manual. The update is peculiar, because it refers to a change in policy that took effect on 1 November 1996, and it is not clear what they have actually changed. The guidance now reads as follows:

The fee charged by an approved test centre for carrying out an MOT test has always been seen as outside the scope of VAT. However, a garage which is not approved as a test centre may arrange for a vehicle to be tested elsewhere as part of its service to the vehicle's owner. In these circumstances, the unapproved garage will usually be classed as an agent and the treatment of the MOT test fee is based on normal disbursement principles. With effect from 1 November 1996:

- *the charge for an MOT test provided direct by a test centre to its customers is outside the scope of VAT, provided it does not exceed the statutory maximum;*
- *any discount given by a test centre to an unapproved garage should be treated as a normal trade discount and not as consideration for a taxable supply by the unapproved garage to the test centre;*
- *the unapproved garage may treat the amount that it pays to the test centre for the MOT [as a disbursement – these words appear to have been deleted in the updating] (assuming, of course, that all the other conditions set out in VTAXPER39000 are met);*
- *any amount charged by an unapproved garage to its customer over and above the amount charged by the test centre is consideration for its own service of arranging the test as agent of the customer and is taxable at the standard rate;*
- *if the unapproved garage chooses not to treat the exact amount charged by the test centre as a disbursement, or otherwise does not satisfy all the conditions set out in VTAXPER39000, it must account for VAT on the full invoiced amount.*

This policy is supported by both the Society of Motor Manufacturers and Traders and the Retail Motor Industry Federation.

In January 1999, it was upheld by the VAT tribunal in the case of M A Ward trading as Acorn Garage (MAN/98/507Y). However, in the latter, the law was not argued in any detail.

For operational reasons, an approved MOT test centre may need to subcontract the test to another approved MOT test centre. Reasons may include staff shortage, equipment failure etc. Where this happens, the supply of the MOT to the customer will remain outside the scope of VAT, provided it does not exceed the statutory maximum, regardless of any discount that may be given by the subcontracted test centre. This is because the first test centre is still making a supply of an MOT test (the charge for which is outside the scope of VAT) whether from its in-house resources or not.

At first sight, this appears to reiterate a policy that was heavily criticised by several VAT Tribunal judges in cases around 2006/07, which are not mentioned here. Where an unapproved garage subcontracted MOT testing to an approved garage, the Tribunals held that the amount recharged to the customer could be treated as outside the scope of VAT even if all the normal conditions of disbursement treatment were not met (in particular, recharging the exact amount that the approved garage charged). The judges held that it was enough that the customer knew that the test would be carried out by someone else, and only the excess of the recharge over the cost of the test was subject to output tax (as consideration for the unapproved garage arranging for the test to be carried out).

VTAXPER48000

Lecture 2

2.3 Exemptions

2.3.1 Updated guidance on insurance

The *VAT Insurance Manual* has been updated to reflect the changed status of EU law from 1 January 2024. The page on “services of an insurance intermediary: insurance brokers and insurance agents” which deals with the CJEU decision in *Arthur Andersen & Co* (Case C-472/03) states that the direct effect of EU law cannot override the UK law for periods after 1 January 2024.

This is curious, because the *Andersen* case was about *limiting* the exemption to supplies meeting the CJEU’s view of what an insurance broker or agent did. The guidance therefore suggests that traders might have relied on it up to 31 December 2023 to make certain supplies *taxable* when the UK law treats them as exempt. Now, according to the guidance, they must be treated as exempt. It seems more likely that HMRC would have wanted to rely on the *Andersen* case in order to deny exemption.

The revised guidance reads as follows:

From 1 January 2024, it will no longer be possible for any part of any UK Act of Parliament or domestic subordinate legislation to be quashed or disapplied on the basis that it was incompatible with EU law. This will

mean that businesses will no longer be able to rely on direct effect of EU Law.

As a consequence, the relevant guidance for insurance intermediation for periods following the 1 of January 2024 is found within this manual at: VATINS5220.

For periods prior to January 2024, taxpayers may choose to rely on CJEU case law, as set out below.

The Andersen case concerned the VAT liability of certain 'back office' services supplied by Arthur Andersen to an insurance company. These services included the issuing, management and cancellation of policies, the management of claims and, in most cases, taking decisions that bound the insurer to enter into insurance contracts.

The CJEU was asked whether these services qualified for exemption under Article 13 B (a) (now Article 135 1 (a) of the Principal VAT Directive), as 'related services performed by insurance brokers and insurance agents'. To fall within the exemption Andersen had to qualify as either a broker or an agent.

The CJEU held that the essential characteristic of insurance brokers was that they had complete freedom of choice of insurer for their client. Andersen did not work on behalf of an insured party, but rather for a single insurance company, therefore it could not qualify as a broker.

The Court further held that an insurance agent, while usually tied to a particular insurer, must be instrumental in bringing together the two parties to the insurance contract by finding prospective clients and introducing them to the insurer. Andersen did not perform any type of introductory service and therefore could not qualify as an agent. The fact that they were able to bind the insurer was not a determining factor. The Court therefore decided that Andersen did not fall within the exemption.

Consequently, some services which fall within the UK exemption at Item 4, for example claims handling or the administration of contracts of insurance provided separately from introductory services, can be treated as outside of the exemption and therefore taxable, in the event that a business wishes to apply 'direct effect' of EU law. This does not apply to periods following the 1 of January 2024.

VATINS5210

There has also been an update to the page on block insurance policies such as those considered in the *Card Protection Plan* case. This page states that block policyholders, who pass on the benefit of their own insurance to their customers, are treated as principals rather than agents in the supply of insurance. Their whole income from the supply is therefore treated as exempt, rather than being reduced by an amount passed on to the insurer, and this will affect their partial exemption calculations.

VATINS2300

A number of other pages have been deleted because they are no longer relevant after the implementation of the REUL Act 2023 on 1 January 2024.

VATINS5440, VATINS6020, VATINS5110, VATINS2400, VATINS1110, VATINS6025

Lecture 3

2.3.2 Healthcare again

Another case has considered the borderline between exempt medical care and standard rated cosmetic treatments. The decisions appealed against included a registration decision made in January 2020 setting an EDR of 1 July 2010, and assessments totalling £1,635,614 for the period from 1 June 2010 to 31 March 2020. Further assessments had been issued for later periods.

HMRC's position was that almost all of the services supplied by the appellant were purely cosmetic. If there was more than one purpose, the principal purpose was cosmetic, with ancillary therapeutic purposes.

The appellant claimed that purely cosmetic procedures without a medical purpose formed a small proportion of the supplies, if any, and the company was therefore "comfortably below the registration threshold".

Judge Anne Scott noted that the hearing bundle comprised 1,768 pages and the authorities bundle extended to 653 pages. The appellant submitted a further 49-page bundle relating to the Joint Council for Cosmetic Practitioners. The sole witness was the doctor who ran the clinic; the judge agreed with HMRC's counsel that his evidence often strayed into opinion and advocacy. She discounted his evidence to the extent that it amounted to opinion rather than fact.

The judge also noted that she had authorised transcripts at a case management hearing, because the appellant had stated an intention to appeal an adverse decision to the Upper Tribunal. However, the transcripts were "not in conventional format, had no index and at certain points were not in the least coherent". The judge relied on her own notes to interpret the transcripts.

The parties had not agreed on the issues, but there were some common ground. Both parties agreed that some cosmetic treatments can qualify as medical care, but that exemption only applied where the purpose of the service is to diagnose, treat, and insofar as possible, cure diseases or health disorders including the protection, maintenance or restoration of health. The burden lay on the appellant to show that this was the case. The subjective understanding of the patient might be relevant, but would not be determinative. The purpose of the service would determine whether it was exempt, and it was for the Tribunal to identify that purpose.

The parties referred to the Court of Appeal's decision in *Mainpay*. It was not a close analogy on the facts (as it concerned a supply of staff), but it did include an analysis of the meaning of exempt healthcare. The CA had analysed the CJEU decision in *Kugler* (Case C-141/00) and derived four principles:

(a) "mere involvement in medical services by qualified personnel" is not sufficient to qualify for the exemption;

(b) "exemptions are to be construed strictly as exceptions to the general rule …, and that words of extension cannot be read in (see e.g. Case C-366/12 *Finanzamt Dortmund-West v Klinikum Dortmund GmbH*…";

(c) “medical care” is defined as “diagnosing, treating and, in so far as possible, curing diseases or health disorders”; and

(d) “*Kügler* confirms that the supply in question must be of medical care, coming within the established meaning of that term, from D and other cases, which requires that the services have a therapeutic aim, that they consist of the diagnosis, treatment or cure of disease or ill-health. That is what the phrase ‘medical services must be involved’ in the English version of Kügler means.”

The CA had also noted that, if particular supplies are not exempt applying the terms of the PVD, properly construed, they cannot come within the exemption simply because not to do so would increase the cost of medical care. Judge Scott agreed.

She noted that both parties had made submissions in relation to the recent Tribunal cases including *Illuminate Skin Clinics*, *Ultralase Medical Aesthetics*, *Skin Rich* and *Window to the Womb*; as those decisions were not binding, she referred to them only when she adopted their reasoning.

The judge summarised the history of the dispute, which started with a corporation tax enquiry and proceeded to a VAT enquiry conducted under COP 9. Sample patient records were provided to HMRC. It was not disputed that the format of patient records was changed following the involvement of the tax advisers who dealt with the enquiry.

HMRC’s conclusions from reviewing the files were that:

(i) Patients have sought treatment to address cosmetic concerns rather than to address any disease or health disorder (either psychological or otherwise).

(ii) There is no record of any clinical diagnosis of any disease or health disorder having been made or any treatment plan having been directed towards addressing it.

(iii) In some instances, there is reference to a diagnosis of ‘psychological concerns relation [sic] to appearance’ but there is no adequate specification of the nature of those concerns or any diagnosis of any psychological disorder. These references do not amount to a clinical (or other professional) diagnosis.

The judge regretted the difficulty in establishing the facts, which had to be examined going back to June 2010. The doctor’s witness evidence tended to concentrate on the recent past, and was not satisfactory in relation to that. He had been professionally advised since 2018, and he had the onus of proof. She cited comments from other judges on the interpretation of evidence from witnesses who “are emotional and think they are morally right”, who “tend very easily and unconsciously to conjure up a legal right that did not exist.” As a result, it was safer to rely on documentary evidence and known or probable facts.

The judge was in no doubt that the doctor passionately believed that he took a holistic approach to his patients and that everything that he did was in the patient’s best interests and for the benefit of the patient’s psychological health. However, there were numerous discrepancies between the contents of his witness statement, his oral evidence and the documentation that had been lodged with HMRC and the Tribunal. There

were also omissions or gaps. This was particularly true of the account given of the early days of the clinic.

The judge examined the evidence available in great detail, discussing the contents of the patient records from different periods of the practice and the conclusions she drew from them. The discussion of the decision only begins at paragraph 287, where Judge Scott gives this brief summary: “Do I find that the purpose of the services provided by the appellant, in the round, is to diagnose, treat or cure health disorders or to protect, maintain or restore human health? In short the answer is no and that for the following reasons.”

She went on to explain that there was no credible or coherent evidence that the clinic was providing medical care within the accepted definition in any of the years under review. There was no contemporaneous evidence that the treatments given were intended to treat a health disorder. It was clear from the evidence that the patients chose the appellant’s services because they wished to improve their appearance; the appellant’s website encapsulated that thinking. The patient questionnaires showed that to be the case.

The doctor’s assertion in “evidence” that all cosmetic care involves psychological treatment which provides therapeutic benefit “just does not assist; there is a need, a crucial need, to identify both a health disorder and treatment, that for evidenced clinical reasons will provide a therapeutic result. The appellant has not done that.”

The decision goes on to consider a number of peripheral arguments, including whether HMRC’s attitude to cosmetic medicine constituted an unacceptable “administrative fiat”, or imposed an unreasonable standard of record-keeping, and whether fiscal neutrality was engaged.

The overall conclusion was that the appeal failed, on the basis of the facts found, on the evidence adduced. HMRC’s registration decision and best judgement assessment were upheld.

First-Tier Tribunal (TC09030): *Aesthetic-Doctor.Com Ltd*

Lecture 3

2.3.3 Live streaming of funerals

HMRC have issued a Brief on the treatment of live web streaming of funeral, burial or cremation services. They consider that this is an exempt supply where it is made by an undertaker, cemetery or crematorium operator, so any input tax incurred on the direct costs or overheads of providing the service is not recoverable. Where live web streaming of services is supplied by a third party for a separate consideration, that web streaming is not within the scope of this exemption, and will be subject to the standard rate of VAT. HMRC say that any VAT that has been charged or claimed incorrectly can be adjusted through the VAT return.

VAT Notice 701/32 *Burial, cremation and commemoration of the dead* has been updated with this information.

Revenue and Customs Brief 1/2024

HMRC's internal guidance in the *VAT Government And Public Bodies Manual* has been updated to include this service in the table of exempt supplies by crematoria.

VATGPB8645

Lecture 3

2.4 Zero-rating

2.4.1 Sports nutrition

A company sold a package containing a flapjack and either a cake bar or a brownie. The intention was that the flapjack would be eaten before exercise and the cake or brownie afterwards. The company had registered for VAT in September 2021, and in October 2021 its advisers had sought a ruling on the VAT liability of the products. In January 2022 HMRC issued a ruling that they were standard rated confectionery. This was upheld on review in March 2022, a decision that was appealed within 30 days. The company argued that they should be zero-rated as "cakes".

As usual in food cases, witness evidence was provided by a range of experts: the founder and owner of the appellant; a graphic designer and independent brand consultant; the managing director of a pair of wholesale baking companies; and a food consultant specialising in the development of new products.

There was also a preliminary argument about whether three plates of cakes should be admitted in evidence, together with till receipts for these "comparator products" showing their VAT treatment. The judge considered that an additional witness statement had been submitted late without good reason, and declined to admit it. HMRC raised no objections to the plates of cakes, but Judge Ian Hyde agreed with HMRC that till receipts showing the retailers' view of the VAT treatment of these products would be of limited relevance.

Apparently the application to admit the late evidence "was the subject of extensive and at times an intemperate debate between counsel, which took all morning of the first day of the hearing. We would hope that in future counsel, particularly experienced counsel from the same chambers, could maintain a more even debate in the Tribunal."

The decision goes through the development of the product and the idea of selling carbohydrate and protein in separate products to meet the needs of people exercising. Ingredients, manufacturing process and marketing were all reviewed.

It was common ground that the appeal would succeed if the products were held to be "cakes", even if they were also "confectionery". If they were not cakes, it would be necessary to decide whether they were "food in general" or "confectionery", either on general principles or on the basis of the definition in VATA 1994 Sch.8 Group 1 Note 5 ("sweetened prepared food which is normally eaten with the fingers").

The judge raised the question of what would happen if the Tribunal decided that one product was zero rated and the other was standard rated. Both counsel agreed that it might then be necessary to consider whether there was a composite supply, but asked for a ruling on the individual products so that issue could be discussed if necessary.

The judge derived the following principles from precedent cases on food classification:

(1) words should be given their ordinary meaning.

(2) there needs to be a multifactorial assessment of a range of factors that the Tribunal considers relevant which can include not only the objective characteristics of the goods in question such as their ingredients, texture and so on but also factors such as how they are marketed, how they are perceived by the public and how they are eaten.

(3) the test is the ordinary person's view as to the nature of the product and whether or not the product is one which falls within the relevant category.

(4) the precise factors to be considered and their relative importance may vary depending on the circumstances.

(5) the question does not lend itself to extensive legal analysis but is a short practical question.

(6) there may be features on both sides of the argument and the Tribunal should allocate the goods to the category which is most appropriate.

The Tribunal carried out a multifactorial assessment of the products to determine whether they were, on balance, cakes. This involved consideration of ingredients, manufacturing process, size and appearance, taste and texture, marketing, and circumstances of consumption. The conclusion was that "they look and have the appearance of cakes but the ingredients, taste, packaging, marketing and pattern of consumption of the Products are such that an ordinary person would not consider them cakes."

In analysing Note 5, the judge went back to the Purchase Tax Act 1963, the Finance Act 1972 which introduced VAT into the UK, and the 1988 Order which introduced the definition of confectionery. There was extensive argument about the effect of an "inclusive definition" in the law, and whether it served to include other items of the same type as those which went before it (chocolates, sweets and biscuits; drained, glace or crystallised fruits). Counsel for the appellant argued that the products were not similar to such items, so they should not be covered by the definition.

The judge considered the purpose of the 1988 amendment (to bring cereal bars within the definition of confectionery) and the natural meaning of the constituent elements of the phrase in Note 5. He concluded that the products were confectionery as defined by the law.

He also carried out a multifactorial assessment to decide whether the products were confectionery on general principles. This was not strictly necessary but had been argued before the Tribunal. The judge confessed to finding the task difficult, not least because of the lack of logic in the distinctions drawn by the law and by HMRC's practice. Nevertheless, he

concluded that on the multifactorial test an ordinary person would not consider the products to be confectionery.

The appeal was dismissed, on the basis that the products were confectionery as defined by the law, even if not on general principles, and were not cakes.

First-Tier Tribunal (TC09055): *Duelfuel Nutrition Ltd*

Lecture 4

2.4.2 Poppadoms

A company appealed against a ruling, issued in June 2021, that two of its products were standard rated. These were "Sensations Poppadoms", available in Lime & Coriander Chutney and Red Chilli Chutney flavours. HMRC ruled that they fell within excepted item 5 of Group I, because they are "products [similar to potato crisps, potato sticks, potato puffs] made from the potato, or from potato flour, or from potato starch" and are "packaged for human consumption without further preparation". HMRC also contended that it would breach the principle of fiscal neutrality to treat the products as zero-rated (while the manufacturer argued that it would breach the same principle to treat them as standard rated).

Judge Anne Fairpo noted that it was agreed that the products were not specifically "potato crisps, potato sticks, potato puffs"; the dispute was as to whether or not the products are "made from the potato, or from potato flour, or from potato starch" and whether they are "similar products".

As a preliminary point, the company had argued that the products required "further preparation before consumption". At the hearing, they accepted that the packaging would be required to state any such necessary preparation. Their advertising material also showed people eating the product directly from the package. The company agreed that it would no longer rely on this argument.

The ingredients were listed as follows:

(1) Lime & Coriander flavour: Sunflower Oil (22.09%), Potato Granules (17.98%), Potato Starch (17.98%), Gram Flour (14.38%), Rice Flour (14.38%), Flavouring (6%), Modified Potato Starch (4.31%)

(2) Mango & Chilli flavour: Sunflower Oil (21.60%), Potato Granules (17.60%), Potato Starch (17.60%), Gram Flour (14.08%), Rice Flour (14.08%), Flavouring (8%), Modified Potato Starch (4.22%)

Broadly speaking, the two flavours contained nearly 40% of ingredients that were potato granules, potato starch or modified potato starch. The company (which left the modified starch out and based its arguments on 34% potato content) submitted that this was an amount far lower than the potato content of potato crisps, sticks and puffs. It also argued that as Note 5 does not mention "potato granules", these should be left out of account.

The judge agreed with HMRC that "potato granules" and "modified potato starch" were "made from the potato" and were therefore within the scope of Note 5. On the basis of the decision in *Proctor & Gamble* (the Pringles case), 40% was sufficient to satisfy the test that the product was "made from the potato etc.".

The next question was whether the products were "similar to potato crisps". The company argued that this test of similarity did not require a multifactorial assessment, and that the ordinary person on the street would not regard poppadoms as crisps or similar products. The judge agreed with HMRC: a multifactorial assessment was required. The question of whether traditional poppadoms were, or were not, similar to potato crisps was not relevant to this appeal. "It is not a binary test; a product may be similar to many things but the only similarity that matters in this context is whether it is similar to a potato crisp, stick or puff. We note also that a product might be similar to another foodstuff without being mistaken for that foodstuff – the items do not need to be identical to meet the test in Note 5." A traditional poppadom is not made of potato, so it cannot fall within Note 5, regardless of any other similarities.

The judge considered marketing, appearance, flavour, texture, manufacturing process and ingredients. The company provided a customer survey, but the judge did not find it helpful, as it did not make clear what questions were asked, nor the context in which they were asked. Her overall assessment was that the products were sufficiently similar to fall within the definition.

The argument about fiscal neutrality was rapidly dismissed. HMRC argued that the products were not similar to traditional (zero-rated) poppadoms because they were made of potato. Judge Fairpo simply found that there was insufficient evidence about the attitude of customers to meet the company's burden of demonstrating a breach of fiscal neutrality.

The appeal was dismissed.

The decision has the following memorable extract: "The appellants argued that the products were called 'poppadoms, unlike potato crisps'. We consider that this simply means that the word "poppadom" is not a protected term. Nominative determinism is not a characteristic of snack foods: calling a snack food 'Hula Hoops' does not mean that one could twirl that product around one's midriff, nor is 'Monster Munch' generally reserved as a food for monsters."

First-Tier Tribunal (TC09024): *Walkers Snack Foods Ltd*

Lecture 4

2.4.3 Cereal bars

In TC08087, a supermarket reclaimed £1m in respect of one cereal bar ("Organix") and nearly £100,000 in respect of another ("Nakd") that HMRC had ruled were standard rated. The case came before Judge Anne Redston in the FTT in 2021, who provided the following brief summary of how her decision was reached:

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

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

(2) whether there was binding authority as to the meaning of Note 5 to Group 1, which provides that "sweetened prepared food…normally eaten

with the fingers" automatically falls within the meaning of "confectionery". HMRC's position was that R&C Commrs v Premier Foods Ltd [2007] EWHC 3134 (Ch) ("Premier") had decided that the meaning of "sweetened" in that statutory phrase includes items which are intrinsically sweet, such as dates. I decided that this was not the ratio of Premier, see §103ff;

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

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

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

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

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

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

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

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

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

Upper Tribunal

The company appealed to the Upper Tribunal, arguing that the FTT had made errors of law in its analysis of whether the items were "confectionery". The alleged errors were treating certain factors as irrelevant, namely:

- the actual or perceived healthiness of the products and/or the products' marketing as healthy;
- the absence of cane sugar, butter and flour (ingredients associated with traditional confectionery).

HMRC counter-argued that the FTT had also incorrectly dismissed its argument that a product that was already sweet could be categorised as "sweetened", in line with the decision in *Premier Foods*.

The appeal only considered arguments about "confectionery". The separate question of whether the bars were "cakes" was not reconsidered. There was no challenge to the FTT's general approach or to its underlying findings of fact. The Upper Tribunal briefly summarised those findings and the multi-factorial assessment carried out by Judge Redston.

The UT started its discussion with a consideration of the effect of an error of law in the context of a multi-factorial assessment. HMRC argued that the error would have to be perverse (i.e. no Tribunal properly instructed would have left the factor out of account) to be an issue; in addition, to be material (so that the UT would set aside the decision), the UT would have to conclude that the error of law would have changed the outcome. The appellants argued for a lower threshold: there simply had to be an error of law, and it would be enough that it might have changed the outcome.

The UT went on to consider the need for caution when considering a multi-factorial assessment carried out by the FTT, because it should be slow to interfere with the exercise of judgement based on all the evidence. The appellants argued that this related to the overall balancing exercise which was the proper role of the FTT; there should be less caution where (as was claimed here) the FTT had taken an irrelevant factor into account or omitted a relevant factor in its assessment. After examining a number of precedent cases (not exclusively about VAT), the UT concluded that "perversity" was not required for there to be an error of law. The "might have" test of materiality was adopted by the Court of Appeal in the most recent authority on the matter (*Degorce*, a 2017 case about whether participation in a film scheme constituted a trade); the UT rejected a distinction HMRC tried to draw between errors of approach and omission of a factor from the multi-factorial assessment.

The taxpayer's counsel argued that the FTT had misinterpreted the decision in *Kalron* as supporting the proposition that "healthiness" was irrelevant. Although the UT did not accept all of counsel's arguments, it concluded that the FTT had made an error. Healthiness or otherwise was not a "trump card" that proved that something should be zero-rated, but it was potentially a relevant factor in deciding whether something fell within the ordinary understanding of the legislative term "confectionery".

The failure to consider the marketing of the products as healthy was not considered to be a separate error of law, but rather part of the same error.

Turning to the point about the relevance of the ingredients (or absence of them), the UT noted that the FTT had relied on the 2007 High Court

decision in *Premier Foods*. However, that decision did not support the conclusion: the HC had concluded that the Tribunal in that case had made errors of law in its assessment of what was required to be confectionery, and remitted the matter to a differently constituted Tribunal for reconsideration. That did not establish a principle that the absence of particular ingredients was irrelevant to the question.

The UT emphasised that this did not elevate the importance of the ingredients to something that would be likely to determine the issue, but consideration of those ingredients would be part of the overall classification of the product.

The UT then rejected HMRC's argument based on *Premier Foods*: in the view of the judges, the case turned on the meaning of the word "confectionery", not the meaning of "sweetened". Other Tribunals that had relied on the case as supporting the proposition that inherently sweet items could be "sweetened" were, in the view of the UT (agreeing with the FTT) incorrect.

The UT went on to consider whether the errors of law were material to the FTT decision. It concluded that "healthiness" was a factor that could have a pervasive effect on the assessment of other factors in interpreting the word "confectionery"; excluding its relevance might have made a difference. That was the appropriate test, and it was necessary to set aside the FTT's decision.

As the required re-evaluation might involve further findings of fact, it would not be appropriate for the UT to remake the decision. It should be remitted to a differently constituted FTT (to avoid any possible impression of the judge being influenced by her earlier decision), but the new decision should be based on the evidence presented to the first FTT (with the possibility of sampling the products as the first judge had done). A number of other directions were made.

Lastly, the UT noted that the FTT had declined to consider the question of quantum. HMRC had argued that the repayment to Morrisons, if successful, should be restricted by the input tax that it had claimed on purchases of the bars from manufacturers, as that would have been wrongly charged. The FTT had considered that an academic point, and the UT agreed that it should only be considered if it became necessary following the FTT's further consideration.

Remitted to FTT

Judge Greg Sinfield heard the remitted appeal. He noted that the factors that had vitiated the first FTT decision were failures to consider as relevant factors the "healthiness" of the products and their marketing on that basis, and the fact that they do not contain ingredients associated with traditional confectionery (cane sugar, butter or flour). The judge noted that he was to base his decision on the evidence that was taken by the first Tribunal, but could conduct his own tests of the taste and texture of the products. He would take a number of primary findings of fact as given, but was able to make additional findings of fact on the basis of evidence that was before the original FTT.

The judge considered a number of precedents as well as dictionaries on the subject of "confectionery". In his view, the case law shows that the word is a broad term that extends beyond traditional sweets and

chocolates to encompass cakes and biscuits (which are specifically brought within zero rating by item 2 of the excepted items in Group 1 of Schedule 8). "In our view, there is a continuum of sweet snack foods running from items that are undoubtedly 'confectionery' at one end of the scale to items that are incontrovertibly not 'confectionery' at the other. For example, sweets and chocolates are obviously 'confectionery' while raisins and other dried fruits are not 'confectionery' notwithstanding that they fulfil a similar function as a sweet snack."

He suggested that the factors "the ordinary person in the street" would consider in deciding whether something was confectionery were:

(1) what are its ingredients?

(2) how is it made?

(3) what does it look, feel and taste like?

(4) when, where and how is it consumed?

The third factor was likely to be the most significant.

The judge made a number of findings of fact based on the original decision, then additional findings based on his own sampling of the products. There is a discussion of the features of so many products that it appears likely the judge had to taste a large number. The ones he did not taste were likely to share similar features, as the varieties that were available had many factors in common.

On the question of "healthiness", the judge noted that on the government's "traffic light system" to help people make healthy choices, all the products would have a red light, as would all confectionery. The marketing, and the perception of the people buying the product, were not necessarily a good guide.

The judge summarised his findings as follows:

"The Products all look, feel and taste like confectionery products. They are small bars of a similar size to chocolate or candy bars and are clearly intended to be eaten with the hands. The Products are all slightly sticky to the touch and soft when squeezed. The Products share a soft, moist and chewy mouthfeel although some have a cereal like texture while others are denser and more fudgy. The energy density and mouth feel are also similar to energy dense nougat and fudge. All the Products taste sweet with predominant flavours that are either fruity, chocolatey or nutty (or a mixture of them). We find that flavours of fruit, chocolate and peanuts or other nuts are commonly found in confectionery of different types and the use of them in the Products supports our view that they are confectionery."

The judge quoted Judge Fairpo's comment about nominative determinism in dismissing an argument that any of the products could be zero-rated on the basis of what they were called. They were not cakes or flapjacks.

The appeal was dismissed.

First-Tier Tribunal (TC09095): *WM Morrison Supermarkets plc*

Lecture 4

2.4.4 Updated Notice

HMRC have updated their Notice *Energy-saving materials and heating equipment* to confirm that from 1 February 2024, the scope of the energy-saving materials relief is being extended to include installations in buildings used solely for relevant charitable purposes. The list of energy-saving materials is also extended from 1 February 2024 to include water source heat pumps, electrical battery storage and smart diverters.

The guidance on single and mixed supplies in the context of energy-saving materials has also been updated, and information that was only relevant to previous versions of the relief has been removed (e.g. social policy conditions for installation and the 60% proportion test for the cost of materials).

Notice 708/6

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

2.8.1 No separate supply

In TC08462 (2022), an insurance broker developed, marketed and sold “telematics” car insurance, in which a device was fitted to the cars driven by drivers (mainly aged 17 to 25) to measure their driving performance. The data gathered by the devices was monitored to provide feedback to the drivers and the insurers, who would reduce or increase the premiums according to the perceived level of risk. The company was only a broker and did not underwrite any of the risk.

In 2018 it submitted an error correction notice to reclaim just over £2 million in input tax incurred on the purchase and fitting of the devices. It argued that it was making a taxable supply of the devices to the policyholder and was therefore entitled to claim input tax. That supply was alternatively argued to be for non-monetary consideration (in agreeing to enter into the policy) or no consideration (in which case a taxable supply could still arise under VATA 1994 Sch.4 para.5).

HMRC rejected the claim, holding that there was no supply of the goods to the policyholder. The only supply made by the company was of insurance intermediary services made to the insurers; the costs incurred in fitting the device were cost components of that exempt supply. The company appealed to the FTT, where it came before Judge Greg Sinfield.

The judge set out the issues for determination as follows:

(1) Did ISL make supplies of the Device and related services to the policyholders for consideration?

(2) If ISL did not make supplies to the policyholders for consideration, did ISL make a deemed supply of the Device?

(3) If ISL made a taxable supply to the policyholder for consideration, how should the VAT chargeable on the supply be calculated?

(4) If ISL made a deemed taxable supply of goods, how should the VAT chargeable on the deemed supply be calculated?

Because the PVD applied throughout the period, and UK legislation had to be construed as conforming to the PVD, the judge cited only the articles of the PVD that were relevant. These included articles 2(1), 14(1), 16, 24(1), 73, 74, 168 and 135(1)(a).

The evidence included a detailed consideration of the contracts between the company and the insurers, and the company and the insured. The starting point for determining whether there was a supply for consideration was to consider the contracts; in this case, there was no suggestion that the contracts were in any way artificial, and counsel for the taxpayer did not suggest that the commercial and economic reality was in any way different.

The analysis is very detailed, but the conclusion was clear: under the contracts, the company did not make a supply of goods for consideration either to the policyholder or to the insurer. The policyholder was required to have a working device fitted to their car as a condition of having the insurance, and the company undertook to incur the costs of fitting it as part of its obligations to the insurer. The contracts explicitly stated that the device did not become the policyholder’s property as a result. Payments for having new devices fitted were collected by the insurer in the same way as premiums, and the judge held that they were extra consideration for the insurance cover.

HMRC argued that the deemed supply rules could not be used to create a right to deduct input tax where none existed. The goods were cost components of a purely exempt supply, and that could not be recharacterised as a partly exempt supply with a deemed taxable element. Counsel for the taxpayer responded that a deemed supply had been used to generate a right of repayment in *Church of England Children’s Society*, a 2005 High Court decision which was binding on the Tribunal. The judge agreed with HMRC that the reasoning in that case had been superseded by the CJEU decisions in *Mateusiak* (Case C-229/15) and *Mitteldeutsche Hartstein-Industrie* (Case C-528/19).

Mateusiak dealt with a deemed supply on deregistration, but the principle was the same: there could be no deemed supply without a prior right to deduct input tax. The right to deduct input tax could not be generated purely by the deemed supply. In *Mitteldeutsche Hartstein-Industrie*, the taxpayer had incurred costs on improving a public authority’s roads, and the CJEU held that it had not made a deemed supply to the authority because the costs were incurred for its own purposes. The judge considered that *Church of England Children’s Society* had been decided “per incuriam” (incorrectly) and he did not have to follow it.

Because he had decided that no supply or deemed supply was made by the company, it was not necessary to consider what the output tax on such supplies would have been. The appeal was dismissed.

The company appealed to the Upper Tribunal, where it came before Mr Justice Adam Johnson and Judge Thomas Scott. They used the name that the company had when it made the supplies (Ingenie Services Ltd. part of a VAT group with Ingenie Ltd as representative member). The judges agreed with the approach of the FTT in relying on the EU legislation. After summarising the decision of the FTT, the UT set out the grounds of appeal:

The primary argument was that the FTT had made errors of law in deciding that the company did not make a supply to the policyholders for consideration. The policy booklet created a contractual relationship between the company and the policyholders; the consideration for the supply did not have to be explicitly stated in that contract. The FTT had also not adequately considered the alternative argument that the supply was for third party consideration, being £150 received by the company from the insurer for each fitted device. Policyholders who changed their vehicle during the term of the insurance had to pay for a new device, and this was also monetary consideration.

The secondary argument was that the FTT had wrongly analysed the case law authorities on deemed supply and had therefore come to the wrong conclusion that there was no such supply of the device.

Because the FTT had decided that there was no consideration, it had not been necessary to determine what supply the company might have been making. The UT approached the question from the other direction: it decided that it was necessary to decide what, if any, supply the company was making, before determining whether that supply was made for a consideration.

The UT agreed with the FTT that the installation of the device did not constitute a supply of goods to the policyholder, because there was no transfer of the right to dispose of the property as owner. The question of whether there was a supply when the policy lapsed or was cancelled was less clear: the FTT had concluded that the company did not at that point agree to transfer the property to the policyholder, but simply abandoned any claim to it as it was of no further economic use. However, that later occurrence was not relevant to the company's primary ground of appeal, which focussed on the initial fitting of the device.

HMRC argued that "some provisions of goods or services, which viewed separately from the rest of the overall transaction, and in theory capable of constituting supplies, are deprived of the character of a supply when viewed in context." The "supply" of the device was simply a necessary precondition to the supply of insurance services by the insurer to the policyholder. They relied on a 2006 High Court decision, *MBNA Europe Bank Ltd*, a case that had not been cited to the FTT. The UT did not consider the facts of that complex case (about securitisation) to be helpful or relevant in the present situation. Reliance on MBNA had been rejected by the Court of Appeal in *ING Intermediate Holdings* (2017), where Arden LJ said that the correct approach in determining whether a supply had been made remained to examine the contracts between the parties, and

only to go behind the contract if it does not reflect the true agreement between them.

In the present case, it was common ground that the policy booklet set out the contractual terms, and there was no suggestion that it did not reflect the economic and commercial reality of the transactions. Since it set out terms about the installation of the device, it followed that there was a supply of services by the company to the policyholders in that respect.

HMRC maintained that the nature of the supply was a single, indivisible, overarching supply of insurance intermediary services, made either to the insurer or to the policyholder or both. It was therefore a wholly exempt supply. The UT rejected this. The installation of the device could not fall within Sch.9 Group 2: it was possible to regard the act of installing it as a "service of an insurance intermediary", but it was not supplied "in the course of acting in an intermediary capacity" as that requirement is explained in Note 2.

The UT therefore concluded that the company made a supply of services to policyholders, comprising the installation of the device, which would be a taxable supply if made for consideration. That led to the most difficult question in the appeal.

The judges noted the difference between "consideration" in English contract law (where, as a necessary part of a contract, its existence might logically be deduced from the fact that the policy booklet was a contract) and EU VAT law. They commented "It is not particularly helpful to think of the EU law meaning as wider or narrower than (say) the UK contract law meaning; it is different." They summarised the relevant principles established by CJEU precedents for determining whether there is a supply for consideration:

(1) There must be a supply of goods or services.

(2) There must be a legal relationship between supplier and recipient.

(3) There must be reciprocal performance pursuant to that relationship.

(4) Where the consideration is services, there must be a direct link between the supply by the supplier and the provision of services by the recipient.

(5) The value of the services supplied by the recipient must be capable of being expressed in monetary terms.

The UT went through the FTT's analysis of the policy documentation. The judges commented that the precise reason for concluding that the supply of services to the policyholders was not for consideration was not explicitly spelt out. It was therefore necessary to consider the EU criteria in turn:

(1) The UT agreed with the FTT that there was no supply of goods, but there was a supply of services.

(2) The policy booklet created a legal relationship between the policyholders and the company. Because the issue was VAT, it did not matter whether this was a contract in English law.

(5) The FTT had not considered this question because it had decided it did not need to. However, the UT concluded that the condition was satisfied:

even if valuation would be difficult, it would be possible to express that value in monetary terms, for instance by reference to the fee paid to the third party for installation of the device.

As regards (3) and (4), the UT concluded that the FTT must have decided that there was no supply for consideration because there was no "direct link" in all the circumstances, even though this was not explicitly stated in the decision. After further consideration of the A-G's analysis in *Tolsma*, the judges concluded that the FTT reached a decision on this issue which did not involve any error of law and which was available to it on the basis of its findings of fact.

The FTT had commented that the policy booklet "does not contain any term under which the policyholder agreed to do anything or allow anything to be done in return for the provision of the first device". Although HMRC's counsel criticised this on the basis that consideration does not have to be explicitly stated in English contract law, the UT agreed with the FTT judge that it was relevant in the context of VAT law. In *Tolsma*, the A-G referred to the need for "a stipulated exchange of mutually dependent services" and "the stipulation of a price or consideration".

The UT also agreed with the FTT that "the fact that the policyholder enters into two contracts at the same time does not necessarily mean that one is consideration for something done under the other even where the two are inextricably linked". It was open to the FTT judge to decide that entering into the insurance contract was not consideration directly given for in return for the service of fitting the device. Put simply, did a policyholder take out an insurance policy and agree to installation of the Device as the price for installation of the Device, or for something else and for some other reason? That question was not answered simply by asserting that the two contracts were inextricably linked. The FTT was not persuaded that the policyholder did anything in order to receive the device, but rather regarded the device as a necessary precondition to receiving the insurance.

The UT considered that the conclusion was even stronger when standing back and reviewing the commercial and economic reality of the situation. The fitting of the device was something that the company did in pursuance of its contract with the insurance company, and it was paid for it out of its commission. It was not impossible for the same transaction to be the subject of two supplies and two separate sets of consideration, but this undermined the strength of the company's argument.

The UT next considered the argument that there was monetary consideration when a policyholder cancelled the policy and had to make a payment. In this case, the policy booklet clearly stated that the charge was for cancellation of the policy, not for a supply of goods. Similarly, a payment required on a change of vehicle was a further charge for the continuation of the insurance cover.

Lastly, the UT confirmed the decision that there was no deemed supply. The FTT had reached this conclusion on the basis of analysis of CJEU decisions later than *Church of England Children's Society*, but the judges did not consider that necessary. There was a material difference between the situations: in the present case, no input tax was deductible on the initial purchase of the devices (because they were bought for the purposes

of a wholly exempt business), whereas in the earlier case, some of the input tax on the costs had been deductible. That may have been the reason for the High Court judge ignoring the following italicised wording in VATA 1994 Sch.4 para.5(5): "Neither sub-paragraph (1) nor [sub-paragraph (4) above shall require anything which a person carrying on a business does otherwise than for a consideration in relation to any goods to be treated as a supply except in a case where that person [or any of his predecessors is a person who (*disregarding this paragraph*) has or will become entitled…". The words in the parentheses were consistent with the later decisions of the CJEU: where no input tax was initially deductible (as in the present case, unlike *Children's Society*), the deemed supply alone could not create a right to deduct.

The appeal was dismissed.

Upper Tribunal: *WTGIL Ltd v HMRC*

Lecture 5

2.9 Agency

Nothing to report.

2.10 Second hand goods

Nothing to report.

2.11 Charities and clubs

Nothing to report.

2.12 Other supply problems

2.12.1 Self-supply charge

HMRC assessed a company to £22,500 in output tax in respect of an alleged self-supply of two Land Rover Discovery vehicles. HMRC considered that they had been converted from commercial vehicles to non-qualifying cars and were therefore subject to the charge. The company argued that the vehicles were not converted to cars; if they were cars, they were qualifying cars; and if they were non-qualifying cars, the use was only temporary and they were converted back to commercial vehicles.

There was no dispute that the vehicles were commercial when they were purchased. They were to be used in towing trailers (which the company sold) to customers, and to transport staff to trade fairs. A few days after the purchase, three fold up seats with seat belts were installed behind the driver and passenger seats and the side windows and back windows, which had been blacked out, were cleared. The installation had been carried out by a specialist company which had advised the company that the addition of the seats to the vehicle to expand on its use within the business did not affect its commercial status for VAT purposes.

A company director gave evidence that the vehicles were used only for business purposes. The employees were aware that they could not use the vehicles for private purposes and did not do so. The vehicles were kept at the business's premises. Judge Marilyn McKeever considered the witness to be reliable and accepted his evidence.

The company had claimed a large repayment for the 08/21 return when the vehicles were purchased, which led to an enquiry. Documents requested by HMRC were provided, together with the advice received from the converters. Subsequently the company reversed the conversion, taking the seats out and reinstating the vehicles to their original condition.

The original investigating officer disallowed the input tax on the purchase. This was varied on review: the input tax was allowed, but there was a self-supply output tax charge on conversion. The company stated that the conversions had been reversed and claimed the output tax back again, but the officer said this was not possible.

The judge reviewed the law defining cars and qualifying cars and imposing the self-supply charge (the 1992 *Cars Order*). She concluded that the vehicles had been converted into cars, but noted that the self-supply charge would not apply if the trader would have been entitled to the input tax on the purchase of that car. If there was only business use and no intention to make the cars available for private use, there would be no charge.

As she had found as a fact that there was no such intention, and there was only business use, the appeal was allowed.

First-Tier Tribunal (TC09044): *Three Shires Trailers Ltd*

Lecture 6

3. LAND AND PROPERTY

3.1 Exemption

3.1.1 Hospital car parking

In TC08056, a NHS Trust argued that it should not have to account for output tax on parking charges for visitors, hospital staff and others at some of its sites. It put forward two grounds:

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

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

First-Tier Tribunal

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

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

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

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

this one." There were some 50 other claimants with a total of about £70 million in issue.

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

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

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

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

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

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

The Trust's appeal was dismissed on every ground.

Upper Tribunal

In October 2022, the Upper Tribunal upheld the FTT's decision. Bacon J and Judge Jonathan Cannan considered that the car parking facilities offered by the trust were not subject to a special legal regime, and allowing them to be treated as not VATable would lead to a significant distortion of competition.

Court of Appeal

In the CA, Lady Justice Falk started by making three preliminary points. First, she was aware that the subject of hospital car parking charges was controversial: the court was not concerned with the merits of that debate. Second, the case only dealt with the situation in which the supply was

made directly by a NHS Trust, and the court would make no comment on subcontracted arrangements. Third, the dispute and the decisions related to parking at healthcare facilities in general, not just hospitals; however, “hospital car parking” was a convenient way to refer to the supply.

The judge set out the principles derived from CJEU case law on the application of PVD art.13 in determining whether a public authority was “acting as such”:

a) Insofar as it amounts to a derogation from the general rule that economic activities are subject to VAT, Article 13 must be interpreted strictly.

b) Article 13 must be given an autonomous and uniform interpretation, taking account of its context and objective.

c) In deciding whether a public authority is acting as such, the subject-matter and purpose of the activity is irrelevant.

d) Instead, what is determinative is the way in which the activities are carried on. The only criterion is the legal regime applicable under national law. The question is whether the public authority engages in the activities in question under the “special legal regime” applicable to it; in contrast, public authorities do not act as such where they act under the “same legal conditions” as those that apply to private traders. This is the “special legal regime” issue already referred to. All relevant national law conditions must be considered.

e) It is insufficient that the authority in question possesses public law powers if they do not have some impact on the activity.

The principles to apply in deciding whether there is a significant distortion of competition are:

f) The aim of the second subparagraph of Article 13(1) is to ensure that private operators are not placed at a disadvantage because they are taxed while public bodies are not.

g) The second subparagraph should not be construed narrowly.

h) The question whether non-taxation “would lead to significant distortions of competition” must be evaluated by reference to the activity as such, without reference to any particular local market.

i) That question encompasses both actual and potential competition, provided that the possibility of a private operator entering the relevant market is real and not purely hypothetical.

j) Any distortion that is more than negligible is “significant”.

k) The application of the second subparagraph of Article 13(1) requires an assessment of economic circumstances.

After a detailed examination of the CJEU precedents, the judge concluded that the Tribunals below had come to too narrow an interpretation of “special legal regime”. The facts that the Trust could not operate as effectively if it did not manage parking efficiently, that car parking was part of an integrated transport policy, and that there were centrally issued guidelines on parking that the Trust was obliged to follow, were enough to constitute a “special legal regime”.

Turning to the question of distortion of competition, the judge emphasised that the objective of the provision is to ensure that private operators, including potential future entrants, are not placed at a disadvantage. it must be non-taxation, rather than anything else, that is or would be causative of that disadvantage. The question is whether the treatment of public authorities as non-taxable, rather than other factors such as the non-profit making nature of the association in *Taksatorringen* (a case about cost-sharing groups), would lead to significant distortions of competition. The FTT made factual findings that the Trust participated in the market and that there was actual competition between its car parks and parking provided by private operators. The real controversy was not over that issue but whether there would be distortions of competition, and whether they would be significant.

It was for HMRC to prove, on a balance of probabilities, that there would be significant distortions of competition if hospital car parking in general (as opposed to in the particular case) was not taxed. It was necessary to carry out an assessment of the economic circumstances, because a failure to do so would amount to a presumption leading to one result or the other. There were important differences between a competition law case and a VAT case in this area: for VAT, it was necessary to disregard the local market and consider "the activity as such", and the objective is fiscal neutrality. The VAT analysis operates in one direction only: it is concerned with the risk of private operators being placed at a competitive disadvantage, not with any other aspect of competition in the marketplace.

After further detailed analysis of precedents on distortion and fiscal neutrality, including *Rank*, the judge concluded that the FTT had made an error of law in its approach to distortion of competition, and the UT had made an error of law in upholding it. "What is required are findings of fact, based on evidence, that demonstrate that in the counterfactual of non-taxation there would be significant distortions of competition. An assessment of economic circumstances must be carried out." The necessary findings of fact were not present.

This meant that it was appropriate to allow the appeal on both grounds and set the decisions below aside. It was then necessary to remit the case to be reconsidered, or to remake it. The judge decided it was appropriate to remake it. In considering whether she should make any further findings of fact, she had not identified any material that would assist HMRC. Her concluding remarks on how HMRC might go about proving a distortion of competition are interesting:

One issue that would arise in undertaking such an assessment would be what the relevant "activity" is for the purposes of the analysis mandated by Isle of Wight CJEU: is it the provision of car parks generally (like off-street car parking in that case) or is there something specific about car parking at hospitals? And if it is the former, to what extent might differential tax treatment of the limited number of hospital car parks as compared to the total number of car parks actually have a distortive effect?

Assuming that point is resolved, the assessment might be expected to cover the scope for prices to be lower (between 0 and 20% on current VAT rates) and the likelihood of that occurring and to what extent, bearing in mind the references in the guidance to dissuading the use of

hospital car parks by commuters and other non-service users. There would also need to be an assessment of the likely impact of any price reduction on consumers or actual or potential competitors, which would need to include some consideration of such matters as price elasticity and other drivers of demand. For example, if hospital car parks have little or no spare capacity now (with VAT in place) that might well suggest that users are not materially influenced by pricing considerations but rather by other factors, in particular proximity and accessibility. None of that analysis has been undertaken.

The appeal was unanimously allowed by the three judges.

Court of Appeal: *Northumbria Healthcare NHS Foundation Trust v HMRC*

Lecture 7

3.2 Option to tax

3.2.1 Updated Notice

HMRC have updated their Notice *Option to tax land and property* with a list of authorised signatories (section 7.1) and confirmation that no acknowledgement letter will be sent. No e-mail acknowledgement will be sent if an OTT is attached to VAT registration submission; it appears that taxpayers are making duplicate submissions direct to the OTT e-mail address to obtain an e-mail receipt for evidence.

The Notice confirms that an option to tax has legal effect even though HMRC do not acknowledge receipt of a notification. Businesses should begin charging VAT from the effective date of the option to tax.

Notice 742A

Lecture 8

3.3 Developers and builders

3.3.1 Construction Industry Scheme

The *Income Tax (Construction Industry Scheme) (Amendment) Regulations 2024* supplement the changes brought in to the CIS by FA 2024. That added compliance with VAT obligations to the statutory compliance test for being granted, and for keeping, gross payment status. The new regulation sets out the compliance obligations in relation to VAT that must be met to receive and retain GPS and ensures minor VAT compliance failures will not result in GPS refusal or removal. It does this by amending regulation 32 within the CIS Regulations that sets out the prescribed compliance obligations and the failures that HMRC will overlook. The exceptions proposed for VAT are in line with the allowances made for slightly late filing of CIS returns and slightly late payment of other taxes due. The regulations took effect on 6 April 2024.

SI 2024/308

Lecture 9

3.4 Input tax claims on land

Nothing to report.

4. INTERNATIONAL SUPPLIES

4.1 E-commerce

Nothing to report.

4.2 Where is a supply of services?

4.2.1 Fixed establishment

Advocate-General Kokott has given an opinion in yet another case about fixed establishments. She noted that it was the fifth request for a ruling on the issue since 2018, and the third since the judgment in Dong Yang Electronics that has asked, in essence, whether a controlled company or a group company is to be regarded as a fixed establishment of the parent company or another group company. There had been, up to that point, a total of just six comparable requests for a preliminary ruling since the introduction of the Sixth Directive in 1977. The A-G found this "astonishing".

She noted that the CJEU's ruling in *DFDS* may have contributed to this; the fact that the *Dong Yang* judgment did not rule out the possibility that a subsidiary could be a FE of its holding company may have encouraged tax authorities to "search within corporate structures for fixed establishments constituted in the form of subsidiaries or even just other group companies."

She explicitly states that the Romanian tax authorities in the current case are only concerned with collecting interest and penalties: as the companies concerned can all deduct input tax, there would be no actual VAT revenue in any country.

The company in the appeal is a German group company of an automotive group. In 2016 it entered into a contract with a fellow group company in Romania to provide a comprehensive service consisting of both the manufacture and assembly of upholstery components, as well as ancillary and administrative services. The German company owned the goods that the Romanian company worked on, and was registered for VAT in Romania; nevertheless, it used its German VAT number in relation to the supplies of manufacturing and other services from the Romanian company, which treated them as outside the scope of Romanian VAT.

Following a tax inspection, the Romanian authorities ruled that the Romanian company constituted a fixed establishment in Romania, and output tax would therefore be due on the supplies of services. In due course the following questions were referred to the CJEU:

(1) Are the provisions of PVD art.44 and of Implementing Regulation (IR) arts.10 and 11 to be interpreted as precluding the practice of a national tax authority whereby an independent resident legal person is classified as the fixed establishment (FE) of a non-resident entity solely on the basis that the two companies belong to the same group?

(2) Are the provisions of PVD art.44 and of IR arts.10 and 11 to be interpreted as precluding the practice of a national tax authority whereby it is considered, by reference only to the services supplied to a non-

resident entity by a resident legal person, that a FE of a non-resident entity exists within the territory of a Member State?

(3) Are the provisions of PVD art.44 and of IR arts.10 and 11 to be interpreted as precluding tax legislation and the practice of a national tax authority whereby it is considered that a FE of a non-resident entity exists within the territory of a Member State, given that that FE supplies only goods and not services?

(4) Where a non-resident person has, within the territory of a Member State, human and technical resources within a resident legal person which are used to ensure the supply of services whereby goods are manufactured – goods which are to be supplied by the non-resident entity – are the provisions of PVD art.192a(b) and of IR art.11 and art.53(2) to be interpreted as meaning that those manufacturing services supplied by means of the technical and human resources of the non-resident legal person are: (i) services received by the non-resident legal person from the resident person by means of those human and technical resources, or, as the case may be, (ii) services provided by the non-resident legal person itself by means of those human and technical resources?

(5) Depending on the answer to Question 4, how is the place of supply of services to be determined with reference to the provisions of PVD art.44 and of IR arts.10 and 11?

(6) In the light of IR art.53(2), should activities linked to the treatment of goods, such as taking delivery, recording inventory, placing orders with suppliers, providing storage areas, managing inventory in the IT system, processing customer orders, indicating the address on transport documents and invoices, providing quality control support, and so on, be disregarded when determining the existence of a FE, given that they are ancillary administrative activities which are strictly necessary for the manufacture of the goods?

(7) In view of the principles relating to the place of taxation as the place where final consumption takes place, is it relevant for determining the place of supply of the manufacturing services that the goods resulting from those services are mostly (intended to be) sold outside Romania, while those sold in Romania are subject to VAT, and therefore the result of the services is not "consumed" in Romania or, if it is "consumed" in Romania, it is subject to VAT?

(8) Where the technical and human resources of the FE receiving the services are virtually the same as those of the provider through whom the services are actually performed, is there still a supply of services for the purposes of PVD art.2(1)(c)?

The A-G grouped the questions into:

- #8: whether the transaction could happen at all;
- #1, #2, #3 and #7: identifying FEs within a group, where the head office (place of establishment) is in another country;
- #4, #5 and #6: concerning whether the German company should be treated as resident or non-resident in Romania.

She disagreed with the Romanian government's objection that the questions were inadmissible. There was an assumption of relevance that was not overridden in any of the questions.

In answering the eighth question first, the A-G suggested that, on the Romanian government's interpretation, the supply would effectively be an internal transaction: the Romanian FE of the German company would both make and receive the supplies. No Romanian VAT would therefore be due. This circularity has been pointed out in previous cases on the same issue.

Turning to the questions about FEs and groups, she made the following points:

It is apparent from the very wording of the VAT Directive that a controlled but legally independent company cannot be regarded as being, at the same time, a fixed establishment of a different group company. Art.44 refers to "a taxable person who has established his business in one place and has a FE in another place" – but separate companies are two taxable persons, not one.

PVD art.11 allowed Member States to treat closely linked companies as a single taxable person, but that explicitly operated only within a single territory. It could not be applied where the companies were established in different countries.

None of the criteria for identifying a FE under IR art.11 related to company law connections. Rather, they are about permanence and making and receiving supplies. The A-G expanded on her opinion in Dong Yang that the *DFDS* decision was exceptional and restricted to its special circumstances: it was about the application of TOMS, and for that reason alone could not be treated as transferable to other situations.

She regretted the ambiguity in the *Dong Yang* ruling that suggested it was possible for a subsidiary to be a FE. This undermined the legal certainty required by taxpayers and tax authorities alike. The CJEU had noted in *Welmory* that treating separate companies as separately established in their own countries provided a simple, objective and practical criterion for determining the VAT treatment.

She drew a distinction between a contract for the supply of services and a contract for a supply of resources: if a company in one country (not necessarily part of the same group) agreed to provide resources to another company, it could constitute a FE. If it provided services in its own name as an independent contract partner, it is assumed to be using its own resources for its own needs.

The third question was dismissed briefly: there was no apparent reason for determining the place of supply of the Romanian company's supplies based on what the German company did.

Likewise, the seventh question introduced another irrelevant factor: the place of final consumption of the goods concerned made no difference to supplies pf services between the Romanian and German companies.

The A-G noted that the answer might be different if there was evidence of an abusive practice, but there was no such evidence. The Romanian authorities had levelled the accusation of misuse of the German VAT number, but that had been properly used as evidence of a place of

establishment in Germany; the VAT number issued in Romania did not constitute, and was not proof of, a fixed establishment in that country.

The A-G summed up her conclusions in this area as follows:

An independent company cannot in principle be a fixed establishment of a different independent company at the same time. Even a complex contract for the supply of services does not mean, in and of itself, that the supplier is effecting a taxable transaction in favour of a fixed establishment of the service recipient that came into being on the basis of that contract. In that regard, the place of supply of those services depends neither on the nature of the output transactions (supply of goods or services) of the service recipient, nor on the place of 'consumption' of the individual manufacturing services.

In relation to the other questions, the A-G suggested that they concerned the situation in which there was a FE in the other country, and the issue was whether that FE was involved in the particular supply. However, that did not arise here: she returned again to the distinction between a supply of services and a supply of resources. In that case, those resources could "substitute for a head office located within the territory of another Member State".

CJEU (A-G) (Case C-533/22): *SC Adient Ltd & Co. KG v Agentia Nationala de Administrare Fiscala, Agentia Nationala de Administrare Fiscala – Directia Generala Regionala a Finantelor Publice Ploiesti – Administratia Judeteana a Finantelor Publice Arges*

Lecture 10

4.3 International supplies of goods

4.3.1 Inward Processing Relief

In TC08653, the FTT decided that a failure to provide accurate and complete information to HMRC in relation to a quantity of goods on which inward processing relief (IPR) had been claimed gives rise to a customs debt, not just in relation to that quantity of goods, but on all the goods covered by the relevant bill of discharge report. The decision was made on the basis that it was consistent with the CJEU judgment in *Döhler Neuenkirchen GmbH v Hauptzollamt Oldenburg* (Case C-262/10).

The appeal by Thyssenkrupp (T) was against a decision by HMRC to issue a C18 Post Clearance Demand Note in the amount of £8,889,275.43. By the time of the hearing before the FTT in November 2021, HMRC had accepted that the quantum of the Demand should be reduced to £7,739,730.55, comprising (i) customs duty of £2,016,400.94; and (ii) import VAT of £5,723,329.61. The HMRC letter accompanying the C18 included the following words: "failure to comply with an obligation arising in respect of goods liable to import duties, from the use of the customs procedure under which they were placed", which are very similar to the words used in Community Customs Code, Article 204.

Inward processing relief (IPR) was the customs procedure which T had been authorised by HMRC to use. The C18 Demand was issued because

HMRC considered T had breached the IPR conditions by failing to submit accurate bills of discharge which satisfactorily demonstrated the disposal of the goods.

T had complied with the requirement to submit bills of discharge to HMRC quarterly in an Excel spreadsheet format. There was a mismatch, however, between the data that had been submitted on the CHIEF system and the data that was submitted in Excel spreadsheet format. The relatively large amount of the C18 Demand relates to a claim by HMRC that a single error on a single row of a bill of discharge spreadsheet schedule incurs a customs debt, not just in respect of the import duties relating to that row, but in respect of the import duties relating to all the rows in the relevant bill of discharge.

HMRC made the point that if an entry on the CHIEF system was incorrect, and the entry in the bill of discharge was correct, T should have made a post clearance amendment to correct the incorrect entry on the CHIEF system and should have referred to the post clearance amendment in the relevant bill of discharge. The FTT noted that, although a failure to make a post clearance amendment in relation to an entry on the CHIEF system is not an omission on a bill of discharge, the absence of the post clearance amendment meant that it was impossible for HMRC to reconcile the data and therefore it was correct for HMRC to regard the data as inaccurate or incomplete.

One of the arguments presented in support of T was an argument that measures to be adopted by Member States to ensure respect for the Community Customs Code must comply with the principle of proportionality. The CJEU judgment in *Döhler* was referred to in support of the argument.

The FTT did not, however, accept the argument and noted that in the same judgment the CJEU had confirmed that in circumstances where the IPR conditions are not met the obligation to pay customs duties is not a penalty. The FTT considered that the CJEU judgment supported the approach taken by HMRC and dismissed the appeal.

Upper Tribunal

The company appealed to the Upper Tribunal, where it came before Mrs Justice Bacon and Judge Greg Sinfield. The grounds of appeal were that the FTT had erred in concluding that any error on a bill of discharge led to a liability on the whole amount, and also erred in interpreting *Döhler* as supporting that view, and also that it had failed to give sufficient reasons for its conclusions.

The UT reviewed a number of CJEU precedents on customs procedures. In Case C-430/08 *Terex*, the court confirmed that traders had a strict liability for even minor classification errors, but disagreed with HMRC in holding that the trader should be allowed to regularise the situation with a correction. In Case C-402/10 *Groupe Limagrain Holding*, once again the CJEU upheld the strict requirement to maintain stock records in order to protect the revenue, but again held that doubts as to the accuracy of the entries in the stock records or relating to discrepancies or minor omissions in those records could therefore be resolved by reference to additional documents.

Döhler was described by the UT as a “more extreme example”. The company had failed to submit any bill of discharge, even after the deadline was extended by almost two months. The authorities had therefore imposed duty on all the imported goods in respect of which the period for discharge had expired. When Döhler finally submitted its BoD, it indicated that some (but not all) of the imported goods had been re-exported from the EU and so would not have incurred any customs duty had the BoD been submitted on time. Döhler challenged the difference between the amount of duty imposed by the customs authorities and the lesser amount which Döhler considered was due. The CJEU effectively upheld the authorities’ right to impose a customs debt on the whole amount.

The UT pointed out that this case dealt with a situation in which a BoD had not been submitted within the relevant deadline. It was not authority for the proposition that any error on an otherwise compliant BoD would give rise to a customs debt on the whole amount. The UT also noted that the rules that applied at the time had been superseded by the Union Customs Code, which specifically provided that a customs debt which has arisen through non-compliance with one of the conditions for a customs procedure will be extinguished where evidence is provided to the satisfaction of the customs authorities that the goods have not been used or consumed and have been taken out of the customs territory of the EU, and there has not been any attempted deception (art.124).

The company also relied on Case C-154/16 *Latvian Tankers*, which concerned goods in a transit procedure which were not produced “intact” to the customs office at the destination, because some of the liquid goods had leaked. The CJ had confirmed that in principle a customs debt could arise on the whole consignment, but if the loss was due to destruction or irretrievable loss in transit, a customs debt on importation only arose on that part of the goods which was not produced. The UT noted this, but commented that the factual situation was quite different (loss of goods rather than problems with records and documentation), and therefore made its decision without relying on it.

Turning to the analysis of the reasoning in *Döhler*, the UT commented that HMRC’s omission of a particular sentence from the judgment was “pure syntactical sleight of hand”. The CJ decision related to non-submission of the BoD, and did not reach any conclusion as to the consequences of errors in individual cells within a BoD. The UT “unhesitatingly rejected” HMRC’s interpretation of the case.

HMRC’s fallback argument was that the company had submitted BoDs which then had to be corrected, and was therefore “arguably on all fours” with *Döhler* – at the deadline, it had not submitted a BoD. This was described by the UT as “a hopeless proposition”. There was a fundamental difference between non-submission and submission of a document containing a small number of errors across over a hundred thousand data points.

The UT then considered HMRC’s argument that any discrepancy between the BoD and HMRC’s data records gave rise to a customs debt “without the need for further investigation”. The judges rejected this as involving the “Kafkaesque” requirement to submit an incorrect BoD where it was known that the original declaration had contained an error, just to be

consistent. The true position must be that discrepancies required investigation, but that could lead to the position being regularised without incurring a customs debt.

Lastly, the judges considered whether discrepancies could be ignored as de minimis. They examined a number of examples put forward by HMRC, and concluded in relation to the great majority of them that, as a matter of principle and also in relation to the specific facts, they should be ignored. A customs debt will be incurred under art.204(1) of the Community Customs Code where there has been either non-fulfilment of an "obligation" arising from the use of the relevant customs procedure, or non-compliance with a "condition" of that procedure, unless it is established that the relevant failure has "no significant effect on the correct operation of the … customs procedure in question". An error which has either no effect, or no significant effect on the correct operation of the IP procedure will not therefore incur a customs debt under art.204(1).

The appeal was allowed.

Upper Tribunal: *Thyssenkrupp Materials (UK) Ltd v HMRC*

Lecture 11

4.3.2 Evidence of export

A company appealed against assessments totalling £1.176 million which denied zero-rating for 72 separate export transactions in scrap metal between February and September 2016. It was no part of HMRC's case that bad faith was alleged nor was it argued that the company was a participant in fraud. The question for determination by the Tribunal was whether the company held valid commercial evidence within three months of supply per the requirements of Notice 725 to demonstrate that the 72 supplies of scrap metal had been removed from the UK. The 72 supplies were in respect of 91 loads of scrap metal.

Judge Geraint Williams reviewed the history of the dispute, which involved the company accepting that it had not provided the documentation required by Notice 725, but claiming that it had provided adequate alternative documentation. There had been procedural hearings at which an application by HMRC to have the appeal struck out was refused.

The company had also tried to obtain further documentation from P&O Ferries in response to a Tribunal direction in November 2020, but this had not been possible because of the lapse of time, problems arising from Covid-19, and the huge increase in customs-related paperwork following the end of the Brexit implementation period.

Witnesses for the company gave evidence about how the business operated. They claimed that each sale of scrap metal by HR is evidenced by a suite of documents which can be matched to each transaction:

(1) The sales invoice. This is produced by the company.

(2) Bank statement. The payments to the company's account from a particular customer may not match the invoices because a running account is maintained.

(3) Weighbridge ticket. This records the net weight of the load and is automatically produced by the FRED system.

(4) CMR. This produced by the haulier.

(5) Annex VII statement. This is information required to accompany shipments of waste and is completed by the company using information given in advance by the customer and from the haulier.

(6) Boarding card. This is produced by P&O.

The director claimed that these documents, taken together, satisfied the substantial requirements of Notice 725.

The judge considered a number of precedents on the requirements for zero-rating, including *Teleos*, *Musashi Autoparts* and *Arkeley Ltd*. These established that it was not necessary for the Tribunal to determine whether an export had actually taken place: the question was whether the company held sufficient evidence of export within the prescribed time limit.

The judge then went through the documents in detail, together with the submissions made by counsel on behalf of the appellant. He rejected many of the submissions, including one that it was enough for the documents to exist within the three-month period and be obtained by the claimant subsequently – the requirement was for the claimant to obtain and hold the documents within the time limit.

The eventual conclusion was that none of the documents, individually or taken as a whole, relied on by the company were sufficient to evidence the exports of the loads of scrap metal according to the requirements of Notice 725. The appeal was dismissed.

First-Tier Tribunal (TC09067): *H Ripley & Co Ltd*

Lecture 12

4.3.3 Transfer of residency relief

An individual moved to the UK in September 2012 with his family when his son was awarded a scholarship. Initially they had intended to return to New Zealand after 3 years; they brought some of their personal possessions to the UK and stored the remainder in the garage and loft of the NZ House because they intended to return. However, in 2019, they decided to remain permanently in the UK. Plans to sell their New Zealand house and move their possessions were delayed by the pandemic. As a result, when they finally did move their personal possessions, they were outside the 12-month window for claiming customs duty relief following transfer of residency.

HMRC had ruled that a period of 10 years was too long to allow exceptional circumstances to overrule the law. The Tribunal examined the facts and could only agree with HMRC. None of the circumstances put forward by the appellant were exceptional; he had had a number of options available to him over a long period, and had not exercised them. Judge Jennifer Newstead expressed sympathy for the appellant, but the appeal had to be dismissed.

First-Tier Tribunal (TC09088): *Mr Stewart Bowman*

By contrast, the FTT allowed an appeal by a Cypriot national who moved to the UK in February 2023 and applied for transfer of residence relief in respect of a car she had purchased in Cyprus (paying Cypriot VAT) in September 2022. HMRC refused her application, which was made on 8 May 2023, on the basis that she had not possessed the car for six months prior to moving to the UK.

Judge Rachel Gauke noted that the law [the Customs and Excise Duties (Personal Reliefs for Goods Permanently Imported) Order 1992] provides:

(1) Subject to the provisions of this Part, a person entering the United Kingdom shall not be required to pay any duty or tax chargeable in respect of property imported into the United Kingdom on condition that—

(a) he has been normally resident in another country for a continuous period of at least twelve months;

(b) he intends to become normally resident in the United Kingdom;

(c) the property has been in his possession and used by him in the country where he has been normally resident, for a period of at least six months before its importation;

(d) the property is intended for his personal or household use in the United Kingdom; and

(e) the property is declared for relief—

(i) not earlier than six months before the date on which he becomes normally resident in the United Kingdom, and

(ii) not later than twelve months following that date.

HMRC accepted that conditions (a), (b), (d) and (e) were all met. The only issue was the measurement of the 6 months in condition (c). The judge compared the 1992 Order with the Customs (Reliefs from a Liability to Import Duty and Miscellaneous Amendments) (EU Exit) Regulations 2020, which provided for relief post-Brexit if the person coming to the UK had possession and use of the goods for a six-month period before the person ceased to be ordinarily resident in another country. If this was not satisfied, relief would still be available if there were “exceptional circumstances”.

It appeared that HMRC had not noticed the difference in the regulations with regard to the 6 month period. Their representative suggested that the intention of the two sets of regulations was the same. The judge dismissed the various circumstances that the appellant had put forward as “exceptional” – the Russian invasion of Ukraine that led her to apply for a move to the UK, and the Covid-related delays in the car industry that made her wait 8 months for delivery of the car – as not being particular to her and not falling within the 2020 regulations. However, the provisions of the 1992 Order applied to her, as she had not brought the car to the UK yet and continued to use it on visits to Cyprus. The judge thought it unlikely that the 2020 regulations were intended to take away a relief that was already available – they applied in slightly different circumstances.

The appeal was allowed.

First-Tier Tribunal (TC09083): *Antri Georgiou*

4.3.4 Import One Stop Shop

HMRC has published a notice setting out information on what businesses need to do if they have opted to register for the Import One Stop Shop (IOSS) Scheme.

This Notice is made under VATA 1994 Sch 9ZE and provides information on what needs to be done:

- when businesses opt to register for the IOSS scheme;
- to complete and submit an IOSS scheme return;
- to pay the VAT due on an IOSS scheme return;
- when IOSS scheme registration details change; or
- when businesses cease making qualifying supplies under the IOSS scheme.

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

Lecture 13

4.3.5 Amended regulations

The *Value Added Tax (Distance Selling) (Amendments) Regulations 2024* amend the provisions of the VAT Import One Stop Shop (IOSS) and the VAT One Stop Shop (OSS) simplified accounting schemes.

The regulations amend the scope of the IOSS scheme to remove the VAT reporting and accounting requirements for goods moved within the United Kingdom (i.e. between Northern Ireland and the Rest of the UK). Businesses which choose to use the IOSS scheme will continue to account for VAT on these sales through normal UK VAT returns as they would for any other internal UK sale. All VAT due on these supplies will be accounted for through the UK VAT return.

The regulations will also bring into line the regime for penalties and interest for those who do use the IOSS and OSS schemes with the wider regime introduced for VAT on 1 January 2023, ensuring consistent treatment for all types of UK VAT accounting. However, this instrument will only apply the late payment penalty at s.117 of and Sch.26 FA 2021 to the IOSS and OSS schemes to ensure that penalties are not issued in cases where businesses have no UK VAT to report and have legitimately chosen not to make declarations.

They came into force on 1 March 2024.

The explanatory note issued with the regulations has links to the Tax Information and Impact Notes on the OSS and IOSS schemes and the interest and penalty rules, as well as the Windsor Framework documents.

SI 2024/128;
https://www.legislation.gov.uk/uksi/2024/128/made/data.html

The Finance Act 2021, Section 95 and Schedule 18 (Distance Selling: Northern Ireland) (Appointed Day No. 2) Regulations 2024 bring into

force on 1 March 2024 all the provisions of s.95(1) and Sch.18 FA 2021 that are not already in force, subject to the exceptions in regulation 4. These provisions concern Value Added Tax and distance selling transactions.

Regulation 4 sets out the exceptions which concern persons who may be registered for VAT, becoming registered for VAT, further provision about registration, and IOSS representatives.

SI 2024/130

4.3.6 VAT Import One Stop Shop scheme

HMRC have issued new guidance on GOV.UK in relation to the IOSS. Where once this might have been contained in a Notice, there are now several different pages on the website dealing with individual aspects. The web addresses below contain the subject matter of the guidance, which should be read by those who need to use the IOSS.

The overall introductory guidance explains who these people are:

You can choose to register for the VAT IOSS scheme to report and pay VAT, if you sell goods imported in consignments with a value of £135 or less (known as low value goods) from countries outside the EU and Northern Ireland, to consumers in the EU, Northern Ireland, or both.

To use the scheme your goods must:

- *be located in a country outside the EU and Northern Ireland at the point of sale*
- *have a consignment value of £135 or less*
- *be sold to a consumer in the EU or Northern Ireland*

www.gov.uk/guidance/cancel-or-make-changes-to-your-vat-import-one-stop-shop-scheme-registration

www.gov.uk/guidance/check-if-you-can-register-for-the-vat-import-one-stop-shop-scheme

www.gov.uk/guidance/register-for-the-vat-import-one-stop-shop-scheme

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

www.gov.uk/guidance/pay-the-vat-due-on-your-import-one-stop-shop-vat-return

Lecture 13

4.3.7 Confirmation of seizure

The High Court overturned a decision of the magistrate’s court that a notice of seizure had been improperly served on a company because it had been delivered to the company’s solicitors rather than to the company itself. This was misconceived, and the decision would be set aside. The High Court decision considers the rules on lawful seizure and service of notice.

The case was remitted to a differently constituted magistrate’s court for a decision on whether or not the goods in question (3,969kg of products containing tobacco) had been liable to forfeiture.

High Court: *Director of Border Revenue v OM Cash and Carry Ltd*

4.3.8 Low Value Consignment Relief (LVCR)

The Supreme Court has unanimously rejected an appeal by Jersey Choice Ltd in connection with the withdrawal of LVCR for imports from the Channel Islands in 2012.

Up until Brexit, mail order imports into the UK worth up to £15 were generally exempt from VAT on importation. This was exploited by UK businesses using a practice known as "round-tripping": goods such as contact lenses were exported to the Channel Islands in bulk (zero rated), broken down into individual postal packages and sent back to UK customers with the benefit of LVCR. This avoided the output tax that would have to be charged on straightforward UK-to-UK mail order sales.

In 2011 the government announced that it would withdraw LVCR specifically for imports from the Channel Islands. Presumably it was thought unlikely that longer round trips would be worth the VAT saving. The law was changed by FA 2012, s 199 with effect from 1 April 2012.

Before the change was enacted, the governments of Jersey and Guernsey brought a judicial review challenge. This was dismissed in March 2012 and not appealed. Then in March 2018, a commercial company based in Jersey – which had never been involved in round-tripping, but had benefited from LVCR in respect of mail order sales of horticultural plants – brought a claim for damages against the UK government. It argued that the removal of LVCR had breached its directly enforceable rights under the Treaty on the Functioning of the EU and the general principles of EU law of equal treatment, fiscal neutrality and proportionality. It claimed for six years of losses that it had allegedly suffered as a consequence of having to account for VAT on low value consignments sent to UK consumers. The company was said to have been "caught in the crossfire" between HM Treasury and the tax avoiders.

HM Treasury was the defendant in the case. It applied to have the claim struck out on the basis that it stood no reasonable prospect of success and there was no reason to hold a full trial. The High Court agreed with HMT in November 2020; that decision was upheld by the Court of Appeal in December 2021, and has now been confirmed by the Supreme Court.

Because the appeal concerns a strike-out application, it concentrates on general principles of law at a high level rather than the detail of the appellant's business.

Key to the dispute was the special status of the Channel Islands, which (pre-Brexit) were within the "customs union" of the EU but not within the VAT area. This meant that there were no import duties on movements of goods from the Channel Islands to the UK, but there was VAT, subject to LVCR. The company argued that the imposition of VAT, by the withdrawal of LVCR, was effectively an illegal customs duty.

The Supreme Court did not agree. Upholding the decisions below, the judges concluded that import VAT was subject only to the rules and principles of the fiscal VAT regime, not the customs regime. The claim that there was a breach of the TFEU had no reasonable prospect of success, because that related to the customs regime.

The company argued that it was still entitled to damages on the basis of breaches of general principles of EU law. The status of these principles has been substantially reduced by the EU (Withdrawal) Act 2018, but in any case the judges did not agree that they had been breached. Member states are not required to give equal treatment to traders from different non-EU territories; because the Channel Islands were “not in the EU” for VAT purposes, and the fiscal regime applied, traders there could not base an action on fiscal neutrality.

At first glance, this is a decision about something specific that happened some time ago, and is no longer important. However, the Supreme Court judgment contains detailed analysis of the status of EU law post-Brexit, and the ability of a trader to found a claim on general EU legal principles.

The judgment is also a reminder that the withdrawal of a relief is not quite the same as the imposition of a tax. The trader complained that it was being unfairly discriminated against, in that imports from other territories could still enjoy LVCR – but perhaps a fairer comparison was with sales by UK businesses, which were always liable to output tax.

Supreme Court: *Jersey Choice Ltd v HMT*

Lecture 14

4.4 European rules

4.4.1 February 2024 infringements package

The European Commission has released an “infringements package” which sets out the EU Member States the Commission is taking action against for failing to comply with its obligations under EU law. The document lists letters of formal notice, reasoned opinions and CJEU referrals relating to Poland, Portugal, Estonia, Ireland, Italy, Netherlands, Slovakia, France, Romania, Denmark, Greece, Croatia, Malta, Austria, Sweden, Spain, Bulgaria, Luxembourg, Hungary, Belgium, Germany, Czechia, Slovenia and Slovakia for breaching their obligations in the environment, Internal Market, Industry, Entrepreneurship and SMEs, migration, home affairs and security union, justice, energy, taxation and customs union, jobs and social rights, defence and financial services. Latvia, Lithuania and Cyprus appear to have escaped the Commission’s attention.

The only VAT-related item is a reasoned opinion issued to Germany for not properly applying EU rules on exempting private tuition services from VAT as laid out in the VAT Directive and clarified by the CJEU.

https://ec.europa.eu/commission/presscorner/detail/en/inf_24_301

4.4.2 Fraud arrests

The European Public Prosecutor’s Office (EPPO) announced on 29 February that it had moved against a suspected criminal organisation, believed to have orchestrated a €195 million carousel VAT fraud through the sale of smartphones, small electronic devices and protective face masks. More than 180 searches were carried out and 14 people were arrested in 17 countries (Albania, Austria, Croatia, Cyprus,Czechia, Estonia, Germany, Hungary, Italy, Malta, the Netherlands, Poland,

Portugal, Slovakia, Slovenia, Sweden and the UK). Over 680 tax and police investigators supported the investigative measures.

www.eppo.europa.eu/en/news/eppo-investigation-cluster-midas-eu195-million-vat-fraud-spread-across-17-countries

4.4.3 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.

Advocate-General

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.

Full court judgment

The full court agreed that art.203 should not be interpreted as requiring payment from a person whose identity has been hijacked by someone else without their knowledge or consent. That could apply to a situation such as this, in which an employee had carried out a fraud using the tax identity of the employer. However, the referring court had suggested that the employing company had not carried out appropriate due diligence to make sure that employee fraud did not take place. In that case, the employer might not be held to have acted in good faith.

The answer was that art.203 requires that the employee, rather than the employer, would be "the person" who enters the VAT on the invoice and was therefore liable to pay it to the authorities, unless the taxable person (the employer) did not exercise the due diligence reasonably required to monitor the conduct of that employee. That would be for the referring court to determine.

CJEU (Case C-442/22): *P sp. z o.o v Dyrektor Izby Administracji Skarbowej w Lublinie*

Lecture 15

4.4.4 Director's duties

An individual was a member of the boards of a number of Luxembourg public limited companies. His activities included receiving the reports of the senior managers or representatives of the companies concerned, discussing strategic proposals, the choice of operational managers, questions related to the accounts of those companies and their subsidiaries as well as the risks that they face. He had other duties in relation to decision-making for subsidiaries and reporting to shareholders' meetings. He received fees as a director based on a percentage of the profits of the companies. The tax authority assessed him to output tax on this; he appealed, arguing that acting as a board director was not an independent economic activity within art.9 PVD. Questions were referred to the CJEU on the concepts of "economic activity" and "independently" in articles 9 and 10.

The CJEU reviewed the case law on the requirement for a direct link between the service supplied and the consideration given in exchange. Where a fixed sum was agreed in advance, it appeared that there was the necessary link. Where the fee was based on a percentage of profit, it would be for the national court to determine what would happen if the company made a loss. If that would result in no payment, it appears that the link would be broken.

The court went on to consider whether the activity was to generate "remuneration" in the sense required by the *Gemeente Borsele* decision. Given that the board appointments were for up to six years, there was the necessary continuity. It appeared that the conditions for an economic activity were satisfied.

As regards independence, it was necessary to consider whether an employer/employee relationship existed. It was necessary to consider whether the person concerned performs his activities in his own name, on his own behalf and under his own responsibility, and whether he bears the economic risk associated with carrying out those activities. It was for the referring court to ascertain whether the individual arranged freely how he performed his work and that he himself received the emoluments which made up his income. That might indicate a relationship akin to self-employment.

However, it was also necessary for the individual to bear the economic risk of the activity. Even if he was free to offer advice to the boards as he saw fit, and was not under the control of any person, nevertheless it appeared to be the companies that bore the risk of adverse consequences from following his advice. The answer on independence was:

The first subparagraph of PVD art.9(1) must be interpreted as meaning that the activity of a member of the board of directors of a public limited company under Luxembourg law is not carried out independently, within the meaning of that provision, where – despite the fact that that member is free to arrange how he or she performs their work, receives the emoluments making up his or her income, acts in his or her own name and is not subject to an employer-employee relationship – he or she does not act on their own behalf or under their own responsibility and does not bear the economic risk linked to their activity.

CJEU (Case C-288/22): *TP v Administration de l'enregistrement, des domaines et de la TVA*

Lecture 15

4.4.5 Right to deduct

A Hungarian company GI acquired various office supplies during 2012/13. The invoices stated that the supplier was a particular company, OB. The manager of OB was in prison; he denied any dealings with GI. There were other apparent discrepancies in the records. The tax authority therefore decided to deny input tax deduction to GI. The company appealed, arguing that it had acquired the goods concerned, and the tax authority had taken a decision based on unconfirmed allegations. Similar issues had been referred from Hungary to the CJEU in previous years; further questions were referred, partly to find out what ought to happen if a national court failed to put into effect CJEU rulings. Not surprisingly, the first part of the CJEU decision states that a lower national court had to apply a CJEU ruling in preference to an earlier binding precedent from a higher national court in the same country, because the CJEU's rulings had primacy.

The rest of the decision considers the relative right of the trader to deduct and the tax authority to deny deduction, and reaffirms the principle that the right to deduct is fundamental; it can only be denied if the tax authority has demonstrated, to the requisite legal standard, that the taxable person has committed tax fraud, or that he knew or should have known that the transaction was involved in such a fraud. Although a circular billing chain was a suspicious circumstance, it was not enough on its own to demonstrate that a fraud was taking place. The tax authority had to identify what the fraud was and show that the trader had been involved in it or knew or ought to have known that he was facilitating it.

CJEU (Case C-537/22): *Global Ink Trade Kft. v Nemzeti ado- es vamhivatal fellebbviteli igazzatosaga*

Lecture 15

4.4.6 Reduced rate (1)

In 2007, a Portuguese company entered into contracts for renovation of urban buildings. It charged a reduced VAT rate of 5% on the basis that the works were supplied in respect of immovable property used for residential purposes. Following an inspection, the tax authority ruled that the conditions were not satisfied, and raised an assessment for the difference between the reduced and standard rates.

The properties had been commercial but were intended for residential use. The tax authority argued that the Annex to the PVD required properties to be in residential use both before and after the works concerned. The CJEU ruled that this was an acceptable rule: the reduced rate was intended to benefit final consumers, and supplies to commercial companies did not naturally fall within the provisions. It was not a requirement that the property should actually be occupied while the works are carried on, but it was not contrary to the PVD to require that the dwellings concerned are actually used for residential purposes at the time when those works are carried out.

CJEU (Case C-433/22): *Autoridade Tributaria e Aduaneira v HPA – Construcoes SA*

4.4.7 Reduced rate (2)

Bulgaria had allowed a reduced rate to hotels that held a "categorisation certificate". A company which operated a hotel was assessed to the difference between the reduced rate and the standard rate on the basis that it did not meet this condition. Questions were referred to the CJEU on whether such a condition was permitted under the PVD, in the light of cases that had held that restrictions to the Annex III categories were allowed provided that they could be defined and identified clearly so that fiscal neutrality would be maintained.

The CJEU decision asks the national court to consider first, whether "categorised establishments" were a distinct and identifiable category, and if so, whether the distinction between categorised and uncategorised would be recognised by consumers as representing a material difference in the level, scope and quality of the services to be provided. If the answer to both questions was "yes", then the principle of fiscal neutrality would not be infringed: the reduced rate would be applied to supplies that were materially different from those taxed at the standard rate, and there would be an objective distinction between the supplies taxed at different rates.

The court pointed out that the appellant appeared to have made the same kind of supplies on a continuous basis both when it had a certificate and when it did not. The possibility that trading without a certificate might infringe the tourism laws could not have an effect, because fiscal neutrality demanded that lawful and unlawful activities were taxed in the same way if they competed directly with each other.

CJEU (Case C-733/22): *Direktor na Direktsia 'Obzhalvane i danachno-osiguritelna praktika' – Sofia pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite v 'Valentina Heights' EOOD*

4.4.8 Point of entry

A Polish resident bought some cigarettes in a Polish market. They carried only Ukrainian and Belarussian tax stamps. He then took them to Germany and sold them to a German buyer. He was then arrested and the cigarettes were seized and destroyed. The tax authority in Germany issued an assessment to import VAT on the basis that the place of importation was Germany.

The German legislation applied art.215(4) of the Customs Code in determining the place of importation for VAT under PVD arts.30, 60 and

71. Art.215(4) provides that "If a customs authority finds that a customs debt has been incurred under Article 202 in another Member State and the amount of that debt is lower than EUR 5,000, the debt shall be deemed to have been incurred in the Member State where the finding was made." The question referred was whether this deeming permission was allowed to apply to VAT as well as duty.

Art.71 PVD allows Member States to link the time of importation for VAT to the time a customs debt is incurred. The literal words do not also allow a link to rules on the place of importation. The CJEU considered that the fact that art.71 is in the section of the Directive dealing with time of chargeable event, and art.60 has no equivalent provision in the section on the place of importation, supported the view that no such deeming provision could apply.

If the German authorities were satisfied that the goods had entered the customs territory of the EU in Poland, they should have forwarded the information to the Polish authorities under the mutual cooperation rules.

CJEU (Case C-791/22): *G.A.v Hauptzollamt Braunschweig*

4.4.9 Public authority and interest

A Dutch municipality carried out a mixture of economic activities, both taxable and exempt, and activities in relation to which it was not a taxable person. In relation to taxable economic activities, it was entitled to claim input tax; in relation to non-economic activities, it was entitled to claim from a central "VAT compensation fund", presumably the Netherlands equivalent of a s.33 claim.

It was required to allocate all costs to their use in order to determine how much VAT could be claimed. The general costs of the municipality, which could not be directly attributed to a particular activity, could give rise, in part, to a deduction of VAT and, in part, to a contribution from the compensation fund. The respective scopes of that deduction and of that contribution were established by the municipality, on the basis of its accounts, by applying an input tax allocation key.

Following a change in the law, the municipality changed its allocation key; this led to a change in the recovery and the compensation claim, which led on in turn to an examination of its accounts and a dispute with the tax authority. In the end, the municipality received a repayment, together with interest calculated from a date based on when it had submitted the claim for repayment. It argued that it should have been credited with interest from when it incurred the VAT. The following questions were referred to the CJEU:

(1) Must the legal rule that default interest must be reimbursed because there is a right to a refund of taxes levied in breach of EU law be interpreted as meaning that, where a taxable person has been granted a refund of turnover tax, default interest must be reimbursed to that taxable person in a situation where:

(a) the refund is the result of administrative errors on the part of the taxable person, as described in this ruling, and for which the inspector cannot be blamed in any way;

(b) the refund is the result of a recalculation of the allocation key for the deduction of turnover tax on general costs, under the circumstances described in this ruling?

(2) If question 1 is answered in the affirmative, from what day is there a right to the reimbursement of default interest?

The CJEU considered that the key question was whether the unclaimed or late claimed VAT had been "levied in breach of EU law". The court ruled that the tax authority was entitled to levy the tax declared by the taxpayer; if the taxpayer filed a return showing too high an amount payable, or too low an amount deductible, the tax overpaid was not "levied in breach of EU law".

Turning to the overhead VAT that had to be allocated between economic and non-economic activities, the court noted that the PVD does not prescribe rules for this: it is up to the Member States to determine how it should be done, provided that it is done fairly. There was no indication that the Netherlands did not comply with this. It appeared that there was some discretion afforded to the municipality in determining its own method. In that context, the municipality's failure to claim all the VAT that subsequently was repaid to it could not constitute "tax levied in breach of EU law".

EU law therefore did not require the more generous calculation of interest that the municipality claimed.

CJEU (Case C-674/22): *Gemeente Dinkelland vOntvanger van de Belastingdienst/Grote ondernemingen, kantoor Zwolle*

4.4.10 Breach of treaty obligations

The Commission took infringement proceedings against Malta for levying a higher annual circulation licence fee on motor vehicles registered in Member States other than the Republic of Malta before 1 January 2009 and brought to Malta after that date than on similar vehicles registered in Malta before that date. The CJEU agreed that this was a breach of Malta's obligations to give equal treatment to goods originating in other EU countries.

CJEU (Case C-694/22): *European Commission v Republic of Malta*

4.4.11 Cross-border supplies

A Czech company claimed exemption for supplies of rapeseed oil to Poland. Following a tax inspection, the tax authority determined that the conditions for exemption were not met. Although it did not dispute that the goods concerned had actually been transported to another Member State, it took the view that the company had not shown that it had transferred the right to dispose of those goods as owner to the persons presented in the tax documents as being the recipients or even that those goods had been supplied to a person registered for tax purposes in another Member State.

The referring court was not sure whether exemption should be allowed, on the basis of CJEU precedents, where it could be established that the goods had been transported to another member state and supplied to a person with the status of taxable trader, even if the recipient was not the person

named in the documentation; if so, would denial of deduction require the tax authority to show involvement in VAT fraud?

The tax authority sought to rely on the amendment to PVD art.138 made in 2018 which imposed a requirement to show the VAT number of the recipient on the invoice. The CJEU pointed out that this was not relevant because the transactions in dispute took place in 2015.

The CJEU returned to the long-standing distinction between the substantive conditions for exemption (goods leaving the territory, acquired by a taxable person) and the formal conditions (the paperwork). The conclusion was that the trader could enjoy exemption if it could show that the substantive conditions were met, even if the formal conditions were not. This included the situation in which it clearly followed from the factual circumstances that the recipient must have the status of a taxable person (e.g. because of the nature and value of the goods transferred).

It is only where, having regard to the factual circumstances, and despite the evidence provided by the taxable person, the information necessary to verify that the conditions laid down in PVD art.138(1) are satisfied is lacking, that the taxable person must be refused the VAT exemption, without the tax authorities being required to prove that that taxable person was involved in VAT fraud.

CJEU (Case C-676/22): *B2 Energy s.r.o v Odvolaci financni reditelstvi*

4.4.12 Bad debt relief

A long-established Bulgarian construction company went into liquidation in 2020. It had been deregistered for VAT in 2019 following systematic failures to fulfil its VAT obligations. A dispute arose in relation to VAT that had been charged over 10 years earlier to five companies and remained unpaid. The tax authority ruled that a claim for bad debt relief was out of time, and the evidence to support the claim was insufficient.

The referring court noted that Bulgarian law does not provide for a reduction in the taxable amount in the case of non-payment, only in the event of the cancellation of a transaction. Questions were referred to the CJEU on the scope of the derogation in art.90 which appears to allow limitations in the right to reduce the taxable amount in the event of non-payment.

The questions referred only to the application of fiscal neutrality. The CJEU considered that the scope of the questions should be expanded to cover proportionality and effectiveness as well. The court reviewed the case law on art.90, which shows that the option to derogate has to be exercised in line with the general principle that VAT should be collected on what the trader has actually received; where non-payment is permanent and certain, relief should be given.

The court commented that a limitation period was not contrary to EU law, being in the interests of legal certainty; however, it should not be so short as to infringe the principle of effectiveness, and the date from which the limitation was measured should be linked to the date on which the trader could, with reasonable diligence, be expected to be able to exercise the right. In the absence of national provisions concerning the rules governing the exercise of that right (as in Bulgaria), the starting point for

such a limitation period must be identifiable by the taxable person with a reasonable degree of probability.

Further questions asked about the formal conditions which a member state could impose on the right to claim relief – in this case, requirements to issue a corrective invoice and to notify the debtor before making a claim. The court considered that these conditions could not be enforceable where it is impossible for the taxable person to make such an adjustment in due time, for reasons beyond its control. On the other hand, the court noted that the taxpayer in the present case was deregistered from the VAT register on account of a systematic failure to fulfil its obligations stemming from the VAT law and that its application for set off related to the non-payment of invoices issued several years before its removal from the register. Accordingly, it was for the referring court to ascertain whether the taxable person was not responsible for being unable to issue corrected invoices.

The final question confirmed that a reduction under art.90 gave rise to a right of repayment to the taxpayer, with interest for late payment running from the date on which the taxable person asserts its right to the reduction.

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

4.4.13 Non-operating company

An Italian company carried on an economic activity of producing and marketing wine in the Campania region. Following a tax audit in 2010, the authorities ruled that it was an inactive shell company, and raised assessments to disallow input tax pf €42,000 claimed in 2009. The basis for the decision was that the amounts declared as outputs had failed to reach a threshold below which a company is regarded as non-operational in Italy; this had happened in all the years from 2006 onwards. Companies were able to rebut the presumption that they were inactive if they showed "objective circumstances" which resulted in their outputs not meeting the required level, but the company could not satisfy this condition.

The company appealed unsuccessfully; another company took it over in 2012 and pursued the case. In due course, questions were referred to the CJEU to determine:

- whether Italian law was permitted to deny the status of taxable person to someone whose outputs were below a set threshold;
- whether the right of deduction under art.167 PVD overrode the Italian law;
- whether the principles of legal certainty and protection of legitimate expectations overrode the Italian law.

The CJEU noted that the definition of economic activity in art.9 PVD is very wide, and concluded that it could not be limited in the way Italian law purported to do. It would be for the referring court to determine whether the taxpayer satisfied the conditions of art.9 (carrying on an activity independently for the generation of remuneration on a continuing basis, without regard to its purpose or results).

In respect of the second question, the CJEU reaffirmed the principle that the right to deduct is fundamental, and applies where there is a direct and immediate link to outputs but also where there is a link to the business activity as a whole. It could not be restricted by reference to the level of outputs achieved; it would be for the referring court to determine whether there was the necessary link to a business carried on in an economic manner, or to be satisfied on objective grounds that the right to deduct was being relied on for abusive or fraudulent purposes. The Italian law effectively imposed a presumption that traders who did not meet the outputs threshold were abusing the law, and that could not be justified.

It was not necessary to consider the question about legitimate expectations and legal certainty, because the first two questions had already decided the issue against the Italian legislation.

CJEU (Case C-341/22): *Feudidi San Gregorio Aziende Agricole SpA vAgenziadelle Entrate*

4.4.14 Correction without documents

A Polish company ran a sports club, supplying the facilities of the club for fitness and recreation. In 2016 it decided it was entitled to account for 8% output tax instead of the standard rate of 23%, and submitted amended returns for various periods in 2012, 2013 and 2014, claiming a repayment. The tax authority refused this on the basis that no invoices had been issued at the time of the supply, so no corrective document could be issued to amend the taxable amount. According to Polish law, it was not possible to make such a correction merely by amending the return itself. The company appealed, arguing that the records of the transactions on its cash registers were sufficient evidence to support a correction. The question referred to the CJEU also asked whether unjust enrichment was a valid ground to refuse repayment.

The CJEU set out the law on taxable amounts in art.73 and art.78 PVD. The VAT on a supply is not included in the taxable amount, but it is included in the price agreed between the parties. This is so even if the taxable person has made a mistake about the VAT rate. This might suggest that the VAT has always been borne by the final consumer; however, the *Marks & Spencer* case established that the trader may have suffered a financial loss as a result of applying the wrong VAT rate, for example by a reduction in volume of sales.

That established the right to a repayment in principle; the court went on to consider whether it was acceptable to make this conditional on the issue and correction of invoices. There were no specific rules on this in the PVD, so it was up to the member state to provide a system that was proportionate and in compliance with the principles of effectiveness and equivalence. An absolute requirement to produce specific documentation appeared to breach the principle of effectiveness.

The court went on to consider unjust enrichment. It was established law that a member state could refuse to repay VAT, even where it had been incorrectly charged, if it could be shown that the cost of that VAT had been passed on to someone else. It would be for the referring court to establish this on the basis of the facts of the case; the tax authorities “may rely on unjust enrichment on the part of that taxable person only if they have established, following an economic analysis which takes account of

all the relevant circumstances, that the economic burden that the tax levied though not due imposed on that taxable person has been completely neutralised."

CJEU (Case C-606/22): *Dyrektor Izby Administracji Skarbowej w Bydgoszczy v B. sp. z o.o.*

4.5 Foreign refund reclaims

4.5.1 Updated Notice

HMRC have updated their Notice *Refunds of UK VAT for non-UK businesses* to include new sections on VAT groups, email security and electronic signatures. The sections "VAT paid on imports", "Application form", "Certificate of status", "Method of payment" and "Application rejected" have also been updated.

Notice 723A

4.5.2 Claim struck out

A Slovenian business made a claim for UK VAT paid on goods purchased through the eBay platform from suppliers established in the UK. The claim was made on 26 August 2020 in respect of £1,138 of VAT incurred on purchases in the 2019 calendar year.

Although the documentation often did not show the Slovenian address as the destination of the goods, Judge Amanda Brown noted that it did not appear to be in dispute that the goods were indeed sent to Slovenia, and she found that as a fact.

The claim for 2019 was rejected on 9 October 2020, upheld on review and appealed to the Tribunal on 21 June 2021. Meanwhile a second claim was submitted on 15 January 2021 for £179 incurred in the 2020 calendar year, rejected by HMRC on 27 April 2021 and appealed with the 2019 claim.

HMRC rejected the claims on the basis that the cross-border refund procedure could not be used to claim VAT on supplies that should have been zero-rated as intra-EU despatches. HMRC had advised the claimant to approach the suppliers and ask for a refund. On 24 March 2022 HMRC applied to the Tribunal to have the appeals struck out for lack of jurisdiction or for having no reasonable prospect of success.

On the same date, HMRC offered to treat the 2019 claim as a *Reemtsma* Claim i.e. a claim made directly to the UK tax authority to recover sums incorrectly paid to a UK supplier who had accounted to HMRC for the VAT on the supply on the basis that it was virtually impossible or excessively difficult to obtain recovery of such sums directly from the suppliers. HMRC's subsequent letter of 1 April 2022 set out the documents and information HMRC required in order to assess whether the Appellant's ability to recover the sums overpaid as VAT to its supplier met the *Reemtsma* requirements.

HMRC refused to treat the 2020 claim in the same way because, following Brexit, HMRC did not recognise the legal basis for a *Reemtsma* claim.

The appellant provided further information, but on 25 July 2022 HMRC notified the company that the information did not satisfy the conditions required to make out such a claim.

In the strike-out application, HMRC argued that the FTT had no jurisdiction under VATA 1994 s.83 to decide on the refusal of the refund claims. Judge Brown disagreed. The terms of s.83(1)(ha) gave the Tribunal jurisdiction to consider any refusal of a cross-border claim under s.39; it did not matter that the reason for the refusal was that the claimant was making a *Reemtsma* claim which HMRC did not consider justified.

However, the judge considered that the appeals had no reasonable prospect of success, because it was clear that the VAT regulations and Notice 723A did not allow a s.39 claim where the goods should have been zero-rated. She would therefore strike the appeals out on that basis.

According to the Upper Tribunal in a 2014 case (*Earlsferry Thistle Golf Club*), a *Reemtsma* claim would have to be pursued by way of a claim in the county court – they were not claims under the VATA and therefore should not be pursued in the FTT. The judge considered that this was a binding precedent, so she could not consider the claim. She went on to say the following about HMRC's view on *Reemtsma* post-Brexit:

Whether a right to bring a claim in the county court remains is a complex issue. HMRC contend that no new action may be commenced reliant on general principles of EU law post 31 December 2020 by virtue of Schedule 1 paragraph 3 EUWA. There are many practitioners who disagree with them and would consider that as the principles of effectiveness and neutrality were acknowledged by the UK courts directly in connection with a Reemtsma claim prior to Brexit the Appellant would have an entitlement to bring a county court claim to enforce those protected rights. I make no comment on the substance of this issue as it is not a matter for me. It is a matter for the county court.

It seems circular to conclude that the FTT had jurisdiction in relation to the refusal of the claims in spite of them being *Reemtsma* claims, but then to decide that it did not have jurisdiction because they were *Reemtsma* claims; nevertheless, that appears to be what the judge has decided.

First-Tier Tribunal (TC09057): *Metatron D.O.O.*

5. INPUTS

5.1 Economic activity

Nothing to report.

5.2 Who receives the supply?

Nothing to report.

5.3 Partial exemption

5.3.1 Standard Method Override

The Upper Tribunal has reversed the FTT decision in favour of the taxpayer in TC08441. HCL operated the Hippodrome Casino in central London. It considered that it was required to apply the Standard Method Override (SI 1995/2518 reg.107B) to adjust the recovery of its residual input tax, because the "use" of its residual inputs differed substantially from the apportionment that would be achieved by applying the turnover-based standard method. Over the six years under review, the difference between the standard method and the method suggested by the company was on average nearly £550,000 a year. HMRC rejected the company's method and contended that the standard method produced an acceptable result.

The company's method was based on floor areas used for various activities, adjusted for factors that were relevant to the business. The Hippodrome makes exempt supplies of gaming and taxable supplies of catering and entertainment; some of the catering and entertainment is intended to support the gaming activities. The FTT decision considered all of the activities of the casino in detail and set out the various costs and the method, which could be useful to anyone wishing to consider a similar argument. For example, there is a comparison between the income generated by an electronic roulette table (approximately £400,000 a year) and a dining table in the steak house restaurant (approximately £50,000 a year). The two tables themselves occupied about the same space, but the dining table required considerably more surrounding space to support the activity. The argument, in essence, was that building costs were more appropriately apportioned based on the floor area used for taxable and exempt activities than the turnover generated by those activities, which would be skewed towards exemption because the income generated was higher.

HMRC's response was that the whole purpose of the company was to generate exempt income; its method gave approximately 50% recovery on building costs, when its own returns to the Gaming Commission suggested that 70% of visitors to the building were there for the purposes of gaming.

Judge John Brooks reviewed the operations, the arguments and the precedents. He disagreed with the company's counsel in the correct approach to the question: it was appropriate to start with the company's suggested method, rather than with the standard method, because the

SMO should only be used if it gave a "more fair, reasonable and precise proxy of its economic use of its overhead expenditure" than the turnover based standard method. He then set out a number of factors which led him to the conclusion that the supplies of entertainment and hospitality from discrete and defined areas of the Hippodrome could not be regarded as merely an adjunct to, or an amenity for, gaming. Because the majority of the residual costs were property related, the floor area method was fairer than the standard method, and it was therefore to be preferred both for year-on-year recovery and for calculations under the Capital Goods Scheme.

The FTT decision followed precedents, including *VWFS*, in holding that the Tribunal's task is simply to choose between the methods that have been put forward – the standard method for HMRC and the override method (equivalent to a special method) put forward by the company. The Tribunal should not attempt to devise a more precise method as its own alternative. On that basis, the appeal was allowed.

Upper Tribunal

HMRC's appeal came before Judges Rupert Jones and Vinesh Mandalia. HMRC's main argument was that the FTT erred in law in failing to address, and give any reasons for rejecting, their central contention that floorspace used for taxable supplies such as entertainment were also being used for non-taxable supplies of gaming. HMRC argued that the economic use of the areas treated by HCL as only used for taxable supplies was in fact "dual", because the bars, restaurant and entertainment areas were important amenities for the exempt gaming business. HMRC's detailed grounds of appeal were:

1. The Tribunal failed to address the Dual Use Issue. That is, not only did HCL make economic use of the areas in the Hippodrome allocated to hospitality and entertainment for those purposes but also used those areas for its gaming supplies, i.e. there was dual use of these areas. If the FTT rejected HMRC's contentions on this issue, it did not give any reasons why it did so: *Ground 1.*

2. The Tribunal erred in law by adopting a mistaken test, namely whether the supplies of entertainment and hospitality were "merely an adjunct to, or an amenity for, gaming": *Ground 2.*

3. The Tribunal failed to address HMRC's contention that the lack of profitability of the hospitality and entertainment businesses was relevant evidence as to economic use: *Ground 3.*

4. As an alternative to ground 1 above, if (contrary to HMRC's contention) the Tribunal implicitly found that there was no economic use of areas allocated to hospitality and/or entertainment for the purposes of its gaming supplies, such a finding amounted to an error of law per *Edwards v. Bairstow*: *Ground 4.*

5. The Tribunal failed to give any (alternatively, any sufficient) reasons why it rejected HMRC's other points. That is, the claims made by HMRC in the Amended Statement of Case and relied upon in their skeleton argument that:

a. The unreliability of allocations, by relying upon the only floor plan provided to evidence the allocations that was for 2013-2014.

b. The majority of the floor area was not allocated to either exempt or taxable supplies. The SMO was not reasonable because it assumed that the use of the non-allocated areas, which comprised the majority of the floor space, was in the same proportion as the proposed allocations for taxable/exempt areas.

c. A significant amount of the residual costs at issue were not property related, and the SMO was not a reasonable proxy for apportioning them: *Ground 5.*

HCL responded by arguing that the FTT had reached the correct decision for broadly the right reasons, but cross-appealed on two points: first, that the FTT had been wrong in starting with the alternative method rather than considering whether the standard method gave a fair result; and second, if the UT concluded that the business entertainment rules were relevant, to counter a possible "double disallowance" (because free drinks were generally given to gaming customers).

The UT noted the CJEU decision in *VWFS* which gave the one condition for use of a method other than the standard method: "Member States may, as a result of that provision, apply, for a given transaction, a method or allocation key other than the turnover-based method, on condition that the method used guarantees a more precise determination of the deductible proportion of the input VAT than that arising from the application of the turnover-based method."

The UT examined the basis for the FTT decision in detail, and concluded that HMRC's principal objection was made out: nowhere in the decision did the Tribunal give reasons for rejecting HMRC's contention that the areas allocated to bars, restaurant and theatre were also used *in part* for the purposes of its gaming business, such that there was dual use of those areas, or why if there was such dual use, the SMO Method (which assumed exclusivity of use) could be more precise than the standard turnover method (or fair, reasonable and precise). The FTT did not explain why, if there was such dual use, the SMO (which assumed exclusivity of use) guaranteed a more precise result than the result which would arise from the application of the turnover-based standard method. The onus was on HCL to displace the use of the standard method. This was a material error of law, and the decision had to be set aside on that ground.

The UT went on to consider Ground 2, on the basis that "it may be useful to express a view on some of the principles which were subject to argument". With regard to Ground 2, the judge said "The touchstone for the purposes of the apportionment of residual input tax is use (or economic use). There is no dispute that in assessing that use, and its extent, consideration is not limited to physical use. The assessment must be of the real economic use of the input, having regard to economic reality in the light of the observable terms and features of the taxpayer's business." HMRC were not arguing that the bars, restaurant and theatre were "merely ancillary" to the gaming business, but there was the obvious possibility that they were used for both purposes. However, this did not add materially to Ground 1.

The judge decided it was not necessary to consider the third and fifth grounds, and ground 4 was only to be considered if HMRC did not

succeed on the others. The decision below was set aside on the basis that it revealed a material error of law.

The judge considered that the UT had sufficient evidence and findings of fact to remake the decision rather than remitting it. He began by discussing HCL's argument that the correct approach was to consider whether the standard method was deficient; and then, if it was, to consider whether the SMO suggested by the trader was a more accurate reflection of use. Counsel for HCL argued that the jurisdiction of the Tribunal should then not be restricted to deciding whether HMRC's decision was unreasonable, and choosing between the two methods on offer, as it is with appeals about refusal of a special method; in the case of the SMO, the Tribunal should have a full jurisdiction to make whatever adjustments it thought appropriate.

The judge disagreed. In his view, the focus of the appeal must be on the proposed method, with the taxpayer bearing the burden of proof to establish that the SMO guarantees a more precise determination than the standard method. The standard method is the lawful and mandated method of apportionment up until the point that it is determined that a proposed method displaces it. If the test set out in *VWFS* is not met, the standard method continues to apply.

After discussing the FTT findings and decision on the floor-area basis in detail, the judge made the following comment about the relative profitability of gaming and the other activities:

Mr Donmall accepts that there is no legal principle that for an input cost to be used for an output supply, that output supply must be profitable. However, he submits, that does not mean that profitability is not capable of being evidentially relevant to the question of how an input is used, and depending on the facts, very significantly so. As Etherton LJ observed in LCM at [86], business is carried on with a view to profit. If a commercial business incurs costs, a tribunal can properly ask itself why it did so and make inferences in respect of use. If the immediate use of those costs is for a business activity X which is not itself profitable but also supports another business activity Y which is profitable, a tribunal can properly place weight on the evidence of profitability to support a finding that at least part of the economic use of those costs is to further the profitable activity Y.

It was notable that the hospitality and entertainment businesses were not profitable throughout the period under review. Although it was clear that exempt supplies were not made "in" the theatre or the restaurant, economic use must have been made of those areas and the costs incurred in them. They were therefore used to make exempt supplies: the judge said they "are 'cost components' of the exempt gaming supplies, and on the evidence before us, are funded by the profitable gaming supplies."

This led on to the conclusion that the significant dual use of the "taxable" parts of the building was a fundamental problem with a floor-area based method. It could not provide a more reliable proxy for taxable use than the turnover-based standard method. The decision was remade by refusing HCL's appeal against HMRC's rejection of the SMO adjustments.

Finally, the UT considered the argument about the capital goods scheme. The question was put as follows: In respect to the apportionment of the VAT incurred on a capital item, is that VAT first subject to a restriction for use for the purposes of business entertainment, with the residual amount then apportioned under the standard method? HCL contended that there is no prior restriction to exclude use for business entertainment, and the full amount of VAT should be apportioned under the standard method alone. The judge favoured HMRC's proposition: the business entertainment block should be applied first, then the remaining input tax apportioned according to the standard method.

Upper Tribunal: *HMRC v Hippodrome Casino Ltd*

Lecture 16

5.3.2 Article

In an article in *Taxation*, Mike Thexton comments on some of the quirks of partial exemption rules, including the mechanical operation of the standard method if no special method has been agreed, regardless of fairness, and the fact that HMRC appear to believe that a single line of an invoice cannot be split for partial exemption purposes: 100 items bought together are "one supply of 100 items", not "100 supplies of one item", so if they are not ALL used for taxable supplies or ALL used for exempt supplies, that purchase is residual and will be split according to the turnover of the business. It is arguable that this is not supported by the law, and if the trader's accounting system identifies what the 100 items are actually used for, it would be possible to argue that split could be used under the standard method.

Taxation, 14 March 2024

5.4 Cars

Nothing to report.

5.5 Business entertainment

Nothing to report.

5.6 Non-business use of supplies

5.6.1 Invalid input tax claims

A company appealed against best judgement assessments for the 10/19 period and decisions to disallow input tax for periods 07/19 and 04/20 to 01/21. The company registered for VAT from 1 May 2019 after filing dormant accounts for some years up to 30 November 2018. An enquiry into the 07/19 return was commenced in November 2019. The director said that he had no access to his records following a divorce, and had also undergone surgery for a brain tumour. Nevertheless, he started to supply

evidence from 2 March 2020. On 30 November 2020 an officer wrote to the director with a pre-decision e-mail proposing to disallow input tax on some expenses on the basis that it did not appear to be linked to taxable supplies. Further correspondence followed in which the director questioned the basis of this decision.

Judge Vimal Tilakapala noted that the appellant did not appear to have appreciated the principles underlying the recovery of input tax – that there had to be a link to taxable outputs, that it was for the trader to show that link, that there was no recovery on personal or entertainment expenditure. In the hearing, the director appeared to be surprised about the need for any distinction between personal expenditure and expenditure for the purposes of the company business. He seemed to assume that expenditure incurred by him as a director of the company should inevitably be regarded as business expenditure for the purposes of input VAT recovery. The judge "found this view instructive".

The judge went through the various criticisms of HMRC's decisions and dismissed them all, noting only that HMRC had revised one of the adjustments in favour of the appellant. The appeal was dismissed.

First-Tier Tribunal (TC09064): *Passion Incorporated Ltd*

Lecture 17

5.7 Bad debt relief

Nothing to report.

5.8 Other input tax problems

5.8.1 Pre-registration VAT issues

Judge Anne Scott heard an application from a taxpayer for disclosure of information by HMRC as a preliminary issue in a case about deduction of pre-registration input tax. She quoted the applicant's overview of what the taxpayer sought:

"to obtain the same sort of information which HMRC would typically provide in judicial review proceedings concerning the exercise of an administrative discretion. The Application sets out three categories of items. In short, these relate to the identity of HMRC's decision-makers and contemporaneous evidence of HMRC's reasons for the decision."

In April 2022, the taxpayer's representatives had commenced judicial review proceedings, but these were abandoned after receiving HMRC's response. Instead, the company is pursuing a s.83 appeal through the FTT. The appeal concerns HMRC's decision dated 29 March 2022 to refuse part of the VAT which had been claimed by the appellant as input tax on its VAT return for the 07/21 quarter. The disputed VAT was incurred both before and after the date of the appellant's VAT registration but the focus of this appeal is on the disputed VAT incurred prior to the

registration. The application for disclosure relates only to the pre-registration VAT.

It is common ground that the VATA does not provide a statutory entitlement to recover VAT on pre-registration costs. In this appeal those costs related to wholly exempt supplies prior to registration. HMRC have discretion under SI 1985/2518 reg.111 to allow pre-registration VAT as if it is input tax, but they exercised that discretion to refuse the claim in this case. The appellant argued that HMRC has misunderstood the scope of reg.111 and misapplied its own policy.

The judge agreed with the company's counsel that the Tribunal had jurisdiction, even though reg.111 appears to be a discretionary power, and pre-registration VAT is only "treated as if it were input tax", because s.83(c) relates to appeals "with respect to ...the amount of any input tax which may be credited to a person."

In summary, the appellant contended that HMRC's discretion extends to not only deciding whether to treat pre-registration VAT as input tax but also to the quantification thereof. By contrast, HMRC contended that the discretion in terms of reg.111 is limited to deciding whether or not to allow pre-registration VAT to be treated as input tax but the quantification of that is a matter of applying the relevant provisions in VATA, namely ss.24 to 26.

If quantification is discretionary then the FTT's jurisdiction is only supervisory (deciding whether the decision was reasonably made), whereas if it is not, the FTT would have a full appellate jurisdiction. HMRC argued that the requested disclosure was irrelevant because the reasonableness of the decision was not an issue – the Tribunal had full appellate jurisdiction in relation to the amount of VAT allowable.

The appellant is the representative member of a VAT group that provides residential care and transitional services for individuals with autism, learning difficulties and behavioural problems. In February 2021 the company's representatives wrote to HMRC explaining that the businesses would be restructured and would apply to register a VAT group, following which it would seek to make standard-rated supplies of non-regulated care. The EDR was 1 May 2021, and a dispute arose about VAT incurred both before and after that date. The present hearing was concerned only with the pre-registration VAT.

The group started to make taxable supplies in the VAT quarter to 01/22. Nevertheless, it submitted a VAT return for period 07/21 claiming a deduction of VAT incurred before registration, at which time it was only making exempt supplies. The return was selected for review; correspondence ensued, leading to refusal of the claim.

The argument between the parties included consideration of Revenue & Customs Brief 16/2016, which the taxpayer contended implied that pre-registration VAT could be apportioned and partially recovered in the circumstances of the business. The officer engaged in the correspondence stated that the Brief did not support the view that any VAT could be recovered where an asset bought before registration, and used at that time for exempt purposes, was still available for taxable or partially taxable use after registration.

The officer's eventual decision was to allow some of the VAT claimed. The officer stated that "although I explained that there is no statutory requirement to do so where pre-registration costs are first used to make wholly exempt supplies, I then set out that it is appropriate in these specific circumstances, by nature of the assets concerned, to use the discretion afforded to HMRC under [reg,111], to treat some of the tax incurred as recoverable input tax." He referred to "the basis of apportionment I have deemed appropriate."

After lengthy discussion of the law on disclosure, the judge concluded that the decision was made in two parts, as HMRC contended:

- whether to allow any VAT at all – a discretionary decision, over which the Tribunal had supervisory jurisdiction;
- how much to allow – in accordance with the normal rules of the VATA, over which the Tribunal had a full jurisdiction.

As the dispute in the main appeal was about the second one, the disclosures sought were of limited relevance.

In case she was wrong about that, she went on to consider whether she would have allowed the application, and concluded that she would not have been minded to do so. Although the officer had been open with the company's advisers that he had consulted colleagues, his letter consistently referred to his personal decision. The identity of the colleagues was of limited relevance; the officer himself would be cross-examined about the basis of his decision in the substantive hearing.

The other material sought by the taxpayer included "copies of any guidance or policy documents, whether published or not." The judge accepted HMRC's argument that their policy documents were not legally binding, and in any case had all been made available to the taxpayer.

The application was refused, and the appeal will now move to a substantive hearing.

First-Tier Tribunal (TC09090): *Aspire in the Community Services Ltd*

Lecture 17

5.8.2 Missing trader fraud

In TC07315 (2019), HMRC denied an input tax claim for just over £1m for periods between 03/15 and 01/16. The VAT related to 20 purchases from one supplier, alleged to be a defaulting trader. The company accepted that there was a VAT loss, and on most of the deals accepted that its transactions were connected with that loss. On five deals it did not accept the connection, and on all of them it disputed that it knew or ought to have known of the connection.

On the first appeal, the Tribunal examined the history of the trade and the enquiry. It was satisfied that the counterparty in the five deals was a fraudulent missing trader. It did not accept the statements of the company's witnesses that they were naive or unaware of the risks of MTIC fraud in their industry. The company appeared not to have understood the difference between normal commercial due diligence and the "red flag due diligence" that was required when HMRC had issued Notice 726 and given specific warnings of the risk of MTIC fraud. The

Tribunal was satisfied that the company should have known that the challenged deals were connected with MTIC fraud.

On the other hand, it appeared that the director had been “beguiled” by the counterparty into believing that he was of good standing in the industry and his supply chains were of no concern to HMRC. The Tribunal concluded that he did not actually know of the connection to fraud.

The appeal was dismissed by the FTT, and the company appealed to the Upper Tribunal, coming before Judge Jonathan Richards and Judge Guy Brannan in late 2020. HMRC did not seek to challenge the decision that the company had no actual knowledge of fraud; the only point in dispute was whether the FTT should have concluded that it ought to have known of the connection. In particular, the company did not accept that the FTT had given sufficiently full reasons for drawing the conclusions that a reasonable businessman would have concluded that there was a fraud, or it had failed to apply the law on “means of knowledge” to the facts it had found.

The judges commented that the FTT’s decision gave rise to “difficulties” by setting out the parties’ evidence and cases at length, and giving only a short section of “consideration and conclusions”. It was not straightforward to tell which evidence was contentious and which was not; it was not absolutely clear to what extent particular evidence had been accepted.

There was a greater difficulty in relation to potentially controversial evidence, such as the director’s explanation of his reliance on the counterparty. The FTT had made no primary finding of fact as to whether the director genuinely believed the counterparty’s explanation, and no secondary findings about whether the explanation was objectively reasonable or consistent with other facts.

The judges noted two principles of law in relation to “means of knowledge”:

(1) The “should have known” condition is not satisfied if there is a reasonable explanation for the transactions other than those transactions being connected with fraudulent evasion of VAT.

(2) A finding that the Company should have known that there was a risk that its transactions were connected with the fraudulent evasion of VAT, or even that it was “more likely than not” that those transactions were so connected, is not sufficient to invoke the principle in *Kittel*. Rather, it has to be shown that the Company should have known that its transactions were connected with fraudulent evasion of VAT.

The FTT had failed to give express reasons for rejecting the reasonableness of the company’s alternative explanation. HMRC argued that it had identified the “red flags” that should have been obvious from a reading of Notice 726; however, the company had given an “innocent explanation” for at least one of these, and the FTT had given no explanation for disregarding that explanation.

HMRC argued that “even if there was a technical failure to give reasons” the Upper Tribunal should not interfere with a decision that would inevitably have been the same. The UT did not accept that a failure to give reasons was a mere technicality. The parties must understand why

they have won or lost, and an appeal court must understand whether the correct legal approach has been followed.

The UT considered that the decision below did not contain enough findings of fact for it to determine whether or not the alternative explanation was unreasonable. The judges made several detailed criticisms of the decision, which in effect made it clear that the directors should have been aware of the risk of fraud, but that fell short of the required standard.

To ensure a re-hearing that would be free of any suspicion of bias either in favour of the original decision or over-compensating in favour of the taxpayer, the case would be remitted to a differently constituted FTT for reconsideration of the limited question of whether the directors "should have known" of the connection to fraud.

The second hearing came before Judge Poole, who set out the history of the company and its dealings with HMRC over the period from 2005 to 2015. He then described the disputed deals, recording the way in which the company was warned about the counterparty, reviewed its transactions and resumed trading, apparently satisfied with the good faith of the main person acting for the fraudulent trader.

After detailed consideration of the evidence and a rehearsal of the principles of *Mobilx*, the judge concluded that the company had received numerous warnings and were well aware of the content of Notice 726. The disputed deals were very different in nature from the company's normal business, and the totality of the circumstances should have led the company to the only possible conclusion: that the deals were connected to the fraudulent evasion of VAT. The alternative explanation put forward by the company was not a reasonable one when viewed against the background of the totality of the evidence. The company ought to have known of the connection to fraud, even if it did not actually know.

The appeal was dismissed.

First-Tier Tribunal (TC09069): *Revive Corporation Ltd*

5.8.3 Labour supply fraud

Three related companies appealed against decisions to disallow input tax on *Kittel* grounds for the first, and refusal to register the other two on the grounds that HMRC had a reasonable belief that the registrations would be used solely or principally for fraudulent purposes. The refusal of input tax related to £3.5m in periods 05/17 to 08/18 and £1.2 million for periods 11/18 and 02/19. The supplier companies were connected to the appellant. The judge commented that the case was relatively unusual in that there were no "buffer" companies between the claimant and the defaulting traders; the appellant accepted that there was a VAT loss, but disputed that it arose from fraud or that the company should have known of a connection to fraud.

Judge Jennifer Dean set out the history of the main individuals' involvement with the appellant company and the suppliers in detail. She commented that the evidence of HMRC officers had been credible and she accepted it, while disregarding matters of opinion where they were offered; on the other hand, the evidence on behalf of the appellant was poor. The witnesses were "inconsistent, evasive, vague, at times

misleading and, in our view, untruthful and we consider that these features significantly undermined the credibility of their evidence as a whole." The judge also drew adverse inferences from the appellant's failure to call witness evidence from directors of two of the supplier companies, who could have had relevant information about the transactions. She concluded that they had been directors "in name only" and the controlling individuals behind the appellant were in fact running the suppliers as well.

Her conclusion was that the underlying losses were fraudulent and the directors of the appellant, being also the controlling minds behind the suppliers, were well aware of that fact. The supplier companies had been set up to facilitate the fraud. The means of knowledge test was not relevant. All the appeals were dismissed.

First-Tier Tribunal (TC09047): *Minstrell Recruitment Ltd and others*

6. ADMINISTRATION AND PENALTIES

6.1 Group registration

6.1.1 Grouping and time of supply

The Court of Appeal has dismissed the appeal by *Prudential* by a 2-1 majority.

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

First-Tier Tribunal

In the FTT (TC08036), Judge Malcolm Gammie set out the background to the dispute. The supplier company was an investment manager that supplied services for consideration that included performance fees payable if certain benchmark rates of return were exceeded. The company had been a part of the Prudential group up to November 2007 when it was the subject of a management buy-out. It received performance-related fees in 2015 and 2016 related to the services it had provided before 2007, and raised invoices for a total of £9.3m plus VAT.

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

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

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

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

He also considered the *Thorn Materials Resources* case, which directly concerned the grouping provisions. A VAT avoidance scheme depended on a transaction that was 90% paid for while companies were members of

the same VAT group, then completed once they had ceased to be in the group. The idea was that only 10% of the transaction would be subject to output tax (which the purchasing company could not recover), but the vendor company could recover all of its input tax because it was making a taxable supply. The House of Lords held that there was a taxable supply when the companies were not part of the same group, and s.43 did not prevent the whole consideration for that supply being taken into account.

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

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

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

The appeal was allowed.

Upper Tribunal

HMRC appealed to the Upper Tribunal, where it came before Mr Justice Edwin Johnson and Judge Thomas Scott. They noted that the facts were agreed, and rehearsed the applicable law (both UK and EU) on taxable supplies, time of supply and grouping. They commented that the conflict between reg.90 and s.43 appears to be a "chicken and egg" situation; none of the authorities dealt directly with the question of which should take precedence. However, in their view, the answer was to be found in the legislation. It was agreed that the UK regulations conformed to the EU law, so they concentrated on the UK wording and numbering.

The judges started with s.43: the "assumption" (that all supplies are deemed to be carried on by the representative member of the group) and the "disregard" (of supplies between group members). These were stated to apply only while the parties are members of the same VAT group. This was therefore the critical question: when did the supplies take place?

The term "supply" in s.43 must mean the same as it does in other parts of the legislation. It was therefore subject to the rules on time of supply, and

subject to reg.90. The fact that the work was done at a different date did not mean that a "supply" had taken place. This overturned both of the appellant's arguments – that the subsidiary was not a taxable person, and its supplies should be disregarded – because both of those propositions depended on it being a member of the VAT group when the supplies were made. According to the legislation, the supplies were only made after it had left the group.

Having come to that conclusion on the basis of the legislation, the judges considered the main precedents for any indication that the conclusion should be modified. These were:

(1) *B J Rice & Associates v Customs and Excise Commissioners* [1996] STC 581 ("B J Rice").

(2) *Customs and Excise Commissioners v Thorn Materials Supply Ltd & Anor* [1998] 1 WLR 1106 ("Thorn Materials").

(3) *Svenska International plc v Commissioners of Customs & Excise* [1999] 1 WLR 769 ("Svenska").

(4) *Royal & Sun Alliance Insurance Group plc v CCE* [2003] STC 832 ("RSA").

The UT decision summarised the facts and reasoning of each case before considering its application to the present situation. The FTT judge had erred in considering *B J Rice* to be "indistinguishable": that was concerned with a person who was entirely outside the scope of VAT (as an unregistered trader), rather than a person who was temporarily deemed to be part of a larger single taxable person (as a member of the group). That was a material difference between the situations.

The UT gave three reasons for regarding the FTT's application of *Rice* to this situation as inappropriate. First, the facts of *Rice* were unusual, and the CA judges had expressed concern about the possible injustice that would be caused to the taxpayer if the transactions were held to be taxable. Second, Lord Hoffmann in *Thorn* had disapproved of using "some kind or meta-rules, derived from fairness, common sense and other such concepts" to justify departing from the statutory rules. He had said that such an approach "cannot be right". Third, extending the decision in *Rice* more generally would be in conflict with the majority decisions of the HL in *Thorn* and *Svenska*. These were analysed in detail by the judges, and in their view confirmed that the grouping provisions could only be applied after the time of supply had been determined according to the rules for time of supply. The "real world time of supply" was not a legal concept.

The judges went on to consider further reasons put forward by the company's representative in support of affirming the FTT decision, based on the principles of fiscal neutrality and legal certainty. They did not consider either of these concepts to be of any assistance. There were real differences between a single company with two divisions on the one hand, and separate companies on the other, and in any case the EU legislation recognised the possibility that they would be treated differently by implementing art.11 on grouping as a permissive measure. Legal certainty was satisfied because someone supplying or receiving continuous services, "properly advised", would understand the risks involved in leaving a VAT group.

HMRC's appeal was allowed.

Court of Appeal

The company appealed to the Court of Appeal, where Lord Justice Newey examined the statutory background and the various precedent cases at length. He then summarised the parties' cases as follows:

- The company argued that VATA 1994 s.43 requires intra-group supplies to be regarded, and for any business carried on by a member of a group to be treated as carried on by the representative member. The argument was that this meant that a supply that took place when the companies were members of a group had to be disregarded, and there was nothing for reg.90 to apply to.
- HMRC argued that the time of supply rules came first: the disregard would not apply if the transaction was deemed to happen at a time when the companies were not members of a group.

The judge then considered the arguments based on the *BJ Rice* case in detail. He concluded that it was of no assistance: it related to very specific, and different, facts (a trader who was not within the scope of VAT at all when the supplies were made), and subsequent decisions of the CA and House of Lords had raised questions about whether it was correctly decided.

He therefore returned to the legislation, which he decided as presenting a "chicken and egg problem". If s.43 is applied first, reg.90 has no application and the company succeeds; if reg.90 is applied first, s.43 has no application and HMRC succeed.

The judge preferred HMRC's argument. It was still necessary to determine the time that a transaction took place in order to know whether it should be disregarded. The only basis for determining whether a transaction took place while two companies were members of the same group lay in the time of supply rules of s.6 and the regulations made pursuant to it. VATA 1994 nowhere states that either s.6 or regulations made under it are not to be applied when deciding whether companies were members of the same group at the time of a supply. Further, there is no indication that "supply" as used in s.43 has any different meaning to "supply" as used in s.6 or in reg.90. Moreover, it is apparent from *Thorn* and, especially, *Svenska* and *RSA* that the time of supply rules found in VATA 1994 and the VAT Regulations have consequences beyond merely fixing the time of a supply. On top of that, as could be seen from passages quoted from *European Commission v Ireland* and a 2009 Communication from the Commission, VAT groups are designed to simplify administration and combat abuses, not to confer any exemption from VAT. Holding that VAT can be payable where the supplier is no longer a member of a VAT group could not, therefore, be objectionable on the basis that that would serve to deprive the parties of an exemption.

The judge also agreed with HMRC's counsel that applying the time of supply rules first gave greater certainty in situations where companies joined or left groups. He rejected the company's counsel's suggestion that this could be dealt with by apportionment. He also rejected an argument that group companies should be treated in the same way as branches within the same company: he considered that the situations were too dissimilar.

Counsel for the company argued that, on the basis of the assumption in s.43 that all the businesses of group members were carried on by the representative member, the supply could not be treated as "made in the course of a business carried on by the ex-subsidiary". The judge did not agree. The assumption in s.43 was more apt to apply to supplies made by the group to third parties, rather than intra-group transactions, which were simply disregarded. He agreed with the Upper Tribunal that the assumption only applied for as long as the companies were members of the group, and therefore was of no relevance once it had been decided that the supplies happened later in accordance with reg.90.

In conclusion, he agreed with the UT and dismissed the company's appeal.

Lord Justice Nugee then gave a dissenting judgment. He was persuaded that *BJ Rice* was directly applicable: the time of supply rules should not make something taxable when it was not taxable at the time the supply actually took place. He considered at more length whether *BJ Rice* remained a binding precedent. It had not been expressly overruled, so the question was whether it could "stand with" the subsequent decisions of the House of Lords (*Thorn*, *Svenska* and *RSA*). There were dissenting judgments in each of those cases, and he concluded that "the blanket statement by Ward LJ in *B J Rice*, that the time of supply rules are concerned with 'when, not whether' VAT is chargeable, can no longer be regarded as authoritative." However, on balance, he concluded that nothing had overturned the earlier decision; several of the judges appeared to have considered that it was right on its facts, and distinguished the later situations from those facts. He would therefore have allowed the appeal.

Lord Justice Underhill gave a much briefer statement, essentially agreeing with Newey LJ. He considered that the reasoning of the judges in *Rice* could not "stand with" that of the later judges in *Svenska* and *RSA*. Once he had explained his reasons for that, he concluded that it was necessary to construe the legislation without the benefit of direct assistance from precedent cases. He agreed with the reasoning of Newey LJ on that issue, and therefore dismissed the appeal.

Court of Appeal: *The Prudential Assurance Company Ltd v HMRC*

Lecture 18

6.1.2 Updated guidance

HMRC have updated their internal guidance on VAT grouping to clarify that insolvent entities can apply to form or join a new or existing VAT group if they satisfy the control conditions in ss.43A and 43AZA VATA 1994, which refer to s.1159 and Sch.6 Companies Act 2006. The updated guidance also explains that the involvement of an insolvency practitioner (IP) does not automatically change the control position for VAT grouping purposes. The control position will only be changed if the IP has sold shares or reorganised the shares or voting arrangements.

VGROUPS01550

Lecture 18

6.1.3 Updated Notice

HMRC have updated their Notice *Group and divisional registration* with changes relating to late payment and submission penalties and the group application process. New guidance includes the following paragraphs:

5.11 Late submission penalties

Penalties for late submissions are calculated on the basis of points. For VAT groups the representative member has a single liability for these points covering the whole group. If the representative member changes, the existing liability is transferred to the new representative member.

A new member joining the group will not affect the points total of the group, even if the member joining had points before. If someone leaves the group and registers for VAT separately they will start with zero points, even if the group that they left had a penalty point balance.

For divisions, each one is liable for its own separate points and penalties. Each division will have its own maximum points total.

2.17 What to do while you wait for a response to your application

If you are waiting for a response to your VAT grouping application, you should treat the application as provisionally accepted on the day it is received by HMRC and account for VAT accordingly. For more information on accounting for VAT in a VAT group read section 5. The date of receipt should be treated as, if sent online the date it was sent, or if it was posted the date it should be received by HMRC through the ordinary course of post.

If you have not been issued with a group VAT registration number, you cannot charge or show VAT on your invoices until it has been assigned. However, you'll still have to pay VAT to HMRC for this period. You should increase your prices to allow for this and tell your customers why. Once you've got your VAT number you can then reissue the invoice showing the VAT. More guidance on this can be found in who should register for VAT (VAT Notice 700/1) section 5.1.

If you had a VAT registration number before your grouping application, you should not send returns under this number and should follow this guidance.

While you are waiting to receive your VAT grouping registration number, you may receive:

- an automated assessment letter
- letters asking for payment of any automated assessments
- notification of a late submission penalty because you have not filed your tax return
- notification of late payment penalties and late payment interest because you have not paid the automated assessments by the due date

If you do, you will not need to take any action in response to any of these notices because HMRC will automatically cancel them once your application is fully processed. HMRC will not take recovery action for any debts which come about as a result of you following this guidance, though other VAT debts may still subject to recovery actions.

2.12 Who should submit the application for registration

The application for registration which is completed for new group applications, must be signed or submitted by the representative member.

If you cannot register online, you will need to contact HMRC to request a form VAT1 Application for Registration.

The VAT50-51 form, which is completed for each global group application should be signed by either the applicant company (the person making the application on behalf of the company) or the person controlling the group. This can be uploaded as part of your online application for registration.

Notice 700/2

Lecture 18

6.2 Other registration rules

Lecture 19

6.2.1 Budget increase

In a previous Budget, the registration and deregistration thresholds were said to be frozen until 1 April 2026. Nevertheless, in the Budget on 6 March the Chancellor raised the thresholds to £90,000 and £88,000 with effect from 1 April 2024. It appears that the increase in the threshold remains subject to the requirement for Northern Ireland to comply with EU rules. The Red Book stated that the limit would be raised “and then frozen”, but no details were given of the new freezing period.

Budget Statements March 2024

The *Value Added Tax (Increase of Registration Limits) Order 2024* gives effect to this. It also increases the VAT registration and deregistration thresholds for acquisitions in Northern Ireland from EU Member States to £90,000.

SI 2024/307

6.2.2 Compulsory registration mis-understandings

We have two tests for compulsory registration and the test which creates the earliest registration date will be the test the trader must apply. The first (and most common) test is the rolling 12 month test. At the end of every calendar month the trader must consider their taxable income in the last 12 calendar months. If this exceeds £90,000 they have an obligation to notify HMRC of their registration breach within 30 days of that breach. HMRC will then register the trader from the first day after the month following the registration breach. For example, if the trader had taxable income of £84,000 in the 12 months to 31 March 2024 they would not have breached the old £85,000 threshold at that point in time. If they then had taxable income of £96,000 in the 12 months to 30 April 2024 they would have a registration breach and would need to notify HMRC by 30 May 2024. HMRC would register the trader from 1 June 2024.

The second test is applied every day and considers projected sales in the next 30 days in isolation i.e. no account is taken of historic sales. If the trader expects their taxable sales to be over £90,000 in the next 30 days alone then they must notify HMRC and will be registered from the day that expectation arose. So if we consider the example above, if the trader received a new monthly order of £25,000 on 11 April 2024 the historic test would continue to apply i.e. the second test has not been breached as sales in next 30 days would be around £32,000 (assuming existing customers orders continue at £7,000 per month). If the order was for £95,000 the second test would be breached and the trader would need to be registered from 11 April 2024 (that date being earlier than 1 June 2024 under the historic test).

6.2.3 Article

In an article in *Taxation*, Neil Warren comments on the possibility of deregistering taxpayers because of the increase in the limits. He points out possible pitfalls, including output tax charges on stock and other assets, forgotten options to tax on buildings and outstanding periods on capital items. One conundrum is the retailer whose income tax accounts show turnover of £80,000 and who therefore believes that deregistration is possible – if they do not reduce prices on deregistration, turnover will be expected to remain 120% of £80,000, and they will not be able to deregister.

Taxation, 21 March 2024

6.2.4 How many £90k's do I get?

The £90k limit applies to each person e.g. a sole trader, a partnership or a limited company.

So if a VAT registered sole trader was looking to buy a furnished holiday let (FHL) it would be unwise to buy it in their sole name. Income from FHLs is taxable and any taxable income that person has would fall under their sole trader VAT registration. VAT would need to be charged on their FHL income.

The client would be better advised to buy the FHL in joint names with their spouse. This would then be a partnership for VAT purposes and a fresh £90k limit would be at the partnership's disposal. No VAT would need to be charged on the partnerships FHL income until the partnership breached the £90k limit.

If the VAT registered sole trader was then considering buying a residential buy to let (exempt income) we would be advising the client to buy that property in their sole name. This would make the sole trader partially exempt but this would facilitate input tax recovery of up to £7,500 pa on their residential buy to let costs under the partial exemption de-minimis rules. VAT on repair costs, agent's fees, furniture etc would then become recoverable providing the total input tax on the buy to let costs were no more than £7,500 per VAT year <u>and</u> the sole trader turnover exceeded the rental income.

The trader would need to manage their costs on their buy to let as exceeding the £7,500 by £1 or more would mean £nil recover on the buy to let for that VAT year. VAT years are 31 March, 30 April of 31 May

depending on their VAT stagger i.e. VAT quarters. It would be wise to spread a major refurbishment over two VAT years to maximise recovery i.e. keeping both years below £7,500.

So if we assume the sole trader has a residential buy to let in their sole name and an FHL in joint names what would your advice be if he wanted to buy a second buy to let?

It would not be advisable to buy the third property in their sole name as that may jeopardise the input recovery on the first buy to let i.e. only one £7,500 de-minimis limit per person. Ideally the property should be bought in joint names so if the FHL ever breached the £90k limit it would open up input tax recovery on the buy to let as the partnership would have its own £7,500 de-minimis limit.

It should also be noted that partnerships with different partners are treated as different persons from a VAT perspective. So a partnership of Mr and Mrs A and a second partnership of Mr A, Mrs A and Mr B would be two separate persons from a VAT perspective ie each would get their own £85k registration limit. It does not matter if Mr A and Mrs A have the controlling interest in the second partnership – the key issue is that the partnerships are not identical in terms of named partners.

If a client had two companies then they would be two separate persons from a VAT perspective. Common control is irrelevant.

Changes to FHLs for direct tax

It should be noted that the VAT rules will continue to apply to short term holiday lettings even when the direct tax rules change for FHLs from 6 April 2025. Holiday letting income is standard rated per Schedule 9 Group 1 Item 1(e) i.e. totally independent of the direct tax rules for FHLs.

6.2.5 Reinstatement

Where a taxpayer's VAT registration has been cancelled, VATA 1994 Sch.1 and Sch.3 mean that the VAT registration cannot be reinstated without the taxpayer's agreement. HMRC have updated their internal guidance to clarify that if a taxpayer seeks reinstatement of its VAT registration, the reinstatement must occur before their next VAT return due date, in which case their original VAT registration number will be restored as though they were never deregistered. Beyond this deadline, reinstatement cannot happen, meaning that the taxpayer will instead have a period of non-registration and a new VAT registration number.

VATDREG15000

6.3 Payments and returns

Nothing to report.

6.4 Repayment claims

Nothing to report.

6.5 Timing issues

Nothing to report.

6.6 Records

6.6.1 Making Tax Digital

The Treasury Minutes for February include a response to the Public Accounts Committee report on Making Tax Digital. Although this mainly deals with the introduction of MTD for Income Tax Self-Assessment, now delayed to April 2026, there are a number of comments that are relevant to VAT:

Introduction: The programme has so far cost £642 million. HMRC expects introducing Making Tax Digital for VAT and Self Assessment will now cost a total of £1.3 billion, a 400% increase in real terms compared to its original estimate of £222 million in 2016 for all three taxes in the programme.

2.7 MTD software is designed to ensure records are kept accurately and in a timely manner. It is not possible to estimate robustly the effects of the separate components in isolation, since quarterly digital updates help to ensure software is used timeously. While initial assumptions were made, these have been overtaken by evidence from MTD for VAT which does not allow for disaggregation of the source of the additional tax revenue.

2.8 A 2022 evaluation estimated additional tax revenue from MTD for VAT in 2019-20 of at least £185 million, providing strong evidence that MTD reduces the tax gap. This provides confidence that the approach will also yield benefits in ITSA.

2.9 HMRC has now applied the MTD for VAT evaluation findings to MTD for ITSA and expects a reduction of around 15% in the tax gap from error and failure to take reasonable care. This methodology has been approved by the independent Office for Budget Responsibility (OBR).

The report also comments on recommendations from the PAC about the process of approving commercial software for taxpayers and agents to comply with MTD obligations. The Treasury has confidence in HMRC’s “proven software integration model, which ensures commercial products meet with HMRC’s technical specifications and can integrate seamlessly with its systems. MTD for VAT has an ecosystem of over 500 commercially available products, catering to diverse customer needs and budgets.”

https://www.gov.uk/government/publications/treasury-minutes-february-2024

6.7 Assessments

Lecture 20

6.7.1 Best judgement

A fashion retailer was registered for VAT as a partnership on 1 December 2011. In January 2018 HMRC raised an assessment for underdeclared VAT for the periods 03/12 to 09/17, as well as income tax assessments for the years 2012/13 to 2015/16 and a closure notice for 2016/17. These decisions were upheld on review. Penalties were also imposed. Judge Christopher Staker noted that it was agreed that the outcome of the VAT appeal would determine the income tax appeal, so only the VAT dispute needed to be considered by the Tribunal.

At the hearing, the traders' representative accepted that there had been an understatement of cash sales. A great deal of what HMRC submitted was not in dispute; the only question was whether, as the representative argued, the amount assessed was excessive. This depended on the percentage of the business's sales that were in cash.

HMRC selected the business for enquiry because data obtained from its merchant acquirer showed that card sales were 111% of declared turnover. A cash test purchase showed that there was no till in operation. Receipt books were uplifted for a 4-day period; they showed that cash sales were 28% by value of the sales in that period. The decision records the progress of the investigation, which included a claim that previous receipt books had been lost in a flood.

The Tribunal appeal was commenced in June 2018. In October 2018, HMRC revised the original assessment downwards, after discovering that one of the sales recorded as "cash" in the 4-day period had in fact been a card sale. This changed the cash percentage from 28% to 22.4%.

The appellants' defence was, in essence, that the HMRC figures produced results that were not credible. They argued that the profits supposedly generated were clearly higher than their lifestyle suggested. However, as the judge explained at some length, it was necessary to produce evidence to displace HMRC's best judgement assessment. It was fair to say that the 4-day period used by HMRC was not representative of the whole period, but no better evidence was available. The historical receipt books had been lost; an opportunity to provide more recent information was undermined because another test purchase carried out by HMRC during that period was omitted from the records.

The judge concluded "If someone owned a local fish and chip shop, and HMRC issued an assessment that said that its turnover was a billion pounds a year, then it might be said that that is just not credible. However, the evidence in this case does not establish that it is simply not credible that the Appellants' business could have generated the level of profits indicated by the HMRC assessment." The appellants had not discharged the burden of proof, and their appeal was dismissed.

First-Tier Tribunal (TC09054): *Mr Martin Peter Byrne and another (trading as Eva)*

A company appealed against corporation tax assessments totalling £250,000 for periods from 2013 to 2017, together with VAT assessments totalling £176,000 for periods from 06/12 to 03/17, and related penalties. The investigation had commenced with information provided by the Italian tax authorities from a server seized in an enquiry into an Italian wine seller with links to criminal activities.

Judge Anne Scott's decision starts with a discussion of applications by the appellant's counsel to exclude evidence derived from the Italian server. The judge set out the background to the Italian fraud before coming to a decision on admissibility. It had involved large scale evasion of excise duty (£5m) on wine transported from Italy to the UK, and resulted in criminal convictions in both countries when the real accounting records were discovered on the server. After considering counsel's arguments about hearsay evidence in detail, the judge decided that the information was relevant and there was not a compelling reason to exclude it. It was admitted. An application for specific disclosure of certain documents relating to the information on the server was also refused.

The judge recorded the history of the investigation, which included an attempt by an officer to reconcile the stock movements of wine and beer between opening and closing stock, purchases and sales. This showed discrepancies in different directions; there were sales of lines of stock for which there were no recorded purchases. This led to assessments and appeals, and a change of adviser when an insurance company withdrew cover for the fees.

The judge noted that it was the burden of the appellant to displace a best judgement assessment, and none of the appellant's representatives had taken the numerous offered opportunities to respond in material detail to HMRC's questions. One of them chose not to give evidence to the Tribunal. That was his right, but it left unanswered serious specific concerns identified by the HMRC officer in relation to his personal bank statements.

The appellant's counsel described the main witness as "a man of good character" with no convictions. The judge disagreed: there was evidence that he had declared no income on his personal tax return for 2013/14, which was subsequently amended to income of £29,000. Whether that was deliberate or careless, it was not a minor matter, and did not support counsel's assertion. The judge set out a number of discrepancies in the witness's evidence, and concluded that he was not credible.

After further detailed examination of the evidence and the corporation tax rules, the judge concluded that the conditions for making the assessments were met, they were validly issued, the presumption of continuity applied (that the understatement proved in one period could be extrapolated into others), and that the behaviour was deliberate. A minor amendment was required to the amount assessed for the final year.

The VAT assessments were based on the figures used in the corporation tax investigation. The officer had relied on the careful and detailed work done by her colleagues, and was held to have exercised best judgement. The appellants had not produced anything to displace HMRC's figures.

The appeals were dismissed against all the assessments, with the minor correction to one year.

First-Tier Tribunal (TC09019): *New Claire Wine Ltd*

6.7.2 Validity of appeal and assessment

Judge Anne Scott considered preliminary issues in relation to assessments for over £13 million: whether the appellant had appealed in time or at all, and whether an assessment raised on 8 July 2016 in relation to periods up

to June 2012 were in time. The substantive issue was the liability of supplies of welfare services.

The appellant was the representative member of a group of companies that supplied welfare services through a number of care homes. One was state regulated, but there was a dispute as to when it started to trade, and what it did and when. The other two were not state regulated. The preliminary issues were limited to consideration of the earlier periods and VAT due of £3.86 million for them; the wider issues of "who did what and when" would be left for the substantive hearing.

On 30 June 2015, the company had made a voluntary disclosure on the basis that supplies made by the unregulated companies had wrongly been treated as exempt, and should have been standard rated. HMRC raised an assessment on 8 July 2016. Following that, there was further correspondence about the FTT's decision in *Life Services Ltd*, which suggested that the supplies should in fact be exempt. HMRC rejected the argument in the correspondence, and ultimately won the appeal in *Life Services* in the Court of Appeal.

In November 2017, the company appealed an amended version of the assessment (for just over £13 million) to the Tribunal. Its grounds of appeal were that supplies to recipients who were not publicly funded were exempt; it included the wording "For the avoidance of doubt the Appellant does not dispute the remainder of the Assessment." This was effectively relying on the FTT decision in *Life Services*. Further correspondence followed about reclaims for input tax, collection of output tax from local authorities in respect of publicly funded patients, and the correct method of making adjustments (credit notes or s.80 VATA 1994 claims).

Four appeals on various issues were made to the FTT and consolidated. HMRC accepted that some of the VAT which had been included in the original assessment and paid to HMRC should have been treated as out of time when assessed (i.e. July 2016 was more than four years after 06/12); however, the company should have made a s.80 claim to recover it by 30 September 2020 and had not done so, so it was itself out of time.

Correspondence ensued about the legal arguments and about the misunderstandings of fact and law that had led to the original disclosure and the original appeal. The company argued that it had a valid appeal in place against the original assessment that had not been determined, and in any case "s.80(7) VAT Act 1994 does not prevent the Tribunal from correcting an assessment which is partly time-barred pursuant to s.85A(2)(a) VAT Act 1994."

The arguments put to the Tribunal deal with the complex legal issues of what an appeal relates to – the decision underlying the assessment, the assessment itself, or the amount of the assessment – and what is the legal effect of amendments to the assessment and amendments to the grounds of appeal. HMRC contended that the time bar issue had not been raised until 2022, and the amount that had been appealed against was only £1.58 million (which related to privately funded individuals supplied by the state-regulated care home).

The legal argument is detailed and complicated, but the judge concluded on the basis of a number of precedents that the appeal had been validly

made in time, and that any appeal required the Tribunal to consider whether the assessment had itself been validly made in time. It did not matter that the original grounds of appeal had been different, or the stated amount in dispute had been less than the whole of the assessments (because it had related to the different issue of whether the supplies were exempt).

The appeal was allowed in respect of the 2016 assessments to the extent that they had related to the periods up to 06/2012.

First-Tier Tribunal (TC09072): *Monmore Properties Ltd*

6.7.3 Undeclared income

HMRC investigated a Chinese restaurant and concluded that sales were being omitted from the records for both corporation tax and VAT. Substantial assessments to both taxes were raised and appealed. They also raised deliberate behaviour penalties, in respect of which they gave full mitigation for helping and giving but no mitigation for telling (on the basis that throughout the Appellant had denied suppression). The company appealed, accepting that a challenge to the "best judgement" basis of the assessments was bound to fail, but disputing the amounts.

As the investigation started in 2016, there were problems for the Tribunal in tracing all the evidence as some of the officers involved had retired. The officers who raised the assessments had not been involved in the initial enquiry. Some important elements of the evidence were missing. However, on the basis of the evidence available, Judge Amanda Brown concluded that there had been suppression of on average £2,000 a week, which was on a scale that could only have been deliberate.

The main defence raised by the taxpayer was that HMRC's calculations produced a wholly unrealistic result – an extra 151 customers per week. Such a level of turnover and the associated profits arising were, in the appellant's view, wholly unrealistic for the business.

The Tribunal carried out a number of alternative calculations on different assumed levels of suppression, noting that HMRC's figures were at the top of the range in each case. The judge decided that a figure of 81 suppressed sales per week was more likely to be accurate, and reduced the VAT assessments accordingly.

HMRC accepted during the hearing that one of the CT assessments and the associated penalty had not been properly raised, so the appeal was allowed in full in respect of those two items. The appeal in relation to VAT was allowed in part, reducing the amount from £147,000 to £76,600, with a corresponding reduction in the penalties. HMRC were directed to recalculate the corporation tax figures on the same basis.

First-Tier Tribunal (TC09094): *Cheon Fat Ltd*

6.8 Penalties and appeals

Lecture 20

6.8.1 Default surcharge

A company appealed against surcharges of £32,164 for 09/21 and £41,116 for 12/21. HMRC informed the Tribunal that the surcharge for 12/21 had been withdrawn, so it was not considered further. The company did not dispute that the surcharge for 09/21 had been validly issued and was mathematically correct.

The company had a number of Covid-related difficulties, and had negotiated time to pay during 2021. A further request for TTP in relation to VAT and PAYE was made on 8 November, the day after the due date for the 09/2021 VAT payment. FA 2009 s.108 negates a default surcharge if the trader has made a request for TTP not later than the due date. HMRC claimed that the request had to be agreed, but the Tribunal rejected this: as long as the request was subsequently accepted, it was sufficient for the trader to have submitted it to HMRC by the due date. This had happened in relation to 12/21, and led to the cancellation of the penalty.

Unfortunately for the company, it was clear that TTP had been applied for only after the due date for 09/21, so s.108 did not apply. The judge rejected a submission by the company that HMRC's acceptance of TTP could cancel a penalty that had already become due before the application for TTP was made.

The Tribunal also considered whether the company had a reasonable excuse. The combination of lateness by one day and the fact that TTP had been applied for could not assist; the other circumstances put forward (cashflow difficulties, Covid health issues and Covid business issues) were normal circumstances of trade and could have been overcome with reasonable foresight and diligence.

The appeal was dismissed.

First-Tier Tribunal (TC09025): *Pracyva Ltd*

6.8.2 Penalties

In 2018 the FTT dismissed an appeal by a company, *Award Drinks Ltd*, against VAT assessments for undeclared income in 2010 – 2013, relating to supplies of alcoholic drinks that the company had claimed were exported. HMRC subsequently assessed the company to penalties for dishonesty, and raised PLNs transferring the liability to the director. Meanwhile, the Upper Tribunal (2020) and Court of Appeal (2021) dismissed further appeals against the VAT assessments.

The director appealed against the PLN, and sought to argue that the company's returns had not been inaccurate. As a preliminary issue, the Tribunal had to decide whether this was permitted, as the company's own appeals had dealt with that question and had come to a final conclusion. Judge Zachary Citron considered the issues carefully and concluded that it was not open to the individual to argue again about the accuracy of the returns: that had been settled, and to "vex HMRC with the same matter again" would be an abuse of process. However, the question of whether the inaccuracies had been deliberate, and the question of whether any dishonesty was attributable to the individual director, had not been considered. It would therefore be permissible for him to argue those points in an appeal.

Directions were issued to proceed to a substantive hearing.

First-Tier Tribunal (TC09033): *Paul Judd*

An individual applied to make an appeal out of time against a PLN for £1.7 million. HMRC countered with an application to have the appeal struck out (if the appellant's application was granted) for having no reasonable prospect of success.

The applicant became a director of the company, which he owned, on 6 June 2016. He had been made bankrupt at HMRC's petition in April 2015; he had been involved in ten other companies which had been serially non-compliant with VAT obligations, and many of them had been dissolved owing money to HMRC.

The company had issued invoices to a customer showing VAT, but had filed nil VAT returns. The customer had filed an error correction repayment £3.3 million to HMRC on discovering that the supplier's VAT registration had been revoked.

Judge Nigel Popplewell reviewed the assertions made by the individual and did not find them credible. He had nothing to support his assertion that he did not receive the PLN when HMRC said they issued it, so the appeal was about 47 days late. In the light of many other factors, including the individual's experience of other appeals over a number of years, there was no good reason for the delay in appealing. The application to make a late appeal was rejected.

The judge also considered that nothing had been put forward to suggest that the appeal would have more than a fanciful chance of success if it had been allowed to proceed. Had he allowed the application, he would have also allowed HMRC's application to strike the appeal out.

First-Tier Tribunal (TC09034): *Laurence Onwufuju*

A director of a company appealed against a PLN issued to him in respect of a dishonesty penalty assessed on the company he directed. The amount was £242,243 in respect of failure to file VAT returns for periods from 10/16 to 11/17 while knowing that it was liable to pay VAT. The company was in liquidation and had not challenged the penalty.

The individual claimed that he had allowed other people to operate the company without supervising it, and that he had made no money out of the arrangement. He argued that he had not been dishonest, but that his company had been hijacked by others who carried out a VAT and excise duty fraud.

Judge Vimal Tilakapala reviewed the claims made by the appellant and the evidence put forward by HMRC. At the very least, he had turned a blind eye to what was going on; on the balance of probabilities, HMRC had satisfied the burden of proof that he had acted dishonestly. His appeal against the PLN was dismissed.

First-Tier Tribunal (TC09089): *Thomas Hanlon*

In a rare hearing about customs duty penalties, Judge Howard Watkinson dismissed an appeal against a dishonesty penalty by someone who tried to go through the green channel at Manchester Airport with 5,600 cigarettes. The appellant had claimed to believe that this was within his allowance, but his evidence was inconsistent and indicated that he was aware that

there was a limit. The judge concluded that he had acted dishonestly and dismissed the appeal.

First-Tier Tribunal (TC09081): *Ali Salamat*

6.8.3 Hardship

A company appealed against assessments for over £270,000 for the periods from 02/21 to 01/22. The company bought luxury goods in the UK and sold them in the Far East; in gross terms, it sold the goods at a loss after taking shipping costs into accounts, but would be profitable if it could recover the input tax on the purchases. The director claimed that HMRC's assessments had caused it to cease trading, and this caused the hardship.

Judge Natsai Manyarra noted that the applicant had provided very little documentary evidence in support of the application for hardship, and some of her evidence was contradictory. She had referred to various potentially relevant documents in her possession in correspondence, but had failed to produce any of them to HMRC or to the Tribunal. Weighing all the available evidence, the judge concluded that she had not discharged the burden of showing that the company would suffer hardship if it had to deposit the VAT before making its appeal, so the application was rejected.

First-Tier Tribunal (TC09075): *SC Business Gateway Ltd*

6.8.4 Late appeals

An individual appealed on 15 March 2023 against decisions by HMRC issued in July 2020 to assess him to £69,000 in VAT for the period from 1 December 2014 to 31 October 2017, and against a penalty issued in December 2020 for £55,275. Judge Rankin heard an application to allow the appeal to proceed even though it had been made nearly 32 months late.

The Tribunal applied the *Martland* procedure, which involves identifying the length of the delay, considering the reasons given, and then carrying out a balancing exercise based on all the circumstances. The appellant claimed that he had received HMRC's notices during the Covid lockdown and had asked for further explanations but had not received any until shortly before he appealed. He had not understood what HMRC were alleging, and in his opinion he had appealed within the time limit.

The Tribunal found clear evidence that the appellant had received letters and understood that HMRC were making claims against him. Those letters had included instructions about asking for a review and appealing. The delay was very serious and very lengthy, and there was no good explanation for it. The application to appeal out of time was dismissed.

First-Tier Tribunal (TC09096): *Recep Acar*

Judge Anne Scott described a case as "sad and unfortunate", having its origins in a dispute between a trader and Customs & Excise in the 1980s. The trader had carried on arguing a decision about the application of the "sales through retail agents" rules with her MP, the Ombudsman and various other routes, but only made an appeal to the Tribunal in December 2022 after the Adjudicator rejected her complaint.

The judge pieced together the history of the dispute and concluded that the appellant had a very real sense of injustice, but an extremely weak

case in law. On the balance of probabilities, the issues had already been litigated in the 1980s and 1990s, and it was not open to the appellant to reopen decided matters just because she thought she had found new arguments to raise. To the extent that the appeal related to complaints about Customs or HMRC, it was struck out as being outside the FTT's jurisdiction; to the extent that it might constitute an application to make a late appeal against a decision, it was struck out for being very late indeed.

First-Tier Tribunal (TC09091): *Mary Davidson*

6.9 Other administration issues

6.9.1 Helplines

On 19 March, HMRC announced an intention to cut the availability of a number of helplines, as part of a plan to "encourage" taxpayers to use online services. In relation to VAT, the statement read:

VAT helpline*: there are monthly peaks which occur around the VAT filing deadline. The VAT helpline will open for 5 business days each month leading up to and including the VAT deadline. At other times VAT customers can use our webchat services to get support. This will improve service levels overall by concentrating our adviser resource at the point in time it's most needed.*

There were also the following "reassuring" comments:

Customers who need extra support, either because they cannot use our online services, or if they have a health condition or disability, will be asked to call a separate number to access specialist support. Further information on the Extra Support Service can be found on GOV.UK.

The impact of these helpline changes will be monitored and reviewed. The changes follow successful trials over the last year. Key findings from the Self Assessment helpline trials has been published on GOV.UK.

The protest from professional bodies and others was so strong that the policy was shelved, apparently on instructions from the Chancellor, the following day. HMRC will "consider how best to help taxpayers harness online services".

www.gov.uk/government/news/hmrc-helpline-changes-halted

6.9.2 Consequences of fraud

The liquidators of a company alleged that it had been involved in large-scale labour market VAT fraud, in charging VAT to customers which it did not pay over to HMRC. They claimed compensation from the main director and a number of others, including companies under his control. after several hearings over the last year, a High Court judge concluded that there had been such a fraud, and made a number of orders concerning compensation.

High Court: *Mercy Global Consult Ltd (In Liquidation) v Abayomi Adegbuyi-Jackson and others*

In another case brought by liquidators of a metal recycling company, a High Court judge noted that the director had a policy of destroying all documents that recorded his company's transactions; the evidence that he gave orally was careful and detailed, but internally inconsistent and often at odds with such documents as had been retained by others. The conclusion was that he had carried out the fraud alleged by the liquidators, and was ordered to pay back a little over £2.5 million that he had drawn from the company.

High Court: *Thiel-Czerwinke and another (joint liquidators of Courtside Recycling Ltd) v Crabb*

6.9.3 Finance Act 2024

Royal Assent to the Finance Act was notified in the House of Lords on 22 February 2024.

https://lordsbusiness.parliament.uk/ItemOfBusiness?itemOfBusinessId=138027§ionId=40&businessPaperDate=2024-02-22

6.9.4 Finance (No 2) Bill 2024

The *Finance (No 2) Bill 2024* was published on 13 March 2024. The VAT provisions are:

- empowering HMRC to require additional information to substantiate claims under the DIY housebuilders' scheme;
- minor changes to the VAT Terminal Markets Order (SI 1973/173); and
- technical changes to the way the late-payment and repayment interest provisions apply for VAT.

https://bills.parliament.uk/bills/3690

6.9.5 Status of EU law

In an article in *Taxation*, Fabian Barth discusses the status of EU law in the UK following the implementation of the Retained EU Law Act 2023 on 1 January 2024.

Taxation, 22 February 2024

6.9.6 Updated Manual

In the *VAT Fraud Manual*, the introductory page on *Making a submission to the Fraud team* has been updated to remove the statement that 'the Indirect Tax Directorate £150,000 tax at risk limit does not apply to fraud cases.' The relevant information is now withheld because of exemptions under the Freedom of Information Act 2000.

VATF85100

6.9.7 Asset recovery

HMRC have reported a sale of assets to recover public money stolen in a scrap metal "missing trader" VAT fraud by a company director who was jailed for seven and a half years in April 2019. A court order has required the director to pay back more than £1.8 million or face an extra eight

years in jail. The sale by public auction will include gold bars, luxury watches and rare coins.

www.mynewsdesk.com/uk/hm-revenue-customs-hmrc/pressreleases/gold-bars-sold-to-repay-vat-fraud-3299238

6.9.8 Updated Notice

HMRC have updated their Notice *Insolvency*, mainly removing outdated references to default surcharge and repayment supplement. A technical change involves the point covered in 6.1.1 above, that HMRC no longer automatically remove insolvent members from VAT groups, as long as they continue to meet the VAT group control criteria.

Notice 700/56

6.9.9 Electronic Sales Suppression (ESS)

ESS is a form of tax evasion where businesses using an electronic cash register or electronic point of sale system, uses tools including physical devices, software, computer codes/other data in digital form, or anything else, to manipulate electronic records of sales data to hide or reduce the value of individual transactions.

New powers and penalties were introduced in FA 2022 Sch.14 to help HMRC tackle this non-compliance and made it an offence to possess, make, supply and promote ESS tools. HMRC then carried out a technical consultation on regulations for the implementing of the rules; they have now announced that there were no responses to the consultation and no changes were made to the final legislation.

www.gov.uk/government/consultations/draft-regulations-electronic-sales-suppression